

**21-0636-cv**

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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NATIONAL RIFLE ASSOCIATION OF AMERICA,

*Plaintiff-Appellee,*

– v. –

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

*Defendant-Appellant,*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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**THE NATIONAL RIFLE ASSOCIATION'S  
PETITION FOR REHEARING EN BANC**

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## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
STATEMENT OF THE CASE.....	4
ARGUMENT .....	8
I.    The Panel Ignored Testimonial Evidence and Failed to Draw Inferences in NRA’s Favor, in Violation of <i>Tolan</i> .....	8
II.   The Panel’s Opinion Ignores Clearly-Established Law that Selective Enforcement Regimes Violate the First Amendment ....	13
III.  The Panel’s Suggestion That a Government Regulator Can Threaten Economic Sanctions Against Disfavored Speakers for Their Viewpoints Contravenes Supreme Court Authority and the Holdings of Other Circuits.....	15
CONCLUSION.....	17
CERTIFICATE OF COMPLIANCE.....	18
CERTIFICATE OF SERVICE .....	18

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>A &amp; R Eng’g &amp; Testing, Inc. v. City of Houston</i> , 582 F.Supp.3d 415 (S.D. Tex. 2022).....	16
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	12, 13
<i>Cornelius v. NAACP Legal Def. &amp; Educ. Fund</i> , 473 U.S. 788 (1985).....	15
<i>FCC v. Pacifica Found.</i> , 438 U.S. 726 (1978).....	16
<i>Hoye v. City of Oakland</i> , 653 F.3d 835 (9th Cir. 2011) .....	16
<i>Lombardo v. City of St. Louis, Missouri</i> , 141 S. Ct. 2239 (2021) (per curiam).....	12
<i>Matal v. Tam</i> , 137 S. Ct. 1744 (2017).....	2, 13, 14
<i>Mirabilio v. Reg’l Sch. Dist. 16</i> , 761 F.3d 212 (2d Cir. 2014) .....	3, 8
<i>Nat’l Rifle Ass’n v. Vullo</i> , 2022 WL 4372194 (2nd Cir. 2022) .....	<i>passim</i>
<i>Okwedy v. Molinari</i> , 333 F.3d 339 (2d Cir. 2003) .....	1
<i>Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.</i> , 426 F.3d 617 (2d Cir. 2005) .....	15
<i>Rattner v. Netburn</i> , 930 F.2d 204 (2d Cir. 1991) .....	10, 12
<i>Tolan v. Cotton</i> , 572 U.S. 650 (2014) (per curiam).....	2, 3, 8, 9

## INTRODUCTION

It has long been settled that “a public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff’s First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant’s direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form.” *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003).

In defiance of settled law, the panel’s opinion allows a state official to “threaten regulated institutions with costly investigations, increased regulatory scrutiny and penalties should they fail to discontinue their arrangements with” the National Rifle Association (“NRA”). (A-135 at ¶ 21). The reason for Vullo’s animus—the reason she opened an investigation into the NRA and not the many other entities that similarly market affinity insurance plans—was the NRA’s viewpoint. (*Id.* at ¶¶ 14–23, 33–37, 45–53, 58–60, 65–67, 69, 75–79).

Faced with these allegations, the panel boldly dismisses the notion that viewpoint discrimination is unlawful at all. Incredibly, the panel proclaims that a prohibition on viewpoint discrimination by government actors is “antithetical to a healthy representative democracy.” *Nat’l Rifle Ass’n v. Vullo*, 2022 WL 4372194 at \*8 (2d Cir. 2022). In so holding, the panel confuses the role of government officials as regulators with their role as speakers. The Supreme Court has been

clear that when exercising its regulatory power, “the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others[.]” *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (quoting *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)).

That is exactly what NRA’s Second Amended Complaint (“the Complaint”) alleges that Vullo did—she held private meetings with insurance companies wherein she threatened to use her formal regulatory power as Superintendent of New York’s Department of Financial Services (“DFS”) to punish them if they did not discontinue existing business relationships with NRA, and then compounded her threats with an official guidance document and press releases that threatened similar reprisals against other businesses that dared to associate with NRA. (A-135 at ¶¶ 19–23, 34–38, 45–53, 61, 67, 69, 75–79, 90–92). Importantly, these threats were specifically designed to chill NRA’s gun-rights advocacy. (*Id.* at ¶¶ 19-21, 46–51). And the threats worked—three different insurers terminated their relationships with NRA due to them, and NRA has struggled to obtain even basic banking services. (*Id.* at ¶¶ 21, 54–85).

In addition to upending settled First Amendment law, the panel contradicts the Supreme Court’s repeated admonition that in ruling on a motion for summary judgment, “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Tolan v. Cotton*, 572 U.S. 650, 651 (2014)

(per curiam). This admonition is especially true on a motion to dismiss. *Mirabilio v. Reg'l Sch. Dist. 16*, 761 F.3d 212, 213 (2d Cir. 2014); see also *Tolan*, 572 U.S. at 655–56. In fact, the Supreme Court has cautioned that in evaluating a qualified immunity defense, “**courts must take care not to define a case’s ‘context’ in a manner that imports genuinely disputed factual propositions.**” *Tolan*, 572 U.S. at 655–56 (emphasis added).

That is just what the panel did in this case—in defiance of *Tolan*. “The ‘context’ here was an investigation, commenced months before the meetings, that was triggered by a referral from the DA’s Office,” the panel states. *Vullo*, 2022 WL 4372194 at \*11. However, the panel fails to mention that the “referral” in question came from a gun control advocacy group whose purpose was to advance a political agenda against the NRA. (A-135 at ¶¶ 34–37). The panel’s suggestion that Vullo had non-retaliatory motives for investigating the insurance policies at issue is amply rebutted by the facts pleaded in the Complaint. *Id.*

Perhaps most glaring of all, the panel dismisses the importance of meetings between Vullo and the affected insurers where she made “clear and unambiguous” threats that regulated entities “cease[] providing insurance to gun groups, especially the NRA.” (A-135 at ¶ 21). The Court criticizes the Complaint’s “lack of precision as to what Vullo actually said to make her message clear,” ignoring that NRA cannot, and is not required to, plead specific facts regarding statements

at a meeting where it was not in attendance. *Vullo*, 2022 WL 4372194 at \*11. En banc review is necessary to correct these errors.

### STATEMENT OF THE CASE

The NRA is America’s leading provider of gun-safety and marksmanship education for civilians and law enforcement. (A-135 at ¶ 1). It is also the foremost defender of the Second Amendment. *Id.* Former New York Governor Andrew Cuomo has a history of animus towards NRA based on its gun rights advocacy, an animus that is shared by Vullo, his longtime lieutenant and appointee. (*Id.* at ¶¶ 14–20).

Vullo headed DFS, an agency with broad regulatory and enforcement powers to ensure the continued solvency, safety, and soundness of banks and insurance companies. (*Id.* at ¶ 25). Accordingly, DFS directives regarding “risk management” must be heeded by financial institutions. *Id.*

Before 2017, NRA was frequently the target of boycott efforts. (*Id.* at ¶ 33). However, those efforts failed because they were spearheaded by non-governmental groups who lacked the government’s coercive power. (*Id.*).

This changed in 2017, when a pro-gun control organization (Everytown for Gun Safety) successfully enlisted Cuomo and Vullo to silence NRA. (*Id.* at ¶¶ 33–34). Everytown contacted the New York County District Attorney’s Office as part of its political mission to undermine the NRA, using alleged infirmities in Carry

Guard, a concealed-carry insurance program promoted by NRA, as a pretext. (*Id.* at ¶ 34). The DA's Office referred the matter to Vullo, who launched an investigation that was ostensibly focused on Carry Guard but was really motivated by an effort to punish NRA for its gun rights advocacy. (*Id.* at ¶¶ 35–36). The investigation targeted none of the available self-defense insurance products except Carry Guard, which was endorsed by NRA. (*Id.*). Nor did the investigation target any of the many other affinity insurance programs sponsored by other groups that involve most, if not all, of the practices and features referenced by DFS in its investigation of NRA's affinity programs. (*Id.* at ¶ 37).

Vullo threatened regulated institutions with costly investigations, increased regulatory scrutiny, and penalties should they fail to discontinue their arrangements with NRA. (*Id.* at ¶ 21). These exhortations were not limited to Carry Guard, as she indicated that any business relationship with NRA would invite adverse action. (*Id.* at ¶ 38).

In February 2018, Vullo met with the executives of institutions subject to her regulatory power, where she made clear and unambiguous threats that they must cease providing services to NRA in connection with affinity-insurance programs that NRA endorsed. (*Id.* at ¶ 21). Although Vullo discussed many technical regulatory infractions plaguing the affinity-insurance marketplace, she made clear that her real interest lay in coercing the companies to cease providing insurance to

NRA and its members and supporters—not in pursuing these technical regulatory infractions for their own sake. (*Id.*). Indeed, Vullo said that DFS would focus its forthcoming affinity-insurance enforcement action solely on those syndicates which served NRA and its allies, and ignore other syndicates writing similar policies. (*Id.* at ¶ 69).

Within a week, DFS levied multi-million-dollar fines against two insurance firms that dared to do business with NRA. (*Id.* at ¶ 21). Both firms, and later a third, were coerced to terminate their business arrangements with NRA and its members—including arrangements having nothing to do with the allegedly unlawful conduct cited by DFS. (*Id.*).

The fact that these terminations were prompted directly by Vullo’s threats is shown by the fact that the Chairman of Lockton—one of the three entities that announced that it was dropping NRA—called NRA in February 2018 and stated that, although Lockton wished to continue doing business with NRA, Lockton must “drop” NRA entirely for fear of “losing [our] license” to do business in New York due to Vullo’s backroom threats. (*Id.* at ¶ 42). Lockton had been a close business partner of NRA for nearly twenty years; its commitment to the parties’ relationship had not wavered in connection with any previous instance of public controversy relating to gun control. (*Id.*).

Days later, an insurer dropped NRA’s General Liability and Umbrella

coverage solely because it learned of Vullo's threats to Lockton and feared it would be subject to similar reprisals. (*Id.* at ¶ 44).

In April 2018, Vullo followed up her backroom threats with a pair of "guidance documents" directed at all New York State financial institutions and insurers. (*Id.* at ¶ 46). The April 2018 Letters were unrelated to NRA-endorsed affinity programs. (*Id.* at ¶¶ 46–50). Instead, they warned recipients to sever ties with NRA and other "gun promotion organizations." (*Id.* at ¶ 46). The April 2018 Letters did not merely express Vullo's political opinions: they invoked the "risk management" obligations of recipients, and directed banks and insurers to "take prompt actions to manage" purported "reputational risks" arising from "dealings with the NRA or similar gun promotion organizations." (*Id.* at ¶ 47). In addition, testimonial statements from three different New York financial services experts or regulated parties reflect that Vullo's public statements in her April 2018 guidance documents were widely perceived within the industry as express threats not to do business with NRA or else. (*Id.* at ¶¶ 53, 81).

Lloyd's recognized at a subsequent Board of Directors meeting that Vullo's interest lay in targeting NRA for reprisal and had nothing to do with any broader interest in the proper marketing of affinity insurance programs. (*Id.* at ¶ 70). Lloyd's believed that its hands were tied: Vullo's investigation had transformed the "gun issue" into a compliance matter, and Lloyd's had to remain in DFS's good

graces. (*Id.*). So on May 9, 2018, Lloyd’s publicly announced that it directed its underwriters to terminate all insurance related to NRA and not to provide any insurance to NRA in the future. (*Id.* at ¶ 72).

On May 11, 2018, NRA sued Cuomo and Vullo in their official and individual capacities. Following motions to dismiss, the District Court upheld NRA’s First Count, alleging an implicit censorship regime, and its Second Count, alleging retaliation against NRA based on the content of its speech. (A-133).

These rulings were subsequently reaffirmed by the District Court.

Vullo appealed; Cuomo did not. (A-362). The panel’s September 22, 2022 decision reversed the district court’s denial of Vullo’s motion to dismiss and remanded the case with directions for the district court to enter judgment for Vullo. *Vullo*, 2022 WL 4372194 at \*13.

## ARGUMENT

### **I. The Panel Ignored Testimonial Evidence and Failed to Draw Inferences in NRA’s Favor, in Violation of *Tolan*.**

In ruling on a motion for summary judgment, “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Tolan*, 572 U.S. at 651. So too on a motion to dismiss. *Mirabilio*, 761 F.3d at 213; *see also Tolan*, 572 U.S. at 655–56. “Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even

when . . . a court decides only the clearly-established prong of the standard.”

*Tolan*, 572 U.S. at 657. The panel violated this command in at least three ways.

*First*, the panel “define[d] [the] case’s ‘context’ in a manner that import[ed] genuinely disputed factual propositions”—specifically, by contending that Vullo opened her investigation into NRA in a “plainly reasonable” and “legitimate” effort to address its role as an “accomplice” in “serious misconduct.” *Compare id. with Vullo*, 2022 WL 4372194 at \*12–13. The panel’s spin cannot be reconciled with the Complaint’s allegations to the contrary. (A-135 at ¶¶ 14–23, 34–37, 45–53, 58–61, 65–67, 69, 75–79, 90–92). The panel refused to acknowledge that the Complaint pleads in detail that Vullo selectively targeted NRA for discriminatory enforcement over minor, technical regulatory infractions that she had no interest in pursuing except against NRA—and that she opened her investigation in 2017 at the behest of an activist group with the specific goal of retaliating against NRA for its gun rights advocacy. (*Id.* at ¶¶ 33–37). In fact, the Complaint pleads that Vullo confessed her selective focus on NRA to regulated entities and made clear that similar affinity insurance marketing violations would not be punished. (*Id.* at ¶¶ 21, 69–70). And the Complaint pleads background context illustrating the plausibility of its allegations that Vullo used threats and not mere persuasion—similar boycott efforts from activist groups against NRA failed in the past without government support, and Vullo’s overwhelming regulatory power as head of DFS was such that

regulated entities could not afford the financial cost of refusing compliance with her expressed regulatory goals. (*Id.* at ¶¶ 25–26, 33).

*Second*, the panel ignored testimonial evidence from witnesses acknowledging that Vullo used threats and not mere persuasion. The Complaint cites testimonial statements from three different industry experts or regulated parties indicating that they perceived Vullo’s public statements as threats not to do business with NRA. (*Id.* at ¶¶ 53, 81). The panel did not consider these statements in its analysis. Instead, it engaged in its own, decontextualized parsing of Vullo’s Guidance Letters and Press Release and concluded, in defiance of credible testimony from regulated parties and industry experts, that no one could possibly have read them as the insurers themselves did—as threatening regulatory enforcement if the insurers did not immediately cut ties with NRA. *Vullo*, 2022 WL 4372194 at \*11. Indeed, NRA cited testimonial evidence—also not discussed by the panel—from the Chairman of one of NRA’s insurance partners (Lockton) indicating that he was ending the company’s association with NRA solely because of threats from Vullo. (A-135 at ¶ 42). The complaint also presented testimonial evidence indicating that Lloyd’s dropped its affiliation with NRA because of direct threats from Vullo. (*Id.* at ¶ 70). Evidence of this sort is the kind that this Court has previously held to be sufficient to establish disputed issues of fact regarding unconstitutional coercion. *Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991).

*Third*, and perhaps most egregiously, the panel dismisses the importance of meetings between Vullo and the affected insurers where she made “clear and unambiguous” threats that the regulated “cease[] providing insurance to gun groups, especially the NRA.” (A-135 at ¶ 21). The Court criticizes the Complaint’s “lack of precision as to what Vullo actually said to make her message clear.” *Vullo*, 2022 WL 4372194 at \*11. But NRA cannot, and is not required to, plead specific facts regarding statements made by Vullo at a meeting where it was not in attendance.<sup>1</sup>

In its rush to dismiss the case, however, the panel went on to “review the statements in context”—even though it had *no statements to review*. *Id.* Thus the panel, *with no basis*, simply disregarded NRA’s well-pleaded allegation that “Vullo and DFS have threatened regulated institutions with costly investigations, increased regulatory scrutiny and penalties should they fail to discontinue their arrangements with the NRA” and found instead, in defiance of the Complaint’s detailed allegations, that “the allegations do not plausibly amount to an unconstitutional threat or coercion to chill the NRA’s free speech.” *Compare id. with* (A-135 at ¶ 21). The panel then bootstraps the insurers’ own consent decrees

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<sup>1</sup> Indeed, the NRA sought to depose Vullo in June 2018—over *four years ago*—and her deposition was authorized by the Court in March 2020. But discovery was stayed “temporarily” beginning in July 2020, and NRA was unable to depose Vullo. (ECF Nos. 228, 234).

in which they agreed to end their relationships with NRA as proof that the entire investigation was “plainly reasonable,” “natural” and a “legitimate enforcement action.” *Vullo*, 2022 WL 4372194 at \*12.

But the fact that the insurers bowed to Vullo’s threats and entered consent decrees ending their relationships with NRA does not contradict the Complaint’s extensive and well-pleaded allegations that Vullo selectively targeted three insurers having relationships with NRA for enforcement actions. Indeed, under settled law, the fact that the insurers quickly buckled is persuasive evidence confirming NRA’s allegations of threats. *Rattner*, 930 F.2d at 210. To use an analogy: taken in a light most favorable to the non-movant, evidence that plaintiff suffered extensive physical injuries would tend to confirm that officers used excessive force—not that officers had good reason to use force on the suspect in the first place. *Cf. Lombardo v. City of St. Louis, Missouri*, 141 S. Ct. 2239, 2241–42 (2021) (per curiam). By dwelling on the fact that the insurers succumbed to the threats, the panel focused on evidence that only *confirmed* that threats were indeed made. *See Vullo*, 2022 WL 4372194 at \*9–12.

The panel turned to *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) for support (*see Vullo*, 2022 WL 4372194 at \*12), but *Twombly* only shows how far afield the panel went. In *Twombly*, the plaintiffs did **not** “directly allege illegal agreement” but instead relied **entirely** on allegations of parallel conduct to support

their claim of an antitrust conspiracy. *Twombly*, 550 U.S. at 565 & n. 11. *Twombly* makes clear that the pleading would have passed muster had the plaintiffs made such direct allegations. *Id.* Here, by contrast, NRA **directly**, and plausibly, alleges that Vullo made “clear and unambiguous” threats to insurers that they “cease[] providing insurance to gun groups, especially the NRA” at meetings in February 2018. (A-135 at ¶ 21). And NRA included direct testimonial evidence from the insurers themselves confirming that threats were made. (*Id.* at ¶¶ 42, 70). Because NRA pleads actual threats, and does not ask the Court to assume such threats merely from “parallel conduct,” *Twombly* shows that the panel was wrong in dismissing NRA’s claims against Vullo.

## **II. The Panel’s Opinion Ignores Clearly-Established Law that Selective Enforcement Regimes Violate the First Amendment**

Relatedly, the panel adopts an outsized, and unprecedented, view of the “government speech” doctrine that confuses the role of government as regulator with the role of government as speaker—and, in so doing, threatens to eviscerate decades of Supreme Court precedent.

According to the panel, a prohibition on viewpoint discrimination is “antithetical to a healthy representative democracy.” *Vullo*, 2022 WL 4372194 at \*8 (citing *Matal*, 137 S.Ct. at 1757). But neither *Matal* nor any other case has ever held that the government has a First Amendment right to engage in viewpoint discrimination or otherwise engage in selective enforcement based on political

ideology. Instead, the Supreme Court has been clear that “the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others[.]” *Matal*, 137 S.Ct. at 1757 (quoting *Lamb’s Chapel*, 508 U.S. at 394).

That is exactly what the Complaint alleges that Vullo did—she held private meetings with insurance companies where she threatened to use her formal regulatory power as Superintendent of DFS to punish them if they did not discontinue existing business relationships with NRA, and then compounded her threats with an official guidance document and press releases that threatened similar reprisals against other businesses that dared to associate with NRA. (A-135 at ¶¶ 19–23, 34–37, 45–53, 61, 67, 69, 75–79, 90–92). The panel ignores *Matal*’s warning that “the government-speech doctrine. . . is susceptible to dangerous misuse”; specifically, that if it were read to allow not only government advocacy, but also government action, it could be used to “silence or muffle the expression of disfavored viewpoints.” *Matal*, 137 S.Ct. at 1758.

The panel dwells on the fact that the businesses associated with NRA ultimately admitted to insurance law violations, as though this was dispositive evidence that no viewpoint discrimination occurred. *Vullo*, 2022 WL 4372194 at \*11. But it is black-letter law that a public official engages in viewpoint discrimination when that official applies a facially viewpoint-neutral rule in a

viewpoint-discriminatory way. *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 632–33 (2d Cir. 2005). The Supreme Court has made clear that actions motivated by impermissible viewpoint considerations do not become lawful simply because those actions might be justified on some other viewpoint-neutral ground. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 811 (1985). Thus, the panel’s contention that “in 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” only begs the question. *Vullo*, 2022 WL 4372194 at \*12. It does not resolve it. Nor does it, in any way, diminish the force of the Complaint’s well-pleaded allegations that Vullo targeted NRA for investigation based on its viewpoint, and coerced “businesses that associated with” NRA drop their affiliation. *Compare id.* at 10 *with* (A-135 at ¶¶ 14–23, 34–37, 45–53, 58–61, 65–67, 69, 75–79, 90–92).

### **III. The Panel’s Suggestion That a Government Regulator Can Threaten Economic Sanctions Against Disfavored Speakers for Their Viewpoints Contravenes Supreme Court Authority and the Holdings of Other Circuits**

Finally, and most disturbingly, the panel opinion seeks to justify Vullo’s conduct by expressly invoking the popular “backlash” against NRA, suggesting that Vullo’s actions were proper because “a business’s response to social issues can directly affect its financial stability in this age of enhanced corporate social responsibility.” *Vullo*, 2022 WL 4372194 at \*10. This language underscores that

the panel accepted that Vullo was acting as a regulator—not merely speaking out as a concerned citizen—in making her threats.

The panel’s reasoning would eviscerate the First Amendment, giving government regulators free rein to selectively target unpopular speakers in the name of “tak[ing] action to address key social and environmental issues.” *Id.* at 10 n.14; *compare Hoyer v. City of Oakland*, 653 F.3d 835, 854 (9th Cir. 2011) (discriminatory enforcement of a content-neutral law violates the First Amendment); *A & R Eng’g & Testing, Inc. v. City of Houston*, 582 F.Supp.3d 415, 436–37 (S.D. Tex. 2022) (striking down Texas law prohibiting the state government from contracting with entities that boycott Israel; “the First Amendment protects all points of view on this issue, even if they do not comport with the economic goals of this State”).

This theory of the First Amendment would transform the government from the protector of free speech into a dangerous threat, imbued with almost limitless power to dole out heckler’s vetoes and pronounce “guilt by association.” The First Amendment makes clear that the government’s pursuit of its regulatory goals cannot justify punishing speech, no matter how offensive the speech or how much “backlash” there may be against the speaker. *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (“the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker’s opinion that gives offense,

that consequence is a reason for according it constitutional protection.”). The panel committed serious error in suggesting otherwise, and en banc review is necessary to correct its mistake.

### CONCLUSION

The NRA asks the Court to grant rehearing en banc, vacate the panel’s decision, and reinstate the District Court’s order denying Vullo’s motion to dismiss Counts I and II of the Complaint.

Dated: October 6, 2022

Respectfully submitted,

*/s/ Noah Peters*

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ASSOCIATION  
OF AMERICA**

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Times New Roman font, 14-point type. Based on a word count of my word processing system, this brief contains fewer than 3,900 words. It contains 3899 words excluding exempt material.

/s/ Noah Peters

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of October 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Noah Peters

21-636-cv

*National Rifle Association of America v. Maria T. Vullo*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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August Term 2021

(Argued: January 13, 2022      Decided: September 22, 2022)

Docket No. 21-636-cv

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NATIONAL RIFLE ASSOCIATION OF AMERICA,  
*Plaintiff-Appellee,*

*v.*

MARIA T. VULLO, both individually and in her former official capacity,  
*Defendant-Appellant.\**

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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Before:      POOLER, CHIN, and CARNEY, *Circuit Judges.*

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Interlocutory appeal from that portion of a decision and order of the  
United States District Court for the Northern District of New York (McAvoy, J.),

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\*      The Clerk of the Court is directed to amend the caption to conform to the above.

denying the motion of defendant-appellant Maria T. Vullo, the former Superintendent of the New York State Department of Financial Services, to dismiss certain claims against her for qualified immunity. Plaintiff-appellee National Rifle Association of America sued Vullo for violating its rights to free speech and equal protection when she investigated three insurance companies that had partnered with it to provide coverage for losses resulting from the use of guns and encouraged banks and insurance companies to consider discontinuing their relationships with gun promotion organizations. The district court dismissed the equal protection claim on the basis that Vullo was protected by absolute immunity, but it declined to dismiss the free speech claims, concluding that the NRA plausibly alleged its claims and issues of fact existed as to whether she was protected by qualified immunity.

REVERSED AND REMANDED.

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ANDREW G. CELLI JR. (Debra L. Greenberger *and* Marissa R. Benavides, *on the brief*), Emery Celli Brinckerhoff Abady Ward & Maazel LLP, New York, NY, *for Defendant-Appellant*.

SARA B. ROGERS (William A. Brewer III *and* Mordecai Geisler, *on the brief*), Brewer, Attorneys & Counselors, New York, NY, *for Plaintiff-Appellee*.

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CHIN, *Circuit Judge*:

In this case, plaintiff-appellee National Rifle Association of America (the "NRA") claims that defendant-appellant Maria T. Vullo, the former Superintendent of the New York State Department of Financial Services ("DFS"), violated its rights to free speech and equal protection when she investigated three insurance companies that had partnered with it to provide coverage for losses resulting from gun use and encouraged banks and insurance companies to consider discontinuing their relationships with gun promotion organizations. The NRA contends that Vullo used her regulatory power to threaten NRA business partners and coerce them into disassociating with the NRA, in violation of its rights.

In October 2017, based on a referral from the New York County District Attorney's Office (the "DA's Office"), DFS opened an investigation into the legality of certain NRA-endorsed insurance programs that provided coverage for losses caused by licensed firearm use, even in circumstances where the insured intentionally killed or injured someone or otherwise engaged in intentional wrongdoing. Eventually, in 2018, three DFS-regulated entities

entered into consent decrees with DFS, whereby they acknowledged that some of their NRA-endorsed insurance programs violated New York law.

In April 2018, in the wake of the tragic school shooting in Parkland, Florida, which resulted in the death of seventeen students and staff, Vullo, in her capacity as Superintendent of DFS, spoke out against gun violence. She did so through industry-directed "guidance letters" and a press statement issued by the New York State Governor's Office. She called upon banks and insurance companies doing business in New York to consider the risks, including "reputational risks," that might arise from doing business with the NRA or "similar gun promotion organizations," and she urged the banks and insurance companies to "join" other companies that had discontinued their associations with the NRA. J. App'x at 181, 184-7.

Thereafter, multiple entities indeed severed their ties or determined not to do business with the NRA. The NRA then brought this action against Vullo, DFS, then-Governor Andrew Cuomo, and Linda A. Lacewell (who had succeeded Vullo as Superintendent of DFS).<sup>1</sup> The district court eventually

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<sup>1</sup> Vullo left DFS on February 1, 2019. See Statement, Maria T. Vullo, N.Y. State Dep't of Fin. Servs. Superintendent, *Superintendent Maria T. Vullo to Depart DFS After Three Years of Service to New Yorkers* (Dec. 19, 2018), [https://www.dfs.ny.gov/reports\\_and\\_publications/statements\\_comments/2018/st1812191](https://www.dfs.ny.gov/reports_and_publications/statements_comments/2018/st1812191).

dismissed all claims except the First Amendment claims against Vullo, concluding that the NRA plausibly alleged those claims and that issues of fact existed as to whether she was protected by qualified immunity with respect to those claims. Vullo appeals.

The First Amendment forbids government officials from "abridging the freedom of speech." U.S. Const. amend. I; *see Zieper v. Metzinger*, 474 F.3d 60, 66 (2d Cir. 2007). Government officials cannot, for example, use their regulatory powers to coerce individuals or entities into refraining from protected speech. At the same time, however, government officials have a right -- indeed, a duty -- to address issues of public concern. Here, for the reasons discussed below, we conclude that the NRA has failed to plausibly allege that Vullo "crossed the line 'between attempts to convince and attempts to coerce.'" *Zieper*, 474 F.3d at 66 (quoting *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam)). Moreover, even assuming that Vullo's actions and statements were somehow coercive, we conclude further that her conduct here -- taking actions and making statements in her various capacities as regulator, enforcement official, policymaker, and representative of New York State -- did not violate clearly established law. Rather, the only plausible conclusion to be drawn is that Vullo

acted reasonably and in good faith in endeavoring to meet the duties and responsibilities of her office.

Accordingly, we REVERSE and REMAND for the district court to dismiss the remaining claims against Vullo.

### ***STATEMENT OF THE CASE***

Where the district court decides a qualified immunity defense on a motion to dismiss, we accept the material facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff -- here, the NRA. *Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174, 186 (2d Cir. 2020).

#### ***I. The Facts***

The following facts are drawn from the NRA's second amended complaint (the "Complaint"), the exhibits attached thereto, and documents integral to and referenced in it. *See Cohen v. Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 80 (2d Cir. 2018).

##### ***A. The Investigation***

In September 2017, the DA's Office advised DFS of the apparent illegality of an NRA-endorsed affinity insurance program called "Carry Guard." Carry Guard provided coverage for losses caused by licensed firearm use,

including criminal defense costs resulting from using a firearm with excessive force to protect persons or property, even if the insured was found to have acted with criminal intent. In other words, it insured New York residents for intentional, reckless, and criminally negligent acts with a firearm that injured or killed another person. Policies issued through Carry Guard were underwritten by Illinois Union Insurance Company, a subsidiary of Chubb Limited, doing business as Chubb ("Chubb"), and administered by Lockton Companies, LLC ("Lockton").

The next month, DFS opened an investigation into Carry Guard, focusing on Lockton and Chubb. The investigation revealed that Carry Guard and at least two other NRA-endorsed programs violated New York insurance law for providing, among other things, insurance coverage for intentional criminal acts. Additionally, it found that the NRA aggressively promoted Carry Guard without an insurance producer license -- a separate violation of New York insurance law. By November 17, 2017, both Lockton and Chubb suspended the Carry Guard program and stopped offering it to New York residents for purchase.

The investigation also revealed that a third entity, the insurance marketplace Lloyd's of London and its related syndicates (together, "Lloyd's"), served as underwriter for at least eleven other NRA-endorsed programs with similar policy coverages. Like Carry Guard, the other NRA-endorsed programs provided liability defense coverage for criminal proceedings resulting from firearm use even where the insured acted with criminal intent.<sup>2</sup> Lockton administered these insurance programs for Lloyd's.

**B. *The Parkland Shooting***

On February 14, 2018, while the investigation was underway, a shooter armed with a semiautomatic weapon opened fire at Marjory Stoneman Douglas High School in Parkland, Florida, killing seventeen high school students and staff.<sup>3</sup> In the wake of the shooting, the NRA and other gun promotion groups faced intense backlash.<sup>4</sup> Many government officials and major American

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<sup>2</sup> The NRA-endorsed insurance program provided by Lockton and Chubb went by the name "Carry Guard," but similar programs provided by Lloyd's went by other names, including "Self-Defense Insurance," "Second-Call Defense Insurance," and "Retired Law Enforcement Officer Self-Defense Insurance." J. App'x at 231 ¶ 6(a)-(c).

<sup>3</sup> See, e.g., Bernie Woodall & Zachary Fagenson, *Paradise Lost: Massacre Jolts Florida's 'Safest City,'* Reuters (Feb. 15, 2018, 4:50 PM), <https://www.reuters.com/article/us-florida-shooting-town/paradise-lost-massacre-jolts-floridas-safest-city-idUSKCN1FZ2WY>.

<sup>4</sup> See, e.g., Daniel Trotta, *Shunned by Corporations, U.S. Gun Entrepreneurs Launch Start-Ups,* Reuters (May 5, 2018, 11:04 AM), <https://www.reuters.com/article/usa-guns-nra/shunned-by-corporations-u-s-gun-entrepreneurs-launch-start-ups-idUSL1N1S9255>.

business institutions spoke out against gun violence, and some companies publicly severed ties with gun promotion organizations like the NRA.<sup>5</sup>

*C. The Lloyd's Meetings*

Shortly after the Parkland shooting, in late February 2018, Vullo met with senior executives of Lloyd's and one of its United States affiliates.<sup>6</sup> At the meetings, Vullo "presented [her] views on gun control and [her] desire to leverage [her] powers to combat the availability of firearms." J. App'x at 161 ¶ 67. She explained the basis for her belief that Lloyd's was violating several provisions of New York insurance law. *Id.* at 144 ¶ 21 (stating that Vullo "discussed an array of technical regulatory infractions plaguing the affinity-insurance marketplace"). She then explained how Lloyd's could come into compliance and "avoid liability" for its regulatory infractions, *id.* at 162 ¶ 69,

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<sup>5</sup> See Jenna Johnson et al., *Trump, Citing 'Evil Massacre' in Florida, Starts Talking About Gun Control*, Wash. Post (Feb. 20, 2018, 10:37 PM), [https://www.washingtonpost.com/politics/trump-citing-evil-massacre-in-florida-starts-talking-about-gun-control/2018/02/20/8da6dd7e-1683-11e8-b681-2d4d462a1921\\_story.html](https://www.washingtonpost.com/politics/trump-citing-evil-massacre-in-florida-starts-talking-about-gun-control/2018/02/20/8da6dd7e-1683-11e8-b681-2d4d462a1921_story.html); see also Tim Mak, *NRA Facing Most Formidable Opposition Yet, a Year After Parkland*, NPR (Feb. 14, 2019, 12:02 AM), <https://www.npr.org/2019/02/14/693929383/nra-facing-most-formidable-opposition-yet-a-year-after-parkland> ("For the National Rifle Association, the year since the Parkland shooting has led to a changing -- and less favorable -- political landscape.").

<sup>6</sup> Although the Complaint uses the plural "meetings," it seems to describe only one meeting. J. App'x at 161 ¶ 67. Drawing all reasonable inferences in the NRA's favor, we conclude that there were multiple meetings held on or about February 27, 2018.

including by no longer "providing insurance to gun groups" like the NRA, *id.* at 144 ¶ 21. Vullo also sought Lloyd's aid in "DFS's campaign against gun groups." *Id.* at 162-63 ¶ 69.<sup>7</sup>

**D. The Guidance Letters and Press Release**

On April 19, 2018 -- approximately two months after the Parkland shooting and six months after DFS opened its investigation into the NRA-endorsed insurance programs -- Vullo weighed in publicly on the issue of gun violence. She issued a pair of guidance letters entitled "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations"; one was addressed to DFS-regulated insurance entities and the other to DFS-regulated financial institutions (the "Guidance Letters"). J. App'x at 182-87. The Guidance Letters referenced the Parkland shooting and other mass shootings and condemned the increasing "tragic devastation caused by gun violence" as a "public safety and health issue." *Id.* at 183. The Guidance Letters also advised that these tragedies had resulted in strong social backlash against the NRA and

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<sup>7</sup> The Complaint is replete with conclusory allegations that Vullo's statements and actions were "threatening" and "coercive." *See, e.g.*, J. App'x at 170 ¶ 92. As we discuss below, what Vullo did and said are factual assertions; whether the actions were "threatening" and "coercive" in a First Amendment violation sense is a conclusion. We are free to consider whether that conclusion is plausible in light of the supporting factual assertions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

similar organizations and predicted that the backlash would increase after the Parkland shooting.

Citing the changing public sentiment and views as to corporate social responsibility, the Guidance Letters encouraged DFS-regulated entities to "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations, if any, as well as continued assessment of compliance with their own codes of social responsibility." *Id.* at 183-84, 186-87. The Guidance Letters did not refer to any ongoing investigations or enforcement actions, such as those regarding Carry Guard or its related programs.

The same day, Cuomo issued a press statement announcing that he had directed DFS to "urge insurers and bankers statewide to determine whether any relationship they may have with the NRA or similar organizations sends the wrong message to their clients and their communities who often look to them for guidance and support." *Id.* at 180-81 (the "Press Release"). Vullo was quoted in the Press Release 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 urging "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." *Id.* at 181.

*E. The Consent Decrees*

In May 2018, Lockton and Chubb entered into consent decrees with DFS. On May 2 and 7, 2018, DFS issued press releases explaining the content of the Lockton and Chubb consent decrees, respectively, its investigation into Carry Guard, and the relevant insurance law violations. Lloyd's entered into a consent decree with DFS a few months later in December 2018 (together with the Lockton and Chubb consent decrees, the "Consent Decrees").

In the Consent Decrees, the three entities agreed that some NRA-endorsed insurance programs they offered violated New York insurance law, they would no longer provide those or other illegal insurance programs to the NRA or New York residents, and they would pay fines.<sup>8</sup> The Consent Decrees also imposed numerous prohibitions on the entities' abilities to engage in certain

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<sup>8</sup> Lockton agreed to pay a \$7,000,000 fine. Chubb agreed to pay a \$1,300,000 fine. Lloyd's agreed to pay a \$5,000,000 fine. All three entities agreed to cancel and no longer offer several NRA insurance programs that violated New York insurance law, and not to enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance coverage to New York residents or entities.

insurance programs and required Chubb and Lloyd's to do "reasonable due diligence" to ensure that any entity they do business with in the future "is acting in compliance with the Insurance Law." *Id.* at 216 (Chubb Consent Decree), 236 (Lloyd's Consent Decree).

Notably, each Consent Decree expressly allowed the entities to continue to do business with the NRA. The Lockton Consent Decree provided that "Lockton may assist the NRA in procuring insurance for the NRA's own corporate operations." *Id.* at 201 ¶ 43. The Chubb Consent Decree provided that "the NRA may itself purchase insurance from Chubb for the sole purpose of obtaining insurance for the NRA's own corporate operations." *Id.* at 216 ¶ 22. And the Lloyd's Consent Decree provided that "the NRA may itself purchase insurance from [Lloyd's] for the sole purpose of obtaining insurance for the NRA's own corporate operations." *Id.* at 236 ¶ 20.

#### ***F. The Market Reaction***

After the Parkland shooting, "multiple financial institutions" severed ties or decided not to do business with the NRA. *Id.* at 136.

For instance, the NRA received a call from Lockton's chairman on February 25, 2018, eleven days after the Parkland shooting, but months before

the issuance of the Guidance Letters, Press Release, and Consent Decrees, and days before Vullo met with the Lloyd's executives. On the call, the chairman stated that Lockton privately wished to do business with the NRA but had to "drop" the NRA for fear of losing its license to do business in New York. *Id.* at 152 ¶ 42. The next day, Lockton publicly tweeted that it would discontinue providing brokerage services for all NRA-endorsed insurance programs.

About two weeks after the Parkland shooting, but again before any of Vullo's relevant public statements, the NRA's corporate insurance carrier withdrew from renewal negotiations and stated that it was "unwilling to renew coverage at any price." *Id.* at 152 ¶ 44 (emphasis omitted). After the carrier's withdrawal, the NRA "encountered serious difficulties obtaining corporate insurance coverage to replace" the coverage it lost. *Id.* at 167 ¶ 81. "Multiple banks" also withdrew their bids from the NRA's Request for Proposal process in the spring of 2018. *Id.* at 167 ¶ 82.

Additionally, the NRA cites a blog post and a magazine article for examples of general market reaction to the Guidance Letters and Press Release. It first refers to a blog post published by *FinRegRag* on April 22, 2018. The blog post opined that the Press Release "could easily be construed as a thinly veiled

threat" and "could also be seen as an attempt to suppress political speech that some New York policy makers disagree with." Brian Knight, *Is New York Using Bank Regulation to Suppress Speech?*, FinRegRag (Apr. 22, 2018), <https://finregrag.com/is-new-york-using-bank-regulation-to-suppress-speech-ac61a7cb3bf>. The post noted that although Vullo's statement did not indicate that DFS-regulated entities may face adverse regulatory action for failing to cut ties with the NRA, "it [didn't] rule out the possibility either." *Id.*

Next, the NRA refers to a magazine article published by *American Banker* on April 26, 2018. The article reported on the Guidance Letters and surveyed industry reactions:

The guidance appeared somewhat benign, calling on state-chartered banks and other financial services firms to rethink ties they have with the National Rifle Association and other firearms-industry groups in the wake of the mass shootings. The regulator encouraged banks to weigh reputational risk and other corporate responsibility factors in assessing their relationships.

But bankers say such regulatory guidelines are frustratingly vague, and can effectively compel institutions to cease catering to legal businesses.

Neil Haggerty, *Gun Issue Is a Lose-Lose for Banks (Whatever Their Stance)*, *Am. Banker* (Apr. 26, 2018, 1:11 PM), <https://www.americanbanker.com/news/gun-issue-is-a-lose-lose-for-banks-whatever-their-stance>. A senior consulting

associate at Capital Performance Group was quoted in the article as saying the following: "Banks increasingly must consider political issues as part of their risk management decision-making process," which requires "more proactive and broader considerations of reputation risk as part of risk models and calculations."

*Id.* On the other hand, an anonymous banker from upstate New York was quoted as saying the Guidance Letters "felt somewhat politically motivated" and "[i]t's hard to know what the rules are if I don't know what the rules are." *Id.*

On May 9, 2018, Lloyd's publicly announced its decision to terminate its insurance-related relationship with the NRA. Two days later, the NRA brought this suit.

## *II. The Proceedings Below*

This case comes before us on interlocutory appeal after extensive proceedings spanning more than four years in the lower court. The NRA filed three complaints and Vullo filed four motions to dismiss. We discuss only the proceedings necessary for an understanding of our holding.

The district court issued its decision and order on March 15, 2021, dismissing all claims against Cuomo, Lacewell, and DFS, as well as the selective enforcement claim against Vullo. The district court declined, however, to

dismiss two First Amendment claims against Vullo. The first claim alleges that Vullo established an unconstitutional implicit censorship regime in an effort to chill the NRA's protected speech and the second claim alleges that Vullo unconstitutionally retaliated against the NRA for its protected speech. The district court first held that the NRA sufficiently pleaded First Amendment violations. It then concluded that Vullo was not entitled to qualified immunity at the motion-to-dismiss stage, even though it was "inclined to agree with Ms. Vullo that there is no case clearly establishing that otherwise protected public statements transform into an unlawful threat merely because there is an ongoing, and unrelated, regulatory investigation." Special App'x at 25. The court explained that:

a question of material fact exists as to whether Ms. Vullo explicitly threatened Lloyd's with DFS enforcement if the entity did not disassociate with the NRA. . . . Further, because Ms. Vullo's alleged implied threats to Lloyd's and promises of favorable treatment if Lloyd's disassociated with the NRA could be construed as acts of bad faith in enforcing the Insurance Law in New York, a question of material fact exists as to whether she is entitled to qualified immunity under New York law.

*Id.* at 27.

This appeal followed.

## *DISCUSSION*

Vullo contends that she is protected by qualified immunity and thus she asks this Court to reverse the district court's order to the extent it denied her motion to dismiss. The NRA disagrees and argues in addition that this Court lacks jurisdiction to hear this interlocutory appeal. We conclude that, first, we have jurisdiction to hear the appeal and, second, Vullo is entitled to qualified immunity. Accordingly, we reverse the district court's denial of Vullo's motion to dismiss and remand for dismissal of the remaining claims against her.

### *I. Appellate Jurisdiction*

The NRA asks this Court to dismiss Vullo's appeal for lack of jurisdiction, contending the district court's decision turned only on questions of fact and Vullo disputes the facts as alleged.<sup>9</sup>

Generally, a district court's denial of a motion to dismiss is not a "final decision" under 28 U.S.C. § 1291. *Drimal v. Tai*, 786 F.3d 219, 223 (2d Cir.

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<sup>9</sup> The NRA also complains that Vullo denies meeting privately with the Lloyd's executives in February 2018, contradicting the Complaint and thus precluding interlocutory appeal. But Vullo makes clear that to the extent she asserts "the allegations lodged against her by the NRA are false," she does so "not because she fails to understand or accept the procedural posture in which this case rests" but "to protect her hard-earned professional and personal reputation and as a matter of integrity." Reply. Br. at 7 n.5. We do not consider these statements in deciding the legal issues before us on appeal.

2015). But qualified immunity is a defense to litigation rather than a mere defense to liability; it is lost if a case is erroneously permitted to go to trial. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *see also Wood v. Moss*, 572 U.S. 744, 755 n.4 (2014) (noting that the Supreme Court has repeatedly stressed the importance of deciding immunity questions at the earliest possible stage of litigation). Accordingly, we may review the denial of a motion to dismiss based on qualified immunity, on an interlocutory basis, to the extent it turns on issues of law. *See Salim v. Proulx*, 93 F.3d 86, 89 (2d Cir. 1996).

If a district court's decision turns on questions of evidence sufficiency alone (*i.e.*, which alleged facts a party may, or may not, be able to prove at trial), it is not immediately appealable. *Id.* But a decision is not insulated from review simply because the district court declared that genuine issues of fact exist. *Royal Crown Day Care LLC v. Dep't of Health & Mental Hygiene*, 746 F.3d 538, 542 (2d Cir. 2014). "Rather, where a district court denies a defendant qualified immunity, there is appellate jurisdiction over that defendant's interlocutory appeal if the defendant contests the existence of a dispute or the materiality as a matter of law, or contends that he is entitled to

qualified immunity even under the plaintiff's version of the facts." *Id.* (cleaned up).

Here, Vullo certainly contests the existence of material issues of fact and contends as well that she is entitled to qualified immunity even under the NRA's version of the facts. At a minimum, we have jurisdiction to determine whether she is right.

Indeed, where a defendant accepts the facts as alleged for purposes of the appeal (thereby removing any issues of fact), we may review the legal issues on interlocutory appeal. *Id.*; see also *Soto v. Gaudett*, 862 F.3d 148, 158 (2d Cir. 2017). We have recognized the following as "strictly legal" questions reviewable on interlocutory appeal: (1) whether the plaintiff sufficiently pleaded the violation of a constitutional right and (2) whether, at the time of the alleged violation, the defendant's actions, as alleged by the plaintiff, violated clearly established law. *Tellier v. Fields*, 280 F.3d 69, 78-79 (2d Cir. 2000). Here, the district court concluded that "a question of material fact exist[ed] as to whether Ms. Vullo explicitly threatened Lloyd's with DFS enforcement if the entity did not disassociate with the NRA," Special App'x at 27, but Vullo has made clear in her briefs on appeal that she accepts the well-pleaded facts of the Complaint for

purposes of the appeal. While she first argues that the Complaint alleges only conclusions and characterizations, which she need not accept as true, she assumes in the alternative that the Complaint alleges that she met with the Lloyd's executives and offered leniency in exchange for help advancing her policy goals and incorporates that allegation into her merits argument.

Moreover, she does not dispute what she said in the Guidance Letters, the Press Release, or the Consent Decrees, or that she oversaw the investigation; the public record captures her words and actions in those respects. She thus accepts the facts as alleged, and we may consider her qualified immunity defense based on these assumed facts. Hence, we have jurisdiction over this appeal, and we turn to the merits.

## *II. The Merits*

We review the denial of a motion to dismiss based on qualified immunity *de novo*. *Ganek v. Leibowitz*, 874 F.3d 73, 80 (2d Cir. 2017).

### *A. Applicable Law*

#### *1. Pleading Standards*

To sufficiently plead a constitutional violation, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl.*

*Corp. v. Twombly*, 550 U.S. 544, 570 (2007); see *Iqbal*, 556 U.S. at 678. We accept as true factual allegations but not conclusions, such as statements concerning a defendant's state of mind. *Iqbal*, 556 U.S. at 681 ("To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); see also *Whiteside v. Hover-Davis, Inc.*, 995 F.3d 315, 321 (2d Cir. 2021).<sup>10</sup>

To determine whether a claim is plausible, we must separate the complaint's factual allegations from its conclusions and then determine whether the remaining well-pleaded factual allegations plausibly allege entitlement to relief. *Whiteside*, 995 F.3d at 321. This analysis is "context specific, requiring the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 663-64; accord *Lynch v. City of New York*, 952 F.3d 67, 74 (2d Cir. 2020). A claim is plausibly alleged "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

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<sup>10</sup> For further discussion of this issue, see Howard M. Erichson, *What's the Difference Between a Conclusion and a Fact?*, 41 *Cardozo L. Rev.* 899, 904 (2020) ("[*Twombly* and *Iqbal*] relied on a distinction between factual *conclusions* (whether the *Twombly* defendants agreed not to compete, whether Ashcroft and Mueller intended to discriminate) and factual *supporting allegations* (what the telecommunications companies said and did, what Ashcroft and Mueller said and did).").

misconduct alleged." *Iqbal*, 556 U.S. at 678. But where the facts do not permit us to "infer more than the mere possibility of misconduct," the complaint has not plausibly alleged a claim. *Id.* at 679.

## 2. *Qualified Immunity*

Qualified immunity shields government officials performing discretionary functions from suits for money damages unless their conduct violates clearly established law of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It gives government officials the breathing room to make reasonable, even if mistaken, judgments and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It applies unless (1) the plaintiff sufficiently pleaded a constitutional violation and (2) the law the official allegedly violated was clearly established and apparent to a reasonable official at the time of the alleged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011); *see also Iqbal*, 556 U.S. at 673 ("[W]hether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded."). Courts have discretion to decide which of the two prongs to address first, *Pearson*, 555 U.S. at 236-37, but if the complaint fails to sufficiently plead the violation of a

constitutional right, the second question is moot, *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 66 (2d Cir. 1999).<sup>11</sup>

Although qualified immunity defenses are often decided on motions for summary judgment, in appropriate circumstances a district court may address qualified immunity at the pleadings stage. *Drimal*, 786 F.3d at 225.

### 3. *The First Amendment*

The NRA's First Amendment claims turn on whether Vullo's statements at the Lloyd's meetings and in the Guidance Letters, Press Release, and Consent Decrees were "implied threats to employ coercive state power to stifle protected speech." *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983); *see also Zieper*, 474 F.3d at 65 (applying *Hammerhead* to censorship claim); *Dorsett v. County of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013) (applying similar standard to retaliation claim).<sup>12</sup>

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<sup>11</sup> The district court's qualified immunity analysis was incomplete in this respect. Vullo is entitled to qualified immunity unless the NRA plausibly alleged a First Amendment violation *and* "it would . . . have been clear to a reasonable officer in [her] position that [her] conduct was unlawful." *Zieper*, 474 F.3d at 68. The district court held that issues of fact precluded dismissal, but it did not discuss whether, even if the Complaint stated a First Amendment cause of action, the law was clearly established such that a reasonable officer would have known she was violating the law.

<sup>12</sup> Two aspects of the NRA's speech are arguably at issue here: (1) the NRA's long-standing gun promotion advocacy and (2) its Carry Guard program and related business associations. The district court assumed without discussing that the protected

Two sets of free speech rights are implicated: those of private individuals and entities and those of government officials. With respect to the latter, the First Amendment does not impose a viewpoint-neutrality requirement on the government's own speech; a government official has the right to speak for herself (and her agency) and to select the views she wishes to express. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005). Under the government speech doctrine, public officials are generally free to favor certain views over others when they speak. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207-08 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."); *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 34 (2d Cir. 2018) ("When it acts as a speaker, the government is entitled to favor certain views over others.").

A viewpoint-neutrality requirement is antithetical to a healthy representative democracy, and when a government official embarks on a course

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speech at issue is the NRA's gun promotion advocacy. Of course, such speech is protected by the First Amendment. The Carry Guard program, however, is not, to the extent it violated the law. As a result, the NRA can sufficiently plead its claims only if the Complaint contains enough facts to plausibly allege that Vullo's actions were taken in retaliation for, or in an effort to chill, its gun promotion advocacy.

of action, she may well embrace one viewpoint and reject others. *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017). The First Amendment does not forbid her from speaking about her preferred course of action; rather, it gives her the freedom to advocate for it. *Id.* Indeed, both parties here agree that Vullo was entitled to advocate for her political views -- to condemn gun violence and to urge DFS-regulated entities to consider what they could do to reduce both gun violence and the reputational risks of doing business with gun promotion groups.

Nevertheless, in certain circumstances, some government speech may infringe on private individuals' free speech rights. *See Hammerhead*, 707 F.2d at 39; *Zieper*, 474 F.3d at 65 ("It is well-established that First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech." (internal quotation marks omitted)).

Government officials may not engage in unjustified threats or coercion to stifle speech. *Hammerhead*, 707 F.2d at 39. Accordingly, although government officials are free to advocate for (or against) certain viewpoints, they may not encourage suppression of protected speech in a manner that "can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request." *Id.*

"In determining whether a particular request to suppress speech is constitutional, what matters is the distinction between attempts to convince and attempts to coerce." *Zieper*, 474 F.3d at 66 (internal quotation marks omitted). We have considered the following factors when distinguishing between attempts to convince and attempts to coerce: (1) word choice and tone, *id.*; (2) the existence of regulatory authority, *Okwedy*, 333 F.3d at 343; (3) whether the speech was perceived as a threat, *Rattner v. Netburn*, 930 F.2d 204, 210 (2d Cir. 1991); and, perhaps most importantly, (4) whether the speech refers to adverse consequences, *Hammerhead*, 707 F.2d at 39. No one factor is dispositive. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). "[U]nder certain circumstances, oral or written statements made by public officials will require courts to draw fine lines between permissible expressions of personal opinion and implied threats to employ coercive state power to stifle protected speech." *Hammerhead*, 707 F.2d at 39.

As for qualified immunity from these claims, the question whether an official's actions violated clearly established law must be viewed in the light of the specific context of the case, not as a broad general proposition. *Zieper*, 474 F.3d at 67. Indeed, "the fact that the general proposition that the First

Amendment prohibits 'implied threats to employ coercive state power to stifle protected speech' is well-established does not end our inquiry." *Id.* (quoting *Hammerhead*, 707 F.2d at 39). Rather, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). While the exact official action need not have been previously held unlawful, its unlawfulness must be apparent in light of pre-existing case law. *Id.*

***B. Application***

First, we consider whether the NRA sufficiently pleaded a First Amendment violation. Second, we consider whether, assuming it did, the law was clearly established such that the violation would have been apparent to a reasonable official at the time.

***1. Did the NRA Sufficiently Plead a First Amendment Claim?***

In asserting a violation of its First Amendment rights, the NRA relies principally on Vullo's actions with respect to and statements in the Guidance Letters, Press Release, Consent Decrees, and Lloyd's meetings. We discuss first the Guidance Letters and Press Release and second the Consent Decrees and Lloyd's meetings.

**a. The Guidance Letters and Press Release**

The Complaint alleges that Vullo's statements in the Guidance Letters constituted "threats . . . of adverse action if institutions failed to support Defendants' efforts to stifle the NRA's speech and to retaliate against the NRA based on its viewpoint." J. App'x at 154 ¶ 48. It alleges that the Press Release "threatened" regulated entities with "costly investigations, increased regulatory scrutiny and penalties" if they did not "discontinue[] . . . their arrangements with the NRA." *Id.* at 144 ¶ 21 & n.16. And it alleges that the Guidance Letters and actions of Vullo (and Cuomo) were intended to and did "coerce insurance agencies, insurers, and banks into terminating business relationships with the NRA." *Id.* at 155 ¶ 52.

We conclude that these allegations fail to plausibly allege entitlement to relief. First, whether Vullo "threatened" or "coerced" entities in an unconstitutional sense are conclusions and characterizations that must be supported by factual allegations as to what she said and did. *Whiteside*, 995 F.3d at 321 ("[A] court should not accept as true allegations that amount to mere legal conclusions." (internal quotation marks omitted)). Second, when the Complaint's factual allegations are separated from its conclusions and characterizations, *see*

*Iqbal*, 556 U.S. at 679, it is apparent that the Complaint fails to plausibly allege that Vullo engaged in unconstitutional threatening or coercive conduct. *See id.* at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Vullo's words in the Guidance Letters and Press Release speak for themselves, and they cannot reasonably be construed as being unconstitutionally threatening or coercive. For example, in the Guidance Letters, Vullo referred to the "devastation caused by gun violence" as "tragic" and "regrettabl[e]," and called it "a public safety and health issue that should no longer be tolerated by the public." J. App'x at 183. She urged DFS-regulated entities "to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations, if any, as well as continued assessment of compliance with their own codes of social responsibility." *Id.* at 184. And in the Press Release, she stated:

Corporations are demonstrating 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. DFS urges 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.

*Id.* at 181.

We conclude, as a matter of law, that these statements do not cross the line between an attempt to convince and an attempt to coerce. *See Zieper*, 474 F.3d at 66; *see also Bantam Books*, 372 U.S. at 67. Rather, Vullo's statements in the Guidance Letters and Press Release are clear examples of permissible government speech. *See, e.g., Walker*, 576 U.S. at 208; *Wandering Dago, Inc.*, 879 F.3d at 34. She plainly favored gun control over gun promotion and she sought to convince DFS-regulated entities to sever business relationships with gun promotion groups. Although she did have regulatory authority over the target audience, and even assuming some may have perceived the remarks as threatening, the Guidance Letters and Press Release were written in an even-handed, nonthreatening tone and employed words intended to persuade rather than intimidate. They did not refer to any pending investigations or possible regulatory action; the only "adverse consequences" alluded to were the "risks, including reputational risks . . . *if any*," of continuing to do business with gun promotion groups amid growing public concern over gun violence and the "social backlash" against "organizations that promote guns that lead to senseless violence." J. App'x at 183-84, 186-87 (emphasis added). And those consequences

were mentioned only in the context of "encourag[ing]" businesses to evaluate risk. *Id.* at 184, 187. The statements did not "intimat[e] that some form of punishment or adverse regulatory action [would] follow the failure to accede to the [] request" to discontinue arrangements with the NRA and other gun promotion organizations. *Hammerhead*, 707 F.2d at 39.

The NRA argues on appeal that "[t]he Guidance Letters are suffused with political concerns far afield from DFS's mandate, urging banks and insurers to heed 'the voices of the passionate, courageous, and articulate young people' speaking out in favor of gun control." Appellee's Br. at 11 (quoting the Guidance Letters). In our view, however, it was reasonable for Vullo to speak out about the gun control controversy and its possible impact on DFS-regulated entities. The general backlash against gun promotion groups and businesses that associated with them was intense after the Parkland shooting. It continues today.<sup>13</sup> Such a backlash could (and likely does) directly affect the New York financial markets; as research shows, a business's response to social issues can directly affect its financial stability in this age of enhanced corporate social

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<sup>13</sup> See Michael Martin, *Former Gun Industry Exec Speaks Out Against NRA's Role in Mass Shootings*, NPR (May 28, 2022, 5:19 PM), <https://www.npr.org/2022/05/28/1101955074/former-gun-industry-exec-speaks-out-against-nras-role-in-mass-shootings>.

responsibility.<sup>14</sup> As Superintendent of DFS, Vullo was charged with overseeing insurance entities, banks, and other financial institutions in New York, and she surely had the right 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.

We conclude, with respect to the Guidance Letters and Press Release, that the Complaint falls short of plausibly alleging unconstitutional threats or coercion.

**b. The Consent Decrees and Lloyd's Meetings**

Vullo's statements at the Lloyd's meetings present a closer call. The Complaint alleges that during the meetings Vullo "discussed an array of technical regulatory infractions plaguing the affinity-insurance marketplace" but "made it clear, however, that DFS was less interested in pursuing the infractions

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<sup>14</sup> See Lily Zheng, *We're Entering the Age of Corporate Social Justice*, Harv. Bus. Rev. (June 15, 2020), <https://hbr.org/2020/06/were-entering-the-age-of-corporate-social-justice> (explaining that research has shown that companies that have effective corporate social responsibility programs are more profitable than those that do not). Indeed, according to a study published in 2017 -- less than one year before the Parkland shooting -- seven out of ten Americans believed companies had an obligation to take action to address key social and environmental issues, even if those issues were not relevant to everyday business operations. See *Americans Willing to Buy or Boycott Companies Based on Corporate Values, According to New Research by Cone Communications*, Cone (May 17, 2017), <https://conecomm.com/2017-5-15-americans-willing-to-buy-or-boycott-companies-based-on-corporate-values-according-to-new-research-by-cone-communications/>.

of which she spoke, so long as Lloyd's ceased providing insurance to gun groups, especially the NRA." J. App'x at 144. But even putting aside the lack of precision as to what Vullo actually said to make her message "clear," reviewing the statements in context, as we must, *see Iqbal*, 556 U.S. at 663-64, the allegations do not plausibly amount to an unconstitutional threat or coercion to chill the NRA's free speech.

The "context" here was an investigation, commenced months before the meetings, that was triggered by a referral from the DA's Office. DFS had begun an investigation into Carry Guard and related programs in October 2017. The investigation revealed that Lockton, Chubb, and Lloyd's were selling illegal insurance policies -- programs created and endorsed by the NRA. The policies insured New York residents for litigation defense costs resulting from intentional, reckless, and criminally negligent acts with a firearm that resulted in another person's injury or death. This coverage violated New York law and public policy and resulted in three substantial Consent Decrees, whereby the companies agreed to pay a total of more than \$13 million in fines and to discontinue the programs. Again, the Consent Decrees speak for themselves -- they explained the violations of law and, contrary to the NRA's assertions, did

not require the companies to sever ties with the NRA. Rather, they explicitly permitted the companies to continue to do business with the NRA, assuming of course the programs did not violate New York law.

The NRA nonetheless argues that the investigation renders Vullo's other statements threatening. In other words, it argues that even though Vullo did not explicitly threaten adverse regulatory action, the fact that she previously began investigating entities for insurance law violations should render her nonthreatening government speech threatening. We are not persuaded. To the contrary, the investigation explains the reasonableness of Vullo's actions.

To the extent Vullo offered Lloyd's leniency in the course of negotiating a resolution of the apparent insurance law violations, context shows that she was merely carrying out her regulatory responsibilities. Even with all reasonable inferences drawn in the NRA's favor, it is apparent Vullo did not coerce Lloyd's (or the other entities in question) into severing ties with the NRA; indeed, the consent decrees explicitly provided otherwise. Moreover, the Lloyd's Consent Decree was no more severe than that of Chubb or Lockton; in fact, Lloyd's was subject to \$2 million *less* in fines than Lockton. And the Complaint alleges no facts to support the conclusion that Chubb or Lockton were coerced

into settling with DFS. Rather, the well-pleaded facts in the Complaint demonstrate that the entities -- sophisticated companies represented by experienced counsel -- admitted wrongdoing based on their actual insurance law violations and that Vullo was motivated by her duty to address those violations.

*Twombly* provides guidance here. There, the Supreme Court held that allegations of parallel business conduct and a bare assertion of conspiracy were insufficient to state an antitrust conspiracy claim. 550 U.S. at 557-66. The Court reasoned that the defendants' behaviors could be explained by lawful economic incentives and concluded that there was "no reason to infer that the companies had agreed among themselves to do what was only natural anyway." *Id.* at 566 ("[W]e agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each [defendant-company] intent on keeping its regional dominance.").

Here, in 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. Her actions were plainly reasonable. The well-pleaded allegations of the Complaint show that she was

simply executing her duties as DFS Superintendent and engaging in legitimate enforcement action. All in all, the Complaint fails to plausibly allege that Vullo unconstitutionally threatened or coerced Lloyd's or the other entities to stifle the NRA's speech.

2. *Was the Law Clearly Established?*

Finally, even assuming the NRA sufficiently pleaded that Vullo engaged in unconstitutionally threatening or coercive conduct, we conclude that Vullo is nonetheless entitled to qualified immunity because the law was not clearly established and any First Amendment violation would not have been apparent to a reasonable official at the time.

While it was clearly established, as a general matter, that "the First Amendment prohibits implied threats to employ coercive state power to stifle protected speech," *Zieper*, 474 F.3d at 67 (cleaned up), the contours of that right were not so "sufficiently clear" that a reasonable official in the circumstances here would have understood that what she was doing violated that right. *Anderson*, 483 U.S. at 640. The right alleged to have been violated "must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Id.* The violation must have been apparent in light of pre-existing case law for qualified

immunity to be denied. *Id.* Here, the various cases addressing the issue did not provide clear and particularized guidance but involved very different circumstances and much stronger conduct. The cases do not clearly establish that Vullo's statements in this case were unconstitutionally threatening or coercive.<sup>15</sup>

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<sup>15</sup> See, e.g., *Bantam*, 372 U.S. at 62 n.5, 63, 66-67 (finding unconstitutional coercion where the Rhode Island Commission to Encourage Morality sent letters to book distributors citing its legislative mandate, advising that lists of "objectionable" books were being sent to Chief of Police, and warning that the Attorney General "will act" in case of noncompliance); *Okwedy*, 333 F.3d at 344 (holding that a minister who posted a controversial message on a billboard stated a First Amendment retaliation claim where the Staten Island Borough President wrote a letter to the billboard company invoking his official authority, advising that he was aware that the company "derives substantial economic benefits" from their billboards, and instructing the company to contact his "legal counsel and Chair of [his] Anti-Bias Task Force"); *X-Men Sec.*, 196 F.3d at 68 (holding that legislators were protected by qualified immunity from First Amendment claims where the legislators asked government agencies to investigate a private security company, questioned the company's eligibility for an award of a publicly-funded contract, and advocated that it not be retained to provide services to a publicly financed housing complex); *Rattner*, 930 F.2d at 205 (holding that a businessman who wrote a controversial article about a village administrator stated a First Amendment claim against the administrator where the administrator wrote a letter to the businessman's colleagues asking a series of targeted questions about the article, publicly announced that he had written the letter, and publicly warned that he made a list of local businesses at which he regularly shopped); *Hammerhead*, 707 F.2d at 38-39 (holding that First Amendment rights of the creators of a satirical board game were not violated where a city human resources administrator urged stores to refrain from selling the game, appealed to conscience and decency rather than punishment or adverse action, and the request "was nothing more than a well-reasoned and sincere entreaty in support of [the administrator's] own political perspective").

The NRA has not cited, and we are not aware of, any case analogous to this one, where a government official has been held to have violated the First Amendment by making statements like those in the Guidance Letters and Press Release, which use only suggestive language and rely on the power of persuasion. In the Guidance Letters, Vullo commends DFS-regulated entities for their commitment to corporate social responsibility and for being "key players in maintaining and improving public health and safety in the communities they serve." J. App'x at 183. In the Press Release, she praises businesses for "lead[ing] the way and bring[ing] about the kind of positive social change needed to minimize the chance that we will witness more of these senseless tragedies." *Id.* at 181. Moreover, the Press Release states that the Governor was "directing the Department of Financial Services to *urge* insurers and bankers" to assess the risks of doing business with gun promotion groups, *id.* at 180 (emphasis added), not to *investigate* or take any enforcement action against them. It certainly was not clearly established at the time that any of these statements would violate the First Amendment, and indeed, as discussed above, many cases emphasized the right of government officials to speak, to take and express views, and to try to persuade. Furthermore, as the district court acknowledged, we have never held

that nonthreatening government speech *becomes* threatening simply because the speaker oversaw an earlier, legitimate law enforcement investigation, and we decline to do so today.

As for the Consent Decrees and Lloyd's meetings, the NRA similarly has not cited, and we are not aware of, any case like this one, where a government official makes purportedly threatening statements urging an entity to cut ties with what is essentially its accomplice during an ongoing, legitimate investigation into serious misconduct, where the investigation results in consent decrees, and where the entities admit to violations of the law and agree to millions of dollars in fines and other significant relief. Moreover, assuming Vullo offered to go easy on Lloyd's if it severed ties with the NRA, we have never held that law enforcement officials may not offer leniency in exchange for help advancing their policy goals, especially when those policy goals aim to minimize the influence of a noncompliant business partner that has repeatedly violated the law. And again, as noted, DFS explicitly permitted Lloyd's (and the other entities) to continue doing business with the NRA.

Qualified immunity balances the need to hold public officials accountable when they exercise their power irresponsibly with the need to shield

officials from harassment, distraction, and liability when they perform their duties responsibly. *Pearson*, 555 U.S. at 231. The Complaint's factual allegations show that, far from acting irresponsibly, Vullo was doing her job in good faith. She oversaw an investigation into serious violations of New York insurance law and obtained substantial relief for the residents of New York. She used her office to address policy issues of concern to the public. Even assuming her actions were unlawful, and we do not believe they were, the unlawfulness was not apparent by any means.

Accordingly, even assuming the NRA plausibly alleged a First Amendment violation, Vullo would be protected by qualified immunity in any event.<sup>16</sup>

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<sup>16</sup> The Complaint also cites the New York state constitution, but it combines the state law claims with the federal claims and does not assert them as independent claims. Moreover, in their briefs on appeal and to the district court, the parties do not address the state law claims at all and do not cite New York law. Accordingly, we deem the NRA's state law claims abandoned. *See Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999) (per curiam). Moreover, even assuming the claims are not abandoned, we conclude that Vullo would be entitled to qualified immunity under New York law because, as discussed above, her actions were reasonable and there is nothing in the Complaint from which one could reasonably infer bad faith.

*CONCLUSION*

For the reasons stated above, we REVERSE the district court's denial of Vullo's motion to dismiss and REMAND the case with directions for the district court to enter judgment for Vullo.