No. 22-842

IN THE

Supreme Court of the United States

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 INDIANA AND MISSISSIPPI AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

THEODORE E. ROKITA
Attorney General
JAMES A. BARTA
Solicitor General
Counsel of Record
Office of the Indiana Attorney General
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-0709
James.Barta@atg.in.gov

Counsel for Amici *States*

QUESTION PRESENTED

Does the First Amendment allow a government regulator to threaten regulated entities with adverse regulatory actions if they do business with a controversial speaker, as a consequence of (a) the government's own hostility to the speaker's viewpoint or (b) a perceived "general backlash" against the speaker's advocacy?

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INTEREST OF THE *AMICI* STATES[1]

According to allegations that must be taken as true, a former superintendent of the New York State Department of Financial Services (DFS) leveraged her agency's massive regulatory authority over the financial sector to stop private banks and insurance companies from providing services to members of the National Rifle Association (NRA). Pet. App. 206-07. The superintendent investigated the business relationships between the NRA and banks and insurance companies. And she then used "selective prosecution, backroom exhortations, and public threats" to compel the termination of insurance plans protecting NRA members because of disagreement with the NRA's pro-Second Amendment stance. Pet. App. 188, 199. New York regulators could not have canceled these insurance policies based on disagreement with the NRA's political views or its members' exercise of First and Second Amendment rights. Nevertheless, given the DFS's role as a primary regulator of these financial institutions, the superintendent's actions left banks and insurance companies little choice but to terminate their business relations with the NRA.

Many of NRA's five million members live in Indiana and Mississippi. Most are law-abiding citizens who choose to buy insurance to protect themselves and their families against the vicissitudes of life, including those associated with firearms. As a result, Indiana and Mississippi have a significant interest in whether unelected New York bureaucrats may use

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief.

their power over large segments of the insurance industry to force private market participants to do that which government actors cannot do directly—namely, punish the exercise of a constitutionally protected freedom. If such constitutional-violation-by-proxy were allowed, it would infringe the fundamental rights of citizens and deter legitimate business activity, including in *amici* States.

INTRODUCTION

New York's Department of Financial Services (DFS) possesses profound enforcement and regulatory authority over financial institutions that do business in New York, one of the World's preeminent markets. Not unlike the Biden Administration's collusion with social-media platforms to silence the voices of its political opponents, *see Murthy v. Missouri*, No. 23-411 (U.S.), the superintendent of DFS, Respondent Maria T. Vullo, has leveraged that power to chill the speech of the NRA and its members by coercing banks and insurance companies to deny them services.

The NRA's allegations present a clear-cut constitutional violation by proxy. The NRA is one of America's oldest and staunchest defenders of constitutional rights, boasting a nationwide membership of more than five million. The NRA advocates strenuously for policies and business practices that respect its individual members' free speech, associational, and Second Amendment rights. It is one of the principal defenders of Second Amendment freedoms in the world. It is undisputed that New York's DFS could not impose monetary penalties on the NRA or its members for engaging in their First—or, for that matter, their

Second—Amendment rights. Yet citing vague notions of "risk management" and "reputational risk" associated with advocating gun ownership, New York's DFS and its superintendent have sought to exclude advocates for gun ownership from New York's financial markets. Pet. App. 211-12.

The actions of New York's DFS detailed in the pleadings are disturbing. In America's plural and increasingly polarized society, *any* advocacy position carries with it a risk to a financial company's reputation to some subset of the population. To avoid great harm to both the United States's constitutional system and its economy, the Court should not permit a government actor to coerce private parties to take actions that she cannot take herself.

SUMMARY OF ARGUMENT

I. The power of a State to regulate business entities that operate within the State's borders is indisputable—even when the businessses are in the business of speaking. Under the McCarran–Ferguson Act, States generally have regulatory and tax authority over the insurance industry. *See W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 653 (1981). What a State cannot do while it so regulates is "single out any topic or subject matter for differential treatment." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022). Regulatory power is not a license to retaliate against citizens because those citizens chose to exercise their constitutional rights. *See, e.g.*, *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022). New York regulators are bound by the Consitution, and they

cannot forbid the NRA or its members from purchasing insurance just because they do not like either the Second Amendment or NRA's advocacy to retain it.

II. In this case, Vullo and DFS have functionally excluded the NRA and its members from a major financial market. DFS "oversees about 1,500 lenders and institutions with assets totaling about $2.6 trillion and 1,400 insurers with assets valued at $4.7 trillion." *What is the New York State Department of Financial Services?*, Dow Jones, https://www.dowjones.com/professional/risk/glossary/regulatory-bodies/ny-state-dept-financial-services/. Vullo relied on a strategy of speech suppression by proxy. By exercising her massive regulatory control over the financial industry, she allegedly investigated, selectively prosecuted, and implicitly threatened banks and insurance companies until they fell into line and dropped NRA members from their client lists. The NRA has millions of members, including thousands in *amici* States. This Court should rule in favor of the First Amendment and the NRA and restore the NRA's members to first-class citizenship.

III. Although this case's focus is the First Amendment and firearms, if the Second Circuit opinion stands, there is no principled limit to when regulatory bodies can leverage their power over third parties to force political orthordoxy. As if that did not impoverish society enough, the actions taken by DFS and its superintendent literally make the nation poorer by making businesses fear regulatory retaliation should they extend their non-partisan services to all comers. The economic impact of that fear extends beyond the

borders of New York; here, underwriters and insurance compnaies ceased providing NRA-supported insurance plans entirely, impacting NRA members across the country. The Second Circuit nowhere wrestles with how it is consonant with America's constitutional system to allow an unelected New York regulator to control the economic options of citizens in farflung States who simply wish to engage in legally permissible—and constitutionally protected—activity. The Court should reverse.

ARGUMENT

I. New York Cannot Directly Ban the NRA from Participating in the Insurance Market Based on Disagreement with Its Political Views

States undoubtedly may regulate insurance and financial markets within their territorial borders. That regulatory authority includes the power to investigate and threaten to investigate violations of state law, statutory or constitutional. But States, including New York, cannot do so in a way that discriminates against the lawful exercise of a citizen's constitutional rights. It does not matter whether that right derives from the First, Second, Fifth, or any other Amendment.

Given the McCarran–Ferguson Act of 1945, 15 U.S.C. § 1011, *et seq*, New York unquestionably possesses wide-ranging authority to regulate its insurance markets. This law was passed in direct response to this Court's holding in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), that the Interstate Commerce Clause permits Congress to regulate insurance contracts. *Id.* at 550-53.

Specifically, the McCarran–Ferguson Act reestablished the balance between States and the federal government in this core State-level activity by protecting state laws enacted "for the purpose of regulating the business of insurance" from preemption. 15 U.S.C. § 1012(b).

And *amici* States agree that conclusory allegations of First Amendment retaliation, standing alone, do not prevent the State from investigating whether an insurance company has violated the law. After all, this Court has recognized a "presumption of prosecutorial regularity," *Hartman v. Moore*, 547 U.S. 250, 263 (2006), and that "protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest" or otherwise initiate an investigation, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1723-24 (2019) (quoting *Reichle v. Howards*, 566 U.S. 658, 668 (2012)). Challenges to investigations like those Vullo and DFS conducted here are thus not typically considered ripe before initiation of a formal enforcement action. *Reisman v. Caplin*, 375 U.S. 440, 443-44 (1964); *see also, e.g.*, *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1174-76 (9th Cir. 2022).

But these principles are not without limits—both statutory, *see* 15 U.S.C. § 1014 (preserving three existing statutes), and constitutional, *see Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 & n.8 (1985). "Although the McCarran–Ferguson Act exempts the insurance industry from Commerce Clause restrictions, it does not purport to limit in any way the applicability of the Equal Protection Clause." *Id.* at 880. The same principle applies to the First Amendment,

which this Court has recognized as "a kind of Equal Protection Clause for ideas.'" *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2354 (2020) (plurality op.) (quoting *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 470 (2015) (Scalia, J., dissenting)). States may "constitutionally impose reasonable time, place, and manner regulations," but they are generally prohibited "from discriminating in the regulation of expression on the basis of the content of that expression." *Id.* at 2346 (plurality op.) (quotation marks omitted). This Court has been particularly solicitous of this rule because the right to free speech is a *sine qua non*, it is "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

Under these well-established principles, the New York State legislature could not pass a law excluding the NRA or its members from the insurance market in New York based on their political advocacy of Second Amendment rights—any more than it could exclude the American Civil Liberties Union from advocating for free expression or Becket for advocating for religious liberty. The New York State legislature could not prevent the NRA or its members from opening bank accounts simply because they advocated for laws protecting Second Amendment rights. And it could not ban organizations that advocate for stronger statutory recognition of gun-ownership rights.

It does not matter whether a regulation is written to prevent (or is enforced in a way that prevents) disfavored speech or whether it is a regulation or law

that outright bans certain types of speech. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69-70 (1963). A regulatory regime that "inhibit[s] protected freedoms of expression and association," *NAACP v. Button*, 371 U.S. 415, 437-38 (1963); *see NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-62 (1958), or "surreptitiously" targets certain groups, *Shurtleff v. City of Boston*, 596 U.S. 243, 265 (Alito, J., concurring), is as pernicious as direct prohibitions on protected speech. Indeed, indirect regulation can be more troubling because it can "eliminate the safeguards" associated with direct regulation. *Bantam Books*, 372 U.S. at 70.

Applied here, the First Amendment would prohibit the New York legislature from passing a law explicitly preventing groups that support the sale of firearms from borrowing money or buying insurance in New York. It also would prevent DFS from directly excluding the NRA from the insurance market because it disagrees with the NRA's stance supporting responsible gun ownership. The First Amendment "prohibits government officials from subjecting individuals to 'retaliatory actions' after the fact for having engaged in protected speech." *Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022) (quoting *Nieves*, 139 S. Ct. at 1722). So DFS cannot constitutionally suppress protected speech directly or through indirect threats.

II. New York's Political Strongarming of Financial Institutions Is Why Laws Against Political Discrimination Are Necessary

Vullo's conduct is strikingly similar to the suppression of opposing viewpoints carried out by various

social-media platforms in conjunction with the federal government. *See Murthy v. Missouri*, 144 S. Ct. 7, 8 (2023) (Alito, J., dissenting from grant of application for stay). Just as Vullo here used government power to end insurance policies because the NRA engaged in disfavored speech, the Biden Administration leveraged its government authority to get social-media platforms to silence views it found politically uncongenial. "[F]ederal officials admit that these instances of censorship occurred." *Missouri v. Biden*, 83 F.4th 350, 372 (5th Cir.), *cert. granted sub nom. Murthy v. Missouri*, 144 S. Ct. 7 (2023).

New York has accomplished something similar here by using its regulatory control to "silence the voice of competing speakers with a mere flick of the switch." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994). For example, Vullo is empowered "to conduct investigations, research, studies and analyses of matters affecting the interests of consumers of financial products and services," N.Y. Fin. Servs. Law, art. 3, § 301(b), including receiving complaints and (if appropriate) referring matters to law enforcement agencies, *id.* § 301(c)(2), (4). Vullo is supposed to use that power "to protect the users of financial products and services," *id.* § 301(c)(1). Instead, according to the pleadings, she used that power to coerce private industry, by declaring that the NRA's Second Amendment advocacy is a regulable "reputational risk" to any financial institution servicing the NRA. Pet. App. 199, 246-51. Vullo then leaned on this "opinion" to initiate costly investigations of financial institutions that conducted business with the NRA, threaten those institutions to cease doing business

with the NRA, and issue formal agency guidance to terminate insurance plans provided to NRA members. Pet. App. 199-200, 205-06, 208, 210, 216-17, 221.

The reason behind Vullo's actions is troubling: As the pleadings explain, the gubernatorial policy at the time was that firearms and their advocates "have no place in the state of New York." Pet. App. 197. *But see* U.S. Const. amend. I; U.S. Const. amend. II; *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 71 (2022). And as a result of Vullo's attack on the First Amendment, several financial institutions ceased doing business with the NRA. Pet. App. 199-200, 214, 218. For example, Lloyd's, one of the largest insurance carriers in the world, stopped underwriting NRA-related insurance. Pet. App. 224. Insurance carriers that the NRA approached to provide replacement coverage declined. Pet. App. 227-28. And several banks withdrew from a bidding process to provide services to the NRA "based on concerns that any involvement with the NRA—even providing the organization with basic depository services—would expose them to regulatory reprisals." Pet. App. 227-28.

This reluctance should surprise no one since New York's DFS has been described as "perhaps the most powerful state regulator in the nation, with new and broad jurisdiction and substantial enforcement powers" over the thousands of firms that fall within its control. *Governor Cuomo Proposes Significant Expansion of Powers of New York Department of Financial Services*, WilmerHale (Feb. 18, 2020). When a financial institution violates DFS's rules, they face millions in civil penalties and burdensome consent decrees.

See, e.g., Consent Order, *In re Robinhood Crypto, LLC* (N.Y. Dep't Fin. Servs. Aug. 1, 2022).

And it is no response that the financial institutions targeted by Vullo could avoid New York's restrictions by chartering themselves and conducting their financial business elsewhere. Leaving aside the practical effects of exclusion from one of the largest financial markets in the world, the government generally cannot condition the grant of a gratuitous benefit upon the surrender of a constitutionally protected right. *See, e.g.*, *Koontz v. St. Johns River Mgmt. Dist.*, 570 U.S. 595, 607-08 (2013) (collecting cases). If Vullo can decide that a financial institution's compliance with state law turns on its willingness to violate *someone else's* constitutional rights, then the Constitution is not worth the parchment on which it is written.

Although Vullo acted via private proxies, her actions still violate the NRA's and its members' First Amendment rights. It is blackletter law that a private entity exercising state action cannot violate the First Amendment. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (summarizing the so-called "state-action doctrine"). But if the NRA's allegations are true, banks and insurance companies are not refusing service to the NRA and its members because they oppose the NRA's activities but because of fear of targeted regulatory action.

Government actors cannot circumvent core constitutional requirements by subterfuge. They may not do so by manipulating the identity of the governmental actor, *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 108-09 n.5 (1967); their own internal operating

procedures, *United States v. Tsarnaev*, 142 S. Ct. 1024, 1036 (2022); or the language of this Court's stated tests, *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 393 (2011); *accord Rogers v. Tennessee,* 532 U.S. 451, 460 (2001).

Though the government may advocate for its preferred policy positions and use its authority to enforce the law, Vullo should not be permitted to "surreptitiously engage[] in the 'regulation of private speech'" by wielding threats of regulatory action. *Shurtleff*, 596 U.S. at 263 (Alito, J., concurring) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)). The government is not "exempt from First Amendment attack" simply because it uses some indirect approach, particularly one like Vullo used, in an attempt to avoid constitutional scrutiny. *Id.* at 1599 (Alito, J., concurring). A constitutional violation by proxy is still a constitutional violation.

III. Vullo's Evasion of the First Amendment Is Irreconcilable with Constitutional Values

Vullo's actions are unusual. State regulators should use their authority to regulate the insurance industry to help their citizens and protect consumers. *See, e.g.*, Ind. Code §§ 27-1-1-1, 27-1-3-4. To that end, Indiana and Mississippi regulate their insurance industries for the public's benefit, conducting investigations, *e.g.*, Ind. Code § 27-1-22-4; Miss. Code § 83-1-51, and when appropriate, imposing a broad range of sanctions, including revocation of a right to conduct business in the State, *e.g.*, Ind. Code § 27-1-15.6-12; Miss. Code § 83-17-71. By contrast, as groups across the political spectrum have observed, Vullo has

adopted—and has asked the Court to endorse—"a readymade playbook" (which could reach beyond firearms to life issues, immigration policy, free exercise, etc.) "for abusing their regulatory power to harm disfavored advocacy groups without triggering judicial scrutiny." ACLU Amicus Br. in Support of Pl.'s Opp. to Def.'s Mot. to Dismiss at 4, *Nat'l Rifle Ass'n v. Cuomo*, No. 18-cv-0566 (N.D.N.Y. Aug. 24, 2018).

If allowed to stand, the Second Circuit's decision will have profound implications for the rule of law concerning political speech, and even Americans' ability to maintain financial insurance. *See* Montana Amicus Br. 19-24. Vullo's actions already have affected law-abiding citizens across the United States. Indiana and Mississippi protect the rights of free speech and association and the right to bear arms—all central to the NRA's organizational platform. The NRA-supported insurance policy that DFS targeted provided law-abiding citizens protection when exercising those rights. Yet these policies are no longer available to the NRA members in Indiana or Mississippi. And if New York's actions were replicated in another State, the state government there could use its general regulatory authority or Blue Sky laws to force companies to cease providing support to members of the ACLU. Or Delaware could exploit its favorable corporate environment to force companies incorporated there (which includes the vast majority of companies in the country) to create positions on their boards for Diversity, Equity, and Inclusion officers.

So long as they act consistent with the Constitution, other States are entitled to make other choices

about how to balance morality-based legislation with economic growth. *Cf. Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023). Here, however, New York has decided to use its historic position as a dominant market for financial services to force the political agenda of its ruling political party on insurance carriers to those in remote States. Today it does so with respect to guns. Tomorrow, perhaps abortion. And next week? Maybe it will extend its program of disassembling First Amendment rights to religious believers. There is no perceivable end in sight.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

LYNN FITCH
Attorney General
State of Mississippi

THEODORE E. ROKITA
Attorney General
JAMES A. BARTA
Solicitor General
Counsel of Record
Office of the Indiana
Attorney General
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-0709
James.Barta@atg.in.gov

Counsel for Amici *States*

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