No. 25-479

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 Gun Owners of America, Gun Owners Fdn., Gun Owners of Cal., Heller Fdn., America's Future, Citizens United, Tenn. Firearms Assoc., Tenn. Firearms Fdn., Va. Citizens Def. League, Va. Citizens Def. Fdn., Public Advocate of the U.S., Free Speech Coal., Free Speech Def. and Ed. Fund, DownsizeDC.org, Downsize DC Fdn., U.S. Const. Rights Legal Def. Fund, The Senior Citizens League, and Cons. Legal Def. and Ed. Fund in Support of Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Amici Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Inc., Heller Foundation, America's Future, Citizens United, Tennessee Firearms Association, Tennessee Firearms Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, Public Advocate of the United States, Free Speech Coalition, Free Speech Defense and Education Fund, DownsizeDC.org, Downsize DC Foundation, U.S. Constitutional Rights Legal Defense Fund, The Senior Citizens League, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Most of these *amici* filed *amicus curiae* briefs in this case when it was previously before this Court. *See NRA v. Vullo*, No. 22-842, Brief *Amici Curiae* of Gun Owners of America, *et al.* (May. 24, 2023) and Brief *Amici Curiae* of Gun Owners of America, *et al.* (Jan. 16, 2024).

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

In 2018, the New York State Department of Financial Services Superintendent, Maria Vullo, misused her investigatory and regulatory powers to disrupt the normal operations of the National Rifle Association of America ("NRA"), which the New York State government opposed for political and policy reasons. Vullo called upon banks and insurance companies doing business in New York to consider the risks, including what were termed the "reputational risks," from doing business with the NRA or "similar gun promotion organizations." When some banks and insurance companies withdrew their services from the NRA, she urged other similar companies to do the same. The NRA challenged Vullo's coercive activities, and the district court for the Northern District of New York denied Vullo's motion to dismiss the NRA's First Amendment claims. The district court stated that, "in the context of the factual allegations asserted in the Amended Complaint, it was plausible to conclude that the combination of Defendants' actions ... could be interpreted as a veiled threat to regulated industries to disassociate with the NRA...." *See NRA of Am. v. Cuomo*, 525 F. Supp. 3d 382, 402-03 (N.D. N.Y. 2021) ("*Vullo I*").

The Second Circuit disagreed, ruling that the NRA failed to set out a valid First Amendment Claim, and concluded that even if it had, "Vullo is ... 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." *NRA of Am. v. Vullo*, 49 F.4th 700, 719 (2d Cir. 2022) ("*Vullo II*").

This Court granted certiorari only on the question of whether the NRA had plausibly asserted a First Amendment claim. *See NRA of Am. v. Vullo*, 602 U.S. 175, 180 (2024) ("*Vullo III*"). Citing to *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), this Court reversed, "reaffirm[ing] [that] Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors." *Id.* at 180. This Court explained, "a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." *Id.* at 190. It ruled that "the complaint, assessed as a whole, plausibly alleges that Vullo threatened to wield her power against those refusing to aid her campaign to punish the NRA's gun-promotion advocacy. If true, that violates the First Amendment." *Id.* at 194. This Court remanded the case to the Second Circuit adding a footnote that "the Second Circuit is free to revisit the qualified immunity question in light of this Court's opinion." *Id.* at 186, n.3.

On remand, the Second Circuit ruled that Vullo was entitled to qualified immunity on a different ground than previously, that "[r]easonable officials in Vullo's position would [not] have known for certain ... that her conduct crossed the line from forceful but permissible persuasion to impermissible coercion and retaliation." *NRA of Am. v. Vullo*, 144 F.4th 376, 391 (2d Cir. 2025) ("*Vullo IV*") (internal quotation omitted).

SUMMARY OF ARGUMENT

The Second Circuit asserts that New York enjoys qualified immunity to protect it from any financial liability, and thus from any meaningful accountability, despite its clear violation of the NRA's First Amendment rights, as unanimously found by this court. *See Vullo III* at 198. In doing so, the Second Circuit, in essence, adopted the following legal position:

> 1. Solely due to this Court's prior decision in *Bantam Books*, Maria Vullo, Superintendent of the N.Y. Department of Financial Services, was placed on notice that she could not use New York's regulatory powers to threaten and coerce third parties serving as a "conduit of speech" (*Vullo IV* at 394) for the NRA. Because of this awareness, she knew she would have no qualified immunity if she violated NRA's First Amendment rights by threatening and coercing a third parties providing a conduit of speech for the NRA.
>
> 2. However, since *Bantam Books* only involved "conduits of speech" (*e.g.,* bookstores), she was completely unaware that she could not use New York's regulatory powers to threaten and coerce third parties (*e.g.,* banks and insurance companies) from doing business with the NRA to prevent it from conducting its programs. Thus, she asserts she is protected by qualified immunity from accountability arising from her threats and coercion of banks and insurance

companies designed to impair the NRA's First Amendment rights.

Perhaps more clearly than cases involving snap decisions made in the field made by police officers, this case demonstrates the inherent illogic of the judicially invented doctrine of qualified immunity. This doctrine assumes that state officials have no independent duty to understand and follow the U.S. Constitution unless a court in the jurisdiction has affirmed the validity of a specific constitutional protection in a case involving the same fact pattern. Then, immunity attaches even if that court decision was completely unknown to the government official. In the absence of such a decision, the state officials are free to violate constitutional rights of the People without financial accountability, which is to say, with impunity.[2]

Whatever rule may apply to police, the Superintendent of the N.Y. Department of Financial Services is no "cop on the beat" needing to react to an unexpected situation. Vullo was a senior government official, staffed with a small army of lawyers, to whom courts must impute knowledge of and a duty to follow the U.S. Constitution as written. Otherwise, for the People, it is said, "ignorance of the law" is no excuse by which to avoid prison. However, for senior state officials, "ignorance of the law" provides a complete excuse to avoid financial accountability. Qualified immunity violates the basic duty of a judicial system to provide remedies for wrongdoing, not to deny them.

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[2] This doctrine has similarities to the theory that every dog gets "one free bite" before the owner has liability.

ARGUMENT

I. THE QUALIFIED IMMUNITY DEFENSE HAS NO APPLICATION HERE.

A. All the Elements of a *Bantam Books* First Amendment Violation Are Present Here.

In order to justify granting her qualified immunity, the Second Circuit had to deny that Superintendent Vullo had any awareness that her threats and coercive actions against firms doing business with the NRA violated the First Amendment until *Vullo III* was decided in May 2024. This position directly conflicted with this Court's unanimous decision in *Vullo III*, where it explained that it was neither breaking new ground nor establishing any new principle (*Vullo III* at 197), and its ruling was solidly grounded in *Bantam Books*,[3] stating:

> [s]ix decades ago [where] this Court held that a government entity's "**threat** of invoking legal sanctions and other means of **coercion"** against a third party "to achieve the **suppression**" of disfavored speech **violates the First Amendment**. [*Vullo III* at 180.]

In this portion of its opinion, issued just last year, this Court described *Bantam Books* as setting out three elements to find a violation of the First

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[3] The laborious effort by the Second Circuit to narrow the holding of *Bantam Books* is not persuasive. *See* Section II, *infra*.

Amendment when government action is directed against third parties, as follows:

[i] a state government entity's "**threat** of invoking legal sanctions and other means of **coercion"**
[ii] against a third party
[iii] "to achieve the **suppression**" of **disfavored** speech. [*Id.*]

In *Bantam Books*, the three factors were present:
[i] the **threat/coercion** was issued by a Rhode Island state commission
[ii] against third party book distributors
[iii] to **suppress** the sale of certain **disfavored** books and magazines.

Applying the three *Bantam Books* factors to *NRA v. Vullo*:
[i] the **threat/coercion** was issued by Vullo
[ii] against third party banks and insurance companies
[iii] to **suppress** the **disfavored** pro-gun activities of the NRA.

Thus, not just from the First Amendment text, but from *Bantam Books*, Vullo was on notice that her coercion and threats against third parties to suppress NRA's speech and activities violated its First Amendment rights.

B. The Second Circuit Asserted *Bantam Books* Only Applied to Threats and Coercion against Third Parties which Were "Conduits of Speech."

When this case was first before the Second Circuit, that court ruled that the NRA's allegations against Respondent Martha Vullo were insufficient to make out a First Amendment claim, and then opined that even if the NRA had made out such a claim, Vullo enjoyed qualified immunity because there were no actionable threats or coercion alleged. *See Vullo II* at 721. This Court disagreed, finding the NRA's allegation sufficient to make out a cognizable First Amendment claim and remanding the case to the Second Circuit with the option to address the issue of qualified immunity. *See Vullo III* at 199 and n.7.

On remand, the Second Circuit identified the issue before it as whether Respondent Vullo was entitled to qualified immunity against the NRA's allegations that "Vullo violated [NRA's] rights to free speech and equal protection by engaging in behavior that established an implicit **censorship regime** and by **retaliating** against the NRA for its speech through her interactions with various insurers doing business in New York." *Vullo IV* at 379 (emphasis added). Because Vullo's threats and coercion were against third parties which were not "conduits of speech," but rather only banks and insurance companies, she was immunized.

Here, the Second Circuit made a distinction that this Court declined to make in neither *Bantam Books*

nor *Vullo III*. In *Vullo III*, this Court's analysis focused on Vullo's use of coercion to "stifle" NRA's speech and activities with no reference to "conduits of speech":

> As superintendent of the New York Department of Financial Services, Vullo allegedly **pressured regulated entities to help her stifle** the NRA's pro-gun **advocacy by threatening enforcement actions** against those entities that refused to disassociate from the NRA and other gun-promotion advocacy groups. Those allegations, if true, state a **First Amendment** claim. [*Vullo III* at 180-81 (emphasis added).]

The Second Circuit sourced its effort to apply qualified immunity to Justice Jackson's concurring opinion. That opinion agreed that a "government official cannot coerce a private party to punish or suppress disfavored speech..." but asserted that *Bantam Books* was only about restricting "third party conduits of speech" rather than penalizing disfavored speech with regulatory and other exercises of power. *Vullo III* at 200-01 (citation omitted) (Jackson, J., concurring). As the panel stated: "we take up Justice Jackson's invitation to consider separately the NRA's two distinct First Amendment theories: censorship and retaliation." *Vullo IV* at 384.

For the Second Circuit now to embrace the notion that Vullo had no idea that her threats to third-party banks and insurance companies to stop dealing with the NRA because they were not "conduits of speech" is

certainly creative, but unpersuasive. Vullo should not be immunized from her violation of NRA's Free Speech based on a hair-splitting distinction never recognized by this Court.

II. THE SECOND CIRCUIT LABORED HARD TO NARROW THE HOLDING OF *BANTAM BOOKS* TO LAY THE GROUNDWORK FOR A QUALIFIED IMMUNITY DEFENSE.

The Second Circuit worked hard to cabin in the holding of this Court's decision in *Bantam Books* in order to immunize Vullo from any accountability for violating the First Amendment rights of the NRA. *See Vullo IV* at 385, 387. If the Second Circuit could characterize *Bantam Books* as being a case limited to blocking a channel of communication, it apparently believed that would support its position that Vullo had no idea that coercing third parties (banks and insurance companies) to stop doing business with the NRA, with the express purpose of suppressing the NRA's speech, violated the NRA's First Amendment rights. A narrow reading was essential to lay the foundation for such a qualified immunity defense, which could be stated as: "how could Vullo possibly have known that what she was doing to suppress the NRA's speech and programs violated the First Amendment?" To lay that foundation, the Second Circuit understood *Bantam Books* as follows.

- "*Bantam Books* was literally about banning books — the regulator in that case unlawfully coerced a publisher's distributors into

removing certain books and publications from circulation." *Vullo IV* at 392.

- "a book publisher will clearly have trouble disseminating its speech if a regulator has coerced its distributor into stopping the circulation of its books." *Id*.

- "Here, although Vullo is alleged to have coerced third parties who dealt with the NRA, those third parties were not disseminating speech on the NRA's behalf or otherwise engaging in expressive activity." *Id*.

- "the NRA alleges that Vullo infringed its First Amendment rights in a much more attenuated manner...." *Id*.

- Although the Supreme Court's earlier decision in this case "'flowed from *Bantam Books*,' ... under the qualified immunity analysis, general pronouncements of law are not sufficient to 'clearly establish' a right." *Id*.

- "A reasonable officer in Vullo's position would not have been on notice, at the time of her conduct, that such conduct violated the NRA's First Amendment rights." *Id*. at 394.

- "In summary, qualified immunity on the NRA's coercion theory is proper because, although *Bantam Books* and the cases applying it made clear that coercion with the aim of suppressing speech is unlawful

> generally, they did not make clear the more particularized application of that principle here — where the allegedly coerced party was not itself a publisher or conduit of speech. A reasonable officer in Vullo's shoes **'might not have known *for certain*** that the [challenged coercive] conduct was unlawful'...." *Id*. (bold added; italics original).

Until the Second Circuit's heroic effort to narrow its scope, *Bantam Books* had been understood to be the leading case that established that state government officials could not threaten or coerce third parties to indirectly suppress what it could not do directly. The fact that *Bantam Books* arose in the context of cutting off a "conduit of speech" was one of the facts of that case, but was not the essence of the holding which must apply to a variety of situations where government seeks to do indirectly what it may not do directly.

III. AFTER THIS COURT'S REMAND, THE SECOND CIRCUIT CHANGED ITS THEORY OF QUALIFIED IMMUNITY TO ONE THAT IS INHERENTLY IMPLAUSIBLE.

A. The Second Circuit's Shifting Sands Supporting Qualified Immunity.

When this case was first before the Second Circuit believed Vullo had only engaged in permissible government speech, and so that court "REVERSE[D] the district court's denial of Vullo's motion to dismiss and REMAND[ED] the case with directions for the

district court to enter judgment for Vullo." *Vullo II* at 721. Additionally, it concluded that even if the complaint had stated a plausible First Amendment claim, "Vullo would be protected by qualified immunity in any event." *Id*. When this case was remanded by this Court to the Second Circuit, it continued to assert that qualified immunity protected Vullo, but since its prior basis for invoking that doctrine was completely negated by this Court's decision, it had to find a new theory. It gave no indication that it ever considered that qualified immunity might not apply, as it quickly shifted its rationale. The Second Circuit's new justification deserves close examination.

The earlier Second Circuit decision denied that the New York Department of Financial Services ("DFS") made any threats against the NRA, denied that the DFS statements were any more than permissible government speech, and denied that DFS had any motivation other than public safety and health. *Vullo II* at 709, 716-17, 720. This Court completely rejected the Second Circuit's permissive view of Vullo's actions, finding the NRA's allegations of coercive and threatening speech made out a valid First Amendment claim. *Vullo III* at 198. However, after this Court's unanimous decision, the Second Circuit pivoted to an alternative rationale to justify qualified immunity — a rationale that could be termed the *constitutional ignorance justification*. *Vullo IV* at 394.

The Second Circuit's alternative rationale was somewhat different from the traditional justification normally offered for a police officer being entitled to qualified immunity, that there was **no controlling**

law in that jurisdiction on the same facts. The Second Circuit did not at this point claim there was no controlling law, but rather that: "[a] reasonable officer in Vullo's position **would not have been on notice**, at the time of her conduct, that such conduct violated the NRA's First Amendment rights." Would the head of a major New York department, with access to all needed legal assistance, really have no idea that the First Amendment protects Americans working through disfavored advocacy groups from government seeking to undermine their programs? Is reading court opinions about the First Amendment really the only way that such a senior official would be "on notice" of what the First Amendment states and requires? Would the New York official really believe herself free to undermine NRA programs and advocacy with impunity because of a lack of controlling authority?

Petitioner suffered a long train of abuses at the hand of Maria Vullo, which were summarized in its petition. Petition for Certiorari ("Pet. Cert.") at 4-8. There is no question that the pro-gun politics of the NRA and the anti-gun politics of Vullo and the New York State government are at direct odds. The Second Circuit even acknowledged that the very purpose of Petitioner is to engage in First Amendment protected activity (about a Second Amendment protected right): "The NRA is a pro-gun advocacy group [and] 'spends tens of millions of dollars annually distributing ... literature to advocate for its views on the Second Amendment....'" *Vullo IV* at 380. From this could it really be said that Vullo acted innocently, or in good faith, or without "notice" that the First Amendment

protects the People from government undermining of its political speech and activities?

The Second Circuit's recited many facts which confirm that Respondent's actions were specifically targeted to stop protected activity. The Respondent's Guidance Letters to regulated entities directing them to consider "their risks ... that may arise from their dealings with the NRA or similar gun promotion organizations" and "to review any relationships they have with the NRA or similar gun promotion organizations...." *Id*. at 382-83 (quoting from the Guidance Letters). Quoting the Petitioner's complaint, the Second Circuit understood Petitioner's allegations that Respondent's actions had "a singular goal — to deprive the NRA and its constituents of the First Amendment rights to speak freely about gun-related issues and defend their Second Amendment freedoms against encroachment." *Id*. at 383.

B. Vullo's Threatening and Coercive Guidance Letters.

The Guidance Letters issued by DFS recounted that various organizations had "severed their ties with the NRA," lauding them as examples of "corporate social responsibility,"[4] thereby implying that a continued relationship with the NRA is irresponsible. Specifically, DFS warned regulated companies of the alleged "reputational risk" of further "dealings with

[4] New York Department of Financial Services, "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations" (Apr. 19, 2018).

the NRA" given the "social backlash" against the group for its public support of the Second Amendment. *Id.* Thus, DFS "encourage[d]" regulated institutions to take "prompt actions to manag[e]" this "risk." *Id.*

In a press release issued the same day, Vullo "urge[d] all insurance companies and banks doing business in New York to ... discontinue[] their arrangements with the NRA."[5] In that same press release, New York Governor Andrew Cuomo explained his order for Vullo to move against the NRA, advising that the "risk" to companies in New York for doing business with the NRA was not simply a "matter of reputation." *Id.* There is no lack of clarity as to what Vullo or Cuomo were saying or meaning — they were issuing threats.

Moreover, Respondents' words do not exist in a vacuum, and thus the appropriate interpretation is "reading them in 'context, not in isolation.'" *Missouri v. Biden*, 83 F.4th 350, 382-83 (5th Cir. 2023), rev'd on other grounds, *Murthy v. Missouri*, 603 U.S. 43 (2024). Then-Governor Cuomo was a longtime vitriolic opponent of the NRA. In 2000, as then-Secretary of the U.S. Department of Housing and Urban Development, referring to the NRA, Cuomo stated, "[i]f we engage **the enemy** in Washington we will lose.

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[5] New York Department of Financial Services 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" (Apr. 19, 2018) (hereinafter "DFS press release").

They will beat us in this town."[6] Instead, Cuomo suggested, "[w]e're going to beat them state by state, community by community." *Id.* Then, in 2014, after becoming governor, Cuomo went so far as to say that those who are "'pro-assault weapon'" "'**have no place in the state of New York**,'" because that's not who New Yorkers are.[7] It is hardly surprising that, four years later, Cuomo's DFS issued a press release announcing Cuomo's order to Vullo and the DFS to declare war on insurance companies doing business with "the enemy."

Viewed in this context, the statements are even more threatening:

> Governor Cuomo said[] "I am directing the Department of Financial Services to urge insurers and bankers statewide to determine **whether any relationship they may have with the NRA ... sends the wrong message** to their clients and their communities who often look to them for guidance.... **This is not just a matter of reputation, it is a matter of public safety**...."[8]

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[6] U.S. Department of Housing and Urban Development, "Remarks by Secretary Andrew Cuomo" (June 20, 2000) (emphasis added).

[7] F. Dicker, "GOP blasts Cuomo's comments on conservatives," *New York Post* (Jan. 20, 2014) (emphasis added).

[8] DFS press release (emphasis added).

The press release went on to say, "DFS is encouraging regulated entities to consider reputational risk and promote corporate responsibility.... A number of businesses have **ended relationships with the NRA** following the Parkland, Florida school shooting in order to realign their company's values." *Id. (*emphasis added). DFS was not just instructing companies to "consider reputational risk," but also to "promote corporate responsibility." DFS defined "promot[ing] corporate responsibility" as "**end[ing] relationships with the NRA**." *Id.* (emphasis added).

It is difficult to view these undenied statements (not disputed allegations) as constituting anything other than a threat to companies that would defy DFS's "urging" and continue daring to do business with a company Cuomo had identified as "the enemy," and those declared to "have no place in the state of New York."

Even after he issued his press release announcing the DFS measures, Cuomo stated on Twitter, "[t]he NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public."[9] Cuomo also referred to policies such as CarryGuard as "murder insurance."[10] Governor Cuomo continued to be quite open about the intent

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[9] https://x.com/NYGovCuomo/status/987359763825614848.

[10] K. Brown and L. Ellefson, "The NRA claims actions by New York state are harming its finances. Governor Cuomo's response: 'Too bad,'" *CNN* (Aug. 6, 2018).

behind the DFS actions, as, following the NRA's filing of this lawsuit, he publicly reiterated that his goal for the NRA was to "**shut them down**."[11] (Emphasis added.)

In short, Governor Cuomo's clear and repeated statements against the NRA have nothing to do with some purported "reputational risk" to regulated entities. Rather, the DFS guidance was issued at his command and was designed with one purpose in mind — to "engage" and "shut ... down" the Governor's political "enemy" that he believed "had no place in the State of New York."

C. The Existence of Regulatory Authority.

As Director of DFS, Vullo was not simply an anti-gun politician promoting her views as to what state gun policy ought to be. She was directly in a position to punish companies that might disregard her Guidance Letters. "As head of DFS, Vullo had significant regulatory power," including "sweeping power over licensing and rulemaking ... as well as the power to launch civil and criminal investigations and civil enforcement actions," most of which actions she in fact took against NRA-affiliated insurers. Pet. Cert. at 5.

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[11] The Governor could hardly contain his glee: *See* Aug. 3, 2018 post from Cuomo stating that "[t]he regulations NY put in place are working. We're forcing NRA into financial jeopardy. We won't stop until we shut them down." and Aug. 3, 2018 post from Cuomo stating, "If I could have put the @NRA out of business, I would have done it 20 years ago."

D. Threats Were Understood by the Regulated Companies.

The DFS press release went on to note that "Chubb, another DFS-regulated insurer, recently stopped underwriting the NRA-branded 'Carry Guard' insurance program."[12] Like Cuomo's statement, DFS' reference to companies that had stopped doing business with Petitioner also must be viewed in the light of DFS's actions against those companies. The statements were backed up with enforcement by DFS against the companies. *See Vullo IV* at 383.

After the DFS actions against NRA-affiliated insurers, those companies admitted privately the need to sever ties with the NRA "out of fear that [they] would otherwise lose [their] license[s] to do business in New York." Pet. Cert. at 6. As the NRA has tried to find a replacement insurance product with a new provider, it has "struggled to find new insurance coverage." *Id.* at 8.

E. Adverse Consequences.

The NRA alleged that "Vullo's 'concerted efforts to stifle the NRA's freedom of speech and to retaliate against the NRA' caused 'financial institutions doing business with the NRA to rethink their mutually beneficial business relationships with the NRA for fear of monetary sanctions or expensive public investigations.'" *Vullo IV* at 383.

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[12] DFS Press Release.

The words of Cuomo, Vullo, and DFS were not merely helpful hints for risk management. They were reminders to the NRA-affiliated insurers that failure to manage "risk" is a violation of the law. "DFS is encouraging regulated entities to consider reputational risk," the press release stated.[13] DFS's directive, in the form of a "Guidance Letter," instructing companies "to take prompt actions to manag[e] these risks"[14] was a clear threat, and was taken as such.

IV. THE CONNECTION BETWEEN VULLO'S COERCION AND THREATS AND NEW YORK'S GUN CONTROL AGENDA SHOULD NOT BE IGNORED.

Superintendent Maria Vullo's use of coercion and threats against the NRA violated the First Amendment, but it appears significant that her actions were designed to suppress Second Amendment advocacy. As Justice Sotomayor wrote for the court in *Vullo III*:

> Vullo ... could not wield her power ... to **threaten** enforcement actions against DFS-regulated entities in order to **punish or suppress** the **NRA's gun-promotion advocacy**.... What she cannot do ... is use the

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[13] DFS Press Release.

[14] New York Department of Financial Services, "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations" (Apr. 19, 2018).

> power of the State to punish or suppress **disfavored expression**. [*Vullo III* at 187.]

Thus, Vullo's threats and acts of coercion were being employed not against an anti-gun ally of Governors Cuomo and Hochul, but against one of their pro-gun opponents. Clearly, at a minimum, Vullo's acts were designed to "punish or suppress" the NRA's speech, which Vullo "disfavored." In acting unanimously in *Vullo III*, this Court signaled it was following "the shoe on the other foot" analytical approach, demonstrating that it did not matter whose speech was being suppressed because a vital principle was at stake. The case had to be decided just as it would have been if a pro-gun state was trying to shut down an anti-gun group. This is to be commended. However, there are reasons to believe that the Second Circuit did not follow this Court's lead on remand.

It cannot be denied that the Second Circuit has resisted this court's Second Amendment jurisprudence since *District of Columbia v. Heller*, 554 U.S. 570 (2008). Three years ago, this Court found itself obliged to remind the Second Circuit that "[t]he constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 70 (2022) (internal quotation omitted). Now, it appears that the First Amendment also may be a second-class right in the Second Circuit whenever that speech supports the Second Amendment.

Many judges, including Justices of this Court, have noted a decided tendency in the lower federal courts to look askance at the Second Amendment as compared to other constitutional protections. The Petition explains that: "[t]he Second Circuit's decision defies this Court's prior ruling in this very case, which unequivocally held that ... [a] government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." Pet. Cert. at 13. Indeed, this Court previously noted it was not plowing new ground, but only "reaffirm[ing] what it said [in *Bantam Books*]: Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors." *Vullo III* at 180.

When the Second Amendment is not involved, the Second Circuit has been a defender of free speech. Indeed, in 2019, that court rejected the attempt by President Trump to purge critical comments off his public figure social media pages. The court "remind[ed] the litigants and the public that if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less." *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 240 (2d Cir 2019) (vacated as moot after President Trump's 2020 defeat, in *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021). But under the Second Circuit's decision below, "[o]fficials [are] ... incentivized to spend their time inventing new and creative methods to violate clearly established rights by looking for narrow, constitutionally irrelevant factual gaps in the case law." Pet. Cert. at 30.

The distinction seized on by the Second Circuit here was the fact that in *Bantam Books*, the government action was directed at a book distributor, in an effort to suppress the distribution of books by various publishers that were deemed indecent. This Court ruled that Rhode Island violated the First Amendment even when it was only targeting the third-party distributor rather than the books themselves. The Second Circuit deemed that the act of distributing the books was "expressive," just as was the act of publishing the books. However, here, selling insurance to the NRA was deemed not "expressive," making *Bantam Books* inapplicable, even though *Bantam Books* never limited its holding to government coercion of third parties whose conduct was "expressive." The Second Circuit creatively invented the distinction to justify suppressing "the thought that [it] hate[s]." *Matal v. Tam*, 582 U.S. 218, 246 (2017). The Second Circuit found a reason to protect New York from the financial consequences of attacking the NRA: "the coercive conduct alleged was not directed at speech or expressive conduct but at nonexpressive activity, *i.e.,* underwriting insurance policies." *Vullo IV* at 386.

As Petitioner notes, this distinction has no constitutional justification and leads to "absurd" results. "Under the Second Circuit's ruling, even after *Bantam Books* a reasonable official somehow could have believed that the First Amendment allowed him to use government power to pressure hospitals, grocery stores, apartment buildings, and taxis to deny services to disfavored speakers for the very purpose of

suppressing their speech. To state the proposition is to defeat it." Pet. Cert. at 16-17.

Certain circuit courts have assailed this Court's rulings in both *Heller* and *Bruen*, and now it appears that not even the First Amendment is safe, if utilized in support of the Second. Two years before *Bruen*, the same plaintiff in that case, the N.Y. State Rifle & Pistol Association, challenged a New York City rule banning gun owners from transporting their weapons outside the city limits. The city obtained a favorable ruling from the Second Circuit. *New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2d Cir. 2018). The plaintiffs then appealed to this Court. Perhaps seeing *Bruen*'s handwriting on the wall, the New York legislature quickly moved to "amend[] its firearm licensing statute, and the City amended the rule so that petitioners may now transport firearms to a second home or shooting range outside of the city...." *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 590 U.S. 336, 338 (2020). Accordingly, on April 27, 2020, this Court dismissed the case as moot and remanded to the Second Circuit.

Four months later, on August 26, 2020, the Second Circuit declared that "New York's proper cause requirement [that an applicant demonstrate good cause to carry a handgun outside the home] does not violate the Second Amendment." *N.Y. State Rifle & Pistol Ass'n v. Beach*, 818 Fed. Appx. 99, 100 (2d Cir. 2020). This Court then responded with its *Bruen* holding in 2022, reversing the Second Circuit.

The creativity demonstrated by the Second Circuit in finding an alternative basis for its decision that qualified immunity applies indicates that other factors may be at work. The Second Circuit's demonstrated hostility to the Second Amendment just may have caused it to abandon its traditional support for the First Amendment because of the identity of the speaker. If so, this would violate the manner in which this Court decided *Vullo III* and should not be allowed.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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