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 FOR THE STATES OF TEXAS AND INDIANA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

In this case, a former superintendent of the New York State Department of Financial Services (DFS), leveraged broad regulatory authority of her agency over financial institutions to prevent private banks and insurance companies from providing services to members of the National Rifle Association (NRA). Specifically, by her own admission, the superintendent conducted internal investigations into the insurance offerings and then used the threat of enforcement action to compel these entities to terminate insurance plans protecting NRA members who have engaged in lawful self-defense based solely on the superintendent's disagreement with the organization's protected political speech. No act by the state legislature could have cancelled these private contracts based on disagreement with the NRA's political views or its members' exercise of Second Amendment rights. Nevertheless, given the DFS's role as a primary regulator for these financial institutions, the superintendent's actions left banks and insurance companies little choice but to terminate the targeted insurance coverage plans and cease business relations with the NRA.

Approximately 400,000 of the NRA's five million members reside in Texas—more than in any other State. Many of them are law-abiding citizens who choose to buy insurance to protect themselves and their families against the vicissitudes of life, including those associated with firearms. As a result, the State of Texas has a significant interest in whether unelected New York bureaucrats may use their power over the regulated insurance

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

industry to force private market participants to do that which government actors cannot do—namely, punish the exercise of a constitutionally protected freedom. If such constitutional-violation by proxy were allowed, it would both impinge upon the fundamental rights of Texans and deter legitimate business activity in Texas's vibrant economy.

SUMMARY OF ARGUMENT

I. Texas does not dispute that States can regulate the conduct of business entities within their borders—even when those entities are in the business of speaking—so long as they "do not single out any topic or subject matter for differential treatment." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022). And Texas agrees that under the McCarran–Ferguson Act, New York generally has the authority "to regulate and tax the business of insurance" in New York. *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 653 (1981) (collecting cases). However, it is a fundamental precept that States may not enforce regulations in a way that retaliates for the exercise of a constitutional right. *E.g.*, *Hous. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1259 (2022). As a result, neither respondent nor New York State could directly forbid the NRA or its members from purchasing insurance because of a disagreement with the advocacy of those seeking to lawfully exercise their Second Amendment rights.

II. Respondent may not use threats against banks to accomplish indirectly that which the Constitution prohibits her from doing directly. Again, Texas agrees with respondent that rules about private speech do not apply to government speech, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005), including speech about enforcement priorities. But that doctrine has limits:

though the government may advocate for its preferred policy positions and use its authority to enforce the law, it may not attempt to "surreptitiously engage[] in the 'regulation of private speech,'" *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1596 (2022) (Alito, J., concurring in the judgment) (citing *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009)). The government is not "exempt from First Amendment attack if it uses a means that restricts private expression." *Id.* at 1599 (Alito, J., concurring in the judgment). Put another way: a constitutional violation by proxy is still a constitutional violation. That is exactly what occurred here: the superintendent sought to retaliatorily restrict the NRA's free speech, and that of its members, through coercing private companies.

III. This case is one of great national importance. Although the current case is about firearms, there is nothing that limits the Second Circuit's ruling to Second Amendment issues. Allowing government regulatory bodies to leverage their power over third parties to intrude on the speech and associational interests of any private entity harms the ability of States like Texas to maintain vibrant, growing economies. The actions taken by DFS and its superintendent in this case tend to minimize economic freedom by making businesses hesitant to interact with certain groups and individuals for fear of regulatory retaliation. And this fear extends beyond the borders of New York; here, the targeted banks and insurance companies ceased providing the NRA-supported insurance plans entirely. Because they are not regulated by DFS, it appears that affected policy holders had no way to seek judicial review of that decision. In some circumstances, such an act would arguably violate due process. At minimum, it is

fundamentally unfair to allow an unelected New York regulator to control the economic options of citizens in states like Texas that simply encourage legal business activity. If the Court does not grant the petition, state economies across the country will continue to unfairly suffer.

REASONS FOR GRANTING THE PETITION

Although not without its critics, with over five million members nationwide, the NRA is one of America's oldest civil-rights groups. At an organizational level, the NRA advocates for policies and business practices that respect its individual members' free speech, associational, and Second Amendment rights. It is perhaps the principal defender of Second Amendment freedoms in the country. Here, DFS has been delegated sweeping authority to regulate financial institutions, which the superintendent has leveraged to oppose the NRA's advocacy efforts. Without doubt, this case would present a clear-cut First Amendment violation if DFS had restricted the NRA's speech *directly*. There should be no greater doubt just because DFS restricted that same speech *indirectly* through private intermediaries. To conclude otherwise would invite great harm to both our constitutional system and our economy.

I. New York Could Not Directly Ban The NRA From Participating In The Insurance Market Based On Disagreement With Its Political Views.

To start, Texas's point in this appeal is a limited one: it does not dispute that the New York State Legislature has broad power to regulate the insurance market in New York. That power includes the power to investigate—or threaten to investigate—violations of state law. But it cannot do so in a way that discriminates against the lawful exercise of a constitutional right—whether it

is free speech, the Second Amendment, or speech in favor of the Second Amendment.

New York undoubtedly has broad authority to regulate its insurance markets, as evidenced by the passage of the McCarran–Ferguson Act of 1945, 15 U.S.C. § 1011, *et seq*. This law was passed in direct response to *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), which held for the first time that the Interstate Commerce Clause permitted Congress to regulate insurance contracts. Designed specifically to reestablish the balance of federal power, McCarran–Ferguson protects from preemption state laws enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). McCarran–Ferguson therefore saves from preemption some state laws that would otherwise be preempted by virtue of those state laws' relationship to insurance regulation. *Id.*

Moreover, standing alone, allegations of First Amendment retaliation will not prevent the State from investigating whether an insurance company has violated a constitutionally enacted law. After all, this Court has recognized a "presumption of prosecutorial regularity," *Hartman v. Moore*, 547 U.S. 250, 263 (2006), and notes that "protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest" or otherwise initiate an investigation. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1723-24 (2019) (quoting *Reichle v. Howards*, 566 U.S. 658, 668 (2012)). That is why a challenge to an investigation such as the ones initiated by respondent typically are not considered ripe before initiation of a formal enforcement action. *Reisman v. Caplin*, 375 U.S. 440, 443-44 (1964); *see also, e.g.*,

Twitter, Inc. v. Paxton, 56 F.4th 1170, 1174-76 (9th Cir. 2022).[2]

But both these principles have limits. The power to regulate insurance is subject to both statutory, *see* 15 U.S.C. § 1014 (preserving three existing statutes), and constitutional limits, *e.g.*, *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 & n.8 (1985). After all, this Court has explained "[a]lthough the McCarran–Ferguson Act exempts the insurance industry from Commerce Clause restrictions, it does not purport to limit in any way the applicability of the Equal Protection Clause"—or seemingly any other provision of the Bill of Rights. *Id.* at 880.

The New York State Legislature could not pass a law excluding the NRA from the insurance market in New York based on its advocacy of Second Amendment rights. As this Court has recognized, "[t]he 'First Amendment is a kind of Equal Protection Clause for ideas.'" *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2354 (2020) (plurality op.) (quoting *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 470 (2015) (Scalia, J., dissenting)). States may "constitutionally impose reasonable time, place, and manner regulations," but they are generally prohibited "from discriminating in the regulation of expression on the basis of the content of that expression." *Id.* at 2346 (plurality op.) (quotation marks omitted). The Court has been particularly solicitous of this rule because the freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

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[2] Although Texas is also concerned about the Second Amendment and due-process implications of respondent's actions, because the NRA has pleaded its claim under the First Amendment, this brief focuses on First Amendment principles.

This rule applies equally to regulations that seek to prevent disfavored speech as well as to outright bans on speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69-70 (1963). A regulatory regime that "inhibit[s] protected freedoms of expression and association," *NAACP v. Button*, 371 U.S. 415, 437-38 (1963); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-62 (1958), or "surreptitiously" targets certain groups, *Shurtleff*, 142 S. Ct. at 1596 (Alito, J., concurring in the judgment), is as pernicious as a regime that directly prohibits speech. Indeed, indirect regimes may be more problematic because they "eliminate[] the safeguards" associated with direct regulation. *Bantam Books, Inc.*, 372 U.S. at 70.

Importantly, the rule "prohibits government officials from subjecting individuals to 'retaliatory actions' after the fact for having engaged in protected speech." *Houston Cmty. Coll. Sys.*, 142 S. Ct. at 1259 (quoting *Nieves*, 139 S. Ct. at 1722). As applied here, the Court's rule would have prevented the New York Legislature from passing a law explicitly preventing groups that support the sale of firearms from borrowing money or buying insurance in New York. Likewise, the rule prevents DFS from directly excluding the NRA from the insurance market because it disagrees with the NRA's stance supporting responsible gun ownership.

II. New York's Insurance Regulator Cannot Use Her Overly Broad Delegation Of Power To Do Indirectly That Which She Cannot Do Directly.

Respondent cannot leverage her largely unchecked delegation of authority over the financial industry to force third parties to do that which the Constitution prohibits her from doing directly. To start, respondent's actions in this case reflect that the delegation of authority provided by the New York State Legislature may be so

broad as to violate due process. The Court need not address that question, however, because respondent has committed a First Amendment violation by proxy.

A. Respondent's actions in this case may reflect the rare instance when a State's delegation of authority to one of its own agencies violates federal due process. At the federal level, the Founders designed a system that both limited and divided federal power so the ambitions of the three co-equal branches "counteract" each other. The Federalist No. 51 (J. Madison). This dynamic requires keeping legislative power out of the hands of the executive and is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

Nondelegation is a simple but foundational concept embedded in our constitutional system: a legislative body cannot pass off the important work of lawmaking to an executive or an executive's agencies. At its core, nondelegation protects against administrative overreach and improper executive assertions of lawmaking power. It prevents the legislature from "delegat[ing] to the Courts, or to any other tribunals," or to any regulators, "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. 1, 42 (1825); *accord Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.). In that way, it preserves our constitutional system and fundamental rights. *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).

Because that principle arises from the vesting clauses of the United States Constitution, it does not apply to state governments. After all, "federal separation-of-powers concerns . . . cannot dictate how state governments

allocate their powers." *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701, 707 (5th Cir. 2017); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-delegation and Antitrust Challenges*, 37 Harv. J. L. & Pub. Pol'y 931, 974 (2014). There is, however, a species of non-delegation doctrine that sounds in the Due Process Clause, which does apply to the States. *Currin v. Wallace*, 306 U.S. 1, 15 (1939); *United States v. Rock Royal Coop.*, 307 U.S. 533, 545-46 (1939). Unlike its separation-of-powers-based cousin, this principle is "all about fairness," including notice to the affected party. Volokh, *supra*, at 974.

To date, this Court has addressed this due-process-based nondelegation only in the context of delegation to private parties. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). This case, however, shows that excessive delegation to public entities can lead to the co-option of private parties in a way that leads to the same constitutional concern. After all, the "core elements" of due process are limited to "notice of the factual basis for" the charge "and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). Texas takes no position on whether the financial institutions that are directly regulated by DFS would have such rights because they are not the ultimate target of respondent's actions.

Here, DFS and respondent, as its head, have functionally excluded the NRA and its members from a major financial market: DFS "oversees about 1,500 lenders and institutions with assets totaling about $2.6 trillion and 1,400 insurers with assets valued at $4.7 trillion." *What is the New York State Department of Financial Services?*, Dow Jones, https://www.dowjones.com/professional/risk/glossary/regulatory-bodies/ny-state-dept-

financial-services/ (last visited May 23, 2023). And it did so based on a view of state law that is questionable at best and that neither the NRA nor its members had the opportunity to challenge because they are not subject to the DFS's jurisdiction.

These decisions are the kind that citizens elected their representatives to make themselves—not offload to an agency bureaucrat to decide on a whim. When "a regime administered by a ruling class of largely unaccountable 'ministers'" takes over, problems arise. *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (quoting The Federalist No. 11 (A. Hamilton)); *see also N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 505 (2015) (warning about the special concerns that arise when a "State seeks to delegate its regulatory power to active market participants"). Regulation with a "discriminatory or protectionist nature represents a breakdown of the mechanism of democratic government," Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425, 443 (1982). That is particularly true when the regulator was never elected by the people and acts in a way that creates fundamentally unfair outcomes, as is the case here. The Court need not get into these concerns, however, as the NRA has pleaded a compelling case under the First Amendment.[3]

B. In this case, respondent's broad delegatory authority allowed her to do indirectly (through private companies) that which she could not do directly—censor private political speech. Specifically, in her role as DFS's superintendent, respondent has broad powers "to conduct investigations, research, studies and analyses of

[3] Texas takes no position on whether the NRA will ultimately be able to prove its claims because the case was dismissed in its infancy.

matters affecting the interests of consumers of financial products and services," N.Y. Fin. Servs. Law, art. 3, § 301(b), including receiving complaints and (if appropriate) referring matters to law enforcement agencies, *id.* § 301(c)(2), (4). She is supposed to use that power "to protect the users of financial products and services," *id.* § 301(c)(1).

Here, however, the respondent allegedly used her power to investigate private businesses that provided services to a disfavored political group—the NRA. As explained in detail in the petition, respondent initiated costly investigations of financial institutions that conducted business with the NRA, threatened those institutions to cease doing business with the NRA, and issued formal agency guidance to terminate insurance plans provided to NRA members. Pet. App. 199-200, 205-06, 208, 210, 216-17, 221. It is undisputed that DFS's official regulatory guidance deemed the NRA's Second Amendment advocacy a regulable "reputational risk" to any financial institution servicing the NRA. Pet. App. 199, 246-51. These actions directly reflect the stated gubernatorial policy at the time—that firearms and their advocates "have no place in the state of New York," Pet. App. 197.

It is also undisputed that several financial institutions ceased doing business with the NRA entirely. Pet. App. 199-200, 214, 218. This is unsurprising given that DFS has been described as "perhaps the most powerful state regulator in the nation, with new and broad jurisdiction and substantial enforcement powers" over the thousands of firms that fall within its control. *Governor Cuomo Proposes Significant Expansion of Powers of New York Department of Financial Services*, WilmerHale (Feb. 18, 2020), https://tinyurl.com/WilmerDFS. Violations of its rules can expose a financial institution to millions in civil

penalties as well as burdensome consent decrees. *E.g.*, Consent Order, *In re Robinhood Crypto, LLC* (N.Y. Dep't Fin. Servs. Aug. 1, 2022), https://www.dfs.ny.gov/system/files/documents/2022/08/ea20220801_robinhood.pdf. It is no mystery that respondent's effort to deprive the NRA of equal access to the financial markets worked.

What's worse, the financial institutions cannot avoid New York's restrictions simply by choosing to be chartered or conduct financial business somewhere else. Leaving aside the practical impact of being excluded from one of the largest financial markets in the world, *supra* at 9, it is blackletter law that the government cannot condition even the grant of a gratuitous benefit upon the surrender of a constitutionally protected right. *See, e.g.*, *Koontz v. St. Johns River Mgmt. Dist.*, 570 U.S. 595, 607-08 (2013) (collecting cases). It would be particularly odd to say that respondent can deem financial institutions' compliance with state law to turn on their willingness to cede *someone else's* constitutional rights.[4]

C. Although respondent acted through the proxy of private parties, her actions nevertheless violated the Constitution. Ordinarily, the actions of a private party such as an insurance company cannot violate the First Amendment. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (summarizing the so-called

[4] For similar reasons, respondent's actions likely also violate the First Amendment rights of the *banks* in question. After all, respondent is effectively requiring banks and insurance companies in New York to take an anti-gun stance—which she constitutionally may not do. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219 (2015) ("[W]e have recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees."). Texas does not understand that claim to be pressed here, however.

"state action" doctrine). But assuming the NRA's allegations are true, the banks and insurance companies in question are not excluding the NRA and its members from participation in the New York market of their own free will: they are being coerced based on the threat of draconian sanctions. Pet. 11-12. Thus, their acts are those of the respondent—just one step removed.

This Court's jurisprudence has repeatedly warned that government actors cannot circumvent core constitutional requirements so easily. They may not do so by manipulating the identity of the governmental actor, *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 108-09 n.5 (1967); their own internal operating procedures, *United States v. Tsarnaev*, 142 S. Ct. 1024, 1036 (2022); or the language of this Court's stated tests, *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 393 (2011); *accord Rogers v. Tennessee,* 532 U.S. 451, 460, (2001). Respondent should not be permitted to sidestep the Constitution and this Court's precedents by hiding behind private actors.

III. Respondent's Evasion Of The First Amendment Is An Important Issue Meriting This Court's Attention.

Although respondent's actions are unique, this case nonetheless merits the Court's prompt attention for at least two reasons. *First*, if allowed to stand, the decision below provides public officials "a readymade playbook"—which is in no way limited to the topic of firearms—"for abusing their regulatory power to harm disfavored advocacy groups without triggering judicial scrutiny," Br. of Amicus Curiae ACLU in Support of Pl.'s Opp. to Def.'s Mot. to Dismiss, *Nat'l Rifle Ass'n* v. *Cuomo*, No. 18-cv-0566 (N.D.N.Y. Aug. 24, 2018), at 4. As such, the decision below has profound implications for the rule of law concerning political speech. *See* Montana

Amicus Br. 19-24. The Court should grant the petition to avoid additional government agencies taking a page out of this playbook to conduct further indirect constitutional violations.

Second, because the respondent chose to execute her scheme by manipulating financial markets—which, in the modern globalized economy, by definition extend far beyond the borders of New York State—the decision below has profound economic implications. Texans have worked hard to lead the country in economic growth, making Texas a top state for job creation. In fact, new data released by the Bureau of Economic Analysis shows Texas leading the country with the fastest economic expansion in the fourth quarter of last year. *See* Press Release, Off. of the Tex. Governor, *Texas Leads Nation With Fastest Economic Expansion* (Mar. 31, 2023), https://perma.cc/2VA9-LNSJ. Preliminary GDP estimates for the full year of 2022 reveal that the Texas economy grew to an estimated $2.36 trillion in size, an increase from $2.1 trillion in 2021. *Id.* This represents an estimated growth rate of 14.8%, beating the average national growth rate. *Id.*

Texas has made such astounding economic growth because it offers a combination of unique competitive business advantages including a business-friendly climate, a highly skilled and diverse workforce, and a limited regulatory environment. Perhaps most importantly, Texas protects its citizens' constitutional rights and fosters a marketplace full of different ideas and perspectives. Relevant to this case, Texas protects the rights of free speech and association and the right to bear arms, which is central to the NRA's organizational platform. The NRA-supported insurance policy that DFS targeted provided law-abiding citizens protection when exercising

those rights. There is no evidence that the policy offerings violated Texas law, but they are nevertheless no longer available to the nearly half-million Texas NRA members who may have benefited from that coverage.

So long as they act consistent with the Constitution, other States are entitled to make other choices about how to balance morality-based legislation with economic growth. *Cf. Nat'l Pork Producers Council v. Ross*, No. 21-468, 2023 WL 3356528, at *12 (U.S. May 11, 2023). Here, however, New York has decided to use its unique historical position as a dominant market for financial services to force its political agenda on providers of insurance to those well beyond its borders. Today it does so with respect to guns. Tomorrow, who knows? The economy of any number of States will suffer if their residents cannot access the financial markets because New York has come to a different conclusion about environmental policy, gender identity regulations, or any number of other social issues about which Americans vociferously disagree.

If this Court does not intervene to prevent unchecked government power, the economies of states that respect and protect constitutional rights will unfairly suffer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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