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

BRIEF FOR SENATOR TED BUDD AND 17 ADDITIONAL MEMBERS OF THE UNITED STATES SENATE, AND REPRESENTATIVE RICHARD HUDSON AND 62 ADDITIONAL MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are Senator Ted Budd and 17 additional members of the United States Senate, and Representative Richard Hudson and 62 additional members of the United States House of Representatives. *See* Appendix. As elected representatives, *amici* have an interest in protecting their constituents' First and Second Amendment rights. Statutes enacted by Congress such as 42 U.S.C. § 1983 give individuals the ability to enforce their constitutional rights against government officials. In addition to longstanding civil rights laws, Congress previously passed legislation for the express purpose of protecting the First Amendment rights of gun manufacturers, sellers, and their trade associations. Those rights are at stake in this case.

The power of one State to drive policy across the entire country is also at issue here. "The people will be represented in one house," and "[t]he state legislatures in the other," explained James Iredell, one of this Court's first Justices, at North Carolina's 1788 ratifying convention. 3 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS IN CONVENTION ON THE ADOPTION OF THE FEDERAL CONSTITUTION 48 (Jonathan Elliot ed., 1830). Given the Senate's role in representing the interests of the States, Senator Budd and his fellow

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* made such a monetary contribution.

Senate colleagues have a unique interest in ensuring that sister States do not exert control over the affairs of the people in the States they represent.

INTRODUCTION AND SUMMARY OF ARGUMENT

Former New York Governor Andrew Cuomo is an implacable foe of gun rights. While previously serving as a cabinet member, Cuomo pledged the federal government's resources to a litigation campaign against gun manufacturers and their supporters, an agenda so extreme it rattled gun control proponents. In 2005, Congress quelled Cuomo's ambitions by enacting the Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, §§ 1-4, 119 Stat. 2095, 2095-99 (codified at 15 U.S.C. §§ 7901-7903) (the "PLCAA"), a statute to shield both the gun industry and organizations like Petitioner NRA from legal claims arising out of violent crimes committed by third parties.

Cuomo did not accept democracy. Aware such legislation might become a reality, Cuomo earlier promised to take his fight against gun rights to the state and local level whatever may come. Together with longtime ally Respondent Maria T. Vullo, the former Superintendent of the New York Department of Financial Services ("DFS"), Cuomo delivered on that promise. Blocked by federal law and this Court's Second Amendment precedents from mounting a direct attack on the NRA and gun manufacturers, Cuomo instructed

Vullo and her powerful state agency to urge insurers and financial institutions to drop the NRA as a customer. Meanwhile, Vullo and DFS selectively enforced the Empire State's insurance laws against NRA vendors, interfering with the organization's access to mission-critical insurance coverage and basic financial services. This campaign singled out the NRA's financial relationships on account of the organization's First Amendment-protected advocacy for gun rights, speech Vullo maligned as "promot[ing] guns that lead to senseless violence." Pet. App. 246, 249. This was not, as the Second Circuit found below, a "good faith" effort to enforce New York's insurance laws in an evenhanded way, but rather a state-sanctioned assault on disfavored speech in violation of the First Amendment—including the very speech rights Congress sought to protect in the PLCAA. 15 U.S.C. § 7901(b)(5).

This case presents other constitutional problems. In their pursuit of the NRA and gun rights advocates, Cuomo, Vullo, and DFS used New York's insurance laws to project power outside the State's boundaries. Their agenda raises federalism concerns. "Not only do States retain sovereignty under the Constitution, there is also a fundamental principle of equal sovereignty among the States." *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013) (internal quotation marks omitted). If Vullo's actions are affirmed, some States may prove to be more equal than others.

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ARGUMENT

I. THE SECOND CIRCUIT'S DECISION UNDERMINES FIRST AMENDMENT FREEDOMS CONGRESS PASSED LEGISLATION TO PROTECT.

A. Congress Passed Legislation to Prevent Former New York Governor Andrew Cuomo and Others From Bringing Baseless Lawsuits Against the Gun Industry.

Former New York Governor Andrew Cuomo has long targeted gun rights. In the late 1990s, inspired by lawsuits against the tobacco industry, various plaintiffs started suing gun manufacturers, retailers, and trade associations for gun violence. Fred Musante, *After Tobacco, Handgun Lawsuits*, N.Y. TIMES (Jan. 31, 1999), https://www.nytimes.com/1999/01/31/nyregion/after-tobacco-handgun-lawsuits.html. While serving as the Secretary of the United States Department of Housing and Urban Development, Cuomo pledged to throw the resources of an entire federal cabinet department behind this nascent litigation campaign. David Stout & Richard Perez-Pena, *Housing Agencies to Sue Gun Makers*, N.Y. TIMES (Dec. 8, 1999), https://www.nytimes.com/1999/12/08/us/housing-agencies-to-sue-gun-makers.html. Initial reports attributed Cuomo with saying "that his agency would file a massive lawsuit" against gun companies "on behalf of the nation's 3,191 public housing authorities." Sharon Walsh, *Gunmakers Up in Arms Over HUD Plan to Sue Them*, WASH. POST (Dec. 9, 1999), https://www.washingtonpost.com/wp-srv/WPcap/1999-12/09/056r-120999-idx.html.

Later reports clarified the housing authorities "would bring a class action lawsuit against gun makers with help from" Cuomo's agency. Stout & Perez-Pena, *supra*.

Cuomo's plan was too extreme even for gun control proponents. *The Washington Post*, which said it "strongly supports rigorous controls for handguns," editorialized against the plan, describing Cuomo's project as "an abuse of a valuable system." *The HUD Gun Suit*, WASH. POST (Dec. 17, 1999), https://www.washingtonpost.com/archive/opinions/1999/12/17/the-hud-gun-suit/48ee0a45-18da-4e8d-9b86-b9512172ae09/. The *Post* conceded that it is "wrong for an agency of the federal government to organize other plaintiffs to put pressure on an industry"—even one the paper described as "distasteful"—in order "to achieve policy results the administration has not been able to achieve through normal legislation or regulation." *Id.*

Undeterred, Cuomo later argued that "when you've tried for years and years to get legislation, and you see no progress, then you go to the court system." Remarks by Secretary Andrew Cuomo to Handgun Control, Inc. (June 20, 2020), https://archives.hud.gov/remarks/cuomo/speeches/handguncontrl.cfm. To promote his agenda, Cuomo indulged what one member of this Court called an "overweening addiction to the courtroom as the place to debate social policy" rather than the ballot box, something "bad for the country and bad for the judiciary." Neil Gorsuch, *Liberals'N'Lawsuits*, NAT'L REV. (Feb. 7, 2005), https://www.nationalreview.com/2005/02/liberalsnlawsuits-joseph-6/.

Cuomo speculated that voters might reject his litigation agenda. Calling this "very much a political issue," one on which "the NRA is very potent politically," Cuomo worried "that if certain politicians are elected, the lawsuits [against the gun industry] will go away." Remarks by Secretary Andrew Cuomo, *supra*. Gun manufacturers, Cuomo complained, are "going to be immunized" from liability "if Bush becomes president." *Id.* Ultimately though, "this is not going to be an effort that is won in Washington." *Id.* "You can't win this in Washington," Cuomo explained. *Id.* "If we engage the enemy in Washington we will lose." *Id.* The gun industry "will beat us in this town," which Cuomo called the industry's "fortress." *Id.*

In 2005, with bi-partisan support, Congress handed Cuomo the defeat he long feared. The PLCAA shields manufacturers, distributors, and trade associations from any "civil action or proceeding or an administrative proceeding brought by any person" against a gun manufacturer, seller, or trade association "resulting from the criminal or unlawful misuse of a [firearm] by the person or a third party." 15 U.S.C. § 7903(5)(A). Congress provided that such litigation "may not be brought in any Federal or State court," *id.* § 7902(a), and required that all pending actions "be immediately dismissed," *id.* § 7902(b). Not only that, Congress defined "person" to include "any governmental entity," *id.* § 7903(3), permanently blocking by federal statute Cuomo's proposed litigation campaign.

Congress' rejection of Cuomo's agenda contained a detailed list of findings and purposes. By banning

these lawsuits, Congress determined that "[t]he liability actions commenced or contemplated by the Federal Government [(i.e., Cuomo's plan)], States, municipalities, and private interest groups and others" were not only misguided, but "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." *Id.* § 7901(a)(7).[2] Congress also found, three years before this Court's landmark decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment "protects the rights of individuals, including those who are not members of a militia or engaged in military service, to keep and bear arms," 15 U.S.C. § 7901(a)(2). And relevant here, one of the PLCAA's core purposes is "[t]o protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances." *Id.* § 7901(b)(5).

Stymied by "the enemy" on Capitol Hill, Cuomo did not accept democracy. In 2000, more than five years before Congress enacted the PLCAA, Cuomo pledged to take his fight against the gun industry and its allies to the state and local level. Prefiguring the events

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[2] Congress' rejection of these legal theories as a legitimate expansion of the common law evokes Rule 11's sanctionable bar on pursuing legal claims unsupported "by a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law." Fed. R. Civ. P. 11(b)(2).

giving rise to this litigation, Cuomo promised that "[w]e're going to beat them," meaning gun rights advocates like the NRA, "state by state, community by community." Remarks by Secretary Andrew Cuomo, *supra*. New York's former governor was not bluffing.

B. Andrew Cuomo, Maria Vullo, and the New York Department of Financial Services End Run the PLCAA and the First Amendment.

1. Cuomo and Vullo Use New York State Financial Services Regulations to Disrupt the NRA's Access to Essential Financial Services.

After Congress enacted the PLCAA, this Court subjected state and local gun regulation to fundamental rights scrutiny in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which incorporated the Second Amendment against the States. Having lost in Congress and before this Court, state regulators like Cuomo had a problem. Because of the PLCAA, direct lawfare against the gun industry and trade associations like the NRA was off the table. At the same time, wholesale restrictions on gun ownership at the state and local level were out of the question after *McDonald*, and now so are bans on carrying handguns for self-defense outside the home, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

This is where DFS and its former Superintendent Respondent Maria T. Vullo, a Cuomo nominee to that

job and one of the former New York Governor's long-time political allies, Pet. App. 198 ¶¶ 19-20, enter the scene. Thwarted from achieving their goals in other ways, Cuomo and Vullo sought to deny gun rights activists access to basic financial and insurance services. And there is no doubt such services are and were essential. At the outset of the COVID-19 pandemic, Cuomo identified financial services as one of twelve categories of "essential businesses" allowed to operate. Governor Cuomo Issues Guidance on Essential Services Under The 'New York State on PAUSE' Executive Order (Mar. 20, 2020), https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order.[3] DFS itself recognizes that "[a]ccess to safe and affordable financial services is critical to household financial stability." N.Y. State Dep't of Fin. Servs., ACCESS TO FINANCIAL SERVICES IN NEW YORK 1 (2023), https://www.dfs.ny.gov/system/files/documents/2023/05/nydfs_access_to_financial_services_nys_20230505.pdf.

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[3] This Court previously enjoined, on First Amendment grounds, Cuomo's targeting of religious services as part of his response to the COVID-19 pandemic, noting that "while a synagogue or church may not admit more than 10 persons," so-called "essential businesses," including financial institutions, were allowed to "admit as many people as they wish." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam); *see also* Guidance for Determining Whether A Business Is Subject To A Workforce Reduction Under Recent Executive Orders (Oct. 23, 2020), https://esd.ny.gov/guidance-executive-order-2026 (defining banks, lending institutions, and insurance companies as "essential businesses").

What is true for individuals and families holds true for organizations like the NRA which need banking services to raise, manage, and disburse funds. Pet. App. 203 ¶ 28. Commercial liability insurance is a general requirement to conduct business and a common contractual prerequisite to engage vendors and hold in-person events. *Id.* at 203-04 ¶ 29. The NRA, like bar associations, civic organizations, and other groups, offers affinity insurance plans as a membership perk. *Id.* at 204 ¶ 30. Under Vullo, DFS regulated all these offerings.

Prevented by Congress and this Court from mounting a direct legal attack on the NRA and gun manufacturers, Cuomo and Vullo set out on an indirect, but just as damaging path. For the NRA's longtime financial vendors, this first meant unwanted attention from DFS regulators. In October 2017, DFS launched an investigation into the NRA's Carry Guard self-defense affinity insurance product. *Id.* at 206-07 ¶¶ 34-37. The pressure became so pronounced that the NRA's longtime insurance broker ended its relationship with the organization, with the broker raising concerns that it might lose its New York business license. *Id.* at 209 ¶ 42. Contemporaneously, a large commercial insurance carrier declined to do business with the NRA at any price. *Id.* at 210 ¶ 44.

Cuomo and Vullo took the campaign to another level. In an April 2018 press release, Cuomo announced he had instructed Vullo and DFS "to urge insurers and bankers statewide to determine whether any relationship they may have with the NRA or

similar organizations sends the wrong message to their clients," explaining further that "[t]his is not just a matter of reputation, it is a matter of public safety." *Id.* at 243-44. Vullo issued two guidance letters to all insurers and financial institutions doing business in the State of New York. After invoking the lives lost at Sandy Hook and Columbine High School, Vullo framed any ongoing or potential relationship with "the NRA or similar gun promotion organizations" as fraught with "reputational risks" and "encourage[d]" these DFS-regulated entities "to take prompt actions to managing these risks and promote public health and safety." *Id.* at 248, 251. The day after Vullo sent her guidance letters, Cuomo called the NRA "an extremist organization" and "urge[d] companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public." *Id.* at 213 ¶ 51.

Two weeks later, DFS and the entities involved in administering, marketing, and underwriting NRA-branded affinity insurance products entered consent decrees. One of the decrees barred the NRA's affinity insurance administrator not only from participating in the Carry Guard insurance program, but also in "any other NRA-endorsed programs with regard to New York State." *Id.* at 269 ¶ 42. Similarly, the underwriters for the NRA-endorsed program agreed "they shall not enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance." *Id.* at 289 ¶ 22. DFS also imposed civil penalties of

$7 million and $1.3 million on the entities involved in NRA's insurance program. *Id.* at 268 ¶ 41, 287 ¶ 20.

While Cuomo and Vullo were exercising state power against the NRA's insurance vendors through DFS, the state agency was working against Lloyd's of London. Vullo and DFS gave the company the bad news first: Lloyd's was out of compliance with New York laws governing affinity insurance. *Id.* at 223 ¶ 69. Then came the good news: leniency was available if only the global insurance marketplace would instruct its syndicates to stop underwriting gun and NRA-related polices. *Id.* Lloyd's accepted the deal, announcing its underwriters would stop providing insurance to the NRA. *Id.* at 224 ¶ 72. Lloyd's later entered a consent decree with DFS, paying $5 million in civil monetary penalties while committing to refrain from "enter[ing] into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance covering persons or entities whose home state is New York." *Id.* at 305-06 ¶¶ 19-20.

The campaign had the effect Cuomo and Vullo wanted. The NRA struggled to find an insurance carrier willing to extend general commercial liability insurance to the organization for fear of being targeted by DFS, imperiling the organization's Second Amendment advocacy agenda. *Id.* at 227-28 ¶ 81. The organization even found basic financial services difficult to come by, as banks withdrew their bids for the NRA's business after Vullo's April 2018 guidance letters. *Id.* at 228 ¶ 82.

2. Cuomo and Vullo's Targeted, Coercive Regulatory Agenda Flouts Congress' Express Desire to Protect the First Amendment Rights of Gun Rights Advocates.

In the PLCAA, one of Congress' express purposes was to ensure "the right, under the First Amendment to the Constitution, of . . . trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances." 15 U.S.C. § 7901(b)(5). The statute blocks what Congress defined as a "qualified civil liability action," meaning any "civil action or proceeding or administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association" which is premised on "the criminal or unlawful misuse" by the person bringing the action "or a third party." *Id.* § 7903(5)(A); *see also id.* § 7902 (barring any "qualified civil liability action"). The term "trade association" includes groups like the NRA. *See id.* § 7903(8).

Third party conduct was front and center in Vullo's April 2018 guidance letters. Opening with references to school shootings, DFS' former Superintendent noted the "social backlash" against both the NRA and other organizations "that promote guns that lead to senseless violence," praising "the passionate, courageous, and articulate young people who have experienced this recent horror first hand." Pet. App. 246, 249. Vullo cited "recent actions of a number of financial institutions that severed their ties with the NRA after" a school shooter "killed 17 people in Parkland, Florida" as "an

example" of companies "fulfilling their corporate social responsibility." *Id.* at 247, 250.

The PLCAA prevented Vullo from suing the NRA and the components of the supply chain for the firearms used in these tragedies.[4] But Vullo evaded the statute by targeting the NRA's insurance and financial vendors which happen to fall outside the definitions of "manufacturer," "seller," and "trade association." By leveraging financial regulations to inflict long-desired harm on the NRA, Vullo and DFS effectively nullified a federal statute. Vullo also handed state and local regulators a playbook for undermining the First Amendment rights of any group that expresses disfavored views, as any number of environmental, health, and safety regulations can be used as a predicate to hinder an opponent's access to essential services. After all, the power to regulate is the power to destroy. *Cf. McCulloch v. Maryland*, 17 U.S. 317, 431 (1819) ("[T]he power to tax involves the power to destroy."). Letting the decision below stand "invites the disassembly and destabilization" of not just the gun industry, but "of other industries and economic sectors lawfully competing in the free enterprise system in the United States," 15 U.S.C. § 7901(a)(6), the very result Congress sought to avoid by passing the PLCAA.

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[4] Congress defined the term "qualified product" to include "a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce." 15 U.S.C. § 7903(4).

3. The First Amendment Bars Cuomo and Vullo From Using Regulatory Power to Target, Censor, and Chill Protected Speech. The Second Circuit's Contrary Holding, Which Gave Short Shrift to This Court's Cases, Should be Reversed.

Governments have long sought to inhibit disfavored speech by controlling the medium of expression. The "core abuse against which [the First Amendment] was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the 'evils' of the printing press in 16th- and 17-century England." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320 (2002). That system prohibited "the publication of any book or pamphlet without a license and required that all works be submitted for approval to a government official." *Id.*

This Court confronted a more modern, informal censorship regime in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). That case involved a First Amendment challenge to the Rhode Island Commission to Encourage Morality in Youth's activities. *Id.* at 60. The Commission was tasked with "investigat[ing] and recommend[ing] the prosecution of all violations" of state laws related to content "containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth." *Id.* Instead of targeting book publishers, the Commission sent notices to book distributors that held content in inventory which "had been declared by a majority of [the Commission's]

members to be objectionable for sale, distribution or display to youths under 18 years of age." *Id.* at 61. The censors targeted the distributors for a reason—the government almost certainly knew that "[t]he distributor who is prevented from selling a few titles is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights." *Id.* at 64 n.6. Unsurprisingly, with the threat of prosecution looming, the notices caused the targeted distributors to stop listing and selling the objectionable titles. *Id.* at 64. This Court struck down the system on First Amendment grounds, finding the Commission to be "an agency not to advise but to suppress." *Id.* at 72.

Cuomo, Vullo, and DFS employed a similar scheme to the one Rhode Island devised in *Bantam Books*. In much the same way the Commission targeted book distributors instead of publishers in that case, New York's executive branch did not target the NRA directly, but rather financial services vendors critical to its mission. Vullo and DFS' enforcement activities barred the NRA's affinity insurance administrator, marketer, and underwriter from certain further dealings with the organization. Part I.B.1, *supra*. DFS also extracted millions of dollars in civil penalties from the NRA's vendors. *Id.*

The conduct at issue here is even more coercive than what took place in *Bantam Books*. Before this Court, the Commission argued that it "simply exhorts booksellers and advises them of their legal rights." *Id.* at 66. Even "though the Commission" could only inflict "informal sanctions," there had been no prosecutions,

and no books had "been seized or banned by the State," this Court found "the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67. The same is true here. As in *Bantam Books*, this Court should "look through forms to substance," and "recognize" the "informal censorship" that exists here for what it is. *Id.*

The Second Circuit reached a different conclusion. The court determined, "as a matter of law" at the Fed. R. Civ. P. 12(b)(6) stage, that "Vullo's statements in the Guidance Letters and Press Release are clear examples of permissible government speech," Pet. App. 28, which "use[d] only suggestive language and rely on the power of persuasion," *id.* at 36. In this telling, Vullo's statements "were written in an even-handed, non-threatening tone and employed words intended to persuade rather than intimidate." *Id.* at 29. Similarly, the Second Circuit found Vullo and DFS' treatment of Lloyd's and the consent decrees entered against the NRA's vendors "show that [Vullo] was simply executing her duties as DFS Superintendent and engaging in legitimate enforcement action." *Id.* at 33.

The decision below contains multiple flaws. Foremost, the Second Circuit gave only passing attention to this Court's *Bantam Books* decision, with the court's only detailed treatment of the case consigned to a footnote in the qualified immunity section of the opinion. *See* Pet. App. 35 n.15. There, in denying that case law "clearly establish[es] that Vullo's statements in this case were unconstitutionally threatening or coercive,"

the court homed in on the Rhode Island Commission to Encourage Morality in Youth "advising that lists of 'objectionable' books were being sent to the Chief of Police, and warning that the Attorney General 'will act' in case of noncompliance." *Id.* According to the court, that "will act" advisory is sufficient to distinguish *Bantam Books* from Vullo's actions in this case.

Vullo and the state agency she commanded loomed even larger than the Rhode Island Commission. The Commission in *Bantam Books* could only "recommend" obscenity prosecutions, lacking the power to bring them directly. 372 U.S. at 60. As Justice Harlan put it in his dissent, the Commission's statements had "an air of authority which that body does not possess." *Id.* at 77 (Harlan, J., dissenting). Unlike the Commission, Vullo and DFS had direct authority over the NRA's vendors, and the agency exercised it repeatedly. Comparatively, Vullo and DFS held more power and did far more than the Commission which argued, as Vullo does here, that it "simply exhorts booksellers and advises them of their legal rights." *Bantam Books*, 372 U.S. at 66.

The Second Circuit characterized Vullo's actions as "good faith" enforcement of New York's insurance laws, finding that "DFS explicitly permitted Lloyd's (and the other entities) to continue doing business with the NRA." Pet. App. 37. The court substantially overstated the freedom of the NRA's former vendors. While the consent decrees provided that the NRA's affinity insurance administrator "may assist the NRA in procuring insurance for the NRA's own operations," Pet.

App. 270 ¶ 43, and the NRA was allowed to "purchase insurance from [the organization's underwriter] for the sole purpose of obtaining insurance for the NRA's own corporate operations," *id.* at 289 ¶ 22, the entities were still barred from "underwrit[ing] or participat[ing] in any affinity-type insurance program involving any line of insurance to be issued or delivered in New York State," *id.* at 270 ¶ 43, 289 ¶ 22. DFS required the same from Lloyd's. *See id.* at 306 ¶ 20. In this regard, the consent decrees blocked the vendors from engaging in an entire line of business with the NRA, regardless of the underlying compliance of any future affinity programs.

In the Second Circuit's telling, Vullo acted against "serious insurance law violations" to which "the entities—sophisticated companies represented by experienced counsel—admitted." *Id.* at 33. But the consent decrees themselves do not represent a judicial determination of wrongdoing, rather they are "devices to facilitate settlement." *Loc. No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 524 n.13 (1986). The entities may have entered the consent decrees for any number of pragmatic reasons, including to have Vullo and her agency "go easy" on other, more lucrative components of their businesses. Like the distributors in *Bantam Books*, Vullo's enforcement targets lacked the incentives to fully push their rights. 372 U.S. at 64 n.6 The practical effect of the pressure campaign on the private entities was and is to hinder the NRA's First Amendment-protected gun rights advocacy mission. By exploiting a weak link in

the NRA's operation, Vullo and DFS used state power to "induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (cleaned up). Regardless, the court below left unexplored why the "serious misconduct" at issue spurred investigations into NRA-connected entities, but not other similarly situated entities in the affinity insurance marketplace. Pet. App. 220-21 ¶ 66. Nor did the court account for the fact that the press release and Vullo's guidance letter say nothing about insurance compliance matters, focusing instead on gun violence. *See id.* at 243-51.

This leads to the Second Circuit's misapplication of the plausibility standard from *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The lower courts dismissed the NRA's case at the pleadings stage, without the benefit of discovery. The Second Circuit analogized the NRA's claims to the *Twombly* plaintiffs' "allegations of parallel business conduct and a bare assertion of conspiracy." Pet. App. 33. The Second Circuit's apparent "obvious alternative explanation" for what happened here, *Twombly*, 550 U.S. at 567, the "legitimate enforcement action" against the "serious insurance law violations" of the NRA's vendors, Pet. App. 33, is belied by Vullo and her agency's apparent disinterest in other affinity insurance programs with the same compliance issues. The court also ignored the NRA's allegation, which must be accepted as true at the Fed. R. Civ. P. 12(b)(6) stage, that Vullo's actions chilled the NRA's

access to financial services and distressed bankers who complained about her "frustratingly vague" guidance which "can effectively compel institutions to cease catering to legal businesses." Pet. App. 228-29 ¶¶ 83-84. These are far from "unadorned, the-defendant-unlawfully-harmed me accusation[s]." *Iqbal*, 556 U.S. at 678. The NRA's First Amendment claims against Vullo should go forward.

II. THE SECOND CIRCUIT'S DECISION UNDERMINES FEDERALISM AND THE STATES' EQUAL SOVEREIGNTY.

As home to Wall Street and major stock exchanges, New York is the financial capital of the world. *New York remains top financial centre, London clings to second place, survey shows*, REUTERS (Sept. 28, 2023), https://www.reuters.com/business/new-york-remains-top-financial-centre-london-clings-second-place-survey-2023-09-28/. Financial institutions and insurers of any scale, particularly publicly traded companies, have a presence in the Empire State. DFS exerts significant power over these interests, with *The New York Times* going so far as to call Vullo's immediate predecessor the "Sheriff of Wall Street." Pet. App. 201-02 ¶ 25. For these companies, compliance with DFS regulations is the cost of admission to New York and the balance of the American economy.

Subject to Congress' power to regulate interstate commerce, the States enjoy "substantial leeway to adopt their own commercial codes." *Nat'l Pork Producers*

Council v. Ross, 598 U.S. 356, 369 (2023). New York, like its sister States, has the right to govern commercial conduct within its borders. Even so, in our system of divided sovereignty, problems arise "about where one State's authority ends and another's begins—both inside and outside the commercial context." *Id.* at 375. To resolve those conflicts, this "Court has long consulted original and historical understandings of the Constitution's structure and the principles of equal sovereignty and comity it embraces." *Id.* at 376 (internal quotation marks omitted).

This Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), illustrates the limits of state power. That case involved a state law fraud action against BMW for failing to disclose that the company had repainted a car marketed as new, *id.* at 564, which was a legal practice in other jurisdictions at the time, *id.* at 565. An Alabama jury awarded the plaintiff $4 million in punitive damages for "selling approximately 1,000 cars," the vast majority of which were sold outside Alabama, "for more than they were worth." *Id.* at 564.

This Court held that "principles of state sovereignty and comity" prevent "a State [from] . . . impos[ing] economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572. In rejecting the modified $2 million verdict as excessive under the Due Process Clause of the Fourteenth Amendment, this Court recognized that "[w]hile each State has ample power to protect its own consumers, none may use the

punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation." *Id.* at 585.

The same kind of regulatory overreach is at issue in this case. Cuomo, Vullo, and DFS' desire to project power beyond New York's borders was apparent at the outset. In the April 2018 press release, Cuomo "direct[ed] the Department of Financial Services to urge insurers and bankers statewide" to reevaluate their relationship with the NRA. Pet. App. 243-44. Vullo targeted "all insurance companies and banks doing business in New York." *Id.* at 244. Neither Cuomo nor Vullo distinguished between operations inside or outside the Empire State. Similarly, Vullo's guidance letters were addressed to "All Insurers Doing Business in the State of New York," *id.* at 246, and "New York State Chartered or Licensed Financial Institutions," *id.* at 249. The body of those letters contains references to "[o]ur insurers," *id.* at 247, and "[o]ur financial institutions," *id.* at 250, but nowhere did Vullo cabin her demands to New York operations, *see id.* at 246-51.

Vullo's advisories relate to corporate governance. "Corporations are creatures of state law," which means "the first place one must look to determine the powers of corporate directors is the relevant State's corporate law." *Burks v. Lasker*, 441 U.S. 471, 478 (1979). In her appeals to "corporate social responsibility," Vullo did not distinguish between entities incorporated in New York or other jurisdictions where corporate law demands directors prioritize shareholder gains or in Delaware where there is ongoing debate regarding the extent to which corporate directors can legally

promote non-shareholder interests. *See* Robert T. Miller, *Delaware Law Requires Directors to Manage the Corporation for the Benefit of its Stockholders and the Absurdity of Denying It*, HARV. L. SCHOOL FORUM ON CORP. GOVERNANCE (Dec. 13, 2023), https://corpgov.law.harvard.edu/2023/12/13/delaware-law-requires-directors-to-manage-the-corporation-for-the-benefit-of-its-stockholders-and-the-absurdity-of-denying-it/; William B. Barr & Jonathan Berry, *Delaware Is Trying Hard to Drive Away Corporations*, WALL. ST. J. (Nov. 24, 2023), https://www.wsj.com/articles/delaware-is-trying-hard-to-drive-away-corporations-business-environmental-social-governance-investing-780f812a. Cuomo and Vullo's "encouragement" regarding corporate social responsibility placed at least some regulated entities between the Scylla of not being viewed as a good corporate citizen in the world's financial capital, and the Charybdis of home-state fiduciary duty obligations.

The consent decrees contain additional evidence of Cuomo and Vullo's efforts to project power outside the Empire State. The consent decree entered against one NRA vendor bars "underwrit[ing] or participat[ing] in any affinity-type insurance program" with the NRA not just in New York, but anywhere else. *See* Pet. App. 289 ¶ 22.[5] The predicate violations of New York law

[5] That this provision applies outside New York is apparent from the consent decree's plain language. One provision in the consent decree bars the vendor from "participat[ing] in the Carry Guard insurance program or any similar program," but that language is qualified to "with regard to New York State." Pet. App. 288 ¶ 21. The immediately following paragraph contains no such geographic limitation. *See id.* at 289 ¶ 22.

included issuing policies "which provided insurance coverage that may not be offered in" New York such as "defense coverage in a criminal proceeding." *Id.* at 287 ¶ 18. One commentator openly questioned "whether all of the activities listed in the NYDFS consent decrees were in fact illegal" under New York law. George A. Mocsary, *Administrative Browbeating and Insurance Markets*, 68 VILL. L. REV. 579, 602 (2023). New York aside, even though this kind of self-defense coverage is legal in at least some States,[6] the consent decree bars the NRA's former vendor from issuing those policies anywhere. This means Vullo and her agency "impose[d] sanctions" on the vendor "in order to deter conduct that is lawful in other jurisdictions," which is precisely what this Court condemned in *BMW*. 517 U.S. at 573.

Nor is the NRA vendor Vullo targeted a local concern. According to the consent decree, that entity "is the world's largest publicly-traded property and casualty insurance company, and the largest commercial insurer in the United States" with "operations in 54 countries and territories." *Id.* at 280 ¶ 1. The practical effect of this consent decree is not just nationwide, but even extends to foreign commerce.

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[6] *See, e.g.*, Wash. State Off. of the Ins. Comm'r, *Why is Kreidler saying self-defense insurance policies are illegal*?, COMM'R'S EYE ON INSURANCE (Oct. 21, 2019) (explaining that "[s]elf-defense policies in and of themselves are not illegal," but that some policies contravene public policy "by not requiring policy holders to repay defense costs in the event of a criminal conviction").

If this Court affirms the Second Circuit, then Cuomo, Vullo, and DFS' "New York knows best,"[7] extra-territorial meddling will inspire States to leverage their laws to effect policy changes beyond their own borders in violation *BMW*'s rule. 517 U.S. at 585. States home to entrenched, geographically dispersed, critical industries will have the go ahead to impose a policy agenda on their sister States—and not just on guns, but on any number of other contested issues by deploying what Justice Sotomayor called in another, more geographically-limited context, "scheme[s] to target locally disfavored rights." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 72 (2021) (Sotomayor, J., concurring in the judgment in part, dissenting in part).

These are the kinds of federalism problems Congress passed the PLCAA to solve. In enacting that statute, Congress determined that the liability protections that law extended, which Cuomo and Vullo effectively nullified through their indirect litigation campaign, were necessary for the very structural reasons alluded to in *Ross*, 598 U.S. at 376. Congress found that the litigation gun rights opponents contemplated would "impose an unreasonable burden on interstate and foreign commerce of the United States," 15 U.S.C. § 7901(a)(6),

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[7] *Cf. Ross*, 498 U.S. 406-07 (Kavanaugh, J., concurring in part and dissenting in part) ("[California] has aggressively propounded a 'California knows best' economic philosophy—where California in effect seeks to regulate pig farming and pork production in *all* of the United States. California's approach undermines federalism and the authority of individual States by forcing individuals and businesses in one State to conduct their farming, manufacturing, and production practices in a manner required by the laws of a *different* State.").

"and undermin[e] important principles of federalism, State sovereignty and comity between the sister States," *id.* § 7901(a)(8). Related, two of the seven enumerated purposes of the PLCAA were "[t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce," *id.* § 7901(b)(4), and "[t]o preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States," *id.* § 7901(b)(6). What Cuomo, Vullo, and DFS did in this case undermines all these federalism principles Congress explicitly recognized. While a State may "serve as a laboratory" for policy, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), this Court should put an end to New York's unconstitutional experimentation on the NRA's First Amendment rights.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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