No. 22-842

IN THE

Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,
v.
MARIA T VULLO,
Respondent.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

Americans for Prosperity Foundation ("AFPF"), respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

AFPF is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because protecting the freedoms of expression and association, guaranteed by the First Amendment, is essential for an open and diverse society and because government may not circumvent constitutional limits by using a surrogate to do what the government may not do directly.

SUMMARY OF ARGUMENT

This is the first of two cases before the Court this term that must resolve the same issue: to what extent can government do indirectly what it cannot do directly to limit speech rights. Both cases should be controlled by *Bantam Books, Inc. v. Sullivan*,

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief. Counsel for all parties were notified of *amicus'* intent to file this brief greater than ten days prior to the date to respond.

372 U.S. 58 (1963), which held that the successful efforts of a Rhode Island Commission to remove books with disfavored content from bookstores violated the First Amendment rights of the book publishers.

Here, New York's Department of Financial Services ("DFS") pressured insurance companies to induce them to stop doing business with The National Rifle Association of America ("NRA"), a gun rights advocacy group. Had the state directly prohibited the NRA from obtaining financial services in New York due to its advocacy, this case would be an obvious violation of the NRA's speech rights. Instead, the state leaned on private business to reach the same result. Although relying on indirect means, when the State attempted to burden the NRA's advocacy via its insurers, it violated the First Amendment. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990) ("What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.").

The State's efforts here rely on similar tactics to those employed by the federal defendants in *Murthy v. Missouri*, Case No. 23-411. There, government officials induced social media platforms to take action to silence or hinder third-party speakers whose messages the government disfavored. Although the intermediary businesses were social media platforms, instead of financial services companies, the effect on the speech of their clients and users is the same: their messages have been silenced by proxy. In both cases the intermediary responded to a government prompt and modified its existing voluntary conduct to align with the government's viewpoint. In both cases, the

government has attempted to justify censorship by arguing that it must silence speech it disfavors for the public's own good.

This approach undermines the very point of the First Amendment—which prevents government abridgment of speech it disfavors or that is unpopular with the public. *L. Students C.R. Rsch. Council, Inc. v. Wadmond*, 401 U.S. 154, 176 (1971) ("The First Amendment was intended to make speech free from government control, even speech which is dangerous and unpopular."). And, where, as here, the government official plays a role in making the idea unpopular—by attacking another constitutionally protected right in the process—that particular form of heckler's veto is especially pernicious. *See, e.g.*, *Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 284–85 (2022) (Gorsuch, J. concurring in the judgment) ("[T]he suppression of unpopular religious speech and exercise has been among the favorite tools of petty tyrants."); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) ("compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association").

This Court should reaffirm that government efforts to use third-party intermediaries to abridge speech where the government could not do so directly, violates the Constitution.

ARGUMENT

I. GOVERNMENT CANNOT DO INDIRECTLY WHAT IT CANNOT DO DIRECTLY.

It is well-established that government may not do indirectly what it is constitutionally forbidden to do

directly.[2] This rule applies regardless of whether the government acts innocently but abridges constitutional rights nonetheless. And it cannot be bypassed by imposing layers of procedure or non-government actors between itself and the victim.

NAACP v. Alabama, provides an example of a state attempting these gambits to bypass First Amendment rights, and this Court rebuffing them. 357 U.S. 449. Seeking to bypass the NAACP's associational rights, Alabama first tried to rely on a court order compelling production of the NAACP's membership list by disguising its own responsibility for seeking that information in the first place as a matter of court procedure. This Court said not so fast: "The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, has taken no direct action, to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order." *Id*. at 461 (citations omitted).

The Court was also unpersuaded that any harm flowing from exposure of the membership list may have been unintended by the state: "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court

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[2] *See Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (It is "axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.") (cleaned up); *Cummings v. Missouri*, 71 U.S. 277, 288 (1866) ("The legal result must be the same, if there is any force in the maxim, that what cannot be done directly cannot be done indirectly; or as Coke has it, in the 29th chapter of his Commentary upon Magna Charta, '*Quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud*.'").

recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *Id.* And the State's claim that any threat to the NAACP's members came not from the State itself, but from the public, was no excuse either because "[i]t is not sufficient to answer . . . that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from state action but from private community pressures." *Id.* at 463.

The dispositive point was that the State initiated the threat to the NAACP's rights by demanding the membership list in the first place, leading the Court to hold, "[t]he crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold." *Id.*

So too here where the harm to NRA from the insurance companies took hold only "after the initial exertion of state power."

II. THE GOVERNMENT'S ACTION HERE AND IN *MURTHY* IS PROHIBITED BY *BANTAM BOOKS*.

While the level of government—state versus federal—and the number of government actors—two individuals versus dozens—varies between this case and *Murthy*, the technique employed by government employees to drive out disfavored content from the public discourse is similar.

Here, Vullo, the former Superintendent of New York's Department of Financial Services, allegedly: "(1) warned regulated institutions that doing business with Second Amendment advocacy groups posed

'reputational risk' of concern to DFS; (2) secretly offered leniency to insurers for unrelated infractions if they dropped the NRA; and (3) extracted highly-publicized and over-reaching consent orders, and multi-million dollar penalties, from firms that formerly served the NRA." Petition at 3, 8. Lloyd's of London and its related syndicates ("Lloyd's"), Chubb Limited, doing business as Chubb ("Chubb"), and its administrator Lockton Companies, LLC ("Lockton") each received pressure and/or inducements to stop doing business with the NRA. App. 9; App. 11–12.

The motivation behind these tactics is alleged to have been animus at various levels of New York government, including former Governor Andrew Cuomo, and his appointee to NYDFS, Vullo. Petition at 18. Vullo acknowledged her desire to use her position to suppress NRA's ability to operate in New York due to her own views on gun ownership. App. 8–9. "At the meetings, Vullo 'presented [her] views on gun control and [her] desire to leverage [her] powers to combat the availability of firearms.'" *Id.*[3] Accordingly, she applied a variety of types of regulatory pressure to get insurance companies to stop doing business with the NRA. App. 9. For example, Vullo "explained how Lloyd's could come into compliance and avoid liability for its regulatory infractions, including by no longer providing insurance to gun groups like the NRA." App. 9 (cleaned up). Vullo also sought Lloyd's aid in "DFS's campaign against gun groups." *Id.* All three entities

[3] *See also* App. 23, n. 12 ("Complaint contains enough facts to plausibly allege that Vullo's actions were taken in retaliation for, or in an effort to chill, its gun promotion advocacy.").

changed their business relationships with NRA following pressure from Vullo. App. 11, n. 8; App. 15.

Similarly, in *Murthy* a phalanx of federal bureaucrats[4] contacted "nearly every major American social-media company," . . . urging the "platforms to remove disfavored content and accounts from their sites." *Missouri v. Biden*, 83 F.4th 350, 359 (5th Cir.), *cert. granted sub nom. Murthy v. Missouri*, 144 S. Ct. 7 (2023). In some instances, the "urging" took the form of a direct command, such as: "a White House official told a platform to take a post down 'ASAP,' and instructed it to 'keep an eye out for tweets that fall in this same [] genre' so that they could be removed, too." *Id.* at 360; in others, they implied the platform was viewed as a bad-actor, such as, "[the White House was] 'gravely concerned' the platform was 'one of the

[4] "(1) the President; (2) his Press Secretary; (3) the Surgeon General; (4) the Department of Health and Human Services; (5) the HHS's Director; (6) Anthony Fauci in his capacity as the Director of the National Institute of Allergy and Infectious Diseases; (7) the NIAID; (8) the Centers for Disease Control; (9) the CDC's Digital Media Chief; (10) the Census Bureau; (11) the Senior Advisor for Communications at the Census Bureau; (12) the Department of Commerce; (13) the Secretary of the Department of Homeland Security; (14) the Senior Counselor to the Secretary of the DHS; (15) the DHS; (16) the Cybersecurity and Infrastructure Security Agency; (17) the Director of CISA; (18) the Department of Justice; (19) the Federal Bureau of Investigation; (20) a special agent of the FBI; (21) a section chief of the FBI; (22) the Food and Drug Administration; (23) the Director of Social Media at the FDA; (24) the Department of State; (25) the Department of Treasury; (26) the Department of Commerce; and (27) the Election Assistance Commission [and] a host of various advisors, officials, and deputies in the White House, the FDA, the CDC, the Census Bureau, the HHS, and CISA." *Missouri v. Biden*, 83 F.4th at 359, n.2.

top drivers of vaccine hesitancy'", *Id.*; or that the platform was dishonest: "[y]ou are hiding the ball," *Id.* at 360; or they included thinly veiled threats, such as, "the White House was '[i]nternally . . . considering our options on what to do about it.'" *Id.* at 361. In response, "[t]he platforms apparently yielded." *Id.*

In each of these cases government employees held a policy position that differed from some member of the public. The policies were of intense public interest, addressing constitutional rights, government overreach, elections, and matters of life and death. In each case the government intervened with a third party that had the ability to throttle disfavored speakers and applied pressure on those private, intermediary, third parties. And, to some extent, the intermediaries changed their existing business practices to comply with the government's demands.

A. Under *Bantam Books*, the Government may not use a private intermediary to censor speech.

Although new technologies may present unique fact patterns, the dispositive legal issue has been before this Court before. In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), which exemplifies government efforts to use an intermediary to censor speech, this Court provided the model on which this case and *Murthy* should be decided.

In *Bantam Books*, appellants were four New York publishers of paperback books that were exclusively distributed in Rhode Island by Max Silverstein & Sons. *Id.* at 61. The Rhode Island Commission to Encourage Morality in Youth, repeatedly notified Silverstein that he was distributing books that the Commission deemed "objectionable" *Id.* at 60–61. In

response, because he wanted to avoid becoming involved in a court proceeding with a "duly authorized" government actor, Silverstein stopped filling pending orders, refused new orders, and even had his field staff pick up unsold copies from retailers and return them to the publishers. *Id*. at 63.

Silverstein was neither a plaintiff nor a defendant in *Bantom Books*.[5] Nevertheless, the publishers themselves had standing to vindicate their own rights against the government without involving the intermediary as a party in the case. *Id*. at n.6 ("Appellants' standing has not been, nor could it be, successfully questioned."). This was so because "the direct and obviously intended result of the Commission's activities was to curtail the circulation in Rhode Island of books published by appellants," even though the "Commission's notices were circulated only to distributors." *Id*.

Likewise, resolution of the publishers' merits claims did not require them to prove anything more about the distributor beyond that he did not voluntarily change his business practices away from his previously beneficial practice to the one demanded

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[5] Silverstein, as the distributor, could presumably have defended his own First Amendment rights. But the intermediary party does not have to be a speaker. For example, in *Backpage.com, LLC v. Dart*, the intermediary parties were the Visa and Mastercard credit-card companies, which had been asked by a sheriff to stop allowing their credit cards to be used to place ads on Backpage.com. *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015). Both companies stopped allowing their credit cards to be used to purchase ads anywhere on Backpage's website. *Id*. at 232.

by the government. Instead the Court focused solely on the government, holding the activities of the Commission were unconstitutional because its "operation was in fact a scheme of state censorship effectuated by extralegal sanctions," *Id.* at 72, in which "the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67. Such a "system of prior administrative restraints," came before the Court "bearing a heavy presumption against its constitutional validity." *Id.* at 70.

B. Resolution of these Cases Under *Bantam Books* Does Not Involve State Actor Doctrine.

Resolution of this case and *Murthy* under *Bantam Books* does not require analyzing whether the intermediary private entities are state actors. That issue was not present in *Bantam Books* and is not relevant here—nor in *Murthy*—because it imports a legal rubric that serves a purpose distinct from the one at issue in these cases.

State-actor analysis applies in two scenarios. The first is when "the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment," thus subjecting the private-party defendant to constitutional limitations and a constitutional remedy. *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)). Under this first type of scenario, the

private actor must be, (1) a defendant, and (2) acting as the state.

The second scenario is when the plaintiff "seeks to hold the State liable for the actions of private parties" even if the state was not involved in the challenged decision. *Blum*, 457 U.S. at 1004. Under this second type of scenario, the government must, (1) be a defendant, and (2) have not performed the alleged violative act for which liability is to be imposed.

Under both scenarios there is a transfer of liability to the defendant from the party who would ordinarily bear responsibility, justifying an additional layer of analysis to determine when such a transfer of liability is appropriate. The imputed constitutional liability thus could flow from the private party to the government or vice versa. But, in either case, *the legal issue is whether the Constitution applies to the actions for which the remedy is sought*. The "close nexus" test used under state-actor analysis thus turns on whether "it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. at 1004 (emphasis in original).

Section 1983 cases, such as *Polk Cnty. v. Dodson*, provide examples of the first type of relationship, in which the plaintiff seeks to impose constitutional liability on a private party under the theory that the private party acts under the imprimatur of the state and thus should bear state burdens. 454 U.S. 312 (1981). In *Dodson*, the question was whether a public defender acts "under color of" state law within the meaning of section 1983 when representing an indigent defendant in a state criminal proceeding. *Id.* at 314. The Court concluded that he did not because

the public defender was not acting under color of state law when performing a lawyer's traditional functions as counsel. *Id.* at 324–25. This is because the lawyer's decisions were "framed in accordance with professional canons of ethics, rather than dictated by any rule of conduct imposed by the State." *Blum*, 457 U.S. at 1009 (discussing *Dodson*). *See also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (lawsuit against public officials and a class of private insurers and self-insured employers under § 1983 required determining whether the specific conduct of which the plaintiff complained was attributable to the state before private parties could be liable); *Rendell-Baker v. Kohn*, 457 U.S. 830, 830 (1982) (§ 1983 lawsuit against private school that received public funds alleging violation of First, Fifth, and Fourteenth Amendment rights); *Jackson v. Metro. Edison Co.*, 419 U.S. at 345 (§ 1983 claim against a privately owned and operated utility corporation that held a certificate of public convenience issued by the Pennsylvania Utility Commission).

Blum v. Yaretsky, presents an example of the second type of "close nexus" in which the plaintiff seeks to hold the state liable for the actions of a private party. In *Blum*, a class of Medicaid patients sought to hold the State of New York responsible under the Due Process Clause of the Fourteenth Amendment for medical decisions by nursing homes that were reimbursed via the Medicaid program. *Blum*, 457 U.S. at 993–94, 96. The challenged decisions did not originate with state officials but with privately owned and operated nursing homes. *Id.* at 1003. But the lawsuit sought to hold state officials liable for those decisions and the remedy sought would have required the State to adopt regulations

that would prohibit private conduct. *Id*. at 1003. Thus, the desired remedy would have been imposed on the state, which was not responsible for the challenged decisions, and not on the private actors.

Only where one of these scenarios is alleged should state actor doctrine come into play. Where the alleged constitutional harm may be established and remedied without imposing liability or any mandate on the intermediary entity (or holding the government responsible for its behavior as well as the government's own activity), do the myriad of "state-actor" characteristics become relevant to resolution of the controversy.

Neither of those situations is present here or in *Murthy*. Here, and in *Murthy*, the defendants are not private parties, so the first type of state actor nexus is not relevant. Here, the defendant is a state official and liability is alleged to flow from her own unconstitutional action—not the independent act of a private party; there is thus no attempt to impute liability from a third party and, therefore, the first type of state actor analysis does not apply. In *Murthy*, the defendants are also government officials and the allegations of unconstitutional action are levelled only at their activity, so the first type of state actor analysis does not apply there either. In both cases plaintiffs seek to hold only government defendants responsible for their own unconstitutional acts—no state actor analysis is needed.

C. The First Amendment Protects Against Content-Based Restrictions Regardless of Intent.

This Court has been clear that government interference with speech cannot be excused by

claiming government officials had only the best of intentions. In fact, government intent simply does not matter. *Reed v. Town of Gilbert, Ariz.*,576 U.S. 155, 165 (2015) ("We have thus made clear that illicit legislative intent is not the *sine qua non* of a violation of the First Amendment, and a party opposing the government need adduce no evidence of an improper censorial motive.") (cleaned up). A law that is content based is subject to strict scrutiny regardless of the government's benign motive. *Id.* at 165. And, keeping the public ignorant of disfavored ideas does not provide adequate justification for censorship. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.").

Moreover, "good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. The existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Norwood*, 413 U.S. at 466 (citing *Wright v. Council of City of Emporia*, 407 U.S. 451, 462 (1972)). This framework would hold, for example, even if the Town of Gilbert requested a local Boy Scout Troop to go around town removing non-conforming signs and the Boy Scouts, eager to support the town, did as requested. Indeed, in *Norwood*, the Court demonstrated how such intermediary action does not cut off constitutional liability in the Equal Protection context by holding "the Constitution does not permit the State to aid discrimination." 413 U.S. at 465–66. Thus, a "State may not grant the type of tangible financial aid here involved if that aid has a

significant tendency to facilitate, reinforce, and support private discrimination."). *Id.*[6]

Reliance on a private party to facilitate unconstitutional government activity as a middleman does not cut off liability even where the government official believes the intermediary would be better off silencing its customers.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Second Circuit under *Bantam Books*.

Respectfully submitted,

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[6] Notably, the holding in *Norwood* was driven by the provision of funding and not any state directive that the recipient schools discriminate, unlike here where the unconstitutional direction came directly from government officials and did not spring from a private party with whom the government may have disagreed.