No. 22-842

In the

# Supreme Court of the United States

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 OF *AMICUS CURIAE* CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the principle that the people freedom of speech is critical to a functioning republic. The Center has previously appeared before this Court as *amicus curiae* and counsel in several cases addressing these issues, *303 Creative LLC v. Elenis*, 143 S.Ct. 2298 (2023); *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373 (2021); and *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018).

## SUMMARY OF ARGUMENT

This Court has acknowledged that the right to keep and bear arms is among "those fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago*, 561 U.S. 742, 778 (plurality), 822-50 (Thomas, J., concurring in part and concurring in the judgment) (2010). This is a conclusion with which respondent in this case strongly disagrees. Thus, she decided to use her government position to pursue her personal policy goals to silence a Second Amendment advocacy organization. Unable to attack the organization directly (since it was outside of her regulatory purview), she exercised the raw power of a regulator to threaten regulated industries

[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

with costly proceedings and fines if they did not stop doing business with the petitioner.

In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), this Court described as a "fixed star in our constitutional constellation" the precept that "no official, high or petty, can prescribe what shall be orthodox … in … matters of opinion. This term, the Court will hear several cases, in addition to this case, to determine whether that star has been eclipsed by state power to silence critics (*Netchoice v. Paxton*, No. 22-555; *Moody v. Netchoice*, No. 22-277; *Murthy v. Missouri*, No. 23-411).

Government officials pressure social media outlets to suppress ideas and even truthful information that runs counter to the government-backed narrative. Reporters Matt Taibbi, Michael Shellenberger, and Bari Weiss, who were given access to the "Twitter Files," have written about how government officials pressured Twitter to suppress unwanted viewpoints and even deplatform some speakers. *See*, *e.g.*, Julia Shapero, *Former NYT columnist Bari Weiss releases 'Twitter Files Part Two'*, The Hill, December 8, 2022[2]; Joseph A. Wulfsohn, *Twitter Files Part 6 reveals FBI's ties to tech giant: "As if it were a subsidiary"*, Fox News, December 16, 2022[3]. United States Senator Elizabeth Warren used her office to pressure Amazon to suppress a book backed by current presidential candidate Robert Kenney, Jr. that was critical of govern-

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[2] https://thehill.com/policy/technology/3768087-former-nyt-columnist-bari-weiss-releases-twitter-files-part-two/ (last visited August 22, 2023).

[3] https://www.foxnews.com/media/twitter-files-part-6-reveals-fbis-ties-tech-giant (last visited August 22, 2023).

ment policies concerning Covid-19. *Kennedy v. Warren*, 66 F.4th 1199, 1204 (9th Cir. 2023). The current administration continues to work with Facebook to suppress unwanted points of view. *Missouri v. Biden*, 2023 WL 4335270 at *2 (WD LA 2023) (cert granted, *Murthy v. Missouri*, No. 23-411). Apparently, those in power believe that they have the authority to decree what shall be orthodox opinion and what information can and cannot be shared.

Speakers at college campuses, and even law schools, are regularly shouted down by protestors who want to prevent the speakers from sharing their ideas. In one recent episode, Fifth Circuit Judge Kyle Duncan was prevented by protestors from speaking at a prominent law school. An official from the law school intervened on behalf of the protestors! Katelynn Richardson, *Stanford Admin Eggs Students On As They Shout Down, Heckle Federal Judge During Talk*, Daily Caller News Foundation, March 10, 2023.[4]

The First Amendment was intended to protect speech that challenged the listener – speech intended to change the listener's mind. It cannot tolerate attempts at censorship.

This case is not about whether the government, or even an individual bureaucrat, has the legal authority to advocate for elimination of a fundamental constitutional right. It is instead about whether the government can use its regulatory powers to dissuade other private businesses from working with organizations that advocate in favor of the Constitution.

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[4] https://dailycaller.com/2023/03/10/federal-judge-censured-dei-dean-law-students-stanford/ (last visited August 22, 2023).

## ARGUMENT

### I. Robust Protection of Free Speech Is Essential to a Functioning Republic.

The First Amendment preserves the natural right to liberty of conscience—that right to one's own opinions, and to share those opinions with others to sway them to your point of view. James Madison, *On Property*, Mar. 29, 1792 (Papers 14:266-68) ("A man has a property in his opinions and the free communication of them."). Without this right, the people lose their status as sovereign and officials in power "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Education v. Barnette*, 319 U.S. at 642.

The founding generation rejected the idea that government officials should have the power to silence opposing viewpoints. They recognized that freedom to communicate opinions is a fundamental pillar of a free government that, when "taken away, the constitution of a free society is dissolved." Benjamin Franklin, *On Freedom of Speech and the Press*, Pennsylvania Gazette, November 17, 1737 (reprinted in 2 THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN (McCarty & Davis 1840) at 431).

Thomas Paine argued that "thinking, speaking, forming and giving opinions" are among the natural rights held by people. Edmond Cahn, *The Firstness of the First Amendment*, 65 Yale L.J. 464, 472 (1956). Congress and the states agreed. The First Amendment does not "grant" freedom of speech. The text speaks about a right that already exists and prohibits Congress from enacting laws that might abridge that

freedom. U.S. Const. Amend. I. That prohibition extends to state and local governments. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). As Thomas Cooley noted, the First Amendment's guaranty of free speech "undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing." Thomas Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW, (Little, Brown, & Co. 1880) at 272.

A sample of the speech activity at the time of the founding helps define the breadth of the freedom of speech recognized in the First Amendment. Thomas Paine, of course, is the most famous example of the pamphleteers during the time leading up to the revolution. His pamphlet *Common Sense* urged his fellow citizens to take direct action against the Crown. John P. Kaminski, CITIZEN PAINE (Madison House 2002) at 7.

Such speech was not protected under British rule. Paine thus chose to publish *Common Sense* anonymously in its first printing. *See id*. Paine's work was influential. Another of Paine's pamphlets, *Crisis* ("These are the times that try men's souls"), from *The American Crisis* series, was read aloud to the troops to inspire them as they prepared to attack Trenton. *Id.* at 11. That influence, however, is what made Paine's work dangerous to the British and was why they were anxious to stop his pamphleteering.

With these and other restrictions on speech fresh in their memories, the framers set out to draft their first state constitutions even in the midst of the war. These constitution writers were careful to set out express protections for speech.

The impulse to protect the right of the people to share their opinions with each other was nearly universal in the colonies. In 1776, North Carolina and Virginia both issued Declarations of Rights protecting freedom of the press. Francis N. Thorpe, 5 THE FEDERAL AND STATE CONSTITUTIONS (William S Hein 1993) at 2788 (North Carolina) (hereafter *Thorpe*); 7 *Thorpe* at 3814 (Virginia). Both documents identified this freedom as one of the "great bulwarks of liberty." Maryland's Constitution of 1776, Georgia's constitution of 1777, and South Carolina's constitution of 1778 all protected liberty of the press. 3 *Thorpe* at 1690 (Maryland); 2 *Thorpe* at 785 (Georgia); 6 *Thorpe* at 3257 (South Carolina). Vermont's constitution of 1777 protected the people's right to freedom of speech, writing, and publishing. 6 *Thorpe* at 3741. As other states wrote their constitutions, they too included protections for what Madison called "property in [our] opinions and the free communication of them." James Madison, *On Property*, *supra.*

An example of the importance of these rights to the founding generation is in the letter that the Continental Congress sent to the "Inhabitants of Quebec" in 1774. That letter listed freedom of the press as one of the five great freedoms because it facilitated "ready communication of thoughts between subjects." Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108 *quoted in Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

The revolution against the Crown was not the only topic of controversy that generated pamphlets in this period. Abolition of slavery was a topic that divided the nation in the late 1700's and that would

send the nation into civil war in the 1800's. The Pennsylvania Abolition Society, formed in 1775, was one organization that advocated its views to others. Edward Needles, AN HISTORICAL MEMOIR OF THE PENNSYLVANIA SOCIETY FOR PROMOTING THE ABOLITION OF SLAVERY (Merrihew and Thompson 1848) at 14. The Society and other abolitionists during this period engaged in legal actions, published books against slavery, circulated petitions, and distributed pamphlets. *See id*. at 17-18. The focus of their efforts was to convince their fellow citizens of the inherent evils of slavery. In their own way, the abolitionists were an early example of a right to life organization, promoting the view that we are equal in the eyes of our Creator and entitled to life and liberty.

The arguments offered by the abolitionists were designed to capture the attention of their fellow citizens. In the words of William Garrison, in his anti-slavery newspaper, "The Liberator", "I do not wish to think, or speak, or write, with moderation … I am in earnest – I will not equivocate – I will not excuse – I will not retreat a single inch – AND I WILL BE HEARD." *The Liberator*, vol. 1, issue 1, January 1, 1831 (image available at http://fair-use.org/the-liberator/1831/01/01/the-liberator-01-01.pdf).

Notwithstanding the controversial nature of speech activity in the latter half of the 18th Century, the founders were steadfast in their commitment to protect speech rights. The failure to include a free speech guaranty in the new Constitution was one of the omissions that led many to argue against ratification. *E.g.*, *George Mason's Objections*, Massachusetts Centinel, reprinted in 14 The Documentary History of the Ratification of the Constitution at 149-50; *Letter*

*of George Lee Turberville to Arthur Lee*, reprinted in 8 The Documentary History of the Ratification of the Constitution at 128; *Letter of Thomas Jefferson to James Madison*, reprinted in 8 The Documentary History of the Ratification of the Constitution at 250-51; *Candidus II*, Independent Chronicle, reprinted in 5 The Documentary History of the Ratification of the Constitution at 498; *Agrippa XII*, Massachusetts Gazette, reprinted in 5 The Documentary History of the Ratification of the Constitution at 722.

A number of state ratifying conventions proposed amendments to the new Constitution to cure this omission. Virginia proposed a declaration of rights that included a right of the people "to freedom of speech, and of writing and publishing their sentiments." *Virginia Ratification Debates* reprinted in 10 The Documentary History of the Ratification of the Constitution at 1553. North Carolina proposed a similar amendment. *Declaration of Rights and Other Amendments, North Carolina Ratifying Convention* (Aug. 1, 1788), reprinted in 5 The Founders' Constitution at 18. New York's convention proposed amendment to secure the rights of assembly, petition, and freedom of the press. *New York Ratification of Constitution*, 26 July 1788, *Elliot 1:327--31*, reprinted in 5 The Founders' Constitution, *supra* at 12. The Pennsylvania convention produced a minority report putting forth proposed amendments including a declaration that the people had "a right to freedom of speech." *The Dissent of the Minority of the Convention,* reprinted in 2 The Documentary History of the Ratification of the Constitution.

Madison ultimately promised to propose a Bill of Rights in the first Congress. CREATING THE BILL OF

RIGHTS (Helen Veit, *et al*. eds. 1991) at xii. Although Madison argued that a Bill of Rights provision protecting speech rights would not itself stop Congress from violating those rights, Jefferson reminded him that such a guaranty in the Constitution provided the judiciary the power it needed to enforce the freedom. Madison repeated this rationale as he rose to present the proposed amendments to the House of Representatives. *The Firstness of the First Amendment*, *supra*, at 467-68.

Congress quickly tested this limit on its power with the enactment of the Sedition Act. The question for the new country was whether the free speech and press guarantees only protected against prior restraint, as was the case in England, or whether they guaranteed the type of liberty envisioned by Madison and others who argued for a freedom to share ideas with fellow citizens.

In the Sedition Act of 1798 Congress outlawed publication of "false, scandalous, and malicious writings against the Government, with intent to stir up sedition." The supporters of the law argued that it was needed to carry out "the power vested by the Constitution in the Government." *History of Congress*, February 1799 at 2988. Opponents rejected that justification as one not countenanced by the First Amendment. In an earlier debate over the nature of constitutional power, Madison noted "'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 ANNALS OF CONGRESS, p. 934 (1794)." *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964).

The Virginia Resolutions of 1798 also condemned the act as the exercise of "'a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto.'" *Id.* at 274. The particular evil in the Sedition Act, according to the Virginia General Assembly, was that it was "'levelled [sic] against the right of freely examining public characters and measures, and of free communication among the people thereon.'" *Id.*

The Sedition Act expired by its own terms in 1801 and the new Congress refused to extend or reenact the prohibitions. For his part, Jefferson pardoned those convicted and fines were reimbursed by an act of Congress based on Congress' view that the Sedition Act was unconstitutional. *Id.* at 276.

This Court in *New York Times Co.*, noted that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* More important than the "court of history," is the apparent political judgment at the time that the enactment was inconsistent with the Constitution. Where one Congress attempted to insulate itself from criticism, the subsequent Congress immediately recognized that attempt as contrary to the First Amendment. Congress and the President did not merely allow the law to lapse—they took affirmative action to undo its effects through repayment of fines and pardons. This is the clearest indication we have of that the people intended the First Amendment's speech and press clauses to be much broader than a simple bar on prior restraints. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J. concurring) (evidence of original

understanding of the Constitution can be found in the "practices and beliefs held by the Founders").

The First Amendment prohibits government from attempting to silence citizens, especially on matters of controversy. The people of the new nation understood the scope of controversial matters on which people would share their opinions. They nonetheless insisted on including a prohibition on "abridging freedom of speech" in their new Constitution.

In this case, respondent used her regulatory power over third parties to isolate and punish the National Rifle Association. Respondent took this action because she disagreed with the fundamental right protected by the Second Amendment and hoped to silence the primary advocate for that right. But this Court has held: "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

## II. Government Is Free to Add its Voice to a Matter of Public Concern But is Not Free to Silence the Voice of Others.

As important as Freedom of Speech is to political freedom, it is also quite vulnerable to attempts by state and federal regulators to suppress that speech. *See NAACP v. Button*, 371 U.S. 415, 433 (1963). For that reason, this Court has recognized the need to provide "breathing space" for this vital freedom. *Id.* Thus, the Court has been wary of schemes that could "chill" freedom of speech and association. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). For instance, the

Court has protected anonymous speech, in part to protect against government reprisal. *See Talley v. California*, 362 U.S. 60, 65 (1960).

This Court has also ruled that government may not exclude viewpoints it opposes from the marketplace of ideas. The First Amendment places discrimination based on viewpoint "beyond the power of the government." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). The search for political truth excludes the idea that government can dictate what ideas are permissible. *Consol. Edison Co. of New York v. Pub. Services Comm'n of New York*, 447 U.S. 530, 537-38 (1980). Only by prohibiting viewpoint discrimination can there be "an uninhibited marketplace of ideas." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). It is in this way that the First Amendment protects the search for "political truth" and self-government. *Id.*, *see Garrison v. State of Louisiana*, 379 U.S. 64, 74-75 (1964), *see also Colorado Republican Fed. Campaign Comm. v. FEC*, 578 U.S. 604, 629 (1996) (Kenndy, J., concurring in the judgment).

In this case, Vullo has targeted one particular viewpoint (the fundamental right to keep and bear arms), and one particular speaker (the NRA). Undoubtedly, the NRA was targeted because of its success in advocating for the Second Amendment - the viewpoint that Vullo finds objectionable. But rather than engaging in debate in the marketplace of ideas, respondent has chosen to attempt to shut down the debate. Using the state's regulatory power, respondent here sought to frighten regulated entities from doing business with the NRA. Vullo's response to speech

she opposed was to punish that speech by threatening others who engaged in business with the NRA.

Vullo's actions were plainly based on viewpoint discrimination.

## III. Use of Regulatory Power to Discriminate Against Speakers and their Messages Violates the First Amendment.

Vullo used her regulatory power against third parties. She had no regulatory jurisdiction over the NRA. Yet her actions were clearly aimed at the NRA – seeking to have regulated entities cease doing business with the NRA. Her actions were motivated by her disagreement with the NRA's defense of the fundamental individual liberty recognized in the Second Amendment to the Constitution.

There can be no legitimate government purpose in pressuring third parties to stop doing business with an advocate simply because the government opposes the advocate's message. Even mere speech by a regulator that regulated entities ought not to transact business with the NRA cannot be tolerated.

Regulatory agencies wield tremendous power to coerce actions by regulated entities. Complex regulatory schemes coupled with the power of criminal enforcement or imposition of civil penalties, are, as a practical matter, likely to convince regulated entities to fall in line with the political will of the regulator in charge. *See Citizens United v. FEC*, 558 U.S. 310, 355 (2010), *see also Sackett v. EPA*, 566 U.S. 120, 130-31 (2012) ("there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated entities into 'voluntary compliance.'"); *Am. Trucking Ass'ns v. City of Los Angeles*,

569 U.S. 641, 650-51 (2013) (use of a contract was "part and parcel of a governmental program wielding coercive power over private parties"). In reality, these threats against third parties are no different than direct censorship of the speaker.

Once the government identifies speakers and viewpoints it opposes, regulated entities will naturally take notice. When the regulator issues statements "advising" regulated entities to avoid doing business with the government-opposed speaker, those entities are wise to consider that advice to be a threat to their own livelihoods. Government action of this sort is inimical to the values protected by the First Amendment.

## CONCLUSION

Government action that seeks to silence or punish viewpoints and speakers must be judged under strict scrutiny. The respondent in this action sought to suppress and punish speech based on the viewpoint of the speaker. This violates the First Amendment.

January 2024 Respectfully submitted,

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