

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 WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

Neal Kumar Katyal
*Counsel of Record
for Respondent*
HOGAN LOVELLS U.S. LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5528
neal.katyal@hoganlovells.com

Eugene Volokh
*Counsel of Record
for Petitioner*
385 Charles E. Young Dr. E
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu
William A. Brewer III
Sarah B. Rogers
Noah Peters
BREWER ATTORNEYS
& COUNSELORS
750 Lexington Avenue,
14th Floor
New York, NY 10222
David D. Cole
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005

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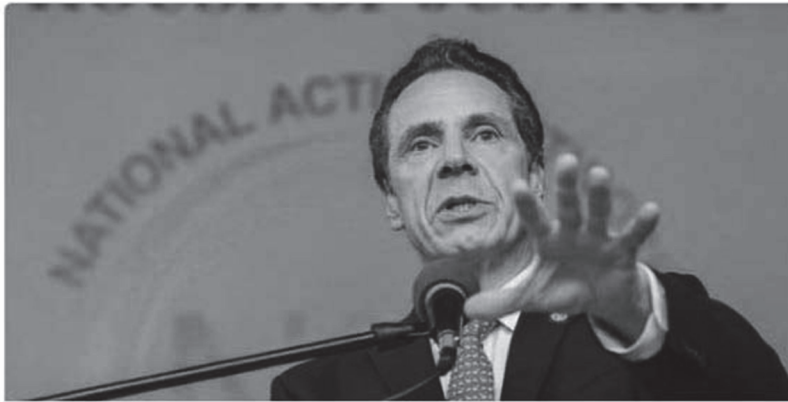
Tweet Sent from Governor Cuomo's
@NYGovCuomo Verified Twitter Account,
April 20, 2018

Attached as Exhibit 6 to the Affidavit of
John Frazer in Support of to the NRA's Motion for
Order to Show Cause for Expedited Discovery,
filed June 14, 2018 in the District Court
(ECF No. 21-2), and Quoted in Paragraph 51 of
the Second Amended Complaint (S. App. 21)

Andrew Cuomo
@NYGovCuomo

The 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.



New York governor presses banks, insurers to weigh risk of NRA ties

New York Governor Andrew Cuomo on Thursday ramped up pressure on banks and insurers to revisit whether their ties to the National Rifle Association and other gun reuters.com

8:58 AM - 20 Apr 2018

290 Retweets **936** Likes

Brian Knight, “Is New York Using Bank
Regulation to Suppress Speech?”, *FinRegRag*,
April 22, 2018

Attached as Exhibit N to the Declaration of Sarah
Rogers in Support of to the NRA’s Motion for
Preliminary Injunction, filed February 28, 2020
in the District Court (ECF No. 176-16), and
Quoted in Paragraph 53 of the
Second Amended Complaint (S. App. 21)

Is New York using bank regulation to suppress speech?

Brian Knight

Apr 22, 2018



Last week, New York Governor Andrew Cuomo and the New York Department of Financial Services (NYDFS) instructed New York based financial institutions (NY FIs) to reconsider their relationships with the National Rifle Association (NRA) and “similar organizations” in light of the NRA being an “extremist organization.” NYDFS wants NY FIs to evaluate whether

relationships with the NRA pose reputational risk to the institutions and “jeopardize public safety.”

This request could easily be construed as a thinly veiled threat. While the NYDFS statement does not explicitly say that NY FIs that may face regulatory sanction for failing to cut ties with the NRA, it doesn’t rule out the possibility either. If the NYDFS had no intention of threatening regulatory sanctions, they could clearly have added language taking the threat of enforcement off of the table. They didn’t, which indicates they want NY FIs to think there is a potential the government will come after them if they don’t end their relationships with groups like the NRA.

These instructions to NY FIs could also be seen as an attempt to suppress political speech that some New York policy makers disagree with. Whatever one thinks of the NRA, it is an organization engaged in legal political speech and advocacy. Cutting off the NRA’s access to financial services could change the political debate by reducing opposition to political efforts to tighten gun laws. The NYDFS release says, “This is not just a matter of reputation, it is a matter of public safety, and working together, we can put an end to gun violence in New York once and for all.” Given that the NRA does not make a product that could pose a direct risk to public safety, this release is clearly referencing the NRA’s political advocacy.

This is reminiscent of the Department of Justice’s “Operation Choke Point” where the DOJ and federal banking regulators pressured banks to withdraw

services from customers in certain legal industries (many of which just happened to be politically disfavored) because those industries allegedly posed a high risk of fraud and servicing those customers created a “reputational risk” for banks that justified regulatory intervention.

After significant political pressure and at least one lawsuit, the DOJ notified Congress that the operation ended in August of 2017. In the letter announcing the operation’s ended, the Assistant Attorney General called the operation “misguided” and reaffirmed that “law abiding businesses should not be targeted simply for operating in an industry that a particular administration might disfavor.” However, as Beau Brunson notes, while DOJ has stopped Operation Choke Point, it will likely require an act of Congress to completely eliminate the risk of something similar reoccurring.

Like Operation Choke Point, the NYDFS’ actions show the danger that a vague regulatory concept like reputational risk poses. Reputational risk can become a vehicle for regulators imposing their policy preferences on FIs (and by extension those who depend on FIs’ services, which is to say everyone), even if those preferences are not based in the law. There is no law that says a FI cannot do business with a gun rights group and such a law would almost assuredly be unconstitutional. However if the regulator declares that such an affiliation poses a reputational risk to the FI (that the regulator, not the market, determined existed), it has leverage to force the FI to comply.

However, the NYDFS action is more troubling than Choke Point. Unlike Operation Choke Point, which dealt with commercial entities where there was at least a possibility of actual fraud, which is not the case here. The NYDFS order appears to be inherently about political speech. After all, there is no allegation that the NRA is committing fraud against its members. Rather, the argument is that the NRA's positions are so dangerous that they are harmful to the community and pose a risk to the reputation of any FI that works with them. This could fairly be seen as an attempt to restrict the NRA's ability to operate in the political arena and marketplace of ideals.

Banks and other financial institutions are uniquely interwoven with government. FIs often need a government charter to operate (which imposes barriers to competition). Additionally, they are closely regulated by the government and are frequently insured or backstopped, either explicitly or implicitly, by the government. This gives FIs market power beyond what they would have in a truly free market and leaves them uniquely vulnerable to government coercion.

While there is a real debate to be had about whether banks and other FIs should use the market power the government grants them to influence social policy, government officials pressuring FIs to cut ties with political enemies in an attempt to suppress speech is beyond the pale. New York should rescind their request and apologize. Failing that, it may become necessary for Congress and the courts to step in to ensure that

restricting access to financial services does not become
a means of restricting speech.

Neil Haggerty, “Gun Issue is a Lose-Lose For Banks
(Whatever Their Stance)”, *American Banker*,
April 26, 2018

Attached as Exhibit M to the Declaration of
Sarah Rogers in Support of to the NRA’s Motion for
Preliminary Injunction, filed February 28, 2020 in
the District Court (ECF No. 176-15), and Quoted in
Paragraph 83 of the Second Amended Complaint
(S. App. 33-34)

Gun issue is a lose-lose for banks (whatever their stance)

By Neil Haggerty

Published April 26 2018, 1:11pm EDT

More in Risk management, Volcker Rule, State regulators, Mitch McConnell, Pat Toomey, Andrew Cuomo, Bank of America, Citigroup, Senate Banking Committee, House Financial Services Committee, Washington DC, New York

WASHINGTON—How banks come down on the politically divisive issue of gun sales is increasingly a case of damned if you do, damned if you don't.

While Citigroup and Bank of America face GOP heat over their restricting services to firearms sellers and manufacturers—criticism that could affect the outcome of regulatory relief negotiations—bankers in New York State now face the potential of regulatory blowback if they don't crack down on gun promoters under new Department of Financial Services guidance.

“One of the problems with any issue like this in today's world, you are going to have people agree with you and disagree with you, often passionately, from both sides,” said Chip MacDonald, a financial services lawyer at Jones Day. “The banks ought to be able to make reasonable decisions consistent with law on how their brand is used and who they do business with.”



“We don’t need red banks and blue banks,” said Sen. John Kennedy, R-La., at a Senate hearing last week. “We need banks that are safe and sound and honest.”
Bloomberg News

To some observers, the issue of gun violence—amplified by mass shootings like that in Parkland, Fla., in February—is hard for banks to ignore. Their public stance could affect customer perceptions and regulators may take notice of the reputational risk.

“Banks increasingly must consider political issues as part of their risk management decision-making process,” said Rolland Johannsen, a senior consulting associate at Capital Performance Group. “This requires new processes and more proactive and broader considerations of reputation risk as part of risk models and calculations.”

But regulatory pressure on banks to act is also drawing criticism, with bankers and other industry observers questioning the move by the NYDFS.

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

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

One community banker from Upstate New York, who spoke on the condition of anonymity, said the guidance “felt somewhat politically motivated.”

“If a business is a legal entity, how do I know who is going to come in disfavor with either the New York State DFS or a federal regulator, that may say, ‘Reputationally, you shouldn’t be doing business with this company?’” the banker said. “It’s hard to know what the rules are if I don’t know what the rules are.”

Brian Knight, a senior fellow at George Mason University’s Mercatus Center, wrote on his blog that the guidance could be seen as a “thinly veiled threat” since it does not rule out the possibility of a regulatory response for maintaining ties to the NRA.

“If the NYDFS had no intention of threatening regulatory sanctions, they could clearly have added language

taking the threat of enforcement off of the table,” he said.

Knight noted similarities between the NYDFS letter and Operation Choke Point, the Department of Justice initiative in which authorities sought to crack down on fraud by obstructing access to the banking system for companies in legal industries.

“However, the NYDFS action is more troubling than Choke Point. Unlike Operation Choke Point, which dealt with commercial entities where there was at least a possibility of actual fraud, . . . [that] is not the case here,” Knight wrote. “The NYDFS order appears to be inherently about political speech. After all, there is no allegation that the NRA is committing fraud against its members.”

Yet restricting loans and other services to firearms-related businesses, whether triggered by regulatory pressure or not, can alternatively incur the wrath of policymakers on the other side of the guns debate.

Republican senators have criticized both the moves by Citi and Bank of America. The former banned retailers that use the bank from offering bump stocks and selling guns to underage customers or those who have not passed background checks. The latter then came out with its own set of restrictions, ending loans to companies that manufacture assault-style weapons used for nonmilitary purposes.

Published reports Wednesday said BofA’s policy came after dozens of employees lost family members or

suffered other trauma related to mass shootings in the past few years. Speaking at the bank's annual meeting Wednesday, CEO Brian Moynihan was quoted as saying, "This comes from our teammates saying we have to help."

But in letters to both Citi and BofA, Senate Banking Committee Chairman Mike Crapo, R-Idaho, criticized the two banks, which he noted get government support, for passing judgment on legal businesses. He also raised concerns about the prospect of banks using personally identifiable information to monitor credit and debit transactions with respect to firearms purchases.

"It is deeply concerning to me when large national banks like Bank of America, which receive significant forms of government support and benefits, use their market power to manage social policy by withholding access to credit to customers and companies they disfavor," Crapo said in a letter Wednesday to Moynihan.

A spokesperson for Citi defended the bank's new policy, saying the decision was not based on political ideology.

"As we have with other industries that have reputational implications, we created standards based not on ideology, but on established best sales practices, which most of the businesses we work with currently follow," the spokesperson said. "This policy does not impact the ability of Citi customers to use their credit and debit cards for the legal purchase of firearms."

Now, the issue is seeping into congressional deliberations over a highly anticipated bill to roll back certain provisions of the Dodd-Frank Act.

The Senate recently passed its version of the bank deregulation bill with the support of 16 Democrats and one Independent, but House Republicans have pushed for the final bill to be expanded. The lower chamber has already passed a number of additional proposals, including one to consolidate supervisory authority for the proprietary trading ban—known as the Volcker Rule—with the Federal Reserve.

While Senate Democrats have been the most resistant to additional deregulatory provisions, it is now some Republicans suggesting that banks should not be additionally rewarded as a result of their positions on gun sales.

Sen. John Kennedy, R-La., cited Citi and BofA's announcements to Majority Leader Mitch McConnell in a recent letter opposing the proposed Volcker Rule provision.

"I bring this specific bill to your attention out of serious concern for the direction that America's biggest banks are trending when it comes to the Second Amendment," Kennedy wrote. "I do not believe that Congress should reward big banks for their offensive actions."

Kennedy and other Republican senators said banks should not be cutting off lawful businesses or in general be politically motivated.

“We don’t need red banks and blue banks,” Kennedy said at a Senate hearing last week. “We need banks that are safe and sound and honest.”

Others say the banks’ moves are particularly concerning since legal businesses need access to the financial system in order to operate.

“Our financial infrastructure is very dependent on a handful of the nation’s largest banks,” said a spokesperson for Sen. Pat Toomey, R-Pa. “As a result, Senator Toomey is very concerned by the decision of some of these banks to deny services to perfectly legal and legitimate businesses.”

Knight said it is possible McConnell would choose not to add the House Volcker provision to the Senate bill.

“If the coalition is weakening from the right as well as left then this is a problem,” Knight said in an interview. “If you don’t bring up a bill in the Senate, you don’t bring the risk of breaking up that coalition.”

But others point out that the Republican criticism will likely have a limited effect since regulatory relief provisions that go beyond the original Senate bill already had a slim chance of passing for other reasons.

“The changes to the Volcker Rule, getting 60 votes for that is unlikely at this time,” said Ed Mills, an analyst with Raymond James. “We got the package of bills that can get 60 votes in the near term already through the

Senate. This is a shot across the bow to the banking industry.”

Neil Haggerty

Lloyd's Official Announcement Withdrawing
from National Rifle Association Programmes,
May 9, 2018

Attached as Exhibit 9 to the Affidavit of John Frazer in Support of to the NRA's Motion for Order to Show Cause for Expedited Discovery, filed June 14, 2018 in the District Court (ECF No. 21-2), and Referenced in Paragraph 72 of the Second Amended Complaint (S. App. 30)

Lloyd's withdraws from National Rifle Association (NRA) programmes

Wed 09 May 2018

The Lloyd's Corporation has given very careful consideration as to whether syndicates at Lloyd's should continue to insure programmes offered, marketed, endorsed or otherwise made available through the National Rifle Association of America (NRA).

This is now subject to an inquiry by the New York Department of Financial Services (NYDFS). Therefore Lloyd's Corporation has decided to direct underwriters in the market to terminate any existing programmes of this type and not to enter into any new ones.

Tweet Sent from Governor Cuomo's
@andrewcuomo Verified Twitter Account,
August 3, 2018

Attached as Exhibit A to the Declaration of
Noah Peters in Support of to the NRA's Response
in Opposition to Motion for Judgment on the
Pleadings, filed April 20, 2023 in the District Court
(ECF No. 387-2)

Andrew Cuomo

@andrewcuomo

The regulations NY put in place are working. We're forcing the NRA into financial jeopardy. We won't stop until we shut them down.

rollingstone.com/politics/polit...

1:57 PM - Aug 3, 2018

17 Retweets **4** Quotes **54** Likes

Tweet Sent from Governor Cuomo's @NYGovCuomo
Verified Twitter Account, August 3, 2018

Attached as Exhibit F to the Declaration of
Noah Peters in Support of to the NRA's Response
in Opposition to Motion for Judgment on the
Pleadings, filed April 20, 2023 in the District Court
(ECF No. 387-7)

Archive: Governor Andrew Cuomo
@NYGovCuomo

If I could have put the @NRA out of business, I would have done it 20 years ago.

I'll see you in Court.



vox.com

The NRA, America's most powerful lobby, claims it's in financial crisis. What? The supposed culprit: New York Gov. Andrew Cuomo.

4:35 PM - Aug 3, 2018

446 Retweets **70** Quotes **2,030** Likes **5** Bookmarks

Tweet Sent from Governor Cuomo's
@andrewcuomo Verified Twitter Account,
August 4, 2018

Attached as Exhibit C to the Declaration of
Noah Peters in Support of to the NRA's Response
in Opposition to Motion for Judgment on the
Pleadings, filed April 20, 2023 in the District Court
(ECF No. 387-4)

Andrew Cuomo
@andrewcuomo

NY is forcing the NRA into financial crisis. It's time to put the gun lobby out of business. [#BankruptTheNRA](#)



nydailynews.com

NRA, under assault from Cuomo administration, claims it's facing financial ruin The NRA may soon be shooting blanks. The powerful gun rights group claims its facing financial ruin due to a full-frontal assault from Gov. Cuomo.

9:47AM - Aug 4, 2018

18 Retweets **5** Quotes **65** Likes
