No. 22-842

IN THE
Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,

v.

MARIA T. VULLO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

This Court granted review limited to question 1 of the certiorari petition. In Petitioner's merits brief, however, Petitioner has rewritten its own question presented. The question this Court agreed to review is:

Does the First Amendment allow a government regulator to threaten regulated entities with adverse regulatory actions if they do business with a controversial speaker, as a consequence of (a) the government's own hostility to the speaker's viewpoint or (b) a perceived "general backlash" against the speaker's advocacy?

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BRIEF FOR RESPONDENT

INTRODUCTION

This case concerns the right of government officials to enforce the law and to speak out about matters of public concern without fear that their statements will subject them to damages actions brought by entities that espouse controversial views.

It "is not easy to imagine how government could function" if public officials lacked the freedom to express their views. *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 468 (2009). Nor could government function if prosecutors faced the "threat of Section 1983 suits" when they hold parties accountable for their unlawful conduct. *Imbler* v. *Pachtman*, 424 U.S. 409, 424 (1976). Yet the NRA seeks to transform a government official's statements expressing her views on a matter of public concern, and her acts enforcing New York law against parties who concededly violated it, into a First Amendment violation.

The NRA alleges that Maria Vullo, then-Superintendent of the New York Department of Financial Services ("DFS"), violated the First Amendment by coercing insurers and banks to cease doing business with the NRA. The NRA's theory is that acts by Vullo enforcing New York law against parties who sold unlawful insurance products, coupled with unrelated industry letters issued after the Parkland school shooting, amount to coercion under *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). This case, however, is nothing like *Bantam Books*, and the NRA's claims fail for a host of reasons.

First, this Court lacks jurisdiction because any decision on the question presented would be purely advisory. There is one plaintiff, the NRA, and one defendant, Vullo, before this Court. The Second Circuit below held that the NRA failed to state a plausible First Amendment claim and that Vullo was entitled to qualified immunity. This Court granted review only of the First Amendment question, but its resolution of that question alone can have no effect on the judgment below. This Court's decision cannot retroactively give notice to Vullo about the scope of the First Amendment at the time of her alleged conduct, as needed to overcome a claim to qualified immunity. Indeed, this Court has summarily reversed lower courts for relying on precedent that postdated the conduct at issue to find a violation of clearly established law. *See Kisela* v. *Hughes*, 138 S. Ct. 1148, 1154 (2018) (per curiam).

Second, even before reaching the question of coercion, the NRA's claims are legally deficient. The NRA has not plausibly alleged that Vullo engaged in retaliation because of its *speech*, rather than regulation of *conduct*. The bulk of the NRA's allegations derive

from enforcement acts related to Carry Guard and similar unlawful insurance products marketed by the NRA and offered through three insurance entities. The NRA's complaint never alleges that these products were lawful. Because they weren't: They violated New York law in numerous respects—a fact memorialized in a binding consent order with the NRA itself (though it has failed to advise this Court of that fact). This case therefore bears no resemblance to *Bantam Books*. Unlike in *Bantam Books*, the NRA challenges core prosecutorial acts protected by absolute immunity and subject to a strong presumption of regularity. Also unlike in *Bantam Books*, the NRA does not allege Vullo prevented it from expressing itself in whatever way it wanted. And although the NRA and United States focus on a meeting in which Vullo supposedly pressured one insurer to scale back its business with the NRA, the complaint's barebones allegations about this meeting are implausible and insufficient for multiple reasons.

Third, if the Court reaches the question, Vullo's alleged statements and enforcement actions were not plausibly coercive. The NRA cites industry letters and an accompanying statement that Vullo issued after the Parkland school shooting. Nothing about these statements so much as hinted that insurers or banks would suffer any adverse consequence for maintaining ties with the NRA, and they are not remotely comparable to the "thinly veiled threats to institute criminal proceedings" in *Bantam Books*. 372 U.S. at 68. Although the statements were critical of the NRA, as Judge Silberman noted when rejecting an argument much like the NRA's, "officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not

have the statutory or even constitutional authority to regulate." *Penthouse Int'l, Ltd.* v. *Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991).

Because the industry letters alone are plainly noncoercive, the NRA links them to the Carry Guard enforcement actions, which were already ongoing before Parkland occurred. But even assuming allegations about this kind of quintessential prosecutorial conduct could ever provide a basis for First Amendment liability, the NRA's allegations do not give rise to a plausible claim. These allegations are conclusory, vague, and internally inconsistent. Moreover, they would require this Court to ignore the "obvious alternative explanation" that businesses severed their ties with the NRA in 2018 not because of Vullo's speech or her legitimate enforcement actions, but because Parkland generated a groundswell of public pressure against the NRA. *See Ashcroft* v. *Iqbal*, 556 U.S. 662, 682 (2009) (citation omitted).

* * *

Accepting the NRA's arguments would set an exceptionally dangerous precedent. The NRA's arguments would encourage damages suits like this one and deter public officials from enforcing the law—even against entities like the NRA that committed serious violations. The NRA's arguments would also allow entities to seek injunctive and declaratory relief to block legitimate enforcement actions. The result would be an influx of strike suits, an erosion of the protections of prosecutorial immunity, and skewed enforcement of the law in favor of entities that engage in controversial speech. Indeed, the NRA asks this Court to give it favored status *because* it espouses a controversial view. This Court should reject that alarming request.

The writ should be dismissed as improvidently granted, or, in the alternative, the Second Circuit's judgment should be affirmed.

STATEMENT

A. Regulatory Background

1. New York is home to many of the nation's largest insurance companies and financial institutions. Altogether, DFS oversees over 1,700 insurance companies with assets of more than $5.5 trillion and over 1,200 financial institutions—including 159 state-chartered banks—with assets in excess of $3.3 trillion. N.Y.S. DFS, *Oversight*.[1] To ensure the safety, resilience, and transparency of this system, the State vests DFS with supervisory, rulemaking, investigative, and civil enforcement authority. *See* N.Y. Fin. Servs. L. § 102.

As a regulator, DFS "issue[s] orders and guidance involving financial products and services." *Id.* § 302(a). This can take several forms. "Regulations" resemble federal regulations promulgated through notice-and-comment rulemaking. *See* N.Y.S. DFS, *Regulatory and Legislative Activities*.[2] "Circular letters" are akin to interpretive guidance for insurance, and they typically interpret relevant legal provisions and identify DFS's compliance expectations. *See* N.Y.S. DFS, *Circular Letters*.[3] "Industry letters" remind regulated entities of existing obligations rather than offering new statutory or regulatory interpretations.

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[1] *Available at* https://www.dfs.ny.gov/About_Us.

[2] *Available at* https://www.dfs.ny.gov/industry_guidance/regulations.

[3] *Available at* https://www.dfs.ny.gov/industry_guidance/circular_letters.

See N.Y.S. DFS, *Industry Letters*.[4] Neither circular letters nor industry letters can themselves form the basis for enforcement actions. *See* N.Y. A.P.A. § 102(2)(b)(iv).

One threat to market stability that DFS monitors is reputational risk, which is "the risk that negative publicity regarding an institution's business practices will lead to a loss of revenue or litigation." Pet. App. 120 (citation omitted). Reputational risk is a legitimate "subject of regulation," U.S. Br. 32-33, because "a business's response to social issues can directly affect its financial stability," Pet. App. 30. DFS accordingly provides guidance to safeguard individual insurance companies, financial institutions, and the market more generally. Operating with reputational risk, however, is not a violation of New York law.

In its enforcement capacity, DFS initiates investigations, notices civil charges, and enters into consent orders. DFS cannot unilaterally impose monetary penalties—it must act through consent orders or adjudicatory proceedings, which afford regulated entities due process protections and appeal rights. Pet. App. 63. DFS cannot prosecute criminal violations; it refers criminal matters to prosecutors. Pet. App. 201-202; N.Y. Fin. Servs. L. § 301(C)(4).

2. New York law provides robust consumer protections against insurance violations. Anyone who underwrites insurance, receives compensation for soliciting or advertising insurance, or receives royalties based on collected premiums must maintain a license with DFS. N.Y. Ins. L. §§ 1102; 2101(a)(1), (c), (k), (o);

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[4] *Available at* https://www.dfs.ny.gov/industry_guidance/industry_letters.

2102(a)(1)(A), (b)(3), (e)(1); 2115(a); 2116; 2117(a). Insurers who are not licensed in New York may still underwrite insurance in the State in limited circumstances, provided they work with a specially licensed broker. *See id.* §§ 1101(b)(2)(F); 2102(a)(1)(B); 2105. This arrangement is known as "excess-line insurance." New York law also prohibits insurers from inducing potential customers to purchase insurance by, for example, offering extra-contractual and unregulated benefits. *Id.* § 2324(a). And it prohibits advertising insurers' financial condition or the services of unlicensed insurers. *Id.* § 2122(a).

Finally, New York law strictly forbids insurance, including excess-line insurance, to cover intentional acts or criminal defense costs. *Id.* §§ 1101(a); 1113(a)(29); 1116(a)(3); 2105(a); 11 N.Y. Comp. Codes R. & Regs. tit. 11 §§ 27.11, 262.5. Such insurance creates moral hazard by insulating individuals from the financial consequences of unlawful conduct.

DFS routinely enforces these provisions. For example, in 2014, DFS entered into a consent order with MetLife, requiring it to pay $50 million for soliciting insurance business in New York through subsidiaries without a license and misrepresenting its activities to DFS, among other things. *See* N.Y.S. DFS, Consent Order, *In re Am. Life Ins. Co.*, No. 2020-0003-C, at 7-10 (Mar. 31, 2014).[5]

B. Factual Background

This case arises from Maria Vullo's regulatory and enforcement actions as the DFS Superintendent in 2017 and 2018. Because the case comes to this Court

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[5] *Available at* https://www.dfs.ny.gov/system/files/documents/2020/04/ea140331_american_life_et_al.pdf.

on a motion to dismiss, Vullo accepts the NRA's "well-pleaded, nonconclusory factual allegation[s]" as true. *Iqbal*, 556 U.S. at 680.

1. *The Carry Guard Investigation*

In April 2017, the NRA launched an insurance product called Carry Guard, which provided coverage for personal injury and criminal defense arising from the use of a firearm, beyond coverage for reasonable use of force. Pet. App. 6; *see* NRABLOG, *The National Rifle Association Launches NRA Carry Guard* (Apr. 27, 2017).[6] Carry Guard was an "[a]ffinity" insurance program, meaning a program "endorsed by a membership organization for use by its members." Pet. App. 97 n.1. The NRA aggressively marketed Carry Guard as providing access to "many great benefits," including "immediate access as needed to supplementary payments for bail, legal retainer fees, compensation while in court and more." NRABLOG, *supra*. The NRA's announcement noted that Lockton Affinity, LLC ("Lockton") was administering the program and that Chubb Ltd. ("Chubb"), insured it. *Id.*

Carry Guard violated New York law in numerous respects. It provided coverage for intentional acts and criminal defense costs. The NRA also marketed Carry Guard to New York residents even though the NRA was not licensed as an insurance producer. *See* N.Y.S. DFS, Consent Order, *In re The Nat'l Rifle Ass'n of Am.*, No. 2020-0003-C, at 6, 8 (Nov. 13, 2020) ("NRA Consent Order").[7]

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[6] *Available at* https://www.nrablog.com/articles/2017/4/the-national-rifle-association-launches-nra-carry-guard/.

[7] *Available at* https://www.dfs.ny.gov/system/files/documents/2020/11/ea20201118_co_nra.pdf.

The NRA's marketing of this illegal product quickly drew attention. Commentators dubbed the policy "murder insurance," "criticize[d]" Lockton and Chubb for their involvement, and "implore[d]" the public to urge those companies "to drop the insurance—and to not purchase their products until they do." *See* CBS News, *NRA's Carry Guard Comes Under Fire as "Murder Insurance"* (Oct. 19, 2017).[8]

Regulators also reacted swiftly. Within six months of the NRA's announcement, in October 2017, DFS received a referral from the New York County District Attorney's Office to investigate Carry Guard. During the investigation, DFS learned that the NRA also unlawfully marketed, solicited, and received insurance premiums from at least eleven other insurance programs even though the NRA lacked the necessary license and even though some of these programs covered intentional acts and criminal defense costs. Pet. App. 97-98. DFS's investigation focused on three companies: Lockton, an insurance broker that administered the NRA's insurance programs in the excess-line market; Chubb, which underwrote Carry Guard; and Lloyd's of London ("Lloyd's"), which underwrote the NRA's other unlawful insurance products. Pet. App. 266.

The investigation revealed that all three companies were violating New York law by selling insurance covering intentional acts and criminal defense costs. Pet. App. 267, 286-287, 304. Lockton additionally violated the law by, among other things, compensating the NRA for insurance sales even though the NRA was not a licensed insurance agent or broker and offering

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[8] *Available at* https://www.cbsnews.com/news/nras-carry-guard-comes-under-fire-as-murder-insurance/.

free one-year NRA memberships to Carry Guard purchasers—thereby unlawfully inducing customers to buy Carry Guard. Pet. App. 267. Chubb and Lloyd's violated the law by underwriting illegal insurance, aiding an unlicensed producer, and unlawfully issuing liability insurance coverage lacking certain required policy provisions. Pet. App. 286-287, 304.

Lockton voluntarily suspended Carry Guard on November 17, 2017, just weeks after DFS began its investigation. Pet. App. 266. Because Lockton was the licensed excess-line broker responsible for administering Carry Guard, its suspension of Carry Guard meant that Chubb was no longer able to underwrite insurance through that program. *See* N.Y. Ins. L. §§ 1102; 2105. Consequently, Chubb also notified the NRA that it would stop participating in Carry Guard. Pet. App. 286.

2. *The Parkland School Shooting*

On February 14, 2018, while DFS's investigation into the NRA's illegal insurance products was underway, a teenager opened fire at a high school in Parkland, Florida, murdering 17 students and staff members. Pet. App. 7. In the NRA's words (at 7), it immediately "faced intensified criticism for its pro-gun rights advocacy from many corners," including from insurance companies and banks. On February 23, following the Parkland shooting, Chubb publicly announced what it had privately told the NRA months before—that it would stop participating in Carry Guard. Reuters, *Insurer Chubb Says Will Stop*

Underwriting NRA Insurance for Gun Owners (Feb. 23, 2018).[9]

More companies followed suit. The NRA's "corporate insurance carrier withdrew from renewal negotiations and stated that it was 'unwilling to renew coverage at any price.'" Pet. App. 13 (quoting Pet. App. 210). Airlines, rental car agencies, healthcare and technology companies—none of which were regulated by DFS—announced they would no longer offer discounts for NRA members. Jacey Fortin, *A List of the Companies Cutting Ties With the N.R.A.*, N.Y. Times (Feb. 24, 2018).[10] MetLife, an insurer not affected by the Carry Guard investigation, announced the end of its relationship with the NRA on February 23, 2018. *Id.*

On February 25, the NRA allegedly received a call from Lockton's chairman, who said he "privately wished to do business with the NRA but had to 'drop' the NRA for fear of losing [Lockton's] license to do business in New York." Pet. App. 12-13 (quoting Pet. App. 209). Lockton publicly announced that decision the next day. Pet. App. 210. Without a licensed excess-line broker to administer the NRA's remaining affinity programs, Lloyd's—an unlicensed excess-line insurer—had no choice but to sever ties, too. *See* N.Y. Ins. L. §§ 1102; 2105. On May 1, 2018, Lloyd's privately announced its decision to terminate its relationship with the NRA, citing an April 11 communication from DFS requesting information related to the

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[9] *Available at* https://www.reuters.com/article/us-usa-guns-chubb-ltd-ch/insurer-chubb-says-will-stop-underwriting-nra-insurance-for-gun-owners-idUSKCN1G724A/.

[10] *Available at* https://www.nytimes.com/2018/02/24/business/nra-companies-boycott.html.

NRA's illegal affinity insurance programs. *See* Sealed App. 56, 64; Pet. App. 223. Lloyd's publicly announced that decision on May 9. Pet. App. 224.

3. *The Alleged Lloyd's Meeting*

The NRA alleges that on February 27, Vullo met with Lloyd's senior executives behind closed doors. Pet. App. 221. During the alleged meeting, the NRA claims that Vullo "presented [DFS's] views on gun control and [her] desire to leverage [DFS's] powers to combat the availability of firearms, including specifically by weakening the NRA." *Id.* She allegedly informed Lloyd's "that DFS was less interested in pursuing" other unspecified violations "so long as Lloyd's ceased providing insurance to gun groups, especially the NRA." Pet. App. 199-200. And she allegedly "made clear"—though the NRA does not explain how—"that Lloyd's could avoid liability for infractions relating to other, similarly situated insurance policies, so long as it aided DFS's campaign against gun groups." Pet. App. 223. The complaint does not allege any specific statements that Vullo supposedly made during the alleged meeting and does not explain what Vullo wanted Lloyd's to do to help the "campaign." Nor does it specify what insurance policies could possibly be "similarly situated" to policies providing liability coverage to gun owners who unlawfully shoot people.

4. *The Industry Letters and Press Release*

DFS's first public statement regarding the Parkland shooting came months later, on April 19. Pet. App. 246, 249. Vullo issued a pair of industry letters entitled "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations." *Id.* Those letters were addressed to DFS-regulated

insurance companies and financial institutions—not the NRA. *Id.* The letters explained that the "social backlash" against the NRA and other gun promotion organizations was "intens[e]," and warned of potential "reputational risks" of working with these organizations. Pet. App. 246-251. Vullo reminded the recipients that the manner in which financial institutions engage "in communities they serve is closely tied to the business they do with their clients," and that many firms reported that "their performance is based on both their strategic business vision as well as on a commitment to society as a whole." Pet. App. 247, 250.

Vullo accordingly "encourage[d]" banks and insurance companies "to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations" and "encourage[d]" them "to take prompt actions to manag[e] these risks." Pet. App. 248, 251. Vullo did not suggest any course of action, did not reference any provision of New York law, did not threaten any sanction against institutions that chose to continue doing business with the NRA, and did not reference Carry Guard.

Accompanying the letters was a press release from then-Governor Cuomo. Cuomo quoted Vullo as stating that "business can lead the way and bring about the kind of positive social change needed to minimize the chance that we will witness more of these senseless tragedies," and asking "all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA, and to take prompt actions to manage these risks and promote public health and safety." Pet. App. 244.

5. *The Consent Orders*

In May 2018, Lockton and Chubb entered into consent orders with DFS. Pet. App. 252, 280. The two companies admitted that they violated New York law and agreed to pay $7 million (Lockton) and $1.3 million (Chubb). Pet. App. 268, 287. The consent orders also explained that "although it did not possess an insurance producer license from the Department, the NRA nonetheless engaged in aggressive marketing of and solicitation for the Carry Guard Program" as well as "at least 11 additional insurance programs." Pet. App. 257-258; *see* Pet. App. 283. Given the NRA's failure to obtain an insurance producer's license, Lockton and Chubb "agree[d] not to participate in the Carry Guard Program *** or any other NRA-endorsed programs." Pet. App. 269; *see* Pet. App. 289. The consent orders also barred Lockton and Chubb from participating in any similar illegal programs, even if they did not involve the NRA. Pet. App. 269, 272, 288, 290. The consent orders, however, expressly allowed Lockton and Chubb to "assist the NRA in procuring insurance for the NRA's own corporate operations." Pet. App. 270; *see* Pet. App. 289. Lockton later entered a supplemental consent order in which it confirmed that it had not administered unlawful firearm-related insurance for other groups. Pet. App. 322.

On December 20, 2018, Lloyd's finalized a consent order with DFS. Pet. App. 296. It, too, acknowledged violating New York's insurance laws, agreed to pay a $5 million fine, agreed not to offer NRA-endorsed insurance programs, agreed not to offer similar illegal insurance unconnected to the NRA, and was permitted to sell corporate insurance to the NRA. Pet. App. 304-309.

Although the NRA's brief *never* acknowledges this fact, the NRA also signed its own consent order with DFS after Vullo left office. The consent order found that Carry Guard "provided insurance coverage that DFS finds may not legally be offered in the New York excess line market," including "defense coverage in a criminal proceeding" and "liability coverage for bodily injury" arising from "use of firearms and that was beyond the use of reasonable force." NRA Consent Order at 6. It further found that the NRA "marketed and solicited numerous additional insurance products" without "an insurance producer license from the Department." *Id.* at 7. The NRA unlawfully received "more than $1.8 million" for sponsoring those insurance products. *Id.* at 8. It agreed to pay $2.5 million, refrain from offering insurance products in New York for five years, and seek an insurance license if it decides to offer insurance after the five-year bar. *Id.* at 9-10.

C. Procedural History

1. *District Court Proceedings*

The NRA sued Vullo, Cuomo, and DFS. As relevant here, the NRA alleged that both Vullo and Cuomo violated the First Amendment by censoring its expression and retaliating against its speech, and that Vullo additionally violated the Fourteenth Amendment by selectively enforcing New York law. Pet. App. 230-239. The NRA sought declaratory relief, injunctive relief, and damages. Pet. App. 239-241.

The NRA alleged that Vullo, as part of DFS's enforcement activities, singled out NRA-endorsed insurance products because of the NRA's gun advocacy, yet looked the other way on allegedly similar violations. Pet. App. 216. The NRA did not allege, however, that

DFS permitted any other entity to promote insurance without a license or to offer insurance coverage for engaging in unlawful violence. The NRA additionally claimed that the industry letters and accompanying press release impermissibly "threaten[ed]" banks and insurance companies "with government prosecution" unless they stopped providing services to the NRA. Pet. App. 231 (brackets and citation omitted). The NRA claimed that Vullo's actions "imperiled" the NRA's access to corporate insurance and banking services, Pet. App. 228, but did not claim that Vullo's actions prevented it from exercising speech rights.

The District Court dismissed the NRA's selective-enforcement claim on the ground that Vullo's enforcement actions against Lockton, Chubb, and Lloyd's were entitled to absolute prosecutorial immunity. Pet. App. 49-67. The court also denied declaratory and injunctive relief. Pet. App. 75-92. The District Court, however, allowed the NRA's First Amendment damages claims to proceed against Vullo and Cuomo. Pet. App. 67-74. The court denied qualified immunity. Pet. App. 74.

Vullo appealed the denial of the motion to dismiss. The NRA did not attempt to cross-appeal the dismissal of its selective-prosecution claim against Vullo or its claims for injunctive or declaratory relief. The only claims on appeal are thus the NRA's retaliation and censorship claims against Vullo.

2. *Second Circuit Proceedings*

The Second Circuit unanimously reversed. As the panel explained, the First Amendment "does not impose a viewpoint-neutrality requirement on the government's own speech." Pet. App. 23. At the same

time, the court recognized that "some government speech may infringe on private individuals' free speech rights" and that government officials "may not engage in unjustified threats or coercion to stifle speech." Pet. App. 24 (citation omitted).

Taking "as true" the NRA's "factual allegations," Pet. App. 20, the Second Circuit concluded that Vullo's actions were not coercive. "[T]he Guidance Letters and Press Release were written in an even-handed, nonthreatening tone," "did not refer to any pending investigations or possible regulatory action," and alluded to only "the 'risks, including reputational risks *if any*,' of continuing to do business with gun promotion groups amid growing public concern over gun violence." Pet. App. 29 (citation and ellipses omitted). In light of the "general backlash" against the NRA and similar organizations following "the Parkland shooting," it was reasonable for Vullo to "raise these concerns to protect DFS-regulated entities and New York residents from financial harm and to preserve stability in the state's financial system." Pet. App. 29-30.

As for the consent orders and Vullo's alleged meeting with Lloyd's, the Second Circuit held that Vullo's actions were legitimate. Pet. App. 33. "[I]n light of the serious insurance law violations, it was only natural for Vullo to take steps – including investigating, negotiating, and resolving apparent violations – to enforce the law." *Id.* Nor did Vullo "coerce Lloyd's (or the other entities in question) into severing ties with the NRA; indeed, the consent orders explicitly provided otherwise"—they allowed insurance companies to continue providing corporate insurance to the NRA. Pet. App. 32. The "context" of the Carry Guard investigation thus made clear that Vullo was simply

"engaging in legitimate enforcement action." Pet. App. 32-33.

The Second Circuit separately held that Vullo was "entitled to qualified immunity because the law was not clearly established." Pet. App. 34-38.

The Second Circuit denied the NRA's petition for rehearing en banc without dissent. Pet. App. 185-186. The NRA petitioned for certiorari, seeking review of both the First Amendment question and the qualified-immunity question. The Court granted review on the First Amendment question only.

SUMMARY OF ARGUMENT

I. The Court lacks jurisdiction. The Second Circuit held both that the NRA did not plausibly allege a constitutional violation and that any alleged violation was not clearly established as required to overcome qualified immunity. This Court granted review limited to the constitutional question, but a decision on that question cannot affect the Second Circuit's conclusion that Vullo is entitled to qualified immunity from damages, nor could it result in any prospective relief. A decision addressing the constitutional question would be advisory, and the writ of certiorari should be dismissed as improvidently granted.

II. A. The NRA's First Amendment claims suffer from fatal problems that make it unnecessary to consider whether Vullo's alleged enforcement acts and statements were coercive.

First, the bulk of the NRA's allegations turn on enforcement acts protected by absolute prosecutorial immunity, like executing a consent order or forgoing enforcement of additional violations as part of a negotiated resolution. The District Court correctly

dismissed the NRA's selective-prosecution claim because the NRA's allegations challenged acts for which Vullo was "functioning" like a "prosecutor." Pet. App. 56-57. The NRA cannot now rely on those same acts as the basis for its First Amendment claims.

Second, the NRA has failed to plausibly allege that Vullo retaliated against its speech, as opposed to regulating third parties' conduct. A plaintiff alleging a First Amendment retaliation claim must show that retaliatory animus was a "but-for cause" of its injury. *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1721 (2019). Because enforcement decisions receive a "presumption of regularity," plaintiffs must show that an allegedly retaliatory law-enforcement action was "objectively unreasonable." *Id.* at 1723. The NRA's allegations do not come close, particularly in light of the insurers' own admissions that they and the NRA were engaged in wide-ranging illegal conduct.

Third, unlike in *Bantam Books* and cases applying it, the NRA cannot show that Vullo suppressed or censored its expression. The NRA alleges that Vullo interfered with its relationships with insurers and banks, limiting only what the NRA could *do*, not what it could *say*. The NRA has never claimed, much less plausibly so, that it was unable to exercise its speech rights.

Fourth, the NRA's and United States' arguments about Lloyd's misread the complaint and misunderstand New York law. Even assuming the Lloyd's meeting happened, the NRA has not plausibly alleged that Vullo threatened to interfere with Lloyd's lawful arrangements with the NRA. Due to the NRA's own illegal conduct, *all* of the affinity programs Lloyd's provided for the NRA were illegal. And based on the

NRA's own allegations, by the time of the alleged Lloyd's meeting, Lloyd's had *no* choice whether to terminate its relationship with the NRA—Lockton had already made that decision for it.

B. If the Court reaches the question, the NRA's complaint does not plausibly allege coercion. *Bantam Books* held that the government violates the First Amendment when it attempts to coerce, rather than convince, third parties to censor speech. To determine when government crosses that line, lower courts have traditionally looked to four indicia, all of which underscore that the NRA has not plausibly alleged coercion.

First, and most important, Vullo did not reference or threaten adverse consequences. The industry letters used quintessential language of encouragement: They did not reference any provision of the law and never threatened enforcement or follow-up. The only adverse consequences referenced in the consent orders responded to the insurers' and the NRA's violations of the law. And the NRA's allegations about the supposed Lloyd's meeting are vague, conclusory, and contradicted by the NRA's allegations elsewhere.

Second, the tone and word choice of the industry letters was even-handed and nonthreatening. The consent orders' tenor was wholly consistent with their aim. And the NRA does not make any allegations about the word choice in the alleged Lloyd's meeting.

Third, the insurance companies' responses to the challenged statements refute any claim of coercion. The NRA tries to make much of these companies supposedly "falling in line," but their acts are easily explained as responses to the horrific Parkland shooting or the insurers' own admittedly unlawful conduct.

Fourth, nothing about Vullo's regulatory authority made her otherwise nonthreatening communications coercive. A conclusion to the contrary would have the perverse consequence of uniquely disabling law-enforcement officials from expressing their views on matters of public concern.

C. The NRA's arguments would be devastating for government officials at all levels. These arguments would eviscerate the protections of prosecutorial immunity and the presumption of regularity; circumvent limits on selective-enforcement suits; inhibit public officials from performing their duties; invite strike suits in response to legitimate law-enforcement actions and government speech; and allow entities to insulate themselves from the consequences of their unlawful conduct by engaging in controversial speech.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO DECIDE THE QUESTION PRESENTED.

A decision from this Court on the question presented would be purely advisory. Resolving that question cannot provide "any effectual relief" to the NRA, meaning the Court lacks jurisdiction to decide it. *Uzuegbunam* v. *Preczewski*, 592 U.S. 279, 796 (2021); *see Camreta* v. *Greene*, 563 U.S. 692, 707 (2011).

The Court's "power is to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945). Where a lower court offers two independent bases for its judgment, only one of which is on review, an opinion reversing on that ground cannot have any effect on the lower court's judgment. When "the same judgment would be rendered" after this Court

corrected an error, this Court's "review could amount to nothing more than an advisory opinion." *Id.*

A ruling from this Court on the question presented would be advisory. The Second Circuit held that the NRA did not plausibly allege that Vullo violated the NRA's First Amendment rights and that, even assuming there was a constitutional violation, Vullo was entitled to qualified immunity because the right in question was not clearly established when she acted. Pet. App. 26-38. The NRA sought certiorari on both questions, but the Court granted review of only the former.

Ruling for the NRA on the First Amendment question cannot alter the Second Circuit's holding that Vullo is entitled to qualified immunity. "[A] reasonable officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the [Constitution] are far from obvious." *Kisela*, 138 S. Ct. at 1154. Even if a plaintiff plausibly alleges a constitutional violation, qualified immunity applies unless "the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). Decisions that "postdate the conduct in question" are thus of "no use in the clearly established inquiry." *Brosseau* v. *Haugen*, 543 U.S. 194, 200 n.4 (2004) (per curiam).

Nothing the Court might say in 2024 can give fair notice to Vullo in 2017 or 2018. The Court's decision on the question presented will thus have no bearing on the judgment. Indeed, if the Second Circuit were to alter its qualified-immunity analysis based on this Court's decision on the constitutional question, that would be grounds for summary reversal. *See Kisela*, 138 S. Ct. at 1154. The court of appeals' qualified-

immunity holding fully supports its judgment and means this Court has no grounds to reverse, *see* NRA Br. 47, or vacate, *see* U.S. Br. 35 & n.14, the decision below.

This case differs from those in which both the constitutional and clearly-established-law questions are properly presented. A court may then address either prong of the qualified-immunity analysis first or may rule on both prongs in the alternative, as the Second Circuit did below. Pet. App. 26-38; *see Pearson*, 555 U.S. at 236. What an appellate court may not do, in the qualified-immunity context or any other, is decide a question that will have no effect on the lower court's judgment, in light of a separate holding that provides an independent basis for the judgment and is not presented for review. *See* Br. in Opp'n 9.

The Court's decision in *Camreta*, illustrates why resolving the question presented would amount to an advisory opinion. In *Camreta*, the court of appeals concluded that the defendant officers had violated the Fourth Amendment but were entitled to qualified immunity, and the officers petitioned for certiorari. 563 U.S. at 699-700. This Court held that it could in some circumstances review a constitutional ruling at the behest of an officer who prevailed below. Although a qualified-immunity ruling eliminates the possibility of the plaintiff obtaining damages, *id.* at 702-703, resolving the constitutional question may sometimes "have a significant future effect" on the parties' relationship, *id.* at 704. In that circumstance, the parties "retain a stake in the outcome" of the constitutional question even after an official is granted qualified immunity. *Id.* at 710. But that reasoning did not apply in *Camreta* because one of the defendant officials had

left his job and thus "lost his interest" in the outcome, and the plaintiff was no longer subject to the remaining official's authority. *Id.* at 710 n.9, 710-711. The constitutional question was therefore "moot." *Id.* at 710.

Here too, the parties lack any stake in the outcome of the constitutional question. Ruling for the NRA on that question cannot result in retrospective damages, given the Second Circuit's independent judgment that Vullo is entitled to qualified immunity. A constitutional ruling also cannot result in prospective relief, because the District Court dismissed injunctive-relief claims against all defendants, and the NRA declined to appeal that ruling. *See* Pet. App. 87-90, 114-145. Nor could a constitutional ruling have some "prospective effect" on Vullo's conduct with respect to the NRA given that Vullo is no longer the Superintendent of DFS and has no intention of returning to that position.

Because the NRA "is no longer in need of any protection from the challenged practice," and a ruling from this Court cannot revive its damages claim, this case is moot. *Camreta*, 563 U.S. at 711. The writ of certiorari should be dismissed as improvidently granted. *See, e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 105 (2001) (per curiam) (dismissing case as improvidently granted because "the current posture *** prevents review of [the] question" presented).

II. THE NRA'S COMPLAINT FAILS TO STATE A FIRST AMENDMENT CLAIM.

The NRA's First Amendment claims fail at the outset for multiple reasons. And even setting aside these problems, the NRA's complaint does not plausibly

allege coercion. The Second Circuit's judgment should be affirmed.

A. The NRA's First Amendment Claims Fail Even Setting Aside Coercion.

Unlike in *Bantam Books*, the bulk of the NRA's allegations involve enforcement acts taken in response to undisputedly unlawful conduct. Also unlike in *Bantam Books*, Vullo's acts did not prevent the NRA from engaging in any expression. These fundamental differences from *Bantam Books* mean that the NRA's claims fail without any need to address whether Vullo's statements were coercive.

1. *Vullo Is Entitled To Absolute Immunity For Her Enforcement Acts.*

Most of the NRA's allegations seek to hold Vullo liable for conduct related to the enforcement actions against Lockton, Chubb, and Lloyd's. Vullo is entitled to absolute immunity for those acts. As the United States explains, the "consent decrees" and corresponding "enforcement actions" cannot serve as "a basis for liability." U.S. Br. 34.

Prosecutors have "absolute immunity" from liability for actions taken with respect to "initiating and pursuing a criminal prosecution." *Imbler*, 424 U.S. at 410, 430. That includes actions taken in preparation for trial that are "intimately associated with the judicial phase of the criminal process," such as charging decisions and plea bargaining. *Id.* at 430; *see Burns* v. *Reed*, 500 U.S. 478, 486 (1991) (immunity applies to "actions preliminary to the initiation of a prosecution") (citation omitted); *Cady* v. *Arenac Cnty.*, 574 F.3d 334, 341 (6th Cir. 2009) (collecting cases holding that plea negotiations are subject to absolute

immunity). In assessing whether immunity applies to a particular action, the Court takes a "functional approach," *Van de Kamp* v. *Goldstein*, 555 U.S. 335, 342 (2009) (citation omitted), which "focuses on the *conduct* for which immunity is claimed, not on the *harm* that the conduct may have caused or the question whether it was lawful," *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 271 (1993) (emphases added).

These principles apply equally to "agency officials performing certain functions analogous to those of a prosecutor." *Butz* v. *Economou*, 438 U.S. 478, 515 (1978). "The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution." *Id.*

Vullo is entitled to absolute immunity as to all claims arising from her prosecutorial functions relating to the consent orders. Her decisions relating to initiating and resolving enforcement actions against Lockton, Chubb, and Lloyd's were "very much like the prosecutor's decision" to initiate proceedings and ultimately reach plea bargains. *Id.* Vullo exercised precisely the authority this Court in *Butz* described as warranting immunity: She had "broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought," and her enforcement discretion "might be distorted" if her immunity "was less than complete." *Id.* Immunity therefore bars the NRA's challenges to Vullo's enforcement actions and the particular terms of the consent orders.

Immunity also attaches to the alleged Lloyd's meeting. The NRA's own allegations belie any suggestion that this meeting occurred as alleged, *infra* pp. 33-34, but even assuming otherwise, the only reasonable

inference is that the meeting occurred in the context of settlement discussions that led to DFS's consent order with Lloyd's. The meeting allegedly occurred on February 27, 2018. Pet. App. 221. By then, DFS had been investigating the NRA's illegal insurance products for several months. Pet App. 206 (investigation began in October 2017). In that context, Vullo's alleged offer not to bring enforcement actions for certain unrelated violations, so long as Lloyd's stopped marketing the NRA's illegal insurance products, was typical of the give-and-take that occurs in plea negotiations.

The decision whether to forgo enforcement as to one violation in exchange for an agreement to cease a different violation is a quintessential prosecutorial act protected by immunity. *See, e.g.*, *Pfeiffer* v. *Hartford Fire Ins. Co.*, 929 F.2d 1484, 1492 (10th Cir. 1991); *Cady*, 574 F.3d at 341-342. If officials faced civil damages liability for every decision they made about which charges to pursue or what terms to offer in plea negotiations, the justice system could not function.

The District Court correctly concluded that in commencing and settling the enforcement actions against Lockton, Chubb, and Lloyd's, Vullo was "functioning in a manner sufficiently analogous to a *** prosecutor" to warrant absolute immunity. Pet. App. 55-56 (citation omitted). The court therefore dismissed the NRA's selective-prosecution claims arising from Vullo's enforcement decisions. Pet. App. 67.

The NRA cannot resuscitate those same allegations to support its First Amendment claims. *Id.* at 67-74. Immunity attaches to the *action*, regardless of the nature of the claim. *See* U.S. Br. 34; *Buckley*, 509 U.S. at 271 (immunity analysis "focuses on the conduct for

which immunity is claimed"). As Vullo explained to the District Court, "an executive official who initiates and brings administrative enforcement proceedings as part of her prosecutorial function is afforded absolute immunity *from suit*," not just from particular types of claims. Dkt. 211-1 at 12, *NRA* v. *Cuomo*, No. 1:18-cv-566 (N.D. N.Y. June 23, 2020) (emphasis added).

The United States agrees that Vullo's alleged conduct related to the "enforcement actions" cannot provide a basis for liability. U.S. Br. 34. Although the United States suggests these actions can nonetheless provide "relevant context" for whether Vullo's other acts were coercive, *id.*, the United States does not explain how that is consistent with absolute immunity—which is, after all, absolute. The United States further assumes without explanation that Vullo's alleged statements during the Lloyd's meeting fall outside the scope of immunity, but it describes that meeting as a prosecutorial act occurring in the course of consent order negotiations. *Id.* at 17-18. As the United States notes, it "would pose no First Amendment concerns" if Vullo had "offered to forgo enforcement based on one insurance-law violation in exchange for an agreement by Lloyd's to cease another violation." *Id.* at 21. That is exactly what happened here.

2. *The NRA Has Not Plausibly Alleged Any Injury Caused By Retaliation Against Its Speech Rather Than Regulation Of Unlawful Conduct.*

One of the NRA's two surviving counts on appeal alleges that Vullo's enforcement acts violated the First Amendment by "retaliating against the NRA based on its speech." Pet. App. 233 (capitalization altered).

This claim suffers from a fundamental flaw: Carry Guard and the NRA's similar products were unlawful. This case is thus nothing like *Bantam Books* or any other First Amendment coercion case of which we are aware, none of which involve law-enforcement officials pursuing conceded violations of the law.

To prevail on a retaliation claim, a plaintiff must show that "the government defendant's 'retaliatory animus' " was "a 'but-for' cause" of "the plaintiff's 'subsequent injury,' " "meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Nieves*, 139 S. Ct. at 1722 (quoting *Hartman* v. *Moore*, 547 U.S. 250, 259 (2006)). Any other rule would "place [a plaintiff] in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 285 (1977).

Claims involving alleged retaliatory law-enforcement acts pose a heightened "problem of causation." *Nieves*, 139 S. Ct. at 1722-25. They involve a "tenuous causal connection between the defendant's alleged animus and the plaintiff's injury," in part because prosecutors' decisions "receive a presumption of regularity" that courts may "not lightly discard." *Id.* at 1723 (citation omitted). "Because a state of mind is 'easy to allege and hard to disprove,' " a standard accepting bare allegations about an enforcer's subjective mental state would allow "doubtful" claims of retaliation to succeed or, at minimum, "threaten to set off 'broad-ranging discovery' in which 'there often is no clear end to the relevant evidence.' " *Id.* (citations omitted). Accordingly, plaintiffs must show "as a threshold

matter" that the alleged retaliatory law-enforcement act was "objectively unreasonable." *Id.* at 1723.[11]

The NRA's allegations do not come close to establishing that Vullo's enforcement acts were objectively unreasonable, for the straightforward reason that Carry Guard and the NRA's similar products were unlawful. DFS began investigating Lockton, Chubb, and Lloyd's after learning that Carry Guard unlawfully covered intentional acts and criminal defense costs. Pet. App. 206; *see also* Pet. App. 266. DFS's investigation confirmed that violation and uncovered eleven additional unlawful NRA-endorsed products. *See* Pet. App. 6-7. Although plaintiffs alleging retaliatory arrest or prosecution "must plead and prove the absence of probable cause," *Nieves*, 139 S. Ct. at 1724, not only has the NRA failed to allege the absence of probable cause, its own complaint confirms that its underlying conduct was unlawful, *see* Pet. App. 219-220, 267-268, 286-287, 304.

The NRA gestures at the exception to the but-for cause requirement applicable in cases where a plaintiff "presents objective evidence" that it was punished "when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 139 S. Ct. at 1727. But the NRA could not claim the exception even if it were properly raised

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[11] Outside of arrests and law-enforcement acts, plaintiffs must show that their constitutionally protected conduct was a "motivating factor" for the government's action, which shifts the burden to the government to show "that it would have reached the same decision" absent the protected conduct. *Mt. Healthy*, 429 U.S. at 287 (citation omitted). Insofar as the NRA's claims challenge law-enforcement acts, the *Mt. Healthy* framework is inapposite here, but the result would be the same even under *Mt. Healthy*.

because the examples it offers (at Pet. App. 216-217) are not at all similarly situated. Those examples did not come close to offering "coverage for losses *** where the insured intentionally killed or injured someone or otherwise engaged in intentional wrongdoing." Pet. App. 3. It was perfectly reasonable for Vullo to prioritize stopping Carry Guard and the other unlawful NRA-sponsored programs, which presented a serious and unique risk to public safety. Such decisions go to the heart of prosecutorial discretion—and Vullo's responsibility as DFS Superintendent.

3. *The NRA Has Not Plausibly Alleged That Vullo Censored Its Speech.*

The other surviving count on appeal alleges that Vullo censored the NRA's speech. Pet. App. 231. Although the NRA below treated this claim as the same as its retaliation claim because the two "are based upon the same conduct," Pet. App. 113, portions of the NRA's brief in this Court could be understood to argue that Vullo "suppress[ed]" or "censor[ed]" the NRA's expression, *see* NRA Br. 32, 36.

Any such allegation fails as a matter of law. In *Bantam Books* and all lower court precedent applying it of which we are aware, the court found a First Amendment violation where the government censored quintessential expression—for example, books, online advertisements, or a billboard. *See Bantam Books*, 372 U.S. 58; *Backpage.com, LLC* v. *Dart*, 807 F.3d 229 (7th Cir. 2015); *Okwedy* v. *Molinari*, 333 F.3d 339 (2d Cir. 2003).

This case is fundamentally different. The NRA does not allege that Vullo has "limit[ed] what [it] may say nor require[d it] to say anything," *Rumsfeld* v. *FAIR*, 547 U.S. 47, 60 (2006), only that Vullo forced insurers

to end their business relationships with the NRA. Even if that were true (and it is not), these acts would regulate the NRA's nonexpressive activity—relationships with insurers and banks. Regulation of "nonexpressive activity" does not infringe the right to speak "simply because [it] will have some effect on the First Amendment activities" of the regulated party. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 706-707 (1986). "The fact that an economic regulation may indirectly" implicate the regulated party's speech "does not itself amount to a restriction on speech"—and here the NRA was not even the directly regulated party. *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470 (1997).

The NRA's allegations are not just "remote" and "attenuated" from its speech, they are entirely "speculative." *University of Pa.* v. *EEOC*, 493 U.S. 182, 200 (1990). The NRA's complaint alleges only that Vullo's acts *could* deprive it of "services critical to the survival of the NRA and its ability to disseminate its message." Pet. App. 231. The NRA has never claimed that it was actually unable to secure banking and insurance services, let alone that any conduct by Vullo prevented it from exercising its speech rights. The NRA "remain[s] free *** to express whatever views [it] may have on" the Second Amendment, New York gun laws, and Vullo's actions. *FAIR*, 547 U.S. at 60. The NRA alleges nothing more than a permissible "incidental" burden on its expression. *Id.* at 62.

4. *The NRA's And United States' Arguments Related To Lloyd's Fail.*

The NRA emphasizes (at 11) that the Lloyd's consent order "barred Lloyd's from providing any affinity insurance programs with the NRA, including fully

lawful offerings." As for the United States, it urges vacatur based solely on its view that the NRA has plausibly alleged that Vullo pressured "Lloyd's to 'scale back its NRA-related business' generally—not to cease underwriting only unlawful insurance programs like Carry Guard." U.S. Br. 19 (citation omitted).

These arguments misread the complaint and misunderstand New York law. Lloyd's served as an excess-line insurer for NRA affinity products. Pet. App. 204-205, 221. *All* of these products were unlawful because the NRA did not have the necessary license (among other reasons). Pet. App. 221, 225. That is why the Lloyd's consent order *prohibited* it from "enter[ing] into any agreement *** with the NRA to underwrite or participate in any affinity-type insurance program." Pet. App. 306. It is also why the order *permitted* Lloyd's to conduct other "NRA-related business" for which the NRA did not need an insurance license. U.S. Br. 19 (citation omitted); *see* Pet. App. 306.

Even assuming the Lloyd's meeting happened as alleged, Vullo cannot have threatened to interfere with Lloyd's lawful arrangements with the NRA because the NRA has not plausibly alleged that Lloyd's had *any* arrangements with the NRA other than its unlawful affinity products. *See* Pet. App. 225, 232, 234, 298-299, 302. If this meeting even occurred, all Vullo did was ask Lloyd's to "cease underwriting only unlawful insurance programs," which the United States recognizes would be an appropriate "neutral effort to enforce the law." U.S. Br. 18-19.

Allegations about the meeting suffer from another glaring problem: The complaint suggests that by the time of the alleged meeting, Lloyd's had no choice but

to discontinue its business with the NRA. Lloyd's was the *unlicensed* excess-line insurer for NRA affinity products that Lockton, the *licensed* excess-line broker, administered. Pet. App. 298-299, 302. Once Lockton decided to sever ties with the NRA on February 25—two days *before* the alleged meeting on February 27—Lloyd's could not lawfully continue its relationship with the NRA either and was obligated to wind down its NRA business. Pet. App. 209-210; *see* N.Y. Ins. L. § 2105; *see also* Pet. App. 271 ("Lockton agrees to fully cooperate with *** Lloyd's" to cancel the NRA's unlawful insurance programs.). Vullo did not need to do anything "to coerce Lloyd's into terminating its business" with the NRA, U.S. Br. 19—that was already a done deal.

B. The NRA's Complaint Does Not Plausibly Allege Coercion.

If the Court reaches the issue, it should reject the NRA's coercion claim. The NRA alleges that insurers and banks cut ties with it in 2017 and 2018—not as part of the general public backlash following Parkland, and not in response to significant insurance law violations—but instead in response to coercion by Vullo. To plausibly allege such a theory, the complaint must plead sufficient factual content to permit a reasonable inference that Vullo's actions impermissibly crossed the line from encouragement to coercion. The complaint does not come close. Permitting a complaint like this to survive a motion to dismiss would run headlong into *Iqbal*'s concerns by exposing officials to "'disruptive discovery'" that inflicts "heavy costs in terms of efficiency and expenditure of valuable time and resources" and by deterring officials from

enforcing the law for fear of damages suits. 556 U.S. at 685-686 (citation omitted).

1. *The First Amendment Permits Convincing But Prohibits Coercing.*

This Court has long held that the government has wide latitude to "'speak for itself'" and "to select the views that it wants to express." *Summum*, 555 U.S. at 467-468 (citation omitted). "[I]t is not easy to imagine how government could function if it lacked this freedom," as it is often "'the very business of government to favor and disfavor points of view.'" *Id.* at 468 (citation omitted). As long as the government aims to convince rather than coerce, it does not violate the First Amendment.

Bantam Books provides the framework for coercion claims. That case concerned a Rhode Island Commission tasked with "investigat[ing] and recommend[ing] the prosecution" of publishers whose materials it deemed objectionable. *Bantam Books*, 372 U.S. at 59-60. Once a book or magazine was identified as objectionable, the Commission sent threatening notices to third-party distributors. *Id.* at 61-62. These notices cited the Commission's authority and mandate, thanked recipients in advance for their "cooperation," noted that the "Chiefs of Police have been given the names of the" objectionable publications, and indicated that compliance would "eliminate the necessity of our recommending prosecution to the Attorney General's department." *Id.* at 62-63 & n.5. The notices were "invariably followed up by police visitations." *Id.* at 68.

The Court held that the Commission's tactics constituted "a scheme of state censorship effectuated by extralegal sanctions" that violated the First

Amendment. *Id.* at 72. In holding that the Commission suppressed speech rather than merely advising the public, the Court emphasized that the Commission had "deliberately set about to achieve the suppression of publications" through "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation." *Id.* at 67, 72.

The Commission was not acting as an enforcer; its duty was to "investigate" potentially obscene publications, "educate" the public, and "recommend" prosecution as applicable, but it lacked the power to impose sanctions or prosecute violations. *Id.* at 59-60, 66-67. But the notices—"phrased virtually as orders"—clearly communicated that "compliance with the Commission's directives was not voluntary." *Id.* at 68. Those notices, coupled with the follow-up visits from police, operated to "stop[] the circulation of the listed publications," rendering formal "criminal sanctions" "unnecessary." *Id.* at 68-69. The Commission's "thinly veiled threats to institute criminal proceedings" therefore crossed the line from convincing to coercing. *Id.* at 68, 72.

Under *Bantam Books*, the ultimate question is whether the government's speech seeks to convince or coerce—that is, whether a public official has objectively "attempt[ed] to suppress the protected speech of private persons by threatening" sanctions for noncompliance. *Backpage.com*, 807 F.3d at 231 (citing *Bantam Books*, 372 U.S. at 64-72); *see* U.S. Br. 20-21. To evaluate that question, lower courts generally look to four considerations: (1) whether the speech referred to "adverse consequences"; (2) the official's "word choice and tone"; (3) whether the official's speech was "perceived as a threat"; and (4) whether the official had

"regulatory authority" over the conduct at issue. Pet. App. 25. Courts will not find coercion lightly given the severe threat of chilling the government's lawful—and necessary—expression.

2. *The NRA's Allegations Fail To State A Plausible Claim Of Coercion.*

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). A court need not accept as true "legal conclusions" or "mere conclusory statements." *Id.* A complaint is not plausible if it requires a court to ignore "obvious alternative explanation[s]" for the defendant's conduct. *Id.* at 678, 682 (citation omitted).

All four of the indicia courts consider in evaluating coercion claims refute the plausibility of the NRA's allegations. The industry letters alone cannot plausibly qualify as coercive, as the NRA barely disputes. And even if the Court considers the allegations regarding the consent orders and the Lloyd's meeting, they do not give rise to a plausible allegation of coercion even in conjunction with the industry letters.

a. Reference to adverse consequences. The most important consideration is that Vullo did not threaten—explicitly or implicitly—adverse consequences. *See* Pet. App. 25.

Industry Letters: The industry letters and accompanying press release "speak for themselves, and they cannot reasonably be construed as being unconstitutionally threatening or coercive." Pet. App. 27.

The letters, along with Vullo's quotation in Cuomo's press release, used the language of encouragement, not coercion, stating that DFS "encourages" and "urges" regulated entities to reconsider their relationships with the NRA. Pet. App. 244, 248. Nothing in the industry letters or press release comes close to the statements in *Bantam Books*. Vullo did not invoke her regulatory authority, state that she was investigating or had referred the matter to another investigatory body, direct recipients to take specific action, or admonish that she "trust[ed]" recipients "will cooperate." *Bantam Books*, 372 U.S. at 62 n.5. Nor did Vullo use terms like "cease and desist," reference applicable laws, warn that recipients had "'*willfully* play[ed] a *central* role' in [illegal] activity," state that recipients had "the legal duty" to take action, or order recipients to meet with her for further discussion. *Backpage.com*, 807 F.3d at 231-232; *Okwedy*, 333 F.3d at 342. And her letter said nothing like the "Chiefs of Police have been given" any names or that compliance would "eliminate the necessity of our recommending prosecution to the Attorney General's department." *See Bantam Books*, 372 U.S. at 62 n.5.

Vullo's language also stands in contrast to other, more forceful DFS communications. The Wells Fargo guidance the NRA cites (at 44-45), for example, stated that certain "[i]ncentive compensation arrangements *** should have *no place in our banking system*" and that DFS "will conduct supervisory review of incentive compensation arrangements." Maria T. Vullo, Guidance on Incentive Compensation Arrangements (Oct.

11, 2016) (emphasis added).[12] The accompanying press release stated that "DFS *will take swift enforcement action* against financial institutions with misaligned incentive compensation schemes." Press Release, *Governor Cuomo Announces New Guidance Instructing Banks to Monitor Incentive Compensation Practices* (Oct. 11, 2016) (emphasis added).[13] Other circular letters likewise warned that DFS will "enforce State requirements vigorously and to the fullest extent of State law." Insurance Circular Letter No. 10 (July 27, 2018).[14] Given Vullo's far softer language here, any reasonable observer would have understood Vullo's letters to state her view about how insurers could best exercise "their corporate social responsibility," Pet. App. 247, not to threaten enforcement against those who disagreed.

Consent Orders: The NRA does not attempt to explain how consent orders addressing conceded violations of the law could possibly amount to coercion. The consent orders were an exercise of Vullo's law-enforcement authority redressing admitted violations, not a veiled, indirect threat. Any references to statutes, punishments, or other adverse consequences responded to admittedly illegal actions, not the NRA's speech.

The consent orders' sanctions were commensurate with the violations addressed. That includes the provision that the insurers stop selling affinity insurance

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[12] *Available at* https://www.dfs.ny.gov/industry_guidance/industry_letters/il20161011_guidance_incentive_compensation_arrangements.

[13] *Available at* https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1610111.

[14] *Available at* https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2018_10.

with the NRA. Because the NRA violated the law by marketing insurance without a license, all its affinity insurance programs were illegal. It is common for consent orders to bar parties that previously engaged in unlawful conduct from engaging in similar future business together to prevent the recurrence of similar violations. *E.g.*, N.Y.S. DFS, Consent Order, *In re Future Income Payments, LLC*, at 10 (Oct. 20, 2016) (requiring lender to "cease all consumer-related transactions within New York" as penalty for making unlawful loans without a license).[15]

The orders, moreover, permitted the insurers to continue working with the NRA. Pet. App. 270, 289, 306. That is squarely inconsistent with the NRA's theory that the orders' purpose was to coerce the insurers into severing all ties with the NRA based on its speech. But it is perfectly consistent with the obvious alternative explanation that the aim was to enforce the law against entities that issued, sold, or marketed illegal insurance.

Lloyd's Meeting: The complaint's allegations about the supposed backroom meeting between Vullo and Lloyd's on February 27, 2018, are vague, conclusory, and implausible. The complaint does not allege anything specific that Vullo said in the meeting; it offers legal conclusions couched as factual allegations, stating that Vullo "threatened" and "coerced" Lloyd's. Pet. App. 199-200 & n.17. The complaint alleges that Vullo "made clear that Lloyd's could avoid liability for infractions relating to other, similarly situated insurance policies," so long as it cut ties with the NRA and other "gun groups." Pet. App. 223. But the complaint

[15] *Available at* https://dfs.ny.gov/system/files/documents/2020/04/ea161020_future_income.pdf.

does not explain how she made this "clear" or identify what other types of affinity insurance could be "similar" to one providing liability coverage for the criminal use of a firearm.

What's more, although Vullo allegedly promised to go easy on Lloyd's in exchange for help in her campaign against gun groups, DFS and Lloyd's ultimately entered a consent order requiring Lloyd's to pay $5 million as a penalty for issuing insurance policies associated with illegal NRA-affiliated insurance programs. Pet. App. 298-305. The consent order also permitted Lloyd's to continue providing insurance to the NRA, which is squarely at odds with the NRA's theory. The NRA's allegations about the meeting are entirely implausible in light of the other allegations in the NRA's own complaint.

b. Tone and word choice. The "Guidance Letters and Press Release were written in an even-handed, nonthreatening tone and employed words intended to persuade rather than intimidate." Pet. App. 29. Vullo "encourage[d]" regulated entities "to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA," "to review any relationships they have with the NRA or similar gun promotion organizations, and to take prompt actions to manag[e] these risks and promote public health and safety." Pet. App. 248. Those "attempts to convince" were a permissible use of the bully pulpit. *Kennedy* v. *Warren*, 66 F.4th 1199, 1207 (9th Cir. 2023) (citation omitted).

Vullo's statements stand in stark contrast to Cuomo's, who called the NRA "an extremist organization" and referred to it "as the enemy." Pet. App. 197, 213 (quotation marks omitted). Cuomo's statements

cannot be ascribed to Vullo under Section 1983. *Iqbal*, 556 U.S. at 676. Vullo's statements also stand in contrast to the tone of some of the communications at issue in *Murthy* v. *Missouri*, *see* Joint Appendix at 112, *Murthy*, No. 23-411 (Dec. 19, 2023) ("I want an answer on what happened here and I want it today.") (quotation marks and citation omitted); Record Excerpts at 26,476-78, *Missouri* v. *Biden*, No. 23-30445 (5th Cir. July 25, 2023) (referring to platforms being "legally liable," including through a "robust anti-trust program") (quotation marks and citation omitted).

The tenor of the consent orders was likewise wholly consistent with their aim: describing the insurers' illegal conduct and ensuing penalties. If that is coercive, so is every consent order or plea agreement, ever. And, tellingly, the NRA has not made any allegations about the word choice in the alleged Lloyd's meeting. The complaint describes that alleged meeting in general terms, asserting in a conclusory fashion that Vullo "discussed" certain topics or "presented" certain positions. *See* Pet. App. 199-200, 221, 223.

c. How regulated parties understood the communications. The coercion inquiry is objective, but regulated parties' responses to communications can provide relevant evidence. Here, regulated parties understood Vullo's statements as expressions of her policy views. Putting aside wholly "conclusory statements," *Iqbal*, 556 U.S. at 663, every instance the NRA describes of a bank or insurer cutting ties with it occurred in the immediate wake of Parkland or in response to DFS's investigation of concededly illegal conduct. These "obvious alternative explanation[s]" render the NRA's claims of coercion implausible. *Id.* at 682 (citation omitted).

Lockton: According to the complaint, Lockton's chairman on February 25 privately told the NRA that he "wished to continue doing business with the NRA" but had to "'drop' the NRA—entirely—for fear of 'losing [Lockton's] license' to do business in New York." Pet. App. 209. Lockton announced that decision publicly on February 26. Pet. App. 210. The "closed-door" Lloyd's meeting could not have possibly affected Lockton's decision because it occurred the day *after* the announcement—on February 27. Pet. App. 200, 221. And recall that MetLife had also dropped the NRA on February 23, in direct response to the Parkland shooting. The only plausible inference from that timeline is that Lockton stopped doing business with the NRA in response to Parkland, just 11 days earlier, and because of Lockton's and the NRA's unlawful conduct, not because of any subsequent secret meeting between Vullo and Lloyd's, which Lockton would not have known about anyway.

Corporate Carrier: In late February 2018, the NRA's "Corporate Carrier," which it identifies for the first time in this Court as AIG, refused to renew the NRA's insurance policies. Pet. App. 209-210. The complaint does not specify whether this occurred before or after the Lloyd's meeting. Nor does the complaint indicate how or why the corporate carrier would have learned of that purported private meeting. The complaint says that the corporate carrier learned of "threats directed at Lockton" but never actually alleges any such threats or attributes them to Vullo. Pet. App. 210. Nor does the complaint explain how the corporate carrier would have learned of these unspecified, non-public threats, particularly when Lockton's public announcement did not mention any such

thing. And all of this allegedly occurred before the industry letters.

Lloyd's: Lloyd's decided to terminate its relationship with the NRA on May 1. *See* Sealed App. 64. The only allegation about the cause of that decision references an April 11 letter asking for information about Lloyd's involvement with the NRA's illegal affinity insurance programs—not the supposed February 27 meeting or industry letters. *See* Sealed App. 29, 56, 64. Even if Lloyd's had any choice in the matter after Lockton's decision to cut ties, the only plausible inference is that Lloyd's terminated its relationship with the NRA in response to DFS's investigation of unlawful conduct.

"The NRA's three principal affinity insurance partners": Lockton, Chubb, and Lloyd's entered into consent orders because they engaged in illegal conduct and were prohibited from carrying NRA affinity programs in the future because *all* of the NRA's affinity programs to date were illegal given the NRA's failure to obtain a license. None of those entities ever alleged those consent orders were coercive or otherwise challenged them.

Other "corporate carriers": The NRA vaguely alleges that "numerous carriers" have declined to provide corporate insurance coverage because they "fear[] transacting with the NRA specifically in light of DFS's actions against Lockton, Chubb, and Lloyd's." Pet. App. 228. This conclusory statement carries "little weight." U.S. Br. 32. The NRA does not specify which carriers, how many, or even when they made those statements. And there is yet again an obvious alternative explanation: These carriers were not coerced into doing anything, but instead chose to avoid

transacting with an organization engaged in illegal conduct.

"Several banks": Finally, the NRA alleges that unspecified banks withdrew bids to provide banking services to the NRA "following the issuance of the April 2018 Letters." Pet. App. 228; NRA Br. 37. Yet again, that is too conclusory to allege coercion. *See* U.S. Br. 32. In particular, the NRA fails to allege any specific statements linking the withdrawal to the challenged actions, how long after the issuance of the industry letters the withdrawals occurred, or whether the banks in question were New York state-chartered and thus subject to regulation by DFS.

d. Extent of DFS's regulatory authority. As even the NRA is forced to concede, the degree of regulatory authority matters only insofar as it makes the message more or less coercive. NRA Br. 28. "The critical question is whether the communications were threatening, not whether they were issued to regulated parties or pursuant to statutory authority." U.S. Br. 26; *see* Pet. App. 28-29.

Regardless, the NRA vastly overstates Vullo's regulatory authority. Contrary to its claim (at 3), DFS does not regulate "all" banks "that do business in New York"; its authority extends only to the 159 New York state-chartered banks. *See* DFS, *Oversight*, *supra*. Moreover, although DFS has authority to initiate civil enforcement actions, it can impose penalties only through consent orders or adjudicatory proceedings in which regulated entities have an opportunity to be heard with judicial review. Pet. App. 63. Courts have not hesitated to find that officials with comparable or greater power were not acting to coerce where the language of their communication is nonthreatening. *See*

O'Handley v. *Weber*, 62 F.4th 1145, 1158, 1163 (9th Cir. 2023) (finding no coercion by California Secretary of State where "compliance with [her] request was purely optional"); *Penthouse*, 939 F.2d at 1015 (Silberman, J.) (letter not coercive even though it "was written on Justice Department stationery" and "used the term 'allegations' " because nothing was threatened).

3. *The NRA's Theory Of Coercion Is Meritless.*

There are five separate problems with the NRA's theory of coercion.

First, the NRA buries the most important factor in assessing coercion—the threat of adverse consequences—in a footnote. NRA Br. 27 n.8. But the entire purpose of the coercion inquiry is to determine whether the government threatened a party with adverse consequences. As this Court explained in *Bantam Books*, "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." 372 U.S. at 68. Lower courts agree that an express or implied threat of adverse consequences is essential. *See Backpage.com*, 807 F.3d at 231 (sheriff violated First Amendment by "using the power of his office to threaten legal sanctions"); *Okwedy*, 333 F.3d at 342 (letter constituted an "unconstitutional implied threat to employ coercive state power to stifle protected speech") (quotation marks and brackets omitted); *Penthouse*, 939 F.2d at 1015 (Silberman, J.) ("the Supreme Court has never found a government abridgement of First Amendment rights in the absence of some actual or threatened imposition of governmental power or sanction"); *R.C. Maxwell Co.* v. *Borough of New Hope*, 735 F.2d 85, 89 (3d Cir. 1984) ("devoid as

they were of any enforceable threats," challenged letters "amounted to nothing more than a collective expression of the local community's distaste").

The NRA claims (at 40) that *Bantam Books* held that "an explicit reference to a particular adverse consequence is not necessary to violate the First Amendment." A threat need not be explicit, but there must be a threat. Nothing here remotely approaches the "thinly veiled threats to institute criminal proceedings" in *Bantam Books*. 372 U.S. at 68.

Second, the NRA treats the extent of Vullo's regulatory authority as nearly dispositive. According to the NRA (at 31), an "official who exercises vast authority over entities with trillions of dollars at stake, as Vullo did, need not bang the drum loudly for her regulated entities to fall into line." That singular focus finds no support in *Bantam Books*. If that factor carried so much weight, those with the most responsibility for enforcing the law would be the least able to speak. For the same reason, that the letters were issued by DFS and not "Citizen Maria Vullo" is immaterial. *See* NRA Br. 32-33. "The leaders of government agencies are entitled to take positions and advocate points of view on behalf of the government, not merely as citizens." U.S. Br. 25.

Third, the NRA declares (at 42-45) that Vullo seeks a "constitutional safe harbor" for "a heckler's veto." The opposite is true. The NRA asks for favored status *because* it espouses controversial views. Despite entering into a consent order spelling out numerous violations, the NRA claims the right to prohibit regulators from holding it accountable for its unlawful conduct. The NRA's argument that government officials who act "indirectly to suppress speech by improperly

pressuring private parties" circumvent "the safeguards associated with more formal and direct processes," NRA Br. 23-24 (quotations and citation omitted), illustrates the fallacy of its position. DFS *did* engage in "direct processes" against the NRA, resulting in a consent order finding the NRA *had violated New York law*.

Fourth, the NRA latches onto the industry letters' reference to "reputational risk," claiming the reference was threatening because "failure to adequately manage reputational risk can lead to massive fines." NRA Br. 40. The United States says the letters' reference to reputational risk provides "additional support" for the NRA's claim, U.S. Br. 23, but never argues these references are coercive standing alone.

The letters' reference to reputational risk is not remotely threatening. As the NRA agrees, *see* Pet. App. 24, NRA Br. 44, Vullo had the right to opine on the risks companies might face from continuing to do business with organizations facing substantial public opprobrium. The United States likewise agrees that the risk of a negative financial condition "arising from negative public opinion" is a legitimate subject of regulatory attention. U.S. Br 27-28 (citation omitted).

Operating with reputational risk is not illegal under New York law and cannot serve as the basis for a standalone enforcement action. In fact, neither of the DFS enforcement actions against Deutsche Bank or Goldman Sachs that the NRA cites as sanctions for "failing to consider reputational risk," NRA Br. 4, was actually based on reputational risk. Instead, the penalties were imposed because of Deutsche Bank's failure to prevent money laundering in connection with Jeffrey Epstein's sex-trafficking ring, N.Y.S. DFS,

Consent Order, *In re Deutsche Bank AG*, No. 20200706, at 18-20, 32 (July 6, 2020),[16] and Goldman Sachs's failure to detect and report fraudulent activity, N.Y.S. DFS, Consent Order, *In re Goldman Sachs*, No. 20201021, at 5-9, 11 (Oct. 21, 2020)[17]. And those orders were entered after Vullo sent the industry letters—and after she left office—so they could not have affected how insurers or banks interpreted her statements at the time.

Finally, the NRA faults Vullo and the Second Circuit for failing to consider the "cumulative effect" of her actions. NRA Br. 40-42. But the Second Circuit did just that; it is the NRA that tries to patch together different allegations regarding unrelated matters, none of which was coercive standing alone, that happened to occur on a similar timeline. For example, lacking plausible evidence that the industry letters alone were coercive, the NRA insists (at 32) that the letters must be considered alongside the consent orders. But the NRA (at 45-46) then tries to downplay the fact that the consent orders involve the regulation of unlawful conduct by pointing to the industry letters. The result is a narrative riddled with mismatches, discrepancies, temporal gaps, and omissions.

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[16] *Available at* https://www.dfs.ny.gov/system/files/documents/2020/07/ea20200706_deutsche_bank_consent_order.pdf.

[17] *Available at* https://www.dfs.ny.gov/system/files/documents/2020/10/ea20201021_goldman_sachs.pdf.

C. The NRA's Arguments Would Have Devastating Consequences For Government Officials.

Adopting the NRA's arguments would wreak havoc at all levels of government, particularly for law-enforcement officers.

The NRA's view of coercion would chill speech necessary for a functional government. A ruling in the NRA's favor would replace the commonsense standard in *Bantam Books* with an overbroad and manipulable three-part test. If a reference to reputational risk in a non-binding industry letter rises to the level of coercion, it is difficult to imagine any critical statement that could not be deemed at least plausibly coercive and therefore sufficient to overcome a motion to dismiss. Because the NRA's standard does not require any threat, public officials will inevitably fear that making statements critical of (indirectly) regulated entities will be recast as retaliation. Adopting the NRA's position would inhibit public officials from expressing their views, thus limiting "debate over issues of great concern to the public" and "radically transform[ing]" our government. *Summum*, 555 U.S. at 468 (citation omitted).

The NRA's theory is more dangerous yet because of its dire implications for law enforcement. Applying the presumption of regularity, this Court has consistently rejected attempts to hold government officials liable for exercising prosecutorial discretion. *Nieves*, 139 S. Ct. at 1723. But the NRA's proposed standard would allow violators to recast selective-prosecution claims that would certainly fail under this Court's precedents as First Amendment retaliation claims, without even attempting to show that the challenged

enforcement conduct was objectively unreasonable. The NRA's theory would thus permit indirectly regulated entities to use claims of retaliation to insulate themselves from the consequences of their own unlawful conduct. And it would allow parties to cite as evidence of coercion quintessential prosecutorial decisions—here, the terms of a consent order or the supposed statements made in negotiating a settlement—that would provide a backdoor to eviscerating absolute immunity.

As a result, parties could secure favorable treatment by expressing controversial views. Individuals engaged in unlawful conduct could seek injunctions preventing valid enforcement actions, and the threat of strike suits would chill enforcement on the front end. That one-two punch would deter public officials from enforcing the law against entities with whom they have policy disagreements, thus allowing controversial speakers to use their speech as a sword to evade equal application of the law.

Examples are easy to foresee. To take just one, last year federal banking agencies issued guidance alerting institutions to the risks of concentrating their deposits in cryptocurrency after a bank collapsed. *See* Bd. of Governors of the Fed. Reserve System, *Joint Statement on Liquidity Risks to Banking Organizations Resulting from Crypto-Asset Market Vulnerabilities* (Feb. 23, 2023).[18] The NRA's theory would allow crypto companies to sue federal regulators, recasting legitimate law-enforcement actions or the SEC's attempts to regulate the crypto industry as speech retaliation. As long as a plaintiff could craft a facially

[18] *Available at* https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20230223a1.pdf.

viable connection between their conduct and some sort of protected speech, their claim would survive a motion to dismiss, permitting intrusive discovery into all sorts of government records.

Courts will be forced to resolve recurring disputes, which, like this case, will often arise in charged political contexts. Public officials can—and should—express their convictions in strong terms on a host of controversial topics, many of which inevitably overlap at least tangentially with legitimate regulatory efforts. *See, e.g.*, U.S. Br. 14 (collecting examples); IMLA Br. 9-10. The NRA's position would force the judiciary into the middle of a wellspring of new First Amendment litigation, leading to the inevitable perception that outcomes differ not based on the relative plausibility of a coercion claim but on courts' own views of the speech at issue. That is precisely why the Constitution "relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks." *Shurtleff* v. *City of Boston*, 596 U.S. 243, 252 (2022). The Court should honor that limit here and reject the NRA's claims.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted or the Second Circuit's judgment should be affirmed.

Respectfully submitted,

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