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 OF HEARTBEAT INTERNATIONAL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Heartbeat International, Inc. is a § 501(c)(3) nonprofit, interdenominational Christian organization whose mission is to support the pro-life cause through an effective network of affiliated pregnancy resource centers. Heartbeat serves approximately 3,400 pro-life centers, maternity homes, and nonprofit adoption agencies in over 80 countries, including more than 2,200 in the United States—making Heartbeat the world's largest such affiliate network.

This case asks whether the First Amendment allows a public official to intimidate and coerce private actors to suppress speech on matters of public concern. Here, it is gun control, but it could just as easily be pro-life speech. Regrettably, many public officials are hostile to pro-life speech and have violated the First Amendment rights of those expressing pro-life views. *E.g.*, *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361 (2018); *Frederick Douglass Found., Inc.* v. *District of Columbia*, 82 F.4th 1122 (D.C. Cir. 2023). And Heartbeat's own insurance provider recently cancelled its general liability policy, bluntly stating that Heartbeat's stance on legalized abortion precipitated the move. Heartbeat submits this amicus brief in support of Petitioners because it is keenly interested in protecting itself and the pro-life centers it supports from viewpoint-based censorship.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person other than amicus curiae, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

In *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 67–68 (1963), this Court held that when the government coerces a private actor to suppress speech the First Amendment protects, it is accountable for the censorship as if it had suppressed the speech directly. That holding rests on the twin premises that (1) private conduct the government directly or indirectly compels is really the government's conduct, and (2) because First Amendment freedoms are especially susceptible to subtle invasion, they "must be ringed about with adequate bulwarks." *Id.* at 66. Government censorship by private proxy jeopardizes free expression just as much as formal censorship.

Identifying coercion requires courts to look at what the government did and ask what it conveyed to the person on the receiving end. *Bantam Books* was clear that the law is concerned with the substance of what the government's conduct conveyed—not the form in which its message was delivered. Government efforts to coerce come in forms both bold and subtle, and a suggestion of repercussions from an official with expansive and unbridled regulatory power can be every bit as threatening as a heavy-handed demand. As with all state-action questions, context is king.

Judged by that metric, this should have been an easy case. The Superintendent of the New York Division of Financial Services—a powerful regulator with day-to-day supervisory authority over financial institutions and the power to punish them—holds Second Amendment advocacy in contempt. In official guidance memoranda and a press release, she pointed out that many institutions had "ended relationships with the NRA" and "encourage[d]" all others to "review"

their relationships with the NRA and "join" the institutions that had already cut it off. Pet.App.244, 248, 251. Leveraging "social backlash" and implicitly threatening enforcement, she cautioned institutions to consider the "reputational risk" from doing business with the NRA. *Ibid.* Both before and after, she commenced well-publicized enforcement actions against insurers on account of their relationship with the NRA. *Id.* at 207, 214, 218, 223–25 & nn. 25, 31, 37, 47. In response, financial institutions dropped the NRA. *Id.* at 227–29.

By intimidating financial institutions to cancel the NRA, the Superintendent coerced censorship. But the Second Circuit kicked the NRA's First Amendment case to the curb, doing the exact opposite of what *Bantam Books* says it should have. It's first misstep was protecting the Superintendent's "government speech" seeking to censor the NRA rather than safeguarding the NRA's speech, which is the speech that needed "adequate bulwarks" against government incursion. *Bantam Books*, 372 U.S. at 66. Then, the court elevated the form of the Superintendent's coercive statements over their substance, saying that because they did not make explicit demands or references to consequences, they passed constitutional muster. And finally, the court endorsed the Superintendent's use of "public outrage" as the basis for her censorship, granting herpower to censor based on a heckler's veto she would never enjoy directly.

That approach, which some other Circuits have unfortunately endorsed, turns First Amendment and state-action principles on their head. The First Amendment protects individual speech from the government, not government speech from the individual. This Court's state-action cases demand a wide-

ranging analysis of all facts in context, not a constricted look at the technical form of the government's conduct. And a heckler's veto has never been a basis for suppressing free speech.

If the Second Circuit's decision stands, more state campaigns of informal censorship will follow. This Court should reverse, making clear that individual speech takes precedence over government speech, coercion claims require courts to analyze all facts in their full context, and government officials cannot use a heckler's veto as justification for pressuring private actors to censor protected expression.

ARGUMENT

I. Public officials are chipping away at the freedom to think and speak by using private proxies to suppress disfavored ideas.

The Framers recognized that "the freedom to think and speak is among our inalienable human rights," and "an uninhibited marketplace of ideas" is indispensable to "test and improve our own thinking both as individuals and as a Nation." *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 584–85 (2023) (quotation omitted). To shield both from a government convinced it has a monopoly on truth, the First Amendment ensures "that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi.* v. *Mosley*, 408 U.S. 92, 95 (1972). Nonetheless, officials eager to squelch dissent often "test these foundational principles." *303 Creative*, 600 U.S. at 585. More and more, these tests come from officials who, aware they can't ban speech outright, browbeat private actors to do the dirty work of censorship on their behalf.

A. Officials increasingly wield the power of office to coerce private actors to censor those with disfavored ideas.

No government official could order a financial institution—or anyone else—to cut ties with a private speaker just because the official disapproves of the speech. The First Amendment denies government the power to "weigh[ ] the value of a particular category of speech against its social costs and then punish[ ] that category of speech." *Brown* v. *Ent. Merchs. Ass'n*, 564 U.S. 786, 792 (2011). That applies when government coerces private actors to censor speech just like when government censors directly. Where the Bill of Rights is concerned, "[w]hat cannot be done directly cannot be done indirectly." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (quotation omitted). So government officials are forbidden to "induce, encourage, or promote private persons" to suppress protected speech. *Norwood* v. *Harrison*, 413 U.S. 455, 465 (1973) (citation omitted).

That means officials cannot use the authority of public office to coerce private actors to suppress protected speech. In *Bantam Books*, this Court held that such coercive conduct threatens free expression as much as direct censorship. 372 U.S. at 66. Because coercion takes forms both bold and subtle, the Court committed to scrutinize official efforts to coerce private censorship rigorously, piercing "through forms to the substance" and favoring private speech over government statements seeking its suppression. *Id.* at 67. The First Amendment demands no less because "[i]t is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments." *Id.* at 66.

Yet many officials are emboldened because the Second, Ninth, and Tenth Circuits have become less vigorous about scrutinizing official bids to jawbone private actors. *E.g.*, *Kennedy* v. *Warren,* 66 F.4th 1199 (9th Cir. 2023); *VDARE Found.* v. *City of Colorado Springs*, 11 F.4th 1151 (10th Cir. 2021); *Nat'l Rifle Ass'n of Am.* v. *Vullo*, 49 F.4th 700 (2d Cir. 2022). As the Nation's politics have reached a boiling point, some officials are also more willing to push the First Amendment envelope in hopes of silencing the other side, presuming judicial correction will come too late to matter. Regardless, more officials are flexing the muscle of public office to intimidate social media platforms, financial institutions, insurance agencies, and others to suppress ideas.[2]

The Administration's full court press to force social media companies like Facebook and Twitter—now "X," but we still call it Twitter too[3]—to suppress speech opposing the government's narrative about COVID-19 is a prime example. The Administration wanted to stifle debate about, among other topics, whether COVID came from a lab in China (it said no), so it deployed the vast authority of the White House, the Surgeon General, and the Centers for Disease Control to do it. See *Missouri* v. *Biden*, 83 F.4th 350, 360–64 (5th Cir. 2023). Officials from the President on down publicly harangued social media companies, accusing them of giving voice to "misinformation" that was "killing people" and demanding they "take action against misinformation super-spreaders" on their

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[2] See generally Will Duffield, *Jawboning Against Speech*, CATO INST. (Sept. 12, 2022), bit.ly/41NEhjb.

[3] Oral Argument Tr. at 12:5–9, *O'Connor-Ratcliff* v. *Garnier*, No. 22-324, (Oct. 31, 2023) (Sotomayor, J.).

platforms. *Id.* at 363. In private, they systematically monitored social media content, had day-to-day communications with social media companies, insisted that platforms remove posts and block accounts, and demanded they alter policies to censor more posts disputing the official story about COVID's origin. See *id.* at 360–62. When the Administration thought the companies weren't responding with sufficient vigor, officials implied serious consequence by asserting that their "concern ... is shared at the highest (and I mean highest) levels of the [White House]." *Id.* at 362.

Understandably, the companies responded with "total compliance," censoring wide swaths of speakers. *Id.* at 359 & n.1, 361, 363. The Fifth Circuit saw through it—and the case is now before this Court, *Murthy* v. *Missouri*, No. 23-411—but speech was squelched, and the marketplace of ideas was denied important viewpoints. As it turns out, the Administration didn't have a monopoly on truth about COVID. That the virus originated in a Chinese lab was not a conspiracy theory; the Nation's top law-enforcement agency now thinks that's the most likely explanation.[4]

Legislators aren't immune to the temptation of leveraging their offices to get private actors to suppress speech. In June 2022, a group of 21 legislators led by Senator Mark Warner and Representative Elissa Slotkin pressured Google to limit the ways

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[4] Michael R. Gordon, *FBI Director Says Covid Pandemic Likely Caused by Chinese Lab Leak*, WALL ST. J. (Feb. 28, 2023), bit.ly/3S3jg0W.

people find pro-life pregnancy centers.[5] Noting they were "especially concern[ed]" after seeing the leaked draft of *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215 (2022), the legislators sought Google's "immediate attention," demanding that it throttle this content and prepare a response describing each step the company would take to address the legislators' concerns. Google complied, and Senator Warner took credit, claiming that he forced Google to accede to the legislators' wishes.[6] Months later, he and Representative Slotkin were at it again, sending Google another letter implying it had not lived up to its commitments and pressing for a "more expansive, proactive approach" to suppressing pro-life content.[7]

These are not outliers. In 2021, Senator Elizabeth Warren browbeat Amazon to stop advertising books about COVID, accusing it of "unethical, unacceptable, and potentially unlawful" conduct and demanding it answer questions so she could "fully understand Amazon's role in facilitating misinformation." *Kennedy*, 66 F.4th at 1204–05. In 2017, a hotel cancelled the conference of a group advocating less immigration after a city mayor wrote the hotel that the city would not condone "hate speech" and was "steadfast in its commitment to the enforcement of Colorado law" protecting individuals from "intimidation" and

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[5] Press Release, Warner, Slotkin, Colleagues Urge Action on Misleading Search Results About Abortion Clinics (June 17, 2022), bit.ly/421J6WB.

[6] Press Release, Following New Investigation, Warner & Slotkin Press Google on Misrepresentation in Ads Targeted to Users Searching for Abortion Services (Nov. 22, 2022), bit.ly/3tH5jwc.

[7] *Id.*

"harassment." *VDARE*, 11 F.4th at 1157. Similar examples abound.[8]

These efforts to compel private actors to squelch speech share significant commonalities. To begin, they are proof of *Bantam Books*'s observation that free speech is "vulnerable to gravely damaging yet barely visible encroachments." 372 U.S. at 66. The Administration's most coercive efforts to suppress COVID "misinformation" happened behind closed doors; in different circumstances, no one might have known the real reason posts and accounts were censored.

Further, these examples demonstrate that low-key communications are just as effective at strong-arming the private suppression of speech as explicit, heavy-handed threats. *E.g.*, *Missouri*, 83 F.4th at 378 ("[I]t is rare that coercion is so black and white."). Neither Senator Warner nor Senator Warren explicitly demanded that Google or Amazon do anything; they made "requests" or asked for "cooperation." Nor did they explicitly threaten adverse consequences (*e.g.*, prosecution, referral for prosecution, or even bad publicity) if their requests were refused. They obliquely cited laws or mentioned "potentially unlawful" activity. The mere fact that powerful public officials were coupling the significant authority of their office with vague, implicit threats was sufficient to coerce compliance.

No one disputes that public officials can try to persuade private actors that someone's speech is wrong: Counter-speech is the classic First Amendment answer to wrong or harmful speech. See *United States* v. *Alvarez*, 567 U.S. 709, 726 (2012). The problem is

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[8] Duffield, *supra* n.2.

using government power to do indirectly what officials are prohibited from doing directly: censoring opposing views.

When the government expressly or by implication pressures a private actor to censor speech, the risk of undue influence looms large. As a matter of persuasion, there's no legitimate reason for a White House official to tell a social media company that censoring posts has attention at the "highest (and I mean highest) levels." *Missouri*, 83 F.4th at 362. The purpose is not to persuade; it is to use the power of office to make the recipient think refusal is not an option. Mischaracterizing such communications as mere attempts to "persuade" gives officials—both those involved and those watching—a green light to censor.

B. When officials wield expansive regulatory power or exercise significant discretion, the potential for coercion is especially strong.

When an official with significant power or discretion relevant to a private actor's interests says, "Jump," the private actor is likely to respond, "How high?" That's how incentives work. The President has immense power and discretion that, depending on how it is exercised, can meaningfully affect Facebook's and Twitter's fortunes, so it is logical that those companies would meet White House insistence with "total compliance," *Missouri*, 83 F.4th at 363. Accord, *e.g.*, *Bantam Books,* 372 U.S. at 68 ("People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings....").

That reality is especially relevant in a case, like this one, involving financial-services regulation. As

others have shown, those regulators exercise enormous power over the institutions they regulate, subjecting them to ongoing, day-to-day supervision through routine examinations and investigations and possessing robust enforcement powers—cease and desist orders, consent decrees, director and officer bars, and other sticks besides.[9] Further, because the laws and regulations they enforce are broad and malleable—think "safety and soundness," for example—much is left to informal judgment. Considering that and the regulators' expansive powers, financial institutions have unusually strong incentives to regard informal guidance like the Superintendent's as binding.[10] Ignoring it is not worth the risk.

The concept of "reputational risk[ ]" that the Superintendent invoked is a good example. *Vullo*, 49 F.4th at 709, 716. This concept includes the idea that regulators can act when "the court of public opinion" might negatively judge an institution based on political, social, or cultural developments.[11] Putting to the side that financial regulators have no more competence to gauge the public mood than the man on the street, and that the public mood can often represent a

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[9] Amici Br. of Fin. & Bus. L. Scholars at 10-13, *Nat'l Rifle Ass'n* v. *Vullo*, No. 22-842 (Mar. 21, 2023); George A. Moscary, *Administrative Browbeating & Insurance Markets*, 68 VILL. L. REV. 579, 587–90 (2023); Julie Andersen Hill, *Regulating Bank Reputation Risk*, 54 GA. L. REV. 523, 557–61 (2020).

[10] Amici Br. of Fin. & Bus. L. Scholars at 10–12 & n.34, *supra* n.9 (citing and discussing, *inter alia*, Nicholas R. Parrillo, *Federal Agency Guidance & the Power to Bind: An Empirical Study of Agencies & Industries*, 36 YALE J. REG. 165, 174 (2019); Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective*, ADMIN. CONF. OF THE U.S. (Oct. 12, 2017)).

[11] Hill at 555, *supra* n.9; accord *id.* at 535–37.

heckler's veto, the subjective character of the issue makes reputational risk whatever the regulator—informed by her own political, social, and cultural values and experiences—decides it is.[12]

That malleability confers on regulators wide discretion in determining how regulated entities should behave. Couple that with the fact that the Superintendent of the New York Division of Financial Services may be the most powerful state financial services regulator of all, and you have a recipe for coercion. With expanded jurisdiction in the American financial services capital and broad powers of supervision and enforcement that include criminal investigations and referrals, the Division of Financial Services is an aggressive supervisor and enforcer.[13] Its first Superintendent after its 2011 expansion earned the moniker "Sheriff of Wall Street."[14] It's easy to see how an institution would regard as mandatory the Superintendent's "guidance" concerning the reputational risk of continuing business relationships with the NRA.

But the more important point is that official statements that may appear anodyne to a person outside a regulatory system would be coercive to a person within it. The context matters immensely because when the motivation for the official's statement is to suppress speech—not to merely advise someone of

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[12] Moscary at 611–12, *supra* n.9; Hill at 592–97, *supra* n.9.

[13] Hill at 554–56, *supra* n.9; see also Adrienne Harris, N.Y. Dep't of Fin. Servs., *Department of Financial Services 2022 Annual Report* at 4–5, 19 (June 15, 2023).

[14] Liz Rappaport, *Wall Street's New Watcher*, WALL ST. J. (Oct. 3, 2021), bit.ly/4aDCRMi.

rights and liabilities—the statement operates as "a scheme of state censorship effectuated by extralegal sanctions." *Bantam Books*, 372 U.S. at 72.

C. Official censorship by private proxy is a dangerous threat to First Amendment freedoms.

"First Amendment interests are fragile interests," *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 380 (1977), entitled to "special constitutional solicitude" in service of individual dignity and the marketplace of ideas, *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981). But when officials jawbone private actors to suppress speech, courts often excuse it by reading words literally instead of in context, saying the official didn't make an explicit threat, and deferring to a "right" of "government speech." *E.g.*, *Kennedy*, 66 F.4th at 1209; *Vullo*, 49 F.4th at 717; *VDARE*, 11 F.4th at 1165. This case is an opportunity to reset first principles in coercion cases so they align with the real world in which politics is zero-sum, citizens respond to incentives, and officials speak softly but carry a big stick. Solicitude is necessary because central First Amendment principles are at stake.

Officials often target matters of public concern. Official attempts to coerce censorship are often leveled at speech on matters of public concern. That speech lies "at the heart of the First Amendment's protection." *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (quotation omitted). So when courts mistake unlawful coercion for permissible persuasion—they grant officials license to target and suppress "expression situated at the core of our First Amendment values." *Texas* v. *Johnson*, 491 U.S. 397, 411 (1989).

Officials often target unpopular speech. Censoring officials doubtless think they're on the right side of history. Indeed, the Superintendent here invoked "societal backlash against the National Rifle Association" as her motivation. But controversial speech is "where the First Amendment's protections are most needed." *Lawson* v. *Murray*, 515 U.S. 1110, 1115 (1995) (Scalia, J., concurring). The Court should be wary of "an unfortunate tendency by some to defend First Amendment values only when they find the speaker's message sympathetic." *303 Creative,* 600 U.S. at 602.

Vague corporate policies open the door to speech censorship by regulators. Financial institutions set the stage for regulators to retaliate against people who express disfavored views by adopting vague and subjective "reputational risk" policies and prohibitions on "hate." According to the 2023 Viewpoint Diversity Score Business Index, which measures corporate respect for free speech and religious liberty, 64% of the 75 largest tech and finance companies include these kinds of problematic terms.[15] Most alarmingly, seven of the nation's 10 largest commercial banks—including the top three—maintain "reputational risk" or "hate speech" policies.[16]

Some customers have already felt the sting of these vague terms of service. Bank of America invoked a "risk tolerance" policy when it closed the long-

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[15] Viewpoint Diversity Score, *2023 Business Index* 14 (May 2023), https://www.viewpointdiversityscore.org.

[16] See generally *ibid.*; *Largest commercial banks in the United States in 2022, by revenue*, Statista, https://www.statista.com/statistics/185488/leading-us-commercial-banks-by-revenue.

time account of Indigenous Advance, a religious nonprofit organization that helps widows and orphans in Uganda.[17] And JPMorgan Chase denied service to an event featuring Donald Trump Jr. for promoting "hate, violence, [and] racial intolerance."[18] Similar examples abound.[19] These kinds of troublesome policies exist across the financial industry. Coupling them with the expansive power of bank and insurance regulators creates an environment that imperils everyone's speech, not just the NRA's.

This targeting chills protected speech. Even where official coercion is directed at speech outside the core of the First Amendment, the risk of chilling expression within it looms large. It's easy to see how both regulated businesses—concerned about how a public official will react—and individual citizens—concerned about being shut off from social media platforms or essential services—will restrict what they say. *E.g.*, *Missouri*, 83 F.4th 382–83; *Volokh* v. *James*, 656 F. Supp. 2d 431, 445 (S.D.N.Y. 2023). To prevent officials from causing the "self-censorship of speech that could not be proscribed," attempts to coerce require careful scrutiny. See *Counterman* v. *Colorado*, 600 U.S. 66, 75 (2022); *Bantam Books*, 372 U.S. at 66.

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[17] *Bank of America boots charity serving impoverished Ugandans under vague 'risk tolerance' policies*, Alliance Defending Freedom (Aug. 22, 2023), https://adflegal.org/press-release/bank-america-boots-charity-serving-impoverished-ugandans-under-vague-risk-tolerance.

[18] Summer Ballentine, *Chase slammed for clash over GOP event with Donald Trump Jr.*, Associated Press News (Nov. 18, 2021).

[19] Viewpoint Diversity Score, *Instances of Viewpoint-Based De-Banking*, https://www.viewpointdiversityscore.org/resources/instances-of-viewpoint-based-de-banking.

II. The Court should reaffirm that that the First Amendment prohibits all official efforts—obvious and subtle—to coerce private actors to suppress free speech.

The Second Circuit's opinion undermines core First Amendment principles by incentivizing public officials to strong-arm private censorship. Indeed, the opinion tells officials they have a protected right to do so. The opinion teaches officials that courts will excuse coercion by indulging the most innocent explanation of their motives. It advises officials that provided they don't make direct threats or reference consequences, coercion is fine. And it encourages officials to harness a heckler's veto when useful to suppress unpopular speech. The Court should reject all this and reverse.

A. This Court should hold that the individual's First Amendment rights supersede government speech seeking to suppress them.

The Second Circuit's opinion went gravely wrong as a matter of first principles. It decided that public officials have a First Amendment right to pressure private actors to suppress individual speech. The Court should hold that government enjoys no such right.

The Second Circuit reasoned that when the Superintendent leaned on financial institutions to drop the NRA, she exercised a protected "right" of "government speech." *Vullo*, 49 F.4th at 715 ("The First Amendment does not forbid her from speaking about her preferred course of action; rather, it gives her the freedom to advocate for it."). And it gave the

Superintendent's right of government speech equal treatment with the NRA's First Amendment rights. Because there were "[t]wo sets of free speech rights" for it to balance, the court perceived a need to "draw fine lines" to avoid over-protecting individual speech at the expense of government speech. See *id.* at 714–15 (quotation omitted).

That false equivalence was the wrong starting point. This Court has never held that the First Amendment protects a government right to advocate for the suppression of individual speech. See *Shurtleff* v. *City of Boston*, 596 U.S. 243, 268 (2009) (Alito, J., concurring) (citing *United States* v. *Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 210–11 (2003)). For good reason: The assumption that government exhortations to suppress speech get the same solicitude as individual speech the government wants to suppress turns constitutional priorities upside down. The Bill of Rights guarantees individual liberty against government interference, not government liberty against individual interference. See *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 37 (2022). So "the First Amendment protects *an individual's right to speak his mind* regardless of whether the government considers his speech sensible." *303 Creative*, 600 U.S. at 586 (emphasis added), not the other way around.

The idea that "government speech" calculated to squelch individual expression merits the same protection as individual expression invites government officials to pressure private actors to censor. It makes no difference to the silenced citizen whether an official censors speech directly or prods someone else to do it. Formal censorship and "informal censorship" both produce the same unconstitutional results. *Bantam Books*, 372 U.S. at 67–68.

The government-speech doctrine does not justify treating private speech and government exhortations to suppress it as equals. It ensures that the First Amendment's protections do not hamstring government's ability to speak in favor of legitimate priorities and programs. *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009). Thus, when the government is promoting or espousing a government priority, the First Amendment doesn't stop it from taking sides or require that it make space for dissenting views. *E.g.*, *Matal* v. *Tam*, 582 U.S. 218, 234 (2017).

The government-speech doctrine is not grounded in the notion that government has an unfettered right to advocate for anything, including the suppression of speech it dislikes. It is grounded in the practical realities of governing. "When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say." *Shurtleff*, 596 U.S. at 251–52. In those circumstances, "imposing a requirement of viewpoint-neutrality ... would be paralyzing" because government can't simultaneously advocate its own priorities and dissent from them too. *Tam*, 582 U.S. at 234. "How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials had to voice the perspective of those who oppose this type of immunization?" *Walker* v. *Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207–08 (2015). And if the policy the government advocates is wrongheaded, the political process provides a remedy: vote the government out. See *id.* at 207 (quoting *Bd. of Regents of Univ. of Wis. Sys.* v. *Southworth*, 528 U.S. 217, 235 (2000)).

Consistent with that framework, this Court has applied the government-speech doctrine to shield officials from the demands of viewpoint neutrality when they administer government programs. For example, the government generally need not make space for all comers when it decides what flags to fly on its buildings, what monuments to erect in its parks, or what private programs to subsidize. *E.g.*, *Shurtleff*, 596 U.S. at 251–52; *Summum*, 555 U.S. at 467–69; *Rust* v. *Sullivan*, 500 U.S. 173 (1991). To say the First Amendment doesn't regulate how the government makes policy decisions like these is one thing. To say it grants government a special protection to exhort others to suppress protected speech is quite another. See *Rust*, 500 U.S. at 193 ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.") (quotation omitted). "[V]irtually every government action that regulates private speech" would qualify as "government speech," but "plainly that kind of action cannot fall beyond the reach of the First Amendment." *Shurtleff*, 596 U.S. at 269 (Alito, J., concurring).

As this Court has warned, the government-speech doctrine "is susceptible to dangerous misuse" precisely because it risks allowing government to "silence or muffle the expression of disfavored viewpoints." *Tam*, 582 U.S. at 235. Squelching speech the government dislikes—whether by persuasion or coercion—is not a legitimate aim of government: Tolerating speech one dislikes "is life under the First Amendment." *Barr* v. *Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2366 (2020) (Gorsuch, J., concurring). If the government disagrees with speech, government counter-speech, not indirect suppression, is the answer.

Nor does anything about the rationale for the government-speech doctrine imply a government right to advocate the censorship of private speech. While demanding viewpoint neutrality might paralyze everyday government efforts to pursue a policy, the same can't be said of government efforts to convince private actors to suppress speech. A private speaker saying things the government disagrees with on his own time and own dime makes no demands of government, and treating that speech neutrally—*i.e.*, not censoring it—presents no difficulties for government. Further, when the government convinces private actors to suppress speech, the next election is no remedy: The speaker's right to express himself is irreparably damaged the moment it is suppressed. See *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality op.).

The Second Circuit's view that government speech advocating censorship is protected had it looking for ways to excuse the Superintendent's obvious plan to squelch the NRA's speech. Hunting for such explanations, the court conducted extra-record "research" on "corporate social responsibility" and decided "it was reasonable for [the Superintendent] to speak out about the gun control controversy and its possible effect on DFS-regulated entities" because "a business's response to social issues can directly affect its financial stability." *Vullo*, 49 F.4th at 717 & n.14. It likewise accepted without question that the Superintendent enforced the law against insurers who did business with the NRA because they committed "serious insurance law violations." *Id.* at 719. Having made those excuses, the court brushed past any inference that the Superintendent wielded her authority against the NRA simply because she does not like its speech. See *ibid.* Instead of expressing skepticism of

the Superintendent's conduct, the Second Circuit approached it from a position of judicial deference.

But the Constitution generally—and the First Amendment especially—exist to restrain official conduct, not to excuse it. See THE FEDERALIST NO. 51 at 269 (James Madison) (George W. Carey & James McClelland ed. 2001) (noting the need for external and internal controls on government because government officials are not angels). This Court should make clear that when a public official speaks as a public official, she has no protected right to exhort—let alone directly or indirectly coerce—private actors to suppress free speech, so there is nothing to "balance" against an individual's right to free speech. That individual right, which the Constitution explicitly protects, takes precedence.

B. The Court should reject the Second Circuit's four-factor test and reaffirm that *Bantam Books* requires a fact- and context-specific analysis of whether an official's actions are coercive.

Because it started from the wrong principles, the Second Circuit's opinion was necessarily wrong about methodology. Perceiving a need to "draw fine lines" to protect government speech and separate "persuasion" from "coercion," it reduced coercion to a four-factor punch-list: "(1) word choice and tone, (2) the existence of regulatory authority, (3) whether the speech was perceived as a threat, and (4) whether the speech refers to adverse consequences." *Vullo*, 49 F.4th at 715 (citation omitted). And it treated that list as

exclusive.[20] See *ibid.* This Court should reaffirm that determining whether an official has coerced a private actor requires a rigorous assessment of all facts in context, and that multi-factor tests are insufficient.

1. Under *Bantam Books*, whether an official has coerced private censorship is a fact- and context-specific inquiry.

The Second Circuit's four-factor test is irreconcilable with *Bantam Books*. That decision makes clear that state coercion is not always—or even primarily—explicit and direct, and that any consideration of the question requires a holistic approach.

The main point of *Bantam Books* is this: It was *not* a case of direct or explicit coercion. The Rhode Island commission had no lawful authority over book distributors—no power to supervise their businesses, enforce the obscenity laws, or sanction noncompliance with its requests. See 372 U.S. at 59–60, 68–69. Its letters to distributors did not claim otherwise or explicitly command distributers to take any action; it requested their "cooperation" and reminded them of its duty to recommend prosecution of those who dealt in obscenity. *Id.* at 62. On paper, the commission's assertion that it was "simply exhort[ing] booksellers and advis[ing] them of their legal rights" and not implicitly suppressing protected speech seemed quite clear, *id.* at 66, and may have survived the Second Circuit's punch-list approach.

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[20] Perhaps not in words, but certainly in application, the Ninth Circuit did the same. *Kennedy*, 66 F.4th at 1207–12 (stating the factors are not exclusive but evaluating only those factors).

But this Court did not accept the commission's justification for its actions. It "look[ed] through forms to the substance" and saw that what the commission had really done was "set about to achieve the suppression of publications deemed 'objectionable'." *Id.* at 67. Among other things, it (1) used official stationery, (2) invoked its official charge to educate and investigate regarding obscenity, (3) identified specific publications it wanted off shelves, (4) prompted monitoring of the distributors, and (5) made "thinly veiled threats" that prosecution would follow. *Id.* at 62–63, 67–68. Accordingly, the Court discredited the commission's assertion that it merely intended to "advis[e] the distributors of their legal rights and liabilities" and concluded that it was engaged in "a scheme of state censorship effectuated by extralegal sanctions." *Id.* at 72.

That whole-context analysis makes clear that evaluating a coercion claim demands close examination of all facts and careful attention to how the recipient would understand it. It will be the unusual official who explicitly demands that a private party censor speech or explicitly threatens a consequence. Officials are usually smarter than that. The form of the official's statement—such as the literal meaning of her words and the justification her statement asserts—are far less important than the practical reality of "what the statement conveys to the person on the other end." *Counterman*, 600 U.S. at 74 (quotation omitted).

That context-specific approach is in line with this Court's state-action precedents. When asking whether the state has coerced a private actor for purposes of holding the state responsible for private conduct, the Court has asked—in substance—whether

the conduct is "fairly attributable" to the state. *Brentwood Acad.* v. *Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295–96 (2001); accord *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). So whatever the theory of state action at issue—coercion, significant encouragement, or something else—the question is always a "necessarily fact-bound inquiry." *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 939 (1982); *Blum*, 457 U.S. at 1004 (explaining that "the factual setting of each case will be significant"). For that reason, when determining whether the state can be deemed responsible for private conduct, this Court has rejected "rigid simplicity," *Brentwood Acad.*, 531 U.S. at 295, like the four-factor test the Second Circuit applied here.

In any case where coercion is alleged, there are "a host of facts" and "range of circumstances" that "could point toward the State behind an individual's face." *Id.* at 296. Given the delicate First Amendment freedoms at stake, a court reviewing such allegations is duty-bound to consider them all.

2. The Second Circuit's test excludes highly probative facts from consideration.

Because it reduces coercion to four factors and pulls all other cards off the table, the Second Circuit's test sidelines a range of highly relevant facts and circumstances from consideration.

a. The test excludes threats implied by context.

A threat need not be explicit to be understood (correctly) as a threat. "I'm going to make you an offer you can't refuse" is not by itself threatening. But if the context is Vito Corleone saying it with Luca Brasi in tow, the listener knows he has no real choice. Statements by public officials are no different: "[T]he government need not speak its threat aloud if, given the circumstances, it is fair to say the message intimates some punishment." *Missouri*, 83 F.4th at 381. Depending on the context, a facially neutral statement can readily and legitimately be understood as a threat. *E.g.*, *Counterman*, 600 U.S. at 74.

Because the Second Circuit's test narrowly focuses on an official statement's "word choice and tone" and whether the statement "refers to adverse consequences," *Vullo*, 49 F.4th at 715, it necessarily excludes critical context. Indeed, the court's analysis of the guidance letters is a case in point. Looking solely at the face of the letters, the court held that they were not coercive because (1) their tone was "even-handed" and "nonthreatening" and (2) they "did not refer to any pending investigations or possible regulatory action." *Id.* at 717. That "some may have perceived the remarks as threatening" was, as far as the court was concerned, beside the point. *Ibid.*

Consider what that overlooks. A public official with vast supervisory and enforcement powers wrote regulatory guidance, which financial institutions take seriously, to regulated entities on official stationery. She invoked their obligation to manage "reputational risk"—a matter she regulates and can enforce—implied that doing business with the NRA was a

reputational risk, and "encourage[ed]" regulated institutions to evaluate whether they could, consistent with their duty to manage that risk, continue business with the NRA. Both before and after, she announced enforcement actions against regulated institutions based on their business with the NRA.

At the pleadings stage, it is entirely plausible that these were thinly veiled threats assuring financial institutions that compliance was not optional, particularly when viewed in context from the perspective of the financial institutions. See *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). What they communicated to regulated institutions was: "Expect us to come after you if you do business with the NRA." But because the Second Circuit's constricted test makes those facts irrelevant, they received no consideration in the court's analysis.

That gets things exactly backward: Under *Bantam Books*, a court is supposed to "look through forms to the substance" and determine how an official's statement would be "reasonably understood" by a recipient, 372 U.S. at 67, 68, not look exclusively at the form of the statement and ask whether its words are explicitly threatening. By looking only to form (words used) and ignoring substance (what, in context, they communicated), the Second Circuit's test wrongly requires an official to explicitly threaten adverse consequences before her statements can be recognized as coercive.

b. The test ignores the extent of the official's regulatory power and discretion.

In a similar way, the Second Circuit's test directs courts to consider "the existence of regulatory authority," *Vullo*, 49 F.4th at 715, but gives no consideration to how much authority the official has or how much discretion she has in wielding it. How the Second Circuit applied the test proves it: It noted in passing that the Superintendent "ha[s] regulatory authority" and stopped there. See *id.* at 717.

That is hardly the complete assessment of the "range of circumstances" the state-action inquiry demands. *Brentwood Acad.*, 531 U.S. at 295. Indeed, with laws and regulations that leave much to interpretation, the Superintendent enjoys considerably more discretion to reward and punish than other regulators.

The extent of a regulator's authority is just as relevant to coercion, if not more so, than the mere fact that regulatory authority exists. If an institution has more to fear from one regulator than another, it is more likely that, in context, statements by the first will be coercive when statements by the second might not. The Second Circuit's test fails to account for this reality.

c. The test is an underinclusive distraction from the ultimate question.

Because coercion hinges on how an official's statements are understood by those to whom they are directed, the Second Circuit's test is destined to miss the forest for the trees. By chopping a fact-dependent question into component pieces and focusing on only some of those pieces, that court mistakes the stated factors for the ultimate issue of whether an official's statement coerced private censorship of protected speech.

Consider some of the facts here that did not fit in the Second Circuit's punch-list consideration of the Superintendent's guidance letters and press release:

- The explicit purpose of the Superintendent's efforts was—as the court acknowledged but accorded no weight—to suppress Second Amendment advocacy: "She plainly favored gun control over gun promotion and sought to convince DFS-regulated entities to sever business relationships with gun promotion groups," *Vullo*, 49 F.4th at 717;
- The Superintendent worked with Governor Cuomo since 2007, and Governor Cuomo had a longstanding hostility to Second Amendment advocates, Pet.App.198–99 & n.15;
- In September 2017, the Superintendent began an investigation of one insurer based on its business with the NRA, instigated by an advocacy group whose mission is opposing the NRA, *id.* at 206–07;

- The Superintendent's investigation of Lockton became a matter of public record—known to other financial institutions—in October 2017, *id.* at 207 n.25;
- The Superintendent's April 2018 guidance letters relied on the malleable concept of reputational risk, using it as cover for squelching disfavored views on gun control, see *supra* Argument I.B;
- The Superintendent has immense regulatory authority and discretion, providing a powerful incentive for regulated entities to accede to her wishes, see *ibid.*;
- Given the unique nature of financial-system regulation, banks and insurers are substantially likely to treat guidance letters as mandatory rather than optional, see *ibid.*;
- The Superintendent followed her guidance letters in May 2018 with the public announcement of regulatory sanctions against Chubb for doing business with the NRA one month later, Pet.App.218;
- After these events, multiple insurers refused to provide coverage for the NRA's corporate operations, *id.* at 227–28; and
- After these events, multiple banks withdrew their bids to provide banking services to the NRA, *id.* at 228.

Because the Second Circuit's test focuses on four tiles instead of the whole mosaic, these facts received no weight. Yet when viewed as a whole and in context, they make it entirely plausible that the Superintendent coerced regulated institutions to suppress the NRA's speech. Taken together, they tell the story of a powerful regulator who wanted to suppress the NRA's speech, who had been empowered by her Governor to do so, who sent guidance letters that implied enforcement action if regulated institutions failed to drop the NRA, and who coupled those threats with publicly known enforcement actions against institutions that did business with the NRA. Had it considered these facts, the Second Circuit would have had to conclude that financial institutions in New York would have understood the Superintendent's statements to mean that noncompliance was not an option.

* * * *

If left undisturbed, the Second Circuit's narrow, four-factor frame for evaluating coercion incentivizes further official attempts to achieve it. Public officials, like anyone else, respond to incentives. The Second Circuit's how-to manual advises officials that, provided they make no explicit demands and no explicit references to consequences, courts can be expected to look the other way. This Court should reject the Second Circuit's test and make clear that a rigorous examination of all facts in context is required.

C. This Court should caution lower courts to be skeptical when public officials seek to enforce the heckler's veto.

When she "encouraged" institutions to "review" their relationships with the NRA, the Superintendent invoked "social backlash against the National Rifle Association" and speculated that "increasing public backlash against the NRA and like organizations" will follow. *Vullo*, 49 F.4th at 717. The Second Circuit endorsed her thinking, finding her statements "reasonable" because "general backlash against gun promotion groups ... continues today." *Ibid.* This judicial approval of the heckler's veto is extraordinary. This Court should clarify that public outrage can neither excuse nor explain away government coercion of private censorship.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414 (collecting cases). After all, speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger." *Terminello* v. *City of Chicago*, 337 U.S. 1, 4 (1949). And the First Amendment protects speech far more offensive than Second Amendment advocacy—if that is offensive—including burning the American flag, *Johnson,* 491 U.S. 397, displaying a swastika, *Nat'l Socialist Party of Am.* v. *Vill. of Skokie*, 434 U.S. 1327 (1977), and vulgar anti-military protests at a servicemember's funeral, *Snyder* v. *Phelps*, 562 U.S. 443 (2011).

By concluding that the "general backlash against gun promotion groups" implicated "reputational risks" that made it "reasonable" for the Superintendent to encourage regulated institutions to cancel the NRA, *Vullo*, 49 F.4th at 717, the court indulged the most innocent possible explanation for the Superintendent's conduct. But when the government coerces a private actor to censor protected speech, it violates the First Amendment. See *Bantam Books*, 372 U.S. at 68. So excusing that coercion—or assuming it didn't happen—because the public (or some fraction of it) is angry about the speech is not an option. The only issue is whether the NRA adequately alleged coercion as distinguished from normal regulatory conduct. Sorting that out required asking questions like:

- Did the Superintendent really have a basis to think "general backlash" against the NRA threatened the viability of financial institutions?
- Was she really trying to inform financial institutions of their obligations, or just using her power to censor speech?

Instead, the Second Circuit deferred to her, giving her a free pass to harness a heckler's veto.

The implications are frightening. Public officials don't need a regulatory mandate to supervise reputational risk to make the heckler's veto effective to coerce private censorship. The same "societal outrage against" the NRA could easily threaten hotels that host pro-life conferences, internet service providers who host pregnancy-center websites, and utility companies who provide pregnancy centers with power. Under the Second Circuit's reasoning, it would be just as easy for police and communications and utility

regulators who don't like pro-life speech to justify enlisting those private actors in suppression: Just write them a memo that asserts a fear of having to respond to disorder at hotels, cyberattacks on internet infrastructure, or vandalism of utility equipment, and "encourage[ ]" them to "take prompt action" declining to provide service to pro-life organizations. Under the Second Circuit's approach, a court can take judicial notice of the "general backlash," deem the government's decision to raise the issue "reasonable," and move on.

The government could never accomplish that directly. Courts should not indulge the most innocent explanations when government attempts to achieve the same result by indirectly coercing private actors to act. The heckler's veto does not support government efforts to suppress speech, and the Court should reaffirm that here.

CONCLUSION

The Second Circuit's decision should be reversed.

Respectfully submitted,

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JANUARY 2024