No. 22-842

In The
Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

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

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 21.2(b), the Goldwater Institute respectfully requests leave to submit a brief as amicus curiae in support of the petition for writ of certiorari filed by the National Rifle Association.

Rule 37.2(a) requires that amici notify all parties' counsel of their intent to file an amicus brief in support of a petition for certiorari at least ten days before the due date, and further that the due date is thirty days after a response is called for. A response was called for on April 24, requiring a response on May 24. On May 1, that due date was extended to June 24. Due to amicus's oversight, amicus notified the parties of its intention to file this brief on May 17, 2023, seven days before the May 24 deadline for amicus briefs in support of the petition. Given the extension of time for the response, however, this will not prejudice any party, as Respondent will have ample time to respond to any point raised herein, if she sees fit.

Goldwater frequently appears before this Court as counsel for amicus in cases involving freedom of speech and the rights of business owners and advocacy groups, as detailed in the Interest and Identity of Amicus section below. It writes in support of Petitioner here because the questions presented raise significant issues concerning these vital constitutional questions, and because of the risk to free speech posed by government threats against dissenters who express their

opinions. In this proposed brief, Goldwater draws on its 35+ years of experience and provides a discussion of first principles to help inform the Court's consideration of the Petition.

Accordingly, Goldwater respectfully asks the Court to grant it leave to file this amicus brief.

Respectfully submitted,

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DATED: May 23, 2023.

QUESTIONS PRESENTED

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

1. Does the First Amendment allow a government regulator to threaten regulated entities with adverse regulatory actions if they do business with a controversial speaker, as a consequence of (a) the government's own hostility to the speaker's viewpoint or (b) a

QUESTIONS PRESENTED—Continued

perceived "general backlash" against the speaker's advocacy?

2. Does such coercion violate a clearly established First Amendment right?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

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

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

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[1] Pursuant to Rule 37, amicus affirms that no counsel for any party authored the brief in whole or part and that no person other than amicus, its members, or its counsel, contributed money to fund the brief's preparation or submission. Amicus curiae did not provide a 10-day notice pursuant to Rule 37.2(a). A motion for leave is included in this brief addressing this issue.

and other courts in free speech cases. *See*, *e.g.*, *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 237 (2021); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). The Institute is particularly concerned with instances, such as this one, where the government has sought to silence dissent through indirect pressure, and for similar reasons the Institute is also participating as an amicus in *Henderson v. Springfield School District*, No. 23-1374 (8th Cir. filed May 12, 2023). The Institute believes its litigation experience and public policy expertise will aid this Court in considering the petition.

SUMMARY OF ARGUMENT

When King Henry II berated his vassals, "Will no one rid me of this turbulent priest?" they unsurprisingly took the hint and made sure that Thomas Becket, the Archbishop of Canterbury, would no longer obstruct the king's political goals. It was not necessary for the king to spell out what he wanted his subordinates to do. Here, too, the state's chief financial regulator made quite clear what she wanted the NRA's former business partners—institutions she regulated—to do, even if on a literal level she may have framed her communications as "suggestions" rather than commands.

This Court held in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963), that the First Amendment prohibits informal coercion against free speech no less than direct punishment—and that courts must consider the full context, including power imbalance,

availability of judicial oversight, and regulatory dynamics, when determining whether such coercion has occurred. The Second Circuit disregarded those principles, as well as its own clearly established law, in concluding that the state's chief financial regulator's expressly "urg[ing] all insurance companies and banks doing business in New York to . . . discontinue[] their arrangements with the NRA" (her own words, App. 28) could not *as a matter of law* constitute a threat or indirect coercion against businesses dealing with the nation's best-known gun rights advocate. *Id.*

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

Indeed, political and ideological coercion via regulation is on the rise. In a variety of spheres, Americans are increasingly subject to complex regulatory regimes that give officials immense leverage to coerce individuals and businesses into disassociating from disfavored speakers and ideas. In many instances, politicians and bureaucrats have made public statements applying just such pressure to regulated entities. This trend is especially pronounced in the realm of social media regulation, but it is just as problematic in other

areas like "Environmental, Social, and Governance" regulation, and so-called "transparency" initiatives requiring donor disclosure for nonprofits and advocacy groups.

In light of the lower courts' recent confusion over how to incorporate context when analyzing informal coercion, this Court should grant certiorari so that it can elaborate on the teaching of *Bantam Books* in light of today's circumstances.

ARGUMENT

I. The regulatory state creates a heightened risk of censorship via hints and insinuations.

This Court has long recognized that determining whether coercion has occurred requires careful attention to context, especially the power dynamics of the parties involved. *See*, *e.g.*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619 (1969) (noting "the economic dependence of . . . employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear"). The same principle applies here: the greater the power imbalance and incentive for private parties to comply with the wishes of the regulator, the more likely coercion will take the form of "nudges," "suggestions," and veiled threats.

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

First, the immense power regulators wield over individuals and businesses means bureaucrats can exert coercive pressure without resorting to explicit threats. Indeed, in many industries, merely being *investigated* poses serious reputational harm, even if an investigation ends favorably to the business (whether through outright dismissal or, as two of the NRA's former business partners experienced here, voluntary settlement). As the Financial and Business Law Scholars point out in their amicus brief, the unique nature of the banking and insurance sectors, and especially the prevalence of risk-based regulation, mean that regulated firms feel bound to comply even with nominally non-binding advice. But the same is true in a host of other highly regulated settings. From doctors to restaurant owners, millions of Americans work in settings where their livelihoods depend not merely on a lack of actual infractions, but on not rocking the boat.

In this instance, the New York Superintendent of Financial Services enjoys extremely broad powers to "conduct investigations . . . of matters affecting the interests of consumers of financial products and services" in the nation's financial capital, N.Y. Fin. Serv. Law

§ 301(b), and to "tak[e] such actions as [she] deems necessary to . . . protect users of financial products." *Id.* § 301(c)(1). The Superintendent, in cooperation with other regulators, can revoke a financial institution's charter—the death penalty for a bank. Such devastating enforcement powers also enable her to demand vast financial settlements for alleged infractions. *See*, *e.g.*, Karen Freifeld, *The Legal Mastermind Behind New York's Record Bank Fines*, Reuters (Dec 8, 2014)[2] (detailing how Superintendent oversaw $2.24 billion settlement with bank for alleged violation). That power, combined with the sometimes-excessive deference applied to such regulators' actions, means they are well positioned to twist a private party's arms.

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

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

Even in the best of circumstances, vindicating oneself against unjustified regulatory action can take years and cost a fortune. *See*, *e.g.*, *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 917 (2023) (Gorsuch, J., concurring in the judgment) (describing "what a *win* looks like" when a party seeks to challenge an administrative enforcement action in an Article III court). And after years of administrative investigations and litigation, the damage often will already have been done, regardless of the ultimate legal outcome.

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

whether, how, and against whom to bring (or threaten) enforcement actions.

All these dynamics enabled Vullo to apply extraordinary pressure to Lloyd's senior executives to cut ties with the NRA for political reasons, even while she was ostensibly "discuss[ing] an array of technical regulatory infractions plaguing the affinity-insurance marketplace." App. 31.

This problem is accentuated by the broad discretion that regulators typically enjoy in a complex regulatory environment. To give one example from a different context, Super Bowl host cities often use complex zoning and signage regulations to silence speech across vast "clean zones" surrounding the festivities, at the NFL's request and direction. *See* Stephen L. Carter, *NFL's Super Bowl "Clean Zone" Is Super Bad for Free Speech*, Wash. Post (Feb. 10, 2023)[3] (describing maneuvers government used under zoning code to effectively require NFL pre-approval for all temporary signage in downtown Phoenix); *see also* Sam Borden & Sara Coello, *How the Super Bowl Tests Boundaries, Including the Constitution*, ESPN (Feb. 7, 2023).[4] Yet despite the clear constitutional violations, these regulations have almost never been subject to judicial review (let alone a timely remedy) until recently. *See Paulin v.*

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

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

Gallego, No. CV 2023-000409, 2023 WL 1872272 (Ariz. Super. Ct. Feb. 3, 2023).

For all these reasons, a letter or phone call from a state regulator need not (contrary to the Second Circuit's approach) explicitly "refer to any pending investigations" or "intimate that some form of punishment or adverse regulatory action would follow," in order to command serious attention from regulated parties. App. 29 (internal marks and citation omitted). A business owner whose livelihood depends on the good graces of a bureaucrat will listen closely to what that bureaucrat says, even if it is said "in an even-handed, nonthreatening tone." *Id.* And because of the complex, fact-bound nature of much regulation, regulators will almost always be able to point to some facially neutral justification as pretext for such pressure.

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

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

> when advising a business client on how to publicly address certain issues that the client considers noncommercial, practitioners

> should alert the client that *the safest choice is silence*. While this is *the textbook example of a chilling effect*, a business client runs a substantial risk in California if it makes a statement that is mistakenly false, or true but misleading.

Jonathan Loeb & Jeffrey Sklar, *The California Supreme Court's New Test for Commercial Speech*, 25-Nov. L.A. Law., at 13 (Nov. 2022)[5] (emphasis added). Attorneys for Exxon, Bank of America, and other companies did, indeed, acknowledge that in light of *Kasky*, they would advise their clients to withhold statements on political matters. Stephanie Kang, *Nike Settles Case With an Activist for $1.5 Million*, Wall St. J. (Sept. 14, 2003).[6] And Nike desisted from trying to express its views, lest it incur the wrath of activist litigants backed up by the state. *See* Henry Butler & Jason Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 Colum. Bus. L. Rev. 1, 42–43 (2010) ("[Nike's] self-imposed speech moratorium lasted several years, and when Nike resumed communications regarding its labor practices, it was careful not to assert anything about labor conditions, but instead simply posted an on-line list with its suppliers' names and locations.").

The free speech concerns are even greater with a heavily regulated business that might risk the

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[5] https://www.westlaw.com/Document/I3a352bb14a6f11db99a18fc28eb0d9ae/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0.

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

displeasure of its regulator by expressing an opinion. When Spirit Airlines sought to express its discontent over the high taxes imposed on its airline tickets, by listing ticket prices on its website in a manner designed to draw attention to these high taxes, the Federal Aviation Administration ordered it to stop. *See* William Dotinga, *Spirit Airlines Ordered to Amend Fare Advertising*, Courthouse News Serv. (July 27, 2012).[7] This Court was asked to intervene, but it declined. *Spirit Airlines, Inc. v. U.S. Dept. of Transp.*, 687 F.3d 403 (D.C. Cir. 2012), *cert. denied*, 569 U.S. 903 (2013). The business was therefore forced to desist.

True, a business that suffers direct punishment from the government for speaking out on a public debate could bring a First Amendment retaliation claim. In *Blankenship v. Manchin*, 410 F. Supp. 2d 483, 490 (S.D. W. Va.), *aff'd*, 471 F.3d 523 (4th Cir. 2006), for example, the governor expressly stated that a business owner who expresses political disagreements with the governor "should expect tougher scrutiny of his business affairs," *id.* at 487, and the district court held that such retribution could very well violate the First Amendment. *See also Walt Disney Parks & Resorts U.S., Inc. v. DeSantis*, No. 4:23-cv-00163-MW-MAF (N.D. Fla. filed Apr. 26, 2023) (alleging government officials retaliated against Disney's political speech).

But government officials are rarely going to be that explicit in their threats. Courts must therefore

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

apply the rule that what government may not do directly, it also may not do indirectly—otherwise the rule against retaliation would amount to a "stupid staff[er]" test. *Cf. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025–26 n.12 (1992). That is why this Court in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990), rejected a lower court's conclusion that a government employee could sue for First Amendment retaliation only if she had experienced termination or the equivalent. This Court said that setting the bar that high "fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy." *Id.*

For the same reasons, the court below, by failing to consider the power dynamics and how that context informed the meaning of Vullo's pressure campaign against the NRA and its partners, departed from this Court's instructions to "look through forms to the substance." *Bantam Books*, 372 U.S. at 67. And this problem is likely to recur wherever regulators can use facially neutral regulatory schemes to pressure entities to disassociate with third parties. What then-Justice Janice Rodgers Brown said of the search-incident-to-arrest doctrine in *People v. McKay*, 41 P.3d 59, 81–82 (Cal. 2002) (Brown, J., dissenting), is equally true of government's power to burden speech: "In the pervasively regulatory state, police are authorized to arrest for thousands of petty *malum prohibitum* 'crimes' . . . . Since this indiscriminate power to arrest brings with it a virtually limitless power to search, the result is the

inevitable recrudescence of the general warrant." Likewise, the ubiquitous and largely unchecked powers of government regulators gives them vast power to restrict speech, unless this Court says otherwise.

III. The risk of ideologically motivated coercion under the guise of regulation is on the rise.

There is a trend of complex regulatory regimes allowing retaliation against disfavored speech under the guise of content-neutral enforcement. While these laws are sometimes crafted to appear content-neutral on their face, they result in censorship and chilled speech because they enable regulators to make ideologically driven enforcement decisions. This, in turn, deters third parties from associating with people and entities that take controversial or disfavored positions, because those third parties legitimately fear retaliation from regulators.

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

items "were viewed by users," and how the company responded to the objectionable content. *Id.* (a)(5).

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

On the other end of the political spectrum, petitions are currently pending before this Court in challenges to Florida and Texas laws regulating social media companies as common carriers and requiring those companies to provide users with explanations when they censor the users' speech. *NetChoice, LLC v. Paxton*, No. 22-555 (U.S. Dec. 15, 2022); *Moody v. NetChoice, LLC*, No. 22-277 (U.S. Sept. 21, 2022). While these states' laws apparently do not vest regulators with the same broad discretion to pressure businesses based on ideology or viewpoint, Petitioner argues that those laws likewise involve "targeting [of] certain disfavored 'social media' websites" based on their connections to third parties' speech. Pet. for Writ of Cert. at I, *Paxton*, No. 22-555.

Similarly, during the COVID pandemic, regulators pressured social media companies to censor speech the regulators characterized as "misinformation" or a threat to public health. *See*, *e.g.*, Vivek H. Murthy, *Confronting Health Misinformation: The U.S. Surgeon General's Advisory on Building a Healthy Information Environment* (2021);[8] Donie O'Sullivan, *White House Turns Up Heat on Big Tech's Covid "Disinformation Dozen,"* CNN Bus. (July 16, 2021) (discussing White House Press Secretary Jen Psaki's singling out of "about 12 people who are producing 65% of anti-vaccine misinformation on social media platforms," and noting that Facebook had since stated it "shut down some pages and groups belonging to the dozen or so people identified").[9]

Even more troubling, it's impossible to know the extent to which federal officials are pressuring social media companies to censor content, because in some instances the FBI has restricted these companies from even disclosing "information about the aggregate *numbers* of . . . governmental requests [to provide information about certain users] that it received," *Twitter, Inc. v. Garland*, 61 F.4th 686, 689 (9th Cir. 2023) (emphasis added). The Ninth Circuit recently upheld such a restriction on Twitter's speech in a First Amendment challenge. *Id.* at 690.

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

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

This issue has arisen in a wide variety of settings outside the social media context, as well. Another prominent example of regulations geared toward informal coercion is so-called "Environmental, Social, and Governance" (ESG) rules. At the federal level, the Securities and Exchange Commission is currently evaluating a proposed rule that would require investment advisors and companies to disclose the greenhouse gas emissions of their portfolios. 87 Fed. Reg. 36,654 (June 17, 2022). Because this rule would force regulated entities to make guesses based on ill-defined metrics and incomplete data regarding politically charged issues, it would pressure them to make decisions about speech (what to disclose, and how) and association (whom to do business with) based on what they believe will be ideologically acceptable to regulators. At the state level, an "ideological battle [is] unfolding . . . pitting liberal-leaning state governments that have embraced ESG-focused investing [regulation] against conservative-led states that would seek to exclude it." Leah Malone, et al., *ESG Battlegrounds: How the States are Shaping the Regulatory Landscape in the U.S.*, Harv. L.S. Forum on Corp. Governance (Mar. 11, 2023).[10]

State regulations are also enabling coercion of donors who support disfavored political and ideological advocacy. Last year, Arizona enacted the so-called "Voters' Right to Know Act," ostensibly designed to promote transparency in political campaigns and to fight "dark

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

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

To be sure, these examples implicate a variety of other constitutional issues in addition to the informal coercion doctrine present in this case, and not every instance of government action here is necessarily unconstitutional under *Bantam Books*. Indeed, some of these mandates are only just being implemented and have not yet given rise to the kind of informal coercion seen in this case. Nevertheless, they all illustrate the ongoing debate over the extent to which regulators may, consistent with the First Amendment, informally coerce individuals and businesses into cutting ties with disfavored speakers.

IV. It is time for this Court to reiterate, and elaborate upon, its *Bantam Books* holding in light of present circumstances.

The obligation of those in power to avoid using their power to censor speech, whether tacitly or

explicitly, is well established. But the practical application of that principle looks very different depending on the context. Since this Court's 1963 *Bantam Books* decision, that context has changed considerably, and lower courts have begun to diverge in how they apply the informal coercion doctrine.[11]

As the state amici note, the Second Circuit broke not only with this Court, but with its own precedent and at least six other circuits. The Tenth Circuit has similarly drifted from the principles of *Bantam Books*, holding that a public official's statements must be positively "egregious to be plausibly retaliatory," and that a government pressure campaign against third parties is constitutional unless the third party's action can legally "be deemed to be that of the State." *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1161, 1174 (10th Cir. 2021) (citations omitted).

With the rise of vague, ideologically charged regulatory considerations like "ESG" and "misinformation," government officials are increasingly taking account of

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[11] To be sure, clearly established law in the Second Circuit "provided [Vullo] 'fair warning,'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (citation omitted), that it was unconstitutional to wage a systematic campaign of thinly veiled coercion against the NRA's business partners. There was no question at the time of Vullo's conduct that a public official "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) (per curiam).

public sentiment toward companies' speech and advocacy. Of course, "[l]isteners' reaction to speech is not a content-neutral basis for regulation," as this Court has stated time and again. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *McCullen v. Coakley*, 573 U.S. 464, 481 (2014). While *Bantam Books* remains the law, lower courts are diverging on its application in an age of ubiquitous regulation, social media, and deep political division. It's time to revisit the doctrine and reiterate the need for a fully contextual approach to informal coercion claims.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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No. 22-842

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,
v.
MARIA T. VULLO, both individually and
in her former official capacity,
Respondent.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 4199 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 23rd day of May, 2023.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

Renee J. Goss
Notary Public

Andrew H. Cockle
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No. 22-842

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,
v.
MARIA T. VULLO, both individually and
in her former official capacity,
Respondent.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 23rd day of May, 2023, send out from Omaha, NE 2 package(s) containing 3 copies of the MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

TIMOTHY SANDEFUR*
JOHN THORPE
SCHARF-NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

*Counsel of Record

Counsel for Amicus Curiae Goldwater Institute

Subscribed and sworn to before me this 23rd day of May, 2023.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
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