No. 22-842

IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,

v.

MARIA T. VULLO,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF THE PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan nonprofit civil rights organization devoted to defending civil liberties. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as freedom of speech, association, and the press, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because legislatures, administrative agencies, and sometimes even the courts have trampled them for so long.

NCLA views the administrative state as an especially serious threat to civil liberties. No other current development in American law denies more rights to more Americans. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by the administrative state's abuse of authority to infringe on Americans' rights to freedom of speech and association—a growing trend that no longer represents an aberration. As such, it is imperative that the Court return to first

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[1] Pursuant to Rule 37.6, no party's counsel authored any part of this brief. No person or entity, other than *amicus curiae* and its counsel, paid for the brief's preparation or submission.

principles and the text of the First Amendment in cases brought alleging unlawful government interference in freedom of speech or association and hold that the controlling question is whether the government's conduct "abridged" any speech or association.

SUMMARY OF THE ARGUMENT

The First Amendment's command is clear: "Congress shall make no law ... abridging freedom of speech[.]" U.S. CONST. amend. I. It is now well-established that the First Amendment's guarantee of freedom of speech extends to freedom of association, protecting Americans from abridgements by federal or state officials.

Thus, the pertinent question for this Court's consideration is whether a government regulator, Maria T. Vullo, the Superintendent of the New York Department of Financial Services ("DFS"), "abridged" National Rifle Association's ("NRA") rights of speech and association when she used her authority to stop regulated entities from conducting business with NRA by raising the specter of adverse regulatory actions.

The court below wrongly concluded that NRA's First Amendment claims turn on whether Vullo's various statements in "Guidance Letters, [a] Press Release, and Consent Decrees were 'implied threats to employ coercive state power to stifle protected speech.'" App.22 (quoting *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983)). The Second Circuit then applied a four-factor framework to assess whether Vullo employed "coercive state power," App.25, and, after applying that framework,

concluded that NRA had failed to provide it sufficient facts from which to infer Vullo had coerced third parties. App.33–34.

While "coercion" constitutes "abridgement," it is not necessary to prove—or even plead—coercion to establish a violation of freedom of speech or association. Coercion is sufficient, but is not necessary for abridgment to occur. Further, rather than create another multi-prong test, four-factor framework, or novel standard to evaluate a constitutional claim, this Court should instead refocus on the text of the First Amendment, as informed by both history and tradition.

The text of the Free Speech Clause establishes "abridging" as the standard to judge whether a government actor has violated the First Amendment's protections for freedom of speech and association. According to the facts NRA alleged in its complaint, which must be accepted as true at this stage of litigation, Vullo clearly was "abridging," or lessening NRA's constitutionally guaranteed freedom of speech and association. Nothing more is needed for NRA to state a claim for violations of its rights to freedom of speech and association.

Assuming *arguendo* that the Second Circuit appropriately concluded that NRA had to show that Vullo coerced third parties into disassociating with it, NRA put forth facts that met this unnecessarily higher bar.

In sum, whether this Court adopts a textual standard that asks whether the government abridged

NRA's rights to freedom of speech and association, or applies the "coercion" standard, the complaint states a valid claim against Vullo upon which relief may be granted. Accordingly, this Court should reverse the Second Circuit's decision and remand the case for further proceedings.

ARGUMENT

I. IN DISMISSING NRA'S COMPLAINT, THE SECOND CIRCUIT ERRED IN APPLYING AN ANTI-TEXTUAL "COERCIVE STATE POWER" STANDARD

A. The First Amendment Forbids the Government from "Abridging" the Freedom of Speech and Association

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging* the freedom of speech, or of the press[.]" U.S. CONST. amend. I. (emphasis added). This Court held in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), that the First Amendment's guarantee of freedom of speech likewise protects freedom of association. *See id.* at 460 ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.") (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925)).

Further, the Fourteenth Amendment incorporates the constitutional protections embodied in the First

Amendment against state governments. *See Janus v. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) ("The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech.").

Courts are obliged to interpret the Constitution in accordance with its text, structure, and original understanding, informed by history and tradition. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2128 (2002). Moreover, "[c]onstitutional analysis must begin with 'the language of the instrument,' … which offers a 'fixed standard' for ascertaining what our founding document means." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244–45 (2022) (quoting *Gibbons v. Ogden,* 22 U.S. 1, 186–89 (1824); 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 399, p. 383 (1833)).

Beginning, then, with the text of the First Amendment: "abridging" is the "fixed standard" adopted at the Founding for evaluating whether the government has violated the constitutional guarantees of freedom of speech, press, and association. Dictionaries published contemporaneously with the Constitution, such as Samuel Johnson's Dictionary, defined "to abridge" first as "to 'make shorter' and, second, to 'contract' or 'diminish.'" *See* Philip Hamburger, *Courting Censorship*, 4 J. FREE SPEECH L. 195, Part III.B (forthcoming 2024) (manuscript)[2] (footnote omitted)

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[2] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4646028

(quoting *Abridge*, SAMUEL JOHNSON'S DICTIONARY[3]). "Its third meaning was to 'deprive of,' including to deprive one of a right or privilege." *Id*. (footnote omitted).

Other dictionaries, as Hamburger details in *Courting Censorship*, likewise consistently defined "to abridge" as "reducing" and "secondarily, some add depriving." *Id*. (footnote omitted). Additional texts from the general time frame further demonstrate that "abridge" was considered synonymous with "restrain," including Federalist No. 84, penned by Alexander Hamilton, wherein he spoke of "an abri[d]gement of the liberty of the press" and stressed "the liberty of the press ought not to be restrained." Hamburger, *supra* p. 5, at Part III.B (quoting THE FEDERALIST No. 84 (Alexander Hamilton) at 580, note (Jacob E. Cooke ed., 1961). "Indeed, *The Federalist* repeatedly used the word *abridging* and variations of it in ways that typically alluded to reducing." *Id*. (citing THE FEDERALIST CONCORDANCE 4 (Thomas S. Engeman, Edward J. Erler, & Thomas B. Hofeller ed., 1980).

"Abridging," as used in the First Amendment thus meant diminishing, reducing, restraining, or contracting freedom of speech—a much lower bar than the "coercion" standard adopted by the Second Circuit.

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[3] https://johnsonsdictionaryonline.com/views/search.php?term=abridge (last visited Jan. 16, 2024).

The lower bar for First Amendment free-speech violations arises not only from the clause's text, but also from its logic and structure. As this Court has recognized, the First Amendment's primary purpose is to encourage free and open debate. *See Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983)) ("'[G]overnment has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"). As Judge Learned Hand recognized, the rationale underlying the First Amendment is that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

Further, as Justice William Brennan noted, "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government." *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

The First Amendment's guarantee of freedom of speech is what some legal philosophers refer to as an architectonic, or basic good. As legal philosopher Robert George has written, "[p]olitical society has … a special interest in those forms of communication that enable people to co-operate to achieve the goods that political society is devoted to achieving." ROBERT GEORGE, MAKING MEN MORAL 205 (1993). Citizens

must be able "to communicate their thoughts … to decision-makers" to "truly advance the common good." *Id.* at 203–04.

The Framers of the First Amendment recognized that the protection at the heart of the Free Speech Clause is freedom from governmental limitation on matters of public importance, including and especially political matters. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

This precedent is consistent with and reflects the values embodied in the First Amendment as well as the use of the term "abridging," rather than "prohibiting": Government should play no role in limiting public discourse or restricting the free flow of ideas, opinions, debate, and association.

The historical record also makes clear that the word "abridging" was intentionally chosen in the speech context to create a lower bar for prohibited government action than that set for establishing unconstitutional government action vis-à-vis the practice of religion. While freedom of speech and of the press may not be "abridged," free exercise of religion cannot be "prohibited," the latter term historically meaning "to forbid; to interdict by authority." *See* Hamburger, *supra* p. 5, at III.B

(quoting *Prohibit*, SAMUEL JOHNSON'S DICTIONARY[4]). Thus, "[a] law prohibiting is prototypically one that comes with the force of law, perhaps its inward obligation and at least its outward coercion." Hamburger, *supra* p. 5, at Part III.B. *See also Lying v. Nw. Ind. Cemetery Prot. Ass'n*, 485 U.S. 439, 450–51 (1988) (explaining "[t]he crucial word in the constitutional text is 'prohibit'" and thus the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions").

While some degree of governmental coercion is acceptable according to the plain text of the First Amendment in the free exercise context, in the freedom of speech context, "not even a minor prohibition is required for abridging the freedom of speech." Hamburger, *supra* p. 5, at Part III.B.

The textual distinction between "abridging" and "prohibiting" also cannot be dismissed as a mere flair of linguistic variety. To the contrary, the drafting history of the First Amendment reveals an intentional choice:

> In July 1789, the draft Bill of Rights contained adjacent paragraphs guaranteeing religious rights and then speech, assembly, and petitioning rights, saying in each that the rights shall not

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[4] https://johnsonsdictionaryonline.com/views/search.php?term=prohibit (last visited Jan. 16, 2024).

> be "infringed." In early September, however, the Senate combined the two paragraphs and barred Congress from making any law "prohibiting" the free exercise of religion or "abridging" the freedom of speech, or the press.

Id. (internal citations and footnotes omitted).

The historical context and structure of the First Amendment thus indicates that the Framers purposefully selected different terms with distinct meanings. The Framers' conscious choice to use the term "abridging" in the freedom of speech context but "prohibiting" in the religion context confirms they sought to prevent the government from *diminishing* freedom of speech, which does not require a plaintiff to show coercive conduct aimed at suppressing speech.

To be sure, the government "abridges" freedom of speech, association, and the press, when it coerces third parties to silence viewpoints. But the Constitution established "abridging" as the "fixed standard" and thus the proper question is whether the government's conduct "contracts," "diminishes," "restrains," or "reduces" protected speech, association, or the press—not whether the government coerced others to abridge those freedoms.

B. The Coercion Standard Applied by *Vullo* and Other Circuit Courts Ignores the Constitutional Text and Flows from a Misreading of Supreme Court Precedent

The Second Circuit below neglected the Free Speech and Press Clause's textual prohibition on "abridging" those rights and instead incorrectly framed the relevant issue as whether Vullo's various statements were "implied threats to employ coercive state power to stifle protected speech." App.22 (quoting *Hammerhead*, 707 F.2d at 39). Further quoting its precedent in *Zieper v. Metzinger*, 474 F.3d 60, 66 (2d Cir. 2007), the court emphasized, "[i]n determining whether a particular request to suppress speech is constitutional, what matters is the distinction between attempts to convince and attempts to coerce." App.24–25 (quoting *Zieper*, 474 F.3d at 66). In addition to *Hammerhead* and *Zieper*, the panel decision in *Vullo* relied on *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam), which also treated coercion as the appropriate standard. App.25.

In *Okwedy*, plaintiffs contracted with a media company to install billboards declaring homosexuality an abomination. Defendant Molinari, Borough President of Staten Island, sent the company a letter stating that the content of the billboards was "not welcome in our Borough" and suggested the borough would interfere with the company's business, harming it economically, if the billboards were not taken down. The company caved to Molinari's demand and removed them. *See Okwedy*, 333 F.3d at 341–42.

The plaintiffs contended that Molinari had violated their First Amendment free speech rights by impliedly threatening a third party with adverse consequences for carrying their message. The Second Circuit held that "a public official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights even if the public official defendant lacks direct regulatory or decisionmaking authority over the plaintiff or a third party that facilitates the plaintiff's speech." *Id.* at 340–41. In reaching that conclusion, the court framed the governing question as whether Molinari's letter "was an unconstitutional 'implied threat[] to employ coercive state power to stifle protected speech,' or a constitutionally-protected expression by Molinari of his own personal opinion." *Id.* at 342 (quoting *Hammerhead*, 707 F.2d at 39).

Other circuits have likewise assumed that coercion of third parties is required to find the government violated the free speech rights of the plaintiff. For instance, the Seventh Circuit in *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230–31 (7th Cir. 2015), quoting *Okwedy*, stated:

> What matters is the distinction between attempts to convince and attempts to coerce. 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.

Id. (quoting *Okwedy*, 333 F.3d at 344).

Similarly, *O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023) considered whether the plaintiff stated a First Amendment claim against the California Secretary of State based on allegations that the office pressured Twitter to censor his tweets. The Ninth Circuit concluded that the pertinent question is whether the Secretary had used coercion or persuasion: "The former is unconstitutional intimidation while the latter is permissible government speech." *Id.* at 1163. The Ninth Circuit affirmed the dismissal of O'Handley's free speech claim, concluding that "the complaint's allegations do not plausibly support an inference that the [Secretary of State] coerced Twitter into taking action against O'Handley." *Id.*

Tellingly, none of these cases focused on the text of the First Amendment or explained why "coercion" is the relevant question when the requisite constitutional term is "abridging." In fact, neither the word "abridging" nor any of its derivations appeared in *Zieper*, *Okwedy*, *Hammerhead,* or *Backpage.com*, and the only reference to "abridging" in *O'Handley* occurred when the Ninth Circuit summarized the plaintiff's theory, explaining that he alleged the defendants "abridged his freedom of speech when the agency pressured Twitter to remove disfavored content[.]" *O'Handley*, 62 F.4th at 1163.

While these decisions ignored the plain language of the Free Speech and Press Clause in framing the controlling question as "coercion," the circuit courts did cite this Court's decision in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963), where the coercion standard apparently found its roots. For example, the Ninth Circuit cited *Bantam Books* to substantiate the proposition that "a State may not compel an intermediary to censor disfavored speech[,]" and then added, "*Bantam Books* and its progeny draw a line between coercion and persuasion[.]" *O'Handley*, 62 F.4th at 1163 (citing *Bantam Books*, 372 U.S. at 68–72). "This line holds even when government officials ask an intermediary not to carry content they find disagreeable[,]" *O'Handley* concluded. *Id.*

This conclusion flows from a fundamental misreading of *Bantam Books*, which fashioned no such distinction.

In *Bantam Books*, four publishers of paperback books widely distributed in Rhode Island sued the Executive Secretary and members of the state's "Commission to Encourage Morality in Youth[.]" *Bantam Books*, 372 U.S. at 59. That Commission had provided the exclusive wholesale distributor of plaintiffs' books a list of materials its members had judged "objectionable for sale, distribution or display to youths under 18 years of age." *Id.* at 59, 61. The Commission also provided the local police force with a list of the objectionable publications and informed the distributor of that fact. *Id.* at 62–63. Police would later visit the wholesaler to inquire whether the books were being distributed in the state. *Id.* at 63. The

government defendants in *Bantam Books* clearly sought to halt the sale of the listed books.

The publishers sued, arguing the Commission's conduct "amount[ed] to a scheme of governmental censorship devoid of the constitutionally required safeguards for state regulation of obscenity, and thus abridge[d] First Amendment liberties[.]" *Id.* at 64. This Court agreed, and in doing so, rejected the Commission's claim that it was "simply exhort[ing] booksellers and advis[ing] them of their legal rights." *Id.* at 66.

The *Bantam Books* Court stressed that "though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrate[d] that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67 (footnote omitted). The Court continued: "We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Id.* at 67–68 (footnote omitted)

Contrary to how lower courts have portrayed *Bantam Books* over the last several decades, that decision did *not* distinguish between "coercion" on the one hand and "convincing" or "persuasion" on the other. Rather, the Court framed the relevant concern as whether the Commission had "deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.*

at 67 (footnote omitted). In other words, the "substance" and not the form of the government's conduct proved dispositive to the question of abridgement.

Nothing in *Bantam Books* suggests that the Court was endorsing the requirement that, in cases where a plaintiff alleges his free speech rights were violated due to government interactions with a third party, coercion of those third parties must be established. While it accepted that coercion would establish a First Amendment violation, the Court did *not* say that something less would not. Further, the Court's reasoning in *Bantam Books* indicates that when government efforts to persuade a third party to censor speech succeed, abridgement has occurred.

That *Bantam Books* did not establish a dichotomy between "coercing" and "convincing" is further evident from this Court's caveat in the decision that it did "not mean to suggest that private consultation between law enforcement officers and distributors prior to the institution of a judicial proceeding can never be constitutionally permissible." *Id.* at 71.

The Court explained that it was not holding "that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws prohibiting obscenity[,]" and that "[w]here such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms." *Id.* at 71–72. The line that the government is allowed to police is legal versus illegal speech—not

favored versus disfavored speech, or even truthful versus untruthful speech.

But that was not the case in *Bantam Books*, the Court emphasized, as the Commission "went ... beyond advising the distributors of their legal rights and liabilities." *Id.* at 72. "Their operation was in fact a scheme of state censorship effectuated by extralegal sanctions; they acted as an agency not to advise but to suppress." *Id.*

Thus, the type of communication that the Court in *Bantam Books* posited would be permissible was one undertaken in good faith and specifically for the purpose of helping citizens comply with "valid laws prohibiting obscenity." *Bantam Books* most assuredly did *not* green light governmental communications designed to "convince" wholesalers to refuse to distribute other legally protected non-obscene books.

This Court's opinion in *Bantam Books* also proves significant for a second reason: The analysis focused on the conduct of the state actors and not that of the third party. That makes it far more relevant to the analysis of this case than other decisions in which courts have evaluated whether the conduct of third parties was attributable to the government. *See infra* at 18–21. Specifically, in *Bantam Books*, this Court did not consider whether the Rhode Island Commission bore liability for the wholesaler's decision not to distribute the blacklisted books but instead focused on "the activities of the Commission" and asked whether the "acts and practices of the members and Executive Secretary of the Commission ... were performed under color of state law and so

constituted acts of the State within the meaning of the Fourteenth Amendment." *Id.* at 64, 68 (citation omitted).

In sum, *Bantam Books*' analysis provides no basis for distinguishing between government's efforts to "coerce" censorship and attempts to "convince" or "persuade" a third party to voluntarily censor the speech or association of a third party. To the contrary, the *Bantam Books* decision indicates the focus for purposes of the First Amendment should be on the "substance" of the government's objective, and when that "substance" is the suppression of lawful speech, the government's conduct is unconstitutional. In other words, *Bantam Books* implicitly recognized that when the government acts to "abridge" or lessen speech, it violates the Free Speech Clause of the Constitution.

C. Case Law Often Cited to Support a "Coercion" Standard Is Not Applicable Here

The analysis in *Bantam Books* differs significantly from cases such as *Blum v. Yaretsky*, 457 U.S. 991 (1982), which have frequently been relied upon to support the high coercion standard.[5] For one, the core issue the Court considered in *Blum* was the

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[5] While the Second Circuit did not reference *Blum* in *Vullo*, the Fifth Circuit in *Missouri v. Biden* did. No. 3:22-cv-01213, 2023 WL 4335270 (W.D. La. July 4, 2023), *rev'd in part*, No. 23-30445, 2023 WL 5821788 (5th Cir. Sept. 8, 2023), *cert. granted sub nom. in Murthy v. Missouri*, 144 S. Ct. 7 (mem.) (2023). It considered *Blum* controlling, as opposed to the "abridging" standard set forth in the First Amendment.

circumstances under which the state could be liable for an independent decision made by a third party.

In that case, the "respondents objected to the involuntary discharge or transfer of Medicaid patients *by their nursing homes* without certain procedural safeguards." *Id.* at 1003 (emphasis added) (footnote omitted). The government in *Blum* had no input into the nursing home's discharge and transfer decisions and in fact had no preference or desired outcome.

This Court in *Blum* began by focusing on the question of whose conduct was at issue in the litigation, writing: "Faithful adherence to the 'state action' requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint." *Id.* The Court concluded that the plaintiffs in *Blum* were "not challenging particular state regulations or procedures, and their arguments concede that the decision to discharge or transfer a patient originates not with state officials, but with nursing homes that are privately owned and operated." *Id.*

After identifying the gist of the plaintiffs' claim, the *Blum* Court categorized the lawsuit as one "seek[ing] to hold state officials liable for the actions of private parties." *Id.* To do so, this Court held, required proof the government had "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 1004 (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978)). Put otherwise, "the complaining party

must [] show that 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" *Id*. (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

In contrast to *Blum*, where the state neither requested nor desired the discharge of any nursing home resident—such determinations were the purview of the third-party facility—here Vullo achieved the specific ends she sought: insurers and bankers dropped NRA as a client because of the organization's pro-Second Amendment viewpoint. Thus, the "gravamen of the plaintiff's complaint" in this case revolves around not what the third-party insurers and banks did, but the New York Commissioner's actions allegedly abridging NRA's rights to freedom of speech and association.

Because the thrust of NRA's complaint concerns Vullo's own conduct (as opposed to the third parties), *Blum* and its variously phrased "coercive power," "significant encouragement," and "sufficiently close nexus," standards are inapplicable.

Blum, of course, also differs from this case in that it involved a due process claim alleging deprivation of Medicare benefits; the First Amendment right to freedom of speech—the crucial issue in this case—was not at play in the case. Thus, the "abridging" standard was not applicable in *Blum*.

To further complicate matters, beyond *Blum*, this Court has found state action present through various

other public/private arrangements. *See e.g. Brentwood Acad. v. Tenn. Secondary Sch., Athletic Ass'n*, 531 U.S. 288, 289, 296 (2001) (applying a "significant encouragement, either overt or covert" standard); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 941 (1982) (asking whether a private actor operated as "a willful participant in joint activity with the State or its agents"); *Evans v. Newton*, 382 U.S. 296, 299 (1966) (framing the standard as entwinement with governmental policies). These precedents also do not involve alleged violations of freedom of speech rights, but other constitutional and statutory abrogation. And for the reasons discussed throughout this brief, the abridging standard for the freedom of speech is more capacious than the standard for some other constitutional rights. Fidelity to the text of the First Amendment and specifically the use of the term "abridging" in assessing freedom of speech challenges also avoids the confusion caused by the evolution of discordant and inconsistent precedents in other contexts over the past decades.

D. The Coercion Standard Conflicts with the Well-Established Principle That the Government Cannot Do Indirectly That Which It Cannot Do Directly

The coercion standard applied by the Second Circuit and other lower courts conflicts with the nearly two-hundred-year-old principle that "a state … cannot do indirectly[] what it is prohibited from doing directly[.]" *Briscoe v. Bank of Commonwealth of Ky.*, 36 U.S. 257, 317 (1837). *See also Norwood v. Harrison*, 413 U.S. 455, 465 (1973) ("'[I]t is … axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is

constitutionally forbidden to accomplish.'") (quoting *Lee v. Macon Cnty. Bd. of Educ.*, 267 F. Supp. 458, 475–76 (M.D. Ala. 1967)); *Smith v. Turner*, 48 U.S. 283, 458 (1849) ("It is a just and well-settled doctrine established by this [C]ourt, that a State cannot do that indirectly which she is forbidden by the Constitution to do directly.").

This doctrine is a logical necessity if the Constitution is to be more than a dead letter: If the government can simply outsource constitutional violations to third parties—whether or not those parties are willing participants—the Constitution is meaningless.

Consistent with this doctrine, this Court in *NAACP v. Alabama*, held that the First Amendment's guarantee of Americans' right to freedom of association prohibited the state from forcing the NAACP to disclose its membership list. 357 U.S. at 461. Although the government's interference with NAACP members' associational rights was indirect, it nonetheless unconstitutionally abridged their associational rights.

This Court reaffirmed that point in *Healy v. James*, 408 U.S. 169 (1972) when, in discussing *NAACP,* the Court stressed "the Constitution's protection is not limited to direct interference with fundamental rights." *Id.* at 183. *See also Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960) (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936)) ("Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."); *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 108 n.5 (1967) (citing

Standard Computing Scale Co. v. Farrell, 249 U.S. 571, 577 (1919)) ("Nor can the restraints imposed by the Constitution on the States be circumvented by local bodies to whom the State delegates authority."); *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) ("[T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, *nor nullified indirectly by them through evasive schemes* for segregation whether attempted ingeniously or ingenuously.") (internal quotation and citation omitted) (emphasis added).

The coercion standard adopted by the Second Circuit and other courts gives government actors carte blanche to violate the free speech, association, and press rights of Americans. Under that analytic framework, government actors can, for example, form cooperative arrangements with third parties to censor Americans' speech. Such an arrangement, resulting in abridgement of freedom of speech, is anathema to and forbidden by the First Amendment. And it is impossible to reconcile such gaming of constitutional rights that would be blessed should this Court ratify the anti-textual "coercion" standard, with what is "axiomatic"—that the government cannot do indirectly that which it cannot do directly. *Norwood,* 413 U.S. at 465 (citing *Lee*, 267 F. Supp. at 475–76).

E. The Government Speech Doctrine Does Not Alter the "Abridging" Standard

Of course, the government may (and is expected to) favor certain views, express certain views, and

promote certain views. Such speech, protected by the government speech doctrine, finds its roots in the executive power of executive officers to speak within the scope of their executive power. *See* Hamburger, *supra* p. 5, at Part IV.B.

As this Court explained in *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009), "it is not easy to imagine how government could function if it lacked this freedom." *Id. See also id.* (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting)) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.") (footnote omitted).

Yet the Second Circuit extrapolated from that principle to reach the unsupported conclusion that the government speech doctrine also allows state actors to entreat, encourage, or convince third parties to censor Americans' speech or refuse to associate with them, without running afoul of the First Amendment, writing: "[Vullo] plainly favored gun control over gun promotion and she sought to convince DFS-regulated entities to sever business relationships with gun promotion groups[]"—and those efforts "are clear examples of permissible government speech." App.28.

The Second Circuit also excused the government's conduct by rationalizing that "government officials have a right—indeed, a duty—to address issues of public concern." *Vullo*, 49 F.4th at 707. Framing the issue as competing rights of two entities, the government and NRA, the court concluded that "public

officials are generally free to favor certain views over others when they speak." *Id.* at 714–15 (citing *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207–08 (2015)).

However, executive officers have no First Amendment right to speak, as that amendment is a limit on government power, not a source of such power. *See* Hamburger, *supra* p. 5, at Part IV.B. And this Court has never held that governmental requests to third parties to censor the viewpoints of other Americans—or to refuse to associate with them because of their viewpoint—is protected "government speech."

To the contrary, drawing on the Constitution, as well as existing precedent, it is clear the government speech doctrine does not encompass a right to covertly abridge speech. Put otherwise, government speech must comport with the other constitutional limitations on governmental power, including the prohibition on abridging freedom of speech and association.

As two constitutional law scholars explained:

> The government must be able to employ speech as a means of accomplishing its constitutional purposes, but it may not employ speech as an end in itself. And just as other means employed by government—regulating, taxing, spending—are subject to the First Amendment's limitations, so also would the means of government speech be subject to the First Amendment.

Randall P. Bezanson, William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1502 (2001).

The Second Circuit failed to grasp the vast and constitutionally significant distinction between a government actor telling the American public that she believes the ready availability of firearms is a detriment to society and extorting third parties to censor speech, refuse to associate with a business or an organization, or to otherwise retaliate against an organization because of its pro-Second Amendment viewpoint.

In short, asking a third party to censor the protected speech of another or to disassociate with another—even if the request is not coercive—constitutes an abridgement of that individual's rights, and the government speech doctrine does not alter that conclusion.

II. THE SECOND CIRCUIT ERRED IN DISMISSING NRA'S COMPLAINT

NRA sufficiently pled facts to show its freedom of speech and association was abridged by Vullo's campaign to dismantle NRA through lost corporate partnerships. Accordingly, the Second Circuit erred in dismissing NRA's complaint.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

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 misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). The plausibility standard is "not akin to a 'probability requirement,' ... [but] it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 556 U.S. at 678 (quoting *Twombly*, 556 U.S. at 556). In deciding a Rule 12(b)(6) motion, the court construes all reasonable inferences in a plaintiff's favor. *Gonzalez v. Hasty*, 802 F.3d 212, 219 (2d Cir. 2015) (citing *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 115 (2d Cir. 2008)).

NRA more than sufficiently alleged a cause of action for violations of its rights to freedom of speech and association under either the textual "abridging" standard or any of the judicially developed doctrinal standards, such as "coercion."

A. Vullo "Abridged" NRA's First Amendment Rights to Freedom of Speech and Association

Here, the facts as alleged by NRA establish that Vullo "contracted," "diminished," "restrained," and "reduced" its protected speech and associational rights, as can be readily discerned from the Guidance Letters, statements made in a Press Release, meetings with industry executives, and investigative actions.

NRA's complaint detailed numerous efforts by the Defendant to induce banks and insurance companies to drop NRA because of its pro-Second Amendment

viewpoint. From the facts alleged, a reasonable factfinder could conclude that Vullo diminished NRA's associational rights because of its viewpoint, including by issuing Guidance Documents and a Press Release that not very subtly called for businesses to forsake relationships with pro-Second Amendment groups for the safety of "the public." Even more blatantly, Vullo targeted insurance companies serving NRA and suggested even more wide spread investigative fishing expeditions would be forthcoming, only to resolve those cases soon after the insurance companies agreed to drop NRA.

Defendant's campaign was clearly aimed to, and in fact did, abridge NRA's First Amendment freedom of speech and association by causing banks and insurance companies to sever their relationships with NRA because of its viewpoint. *See Bantam Books*, 372 U.S. at 68 ("[P]ublic officers' thinly veiled threats to institute criminal proceedings [against third parties] ... directly and designedly stopped the circulation of publications in many parts of Rhode Island."). This impeded NRA's ability to associate and to promote its viewpoint.

This is precisely the pernicious sort of viewpoint discrimination that the Constitution and this Court forbid. As the ACLU put it, DFS "focused on the NRA and other groups not because of any illegal conduct, but because they engage in 'gun promotion'—in other words, because they advocate a lawful activity."[6] *See*

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[6] David Cole, *New York State Can't Be Allowed to Stifle the NRA's Political Speech*, ACLU NEWS & COMMENTARY (Aug. 24, 2018),

Matal v. Tam, 582 U.S. 218, 244 (2017) ("We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'") (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)); *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.").

Indeed, the conduct here resulted in a "form of regulation that creates hazards to protected freedoms" that this Court eschewed in *Bantam Books*. There, the Court condemned the Commission's coercive conduct, observing:

> Herein lies the vice of the system. The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. … It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.

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https://www.aclu.org/news/free-speech/new-york-state-cant-be-allowed-stifle-nras-political-speech.

Bantam Books, 372 U.S. at 69–70.

Likewise, Vullo's conduct served as the functional equivalent of a state regulation, albeit one that "eliminated the safeguards" present in a regulatory system implemented through the proper channels. The abuse was even more insidious in this case because Defendant manipulated the state's regulatory authority over banks and insurance companies to target NRA, which existed beyond the purview of DFS's authority.

DFS may not, through inadvertent channels, squash constitutionally protected speech of gun advocates. The Constitution does not allow it, and neither should this Court.

B. Alternatively, Under the Coercion Standard, NRA Pled Sufficient Facts from Which to Infer That Vullo Violated NRA's First Amendment Rights

Should this Court disagree that "abridging" is the standard for establishing a violation of freedom of speech or association rights, and instead require Plaintiff to allege "coercion," NRA nonetheless sufficiently stated a First Amendment claim under the Second Circuit's own test.

To determine whether the government has unconstitutionally suppressed speech, the Second Circuit considers "'the distinction between attempts to convince and attempts to coerce.'" App.24–25 (quoting *Zieper*, 474 F.3d at 66). The line is drawn between the two by looking at "(1) word choice and tone, … (2) the

existence of regulatory authority, … (3) whether the speech was perceived as a threat, … and, perhaps most importantly, (4) whether the speech refers to adverse consequences[.]" App.25 (citations omitted). The Second Circuit wrongly concluded that Vullo did not cross the coercion line.

True, Plaintiff did not allege that Vullo explicitly stated that companies must drop NRA or face scrutiny and an investigation by the State—serious, adverse consequences that those companies undoubtedly had strong motivation to avoid. But the facts alleged in the complaint created a reasonable inference that such consequences would result should the companies refuse to stop conducting business with NRA. *See Zieper*, 474 F.3d at 66 ("[I]t is necessary to consider the entirety of the defendants' words and actions in determining whether they could reasonably be interpreted as an implied threat.") (citing *Bantam Books*, 372 U.S. at 67). Indeed, Vullo's statements were just the sort of "thinly veiled threats" that the Court in *Bantam Books* found rendered the bookseller's "compliance with the Commission's directives … not voluntary." *See Bantam Books*, 372 U.S. at 68.

Consider the "guidance" letters in context. In February of 2018, a deranged gunman slaughtered seventeen people at a high school in Parkland, Florida. App.7. Later that month, Vullo "met with senior executives of Lloyd's" and expressed "[her] desire to leverage [her] powers to combat the availability of firearms." App.8–9 (internal quotations and citations omitted). Vullo thought it convenient to mention that she believed "Lloyd's was violating several provisions of New York insurance law[,]" and the solution was to

"no longer provid[e] insurance to gun groups like the NRA[.]" *Id.* at 9 (internal quotations and citations omitted). "Vullo also sought Lloyd's aid in DFS's campaign against gun groups." *Id.* (internal quotations and citations omitted).

Then, just a couple of months later, on April 19, 2018, Vullo issued a press release and guidance document directed at "The Chief Executive Officers or Equivalents of All Insurers Doing Business in the State of New York[.]" App.246.[7] The release not only mentioned that atrocity but listed all of the significant mass shootings in the last twenty-five years, including Columbine High School, Sandy Hook, Pulse Night Club, and the music festival in Las Vegas where nearly 60 people[8] were murdered. App.246. Vullo proceeded to "encourage[] regulated institutions to review any relationships they have with NRA or similar gun promotion organizations, and to take prompt actions to manage these risks and promote public health and safety." App.248.

That same day, then-Governor Cuomo issued a press release which branded ties to NRA a matter of

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[7] The same day Vullo issued an identical press release and guidance document aimed at "The Chief Executive Officers or Equivalents of New York State Chartered or Licensed Financial Institutions[.]"App.249.

[8] Andrew Blankstein, Pete Williams, Rachel Elbaum, and Elizabeth Chuck, *Las Vegas Shooting: 59 Killed and More Than 500 Hurt Near Mandalay Bay*, NBC NEWS (Oct. 2, 2017), https://www.nbcnews.com/storyline/las-vegas-shooting/las-vegas-police-investigating-shooting-mandalay-bay-n806461.

public safety.[9] Unsurprisingly, by May of 2018, insurance agencies began dropping NRA. App.11. The words and tone of the private meetings, press releases, and pressure by then-Governor Cuomo all point to coercion.

Vullo's "regulatory authority over the target audience," App.28–29, further supports the viability of NRA's First Amendment claims. DFS's veiled threats were not empty, as the agency "supervises and regulates the activities of nearly 3,000 financial institutions" including "[m]ore than 1,700 insurance companies[.]"[10] In addition, Vullo "has broad regulatory and enforcement powers, which encompass the ability to initiate civil and criminal investigations and enforcement actions." App.201, ¶ 25. "Accordingly, DFS directives regarding 'risk management' must be taken seriously by financial institutions—as risk-management deficiencies can result in *fines of hundreds of millions of dollars*." *Id.* at 202, ¶ 26 (emphasis added). Thus, by framing the decision of banks and insurance companies to do business with NRA as creating a "reputational risk," Vullo did more than merely speak of a matter of public concern—she

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[9] Press Release, *Governor Cuomo Directs Department of Financial Services to Urge Companies to Weigh Reputational Risk of Business Ties to the NRA and Similar Organizations*, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, https://dfs.ny.gov/reports_and_publications/press_releases/pr1804181 (Apr. 19, 2018) ("This is not just a matter of reputation, it is a matter of public safety, and working together, we can put an end to gun violence in New York once and for all.") (statement of Gov. Cuomo).

[10] *About Us—Oversight*, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, https://www.dfs.ny.gov/About_Us (last visited Jan. 16, 2024).

appealed to her regulatory authority over "risk management" decisions.

Understandably then, the industry largely viewed the guidance letters as coercive and acted accordingly. One George Mason University scholar on financial regulations called the request "a thinly veiled threat[]" that "does not explicitly say that [New York financial institutions] [] may face regulatory sanction for failing to cut ties with the NRA, [but] it doesn't rule out the possibility either."[11] That expert noted that if DFS "had no intention of threatening regulatory sanctions, they could clearly have added language taking the threat of enforcement off of the table." *Id.*

Additionally, insurance companies stated that the decision to sever ties with NRA arose from fear of regulatory hostility from DFS. NRA's longtime insurance broker, Lockton, worried about "losing [its] license" to do business in New York. App.209, ¶ 42.

In sum, Plaintiff alleged sufficient facts in the complaint such that, even under the Second Circuit's own four-prong test, a jury could reasonably conclude that DFS coerced third parties to drop NRA in violation of its First Amendment free speech and association rights. *See Barnette*, 319 U.S. at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent."); *303 Creative LLC*

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[11] Brian Knight, *Is New York Using Bank Regulation to Suppress Speech?*, FINREGRAG (Apr. 22, 2018), https://medium.com/finregrag/is-new-york-using-bank-regulation-to-suppress-speech-ac61a7cb3bf; App.13.

v. Elenis, 600 U.S. 570, 603 (2023) ("But tolerance, not coercion, is our Nation's answer."). And given that the coercion test rested heavily on the factual details at issue, dismissing the complaint at this early stage was particularly inappropriate.

CONCLUSION

For the above reasons, this Court should hold that the First Amendment's "abridging" standard controls and that NRA need not establish Vullo coerced banks and insurance companies to sever ties with NRA based on its pro-Second Amendment speech. Under this standard, there is no question that Defendant "abridged" NRA's First Amendment freedom of speech and association. Alternatively, assuming *arguendo* that the lower courts appropriately set the standard at coercion, NRA pled sufficient facts from which to infer Vullo violated its First Amendment rights.

The judgment of the Second Circuit Court of Appeals should be reversed.

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Respectfully submitted,

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