No. 22-842

In The
Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

MARIA T. VULLO, both individually and in her former official capacity,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE AND CATO INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Bantam Books v. Sullivan held that a state commission with no formal regulatory power violated the First Amendment when it "deliberately set about to achieve the suppression of publications" through "informal sanctions," including the "threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation." 372 U.S. 58, 66–67 (1963). Respondent, wielding enormous regulatory power as the head of New York's Department of Financial Services ("DFS"), applied similar pressure tactics—including backchannel threats, ominous guidance letters, and selective enforcement of regulatory infractions—to induce banks and insurance companies to avoid doing business with Petitioner, a gun rights advocacy group. App. 199–200 ¶ 21. Respondent targeted Petitioner explicitly based on its Second Amendment advocacy, which DFS's official regulatory guidance deemed a "reputational risk" to any financial institution serving the NRA. *Id.* at 199 n.16. The Second Circuit held such conduct permissible as a matter of law, reasoning that "this age of enhanced corporate social responsibility" justifies regulatory concern about "general backlash" against a customer's political speech. *Id.* at 29–30. Accordingly, the question presented 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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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Goldwater Institute (GI) was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates cases and files amicus briefs when its objectives or those of its clients are implicated.

GI is particularly devoted to defending the freedoms of speech and association. It has litigated and won important victories for free speech in a variety of contexts, including in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (holding that a matching-funds campaign finance provision violated the First Amendment); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (holding the First Amendment protects tattoos as free speech); and *Protect My Check, Inc. v. Dilger*, 176 F. Supp.3d 685 (E.D. Ky. 2016) (holding a scheme imposing different campaign contribution limits on different classes of donors violated the Equal Protection Clause). GI has also appeared frequently as an amicus in this Court and other courts in free speech cases. *See*, *e.g.*, *Ams. for*

[1] Pursuant to Rule 37, amicus affirms that no counsel for any party authored the brief in whole or part and that no person other than amicus, its members, or its counsel, contributed money to fund the brief's preparation or submission.

Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Amici find troubling the recent rise in cases in which, as here, the government has sought to silence dissent through indirect pressure. For similar reasons, both amici are also participating as amici in *Henderson v. Springfield R-12 School District*, No. 23-1374 & 23-1880 (8th Cir. filed May 12, 2023), and amicus Cato also appeared as an amicus in *Changizi v. Dep't of Health & Hum. Servs.*, No. 22-3573, 2023 WL 8947130 (6th Cir. Dec. 27, 2023). Amici believe their litigation experience and public policy expertise will aid this Court in deciding this case.

SUMMARY OF ARGUMENT

When King Henry II complained within earshot of his vassals that they were "fools and cowards" because "not one of them will avenge me of this turbulent priest," they took the hint and sought to ensure that Thomas Becket, the Archbishop of Canterbury, would

never again stand in the way of the king's political agenda. 1 Winston S. Churchill, *A History of the English-Speaking Peoples* 166 (1956). The king, precisely because he was king, did not need to spell out what he wanted. He could speak delicately because he knew they would listen carefully.

Here, too, New York's chief financial regulator made quite clear what she wanted the NRA's former business partners to do, even if on a literal level she may have framed her directives as "suggestions." She had vast and relatively unchecked regulatory power over them, including the power to revoke their charters: the death penalty for a financial institution. She knew they would listen carefully.

This Court has held that the First Amendment prohibits informal coercion and retaliation no less than direct punishment of free speech—and that courts must consider the full context, including power imbalance, availability of judicial oversight, and regulatory dynamics, when determining whether such coercion has occurred. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). The Second Circuit disregarded those principles when it held that the New York chief financial regulator's expressly "urg[ing] all insurance companies and banks doing business in New York to . . . discontinue[] their arrangements with the NRA" could not *as a matter of law* constitute a threat or indirect coercion against businesses dealing with the nation's best-known gun rights advocate. App. 212–213 ¶ 50; App. 28.

Reaching that conclusion required the court below to ignore context. And that is an issue this Court should urgently address, because the regulatory atmosphere in which informal coercion takes place has changed considerably over the decades since *Bantam Books*. Specifically, government regulation has become far more pervasive and interconnected. In today's hyper-regulated state, more Americans than ever depend on the good graces of regulators—and that exponentially increases the risk of informal censorship.

Indeed, political and ideological coercion via regulation is on the rise. In a variety of spheres, Americans are increasingly subject to complex regulatory regimes that give officials immense leverage to coerce them into disassociating from certain speakers and ideas. In many instances, politicians and bureaucrats have made public statements applying just such pressure to regulated entities. This trend is especially pronounced in the realm of social media regulation, but it is just as problematic in other areas like "Environmental, Social, and Governance" regulation, and so-called "transparency" initiatives requiring donor disclosure for nonprofits and advocacy groups.

Applying *Bantam Books* faithfully in these circumstances requires special attention to context and power relations. The more powerful the official, the subtler the coercion may appear from the outside. Nevertheless, the Court should reaffirm *Bantam Books* and hold that the First Amendment prohibits government officials from using threats of adverse regulatory

action to coerce people or businesses into disassociating from speakers or ideas.

ARGUMENT

I. The regulatory state enables censorship via hints and insinuations.

This Court has long recognized that determining whether coercion has occurred requires careful attention to context, especially the power dynamics of the parties involved. *See*, *e.g.*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (noting "the economic dependence of . . . employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear"). The same principle applies here: the greater the power imbalance and incentive for private parties to comply with the wishes of the regulator, the more likely coercion will take the form of "nudges," "suggestions," and veiled threats.

This phenomenon has become commonplace with the rise of the administrative state and its regulatory power over millions of ordinary Americans' lives. Regulatory power is particularly conducive to informal censorship for three reasons: because of the sheer power regulators wield, their insulation from judicial review, and the complex, discretionary nature of regulation.

First, the immense power regulators wield over individuals and businesses means bureaucrats can exert coercive pressure without resorting to explicit threats. Indeed, in many industries, merely being *investigated* poses serious reputational harm, even if an investigation ends favorably to the business (whether through outright dismissal or, as two of the NRA's former business partners experienced here, voluntary settlement). The nature of the banking and insurance sectors, particularly with the prevalence of risk-based regulation, means that regulated firms feel bound to comply even with nominally non-binding advice. *See generally* Br. of Amici Curiae Fin. & Bus. L. Scholars in Support of Pet. for Cert. But the same principle applies in a host of other regulated industries. From doctors to restaurant owners, millions of Americans work in settings where their livelihoods depend not merely on a lack of actual infractions, but on *not rocking the boat* with regulators.

In this instance, the New York Superintendent of Financial Services enjoys extremely broad powers to "conduct investigations . . . of matters affecting the interests of consumers of financial products and services" in the nation's financial capital, N.Y. Fin. Serv. Law § 301(b), and to "tak[e] such actions as [she] deems necessary to . . . protect users of financial products," *id.* § 301(c)(1). The Superintendent, in cooperation with other regulators, can revoke a financial institution's charter—the death penalty for a bank. Such devastating enforcement powers also give her leverage to demand vast financial settlements for alleged infractions. *See*, *e.g.*, Karen Freifeld, *The Legal*

Mastermind Behind New York's Record Bank Fines, Reuters (Dec. 8, 2014)[2] (detailing how Superintendent oversaw $2.24 billion settlement with bank for alleged violation). That power means regulators like the Superintendent are well positioned to twist a private party's arm without resorting to loud bluster or explicit threats.

Second, regulators can more easily coerce regulated parties because they typically enjoy some degree of insulation from judicial review, whether in the form of an immunity doctrine, exhaustion requirements, deference to an agency's rule-making or fact-finding, or the application of deferential scrutiny. Particularly when the threatened sanctions involve a government-issued license, the right to operate one's business, or civil penalties, regulated parties know they can lose fortunes and livelihoods to regulators who enjoy broad discretion, virtually unchecked fact-finding powers, and little prospect of being called to account through meaningful "judicial superintendence." *Bantam Books*, 372 U.S. at 70–71.

Even in the best of circumstances, vindicating oneself against unjustified regulatory action can take years and cost a fortune. *See*, *e.g.*, *Axon Enters., Inc. v. FTC*, 143 S. Ct. 890, 917 (2023) (Gorsuch, J., concurring in judgment) (describing "what a *win* looks like" when a party seeks to challenge an administrative

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[2] https://www.reuters.com/article/us-usa-banks-alter/the-legal-mastermind-behind-new-yorks-record-bank-fines-idUSKBN0JM0EC20141208.

enforcement action in an Article III court). And often, after years of administrative investigations and litigation, the damage will already have been done, regardless of the ultimate legal outcome.

Third, the sheer complexity of regulation gives officials ample cover to punish disfavored speech (and to reward those who adopt favored stances) under the pretext of facially neutral regulations. At every level of government, officials administer "complex and highly technical regulatory program[s], in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quotation marks and citation omitted). In light of their "unique expertise" and the need to regulate in "complex [and] changing circumstances," agencies enjoy wide-ranging discretion in making rules, enforcing those rules, and adjudicating alleged violations. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (quoting *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991)). This is true not only as a matter of legal doctrine, but also of practical reality, as the scope and complexity of regulation necessarily gives agencies great flexibility in deciding whether, how, and against whom to bring (or threaten) enforcement actions.

To give one example of this dynamic in a very different context: Super Bowl host cities often use complex zoning and signage regulations to silence speech across vast "clean zones" surrounding the festivities, at

the NFL's request and direction. *See* Stephen L. Carter, *NFL's Super Bowl "Clean Zone" Is Super Bad for Free Speech*, Wash. Post, Feb. 10, 2023[3] (describing maneuvers city government used under zoning code to effectively require NFL pre-approval for all temporary signage in downtown Phoenix). This has occurred in plain sight for many years. *See* Sam Borden & Sara Coello, *How the Super Bowl Tests Boundaries, Including the Constitution*, ESPN (Feb. 7, 2023).[4] Yet despite the clear constitutional violations, these regulations have almost never been subject to judicial review (let alone a timely remedy) until recently. *See Paulin v. Gallego*, No. CV 2023-000409, 2023 WL 1872272 (Ariz. Super. Ct. Feb. 3, 2023).

Or consider the summer of 2012, when the mayors of Boston, Chicago, San Francisco, and Washington, D.C. announced that Chick-fil-A was "not welcome" in those cities—and took regulatory steps to block the opening of new restaurants there—because the owners of that company, who are devout Christians, financially supported organizations that share their opposition to same-sex marriage. *See* Greg Turner, *Mayor Menino on Chick-fil-A: Stuff It*, Boston Herald, July 20, 2012[5]; Hal Dardick, *Alderman to Chick-fil-A: No Deal*,

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[3] https://www.washingtonpost.com/business/nfls-super-bowl-clean-zoneis-super-bad-for-free-speech/2023/02/10/f7e8832e-a934-11ed-b2a3-edb05ee0e313_story.html.

[4] https://www.espn.com/nfl/story/_/id/35583812/how-super-bowl-tests-boundaries-including-constitution.

[5] https://www.bostonherald.com/2012/07/20/mayor-menino-on-chick-fil-a-stuff-it/.

Chicago Tribune, June 25, 2012[6]; Ricardo Lopez & Tiffany Hsu, *San Francisco is the Third City to Tell Chick-fil-A: Keep Out*, L.A. Times, July 27, 2012[7]; Tim Craig, *Gray Opposes Chick-fil-A Expansion: Calls it 'Hate Chicken'*, Washington Post, July 28, 2012.[8] It was widely observed at the time that these officials were violating the Constitution. *See* Jack Nicas, *First Amendment Trumps Critics of Chick-fil-A*, Wall St. J., July 27, 2012.[9] But it was simply not worth the time and money of trying to fight City Hall. Opening a new restaurant means navigating a complex regulatory thicket where applicants rely heavily on the goodwill of officials who exercise broad discretion. Officials could claim that their "opposition to the company does not necessarily mean it could not open another store." Craig, *supra*. But they did not have to spell out their retaliatory intent in order to ensure Chick-fil-A would never get the approvals it needed to come to their cities.

A few months later, the owners of Chick-fil-A backed down and halted the controversial donations. *See* Matt Comer, *New Chick-fil-A Filings Show Decrease in Anti-LGBT Funding*, Qnotes Carolinas, Mar.

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[6] https://www.chicagotribune.com/business/ct-met-chicago-chick-fil-a-20120725-story.html.

[7] https://www.latimes.com/business/la-xpm-2012-jul-26-la-fi-mo-san-franciso-mayor-to-chickfila-keep-out-20120726-story.html.

[8] https://www.washingtonpost.com/blogs/dc-wire/post/gray-opposes-chick-fil-a-expansion-calls-it-hate-chicken/2012/07/27/gJQA8SlREX_blog.html.

[9] https://www.wsj.com/articles/SB10000872396390444840104577553433755101016.

3, 2014.[10] Of course, government officials are rarely going to be as overt in their censorious motives as they were in the Chick-fil-A case. And to require a showing of such an explicit plan to violate the First Amendment before a business can seek redress would be tantamount to a "stupid staff[er]" test. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992). In the typical case, government officials will engage in threats, hints, and pressure tactics intended to convey the fact that speech they disapprove of will be penalized through bureaucratic means, which will be just colorable enough to avoid smoking-gun evidence of an intent to censor.

Here, the regulatory dynamics enabled Vullo to apply extraordinary pressure on senior insurance executives to cut ties with the NRA for political reasons, even while she was ostensibly "discuss[ing] an array of technical regulatory infractions plaguing the affinity-insurance marketplace." App. 31. At the very least, she *could* have applied this sort of pressure, and the NRA has plausibly alleged that her intent *was* to coerce insurance companies to disassociate from the NRA because of its protected speech. Yet the Second Circuit held that, *as a matter of law*, this was not First Amendment retaliation.

A letter or phone call from a state regulator need not explicitly "refer to any pending investigations" or "intimate that some form of punishment or adverse

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[10] https://qnotescarolinas.com/new-chick-fil-a-filings-show-decrease-in-anti-lgbt-funding/.

regulatory action would follow" in order to command serious attention from regulated parties. *Id*. at 29 (internal marks and citation omitted). A business owner whose livelihood depends on the good graces of a bureaucrat will listen closely to what that bureaucrat says, even if it is said "in an even-handed, nonthreatening tone." *Id.* And because of the complex, fact-bound nature of much regulation, regulators will almost always be able to point to some facially neutral justification as pretext for such pressure.

II. Regulated businesses are highly sensitive to the prospect of massive liability for engaging in disfavored speech.

To illustrate the chilling effect this kind of situation can have even on huge corporations, consider the case in which the California Supreme Court effectively stripped businesses of their speech rights in *Kasky v. Nike, Inc*., 27 Cal. 4th 939 (2002), *cert. dismissed*, 539 U.S. 654 (2003). As a consequence of that case, litigators have taken the position that

> when advising a business client on how to publicly address certain issues that the client considers noncommercial, practitioners should alert the client that *the safest choice is silence*. While this is *the textbook example of a chilling effect*, a business client runs a substantial risk in California if it makes a statement that is mistakenly false, or true but misleading.

Jonathan Loeb & Jeffrey Sklar, *The California Supreme Court's New Test for Commercial Speech*, 25-Nov

L.A. Law. 13, 16 (2022) (emphasis added). Attorneys for Exxon, Bank of America, and other companies did, indeed, acknowledge that in light of *Kasky*, they would advise their clients to withhold statements on political matters. Stephanie Kang, *Nike Settles Case With an Activist for $1.5 Million*, Wall St. J., Sept. 14, 2003.[11] And Nike desisted from trying to express its views, lest it incur the wrath of activist litigants backed up by the state. *See* Henry Butler & Jason Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 Colum. Bus. L. Rev. 1, 42–43 (2010) ("[Nike's] self-imposed speech moratorium lasted several years, and when Nike resumed communications regarding its labor practices, it was careful not to assert anything about labor conditions, but instead simply posted an on-line list with its suppliers' names and locations.").

The free speech concerns are even greater with a heavily regulated business that might risk the displeasure of its regulator by expressing an opinion. When Spirit Airlines sought to express its discontent over the high taxes imposed on its airline tickets, by listing ticket prices on its website in a manner designed to draw attention to these high taxes, the Federal Aviation Administration ordered it to stop. *See* William Dotinga, *Spirit Airlines Ordered to Amend Fare Advertising*, Courthouse News Serv. (July 27, 2012).[12] This Court was asked to intervene, but it

[11] https://www.wsj.com/articles/SB106337942486641600.

[12] https://www.courthousenews.com/spirit-airlines-ordered-to-amend-fare-advertising/.

declined. *Spirit Airlines, Inc. v. U.S. Dept. of Transp.*, 687 F.3d 403 (D.C. Cir. 2012), *cert. denied*, 569 U.S. 903 (2013). The business was therefore forced to desist.

To be sure, a business that suffers direct punishment from the government for speaking out on a public debate could bring a First Amendment retaliation claim. In *Blankenship v. Manchin*, 410 F. Supp.2d 483, 490 (S.D. W. Va. 2006), *aff'd*, 471 F.3d 523 (4th Cir. 2006), for example, the governor expressly stated that a business owner who expresses political disagreements with the governor "should expect tougher scrutiny of his business affairs," *id.* at 487, and the district court held that such retribution could very well violate the First Amendment.

But, again, government officials are rarely going to be that explicit in their threats. Courts must therefore apply the rule that what government may not do directly, it also may not do indirectly. That is why this Court in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990), rejected a lower court's conclusion that a government employee could sue for First Amendment retaliation only if she had experienced termination or the equivalent. This Court said that setting the bar that high "fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy." *Id.*

For the same reasons, the Second Circuit, by failing to consider the power dynamics and how that context informed the meaning of Vullo's pressure

campaign against the NRA and its partners, departed from this Court's instructions to "look through forms to the substance." *Bantam Books*, 372 U.S. at 67. And this problem is likely to recur wherever regulators can use facially neutral regulatory schemes to pressure entities to disassociate with third parties. What then-Justice Janice Rodgers Brown said of the search-incident-to-arrest doctrine in *People v. McKay*, is equally true of government's power to burden speech: "In the pervasively regulatory state, police are authorized to arrest for thousands of petty *malum prohibitum* 'crimes' . . . . Since this indiscriminate power to arrest brings with it a virtually limitless power to search, the result is the inevitable recrudescence of the general warrant." 41 P.3d 59, 81 (Cal. 2002) (Brown, J., dissenting). Likewise, the ubiquitous and largely unchecked powers of government regulators give them vast power to restrict speech, unless this Court says otherwise.

III. Ideologically motivated coercion under the guise of regulation is on the rise.

The idea that complex regulatory regimes allow retaliation against disfavored speech under the guise of content-neutral enforcement is not merely theoretical. There is a trend of government officials increasingly using laws and regulatory actions to retaliate against their political and ideological opponents. While these laws are sometimes crafted to appear content-neutral on their face, they result in censorship and chilled speech because they enable regulators to make ideologically driven enforcement decisions. This, in

turn, deters third parties from associating with people and entities that take controversial or disfavored positions, because those third parties legitimately fear retaliation from regulators.

This trend is particularly acute in the realm of social media regulation. Last year, California enacted AB 587, requiring social media companies to submit a semi-annual "terms of service report" to the state attorney general detailing how they deal with content such as "[h]ate speech or racism," "[e]xtremism or radicalization," "[h]arassment," "[f]oreign political interference," and "[d]isinformation or misinformation." Cal. Bus. & Prof. Code § 22677(a)(3). They must also include "[i]nformation on content that was flagged" as falling within these categories, how many times such items "were viewed by users," and how the company responded to the objectionable content. *Id.* (a)(5)(A).

These extensive content-based reporting requirements, enforceable by fines at the discretion of both the attorney general and city attorneys, *id.* § 22678, put immense pressure on social media companies to regulate their users' speech in ways deemed acceptable by the administration—particularly if that speech might arguably fall within vague, ideologically-charged categories like "hate speech" and "misinformation." *See* Complaint, *Minds, Inc. v. Bonta*, No. 2:23-cv-02705 (C.D. Cal. Apr. 11, 2023)[13] (challenging AB 587 under

[13] https://1.next.westlaw.com/Link/Document/Blob/Icee9721508354929965920354bc502b1.pdf?targetType=dct-docket-pdf&originationContext=document&transitionType=DocumentImage&

the First Amendment and California's constitutional free speech protections).

On the other end of the political spectrum, challenges are currently pending before this Court to Florida and Texas laws regulating social media companies as common carriers and requiring those companies to provide users with explanations when they censor the users' speech. *NetChoice, LLC v. Paxton*, No. 22-555 (U.S. Sept. 29, 2023) (certiorari granted); *Moody v. NetChoice, LLC*, No. 22-277 (U.S. Sept. 29, 2023) (certiorari granted). While these states' laws apparently do not vest regulators with the same broad discretion to pressure businesses based on ideology or viewpoint, Petitioners argue that those laws likewise involve "targeting [of] certain disfavored 'social media' websites" based on their connections to third parties' speech. Pet. for Writ of Cert. at i, *Paxton*, No. 22-555.

Similarly, during the COVID pandemic, regulators pressured social media companies to stifle speech the regulators characterized as "misinformation" or a threat to public health. *See*, *e.g.*, Vivek H. Murthy, *Confronting Health Misinformation: The U.S. Surgeon General's Advisory on Building a Healthy Information Environment* (Dept. of Health & Hum. Servs. 2021)[14]; Donie O'Sullivan, *White House Turns Up Heat on Big Tech's Covid "Disinformation Dozen,"* CNN Bus. (July

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uniqueId=1b210e19-a9fa-4b64-b7f0-fe9380ea0e29&ppcid=cc6a42d12f044123974a514e552666a7&contextData=(sc.RelatedInfo).

[14] https://www.hhs.gov/sites/default/files/surgeon-general-misinformation-advisory.pdf.

16, 2021) (discussing White House Press Secretary Jen Psaki's singling out of "about 12 people who are producing 65% of anti-vaccine misinformation on social media platforms," and noting that Facebook had since stated it "shut down some pages and groups belonging to the dozen or so people identified").[15]

Even more troubling, it's impossible to know the extent to which federal officials are pressuring social media companies to remove or block content, because in some instances the FBI has restricted these companies from even disclosing "information about the aggregate numbers of . . . governmental requests [to provide information about certain users] that it received." *Twitter, Inc. v. Garland*, 61 F.4th 686, 689 (9th Cir. 2023), petition for cert. pending, No. 23-342 (Oct. 2, 2023). The Ninth Circuit recently upheld such a restriction on Twitter's speech in a First Amendment challenge. *Id.* at 690.

This issue has arisen in a wide variety of settings outside the social media context, as well. Another prominent example of regulations geared toward informal coercion is so-called "Environmental, Social, and Governance" (ESG) rules. At the federal level, the Securities and Exchange Commission[16] is currently

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[15] https://www.cnn.com/2021/07/16/tech/misinformation-covid-facebook-twitter-white-house/index.html.

[16] The Commission, too, routinely imposes restrictions on regulated parties that violate their constitutional right to free speech. As Judges Jones and Duncan recently observed, the Commission's "longstanding policy . . . conditions settlement of any enforcement action on parties' giving up First Amendment rights.

evaluating a proposed rule that would require investment advisors and companies to disclose the greenhouse gas emissions of their portfolios. 87 Fed. Reg. 36,654 (June 17, 2022). Because this rule would force regulated entities to make guesses based on ill-defined metrics and incomplete data regarding politically charged issues, it would pressure them to make decisions about speech (what to disclose, and how) and association (whom to do business with) based on what they believe will be ideologically acceptable to regulators. At the state level, an "ideological battle [is] unfolding . . . pitting liberal-leaning state governments that have embraced ESG-focused investing [regulation] against conservative-led states that would seek to exclude it." Leah Malone, et al., *ESG Battlegrounds: How the States are Shaping the Regulatory Landscape in the U.S.*, Harv. L.S. Forum on Corp. Governance (Mar. 11, 2023).[17]

There has also been a trend of state laws enabling coercion of donors who support disfavored political and ideological advocacy. For example, last year, Arizona enacted the so-called "Voters' Right to Know Act," ostensibly designed to promote transparency in political campaigns and to fight "dark money." In reality, the law creates a complicated and intrusive reporting

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. . . If you want to settle, SEC's policy says, 'Hold your tongue, and don't say anything truthful—ever'—or get bankrupted by having to continue litigating with the SEC. A more effective prior restraint is hard to imagine." *SEC v. Novinger*, 40 F.4th 297, 308 (5th Cir. 2022) (Jones, J., concurring).

[17] https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/.

scheme affecting not only political candidates and PACs, but small charities, issue advocacy groups, and others; it also vests the Arizona Citizens Clean Elections Commission with unfettered discretion to "clarify" and enforce the law. As detailed in an ongoing lawsuit challenging the act, the law opens the door to silencing disfavored speakers by enabling retaliation, selective enforcement, and public "doxxing" of donors. *Ctr. for Ariz. Pol'y, Inc. v. Ariz. Sec'y of State*, No. CV2022-016564 (Maricopa Cnty. Super. Ct. filed Dec. 15, 2022).

With the rise of vague, ideologically charged regulatory considerations like "ESG" and "misinformation," government officials are increasingly taking account of public sentiment toward companies' speech and advocacy. Of course, "[l]isteners' reaction to speech is not a content-neutral basis for regulation," as this Court has stated time and again. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *McCullen v. Coakley*, 573 U.S. 464, 481 (2014).

To be sure, these examples implicate a variety of other constitutional issues in addition to the informal coercion doctrine present in this case. Moreover, some of these mandates are only just being implemented and have not yet given rise to the kind of coercion seen here. Nevertheless, they all illustrate the growing uncertainty over the extent to which regulators may pressure individuals and businesses into cutting ties with disfavored speakers. They also demonstrate the prevalence of complex regulatory regimes under which regulators *could* engage in unconstitutional coercion and

retaliation, unless this Court clarifies that the First Amendment prohibits such government activity even when it is not overt or explicit.

CONCLUSION

The obligation of those in power to avoid using their power to censor speech, whether tacitly or explicitly, is well established. But the practical application of that principle looks very different depending on the context. Since this Court's 1963 *Bantam Books* decision, that context has changed considerably, and lower courts have begun to diverge in how they apply the informal coercion doctrine. This Court should hold that the First Amendment prohibits informal coercion and retaliation, and that courts should closely analyze context, including the power dynamics of any applicable regulatory regime, in determining whether such coercion or retaliation has occurred.

The Court should *reverse* the judgment below.

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