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 OF *AMICI CURIAE* SECOND AMENDMENT FOUNDATION, JOHN LOCKE FOUNDATION, AND INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONER

DAVID B. KOPEL
INDEPENDENCE INSTITUTE
727 E. 16th Ave.
Denver, CO 80203

JONATHAN D. GUZE
JOHN LOCKE FOUNDATION
4800 Six Forks Rd., Ste. 220
Raleigh, NC 27609

JOSEPH G.S. GREENLEE
Counsel of Record
GREENLEE LAW, PLLC
PO Box 4061
McCall, ID 83638
(208) 271-2494
joseph@greenlee.law

Counsel for *Amici Curiae*

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INTEREST OF THE *AMICI CURIAE*[1]

Second Amendment Foundation (SAF) is a nonprofit foundation that protects the right to keep and bear arms through educational and legal action programs. SAF has over 720,000 members, in every State of the Union. SAF organized and prevailed in *McDonald v. Chicago*.

Founded in 1985 on the eternal truths of the Declaration of Independence, the **Independence Institute** is a 501(c)(3) public policy research organization based in Denver, Colorado. The briefs and scholarship of Research Director David Kopel have been cited in seven opinions of this Court, including *Bruen*, *McDonald* (under the name of lead *amicus* Int'l Law Enforcement Educators & Trainers Association (ILEETA)), and *Heller* (same). Kopel's scholarship and briefs have also been cited in over a hundred opinions of lower courts. The Institute's Senior Fellow in Constitutional Studies, law professor Robert Natelson, has been cited in a dozen opinions by Justices of this Court.

The **John Locke Foundation** was founded in 1990 as an independent, nonprofit think tank. Its mission is to be North Carolina's most influential force driving public policy. It employs research, journalism, and outreach to promote liberty and limited, constitutional government as the cornerstones of a

[1] No counsel for any party authored this brief in any part. No person or entity other than *amici* funded its preparation or submission. The Independence Institute has received general contributions from the NRA Foundation, a separate corporation from the NRA.

society in which individuals, families, and institutions can freely shape their own destinies.

As nonprofit organizations, *amici* are concerned that the Second Circuit's precedent will allow state financial regulators to cripple any nonprofit or other corporation whom a regulator dislikes for ideological reasons.

SUMMARY OF ARGUMENT

Abusive government officials have long sought to stifle advocacy they deplore. Starting in the 1950s, southern states tried to dismantle the NAACP. Alabama tried to prevent the NAACP from registering as a foreign corporation to preclude it from conducting business in the state and to compel the disclosure of its membership list to subject its members to abuse and intimidation. Louisiana similarly demanded a list of the Association's members and officers and also required affidavits ensuring that none of its officers or directors belonged to any communist organization. Virginia sought to cripple the NAACP by outlawing its method of soliciting legal business. This Court held that all these tactics violated the First Amendment.

According to the decision below, the southern states could have eliminated the NAACP branches simply by having the state banking and insurance regulators issue a threat letter ("guidance"), warning banks and insurance companies not to do business with the NAACP. The Second Circuit's decision is incompatible with this Court's decisions and must be reversed if they remain good law as a practical matter.

In recent decades, government officials have sought to stifle disfavored advocacy and activities through financial ruin. Andrew Cuomo was at the forefront of these efforts as the Secretary of Housing and Urban Development in the late 1990s. Cuomo organized federally funded housing authorities to bring coordinated lawsuits aimed at coercing and bankrupting firearms manufacturers and retailers. Dozens of localities did the same. Thirty-three states and then the federal government ended the assault on Second Amendment activity by enacting statutes to prevent the abusive lawsuits.

In 2010, the IRS began delaying the processing of applications from conservative groups seeking tax-exempt status, with some applications crossing two election cycles. The delay hampered the groups' ability to fundraise and collectively advocate. At least two major lawsuits were brought against the IRS alleging First and Fifth Amendment violations. One, a class-action, resulted in a multimillion-dollar settlement. The other resulted in a "sincere apology" from the IRS.

In 2013, the Department of Justice initiated "Operation Choke Point," which choked off lawful businesses that the Obama administration deemed objectionable—including firearms and ammunition sales. Financial institutions that served merchants in these "high-risk" lawful businesses were threatened with a federal investigation and potential litigation. Consequently, many federally licensed firearms merchants had their bank accounts frozen or closed. In the face of mounting criticism, the Department of Justice acknowledged that its initiative was "misguided" and terminated it.

Although the attempts to stifle disfavored advocacy and activities through financial ruin have been widely regarded as unconstitutional, Superintendent Vullo and her then-boss Andrew Cuomo used the same tactic here.

Indeed, Governor Cuomo repeatedly gloated that Vullo's regulatory actions were "forcing the NRA into financial jeopardy" and promised not to "stop until we shut them down." "I think we could make a serious dent on their coffers and that would be good for everyone," Cuomo explained. He made clear that his goal was "to put the gun lobby out of business," adding that he would "have put the @NRA out of business . . . 20 years ago," if possible. Like the southern states that assailed the NAACP, Cuomo and Vullo were motivated by animus and retaliation for lawful advocacy.

While Cuomo and Vullo harbor a peculiar animus against the NRA, their threats place all gun rights organizations in peril. Further, consistent with the Second Circuit's decision, Vullo's tactics could be used to punish any advocacy a particular government dislikes, including either side of abortion, immigration, and environmental advocacy. The First Amendment forbids such retaliation.

ARGUMENT

I. The decision below eviscerates this Court's freedom of association precedents by allowing states to dismantle disfavored advocacy groups through coercive financial "guidance."

Vullo's abuse of governmental authority to punish the NRA for its lawful advocacy is functionally similar to southern states' efforts to punish the NAACP for its lawful advocacy in the 20th century.

"[A] coordinated attack against the NAACP throughout the South began about 1950" and "became highly organized and effective from 1954 to 1958." Aldon D. Morris, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT 26 (1984). Southern states—including Alabama, Louisiana, and Virginia—sought to quash the Association through various methods. Consequently, from 1955 to 1958, the NAACP closed 246 branches and lost roughly 50,000 members in the South. *Id.* at 33. Moreover, at the end of 1957, "the Association was involved in 25 suits in which its rights to function in the South [were] at issue." *Id.* at 34. In addition to banishing the NAACP, "The Southern states" were hoping "to break the NAACP by forcing it to deplete its funds in numerous and costly court cases." *Id.* at 33.

The coordinated attacks "began to recede about 1959," *id.* at 26, due to emphatic decisions from this Court upholding the rights of speech and association, *id.* at 32. According to the decision below, however, the southern states could have eliminated the NAACP branches simply by having the state banking and

insurance regulators issue a threat letter ("guidance"), warning banks and insurance companies not to do business with the NAACP. The Second Circuit's decision is incompatible with this Court's decisions and must be reversed if they remain good law as a practical matter.

1. *NAACP v. Alabama ex rel. Patterson*

In 1956, Alabama Attorney General John Patterson sought to banish the NAACP; he alleged in an equity suit that the group had failed to qualify as a foreign corporation. The NAACP's Birmingham, Alabama, office was essential, because "NAACP activities in Florida, Georgia, Mississippi, North Carolina, South Carolina, and Tennessee were generated and coordinated from this office." Morris, at 34. As "People began to observe, 'If they could close the NAACP in Alabama, they certainly are able to close it here.'" *Id.*

Emphasizing that the NAACP provided "financial support and furnished legal assistance to Negro students seeking admission to the state university" and "supported a Negro boycott of the bus lines in Montgomery to compel the seating of passengers without regard to race," the State argued that "by continuing to do business in Alabama without complying with the qualification statute," the NAACP was "causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama[.]" *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 452 (1958) ("*Patterson I*").

The Circuit Court of Montgomery County, Alabama, issued a restraining order prohibiting the

NAACP from conducting any business in the State and from taking any steps to qualify. *Id.* at 452–53. The NAACP moved to dissolve the restraining order, arguing that it was exempt from the qualification requirements and that the State's true objective was to violate NAACP members' constitutional rights. *Id.* at 453.

The State then demanded the names and addresses of the Association's members in discovery, claiming that it needed the information to respond to the Association's claims. When the NAACP refused to provide its membership list, the court fined the Association $100,000. *Id.* at 454.

This Court held the compelled disclosure of the NAACP's membership list unconstitutional. The Court recognized that such disclosure would likely cause NAACP members to suffer "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," and thereby "induce members to withdraw from the Association and dissuade others from joining it[.]" *Id.* at 462–63. Because the consequences would diminish the group's ability to collectively advocate for their beliefs, the compelled disclosure of its membership list violated the right "to associate freely with others." *Id.* at 466.

This Court did not consider the validity of the underlying restraining order at that time. As for John Patterson, he "was elected Governor of Alabama in 1958 after campaigning on a 'Kill the NAACP' platform." Morris, at 32.

2. *NAACP v. Alabama ex rel. Flowers*

After *Patterson I*, the Supreme Court of Alabama defied this Court by affirming the judgment of contempt against the NAACP, which this Court reversed again. *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959) ("*Patterson II*"). But the NAACP still could not obtain a hearing on the merits of the restraining order in the Alabama courts, so this Court acted again, directing the federal district court to "proceed with the trial of the issues," if the State of Alabama did not afford the NAACP an opportunity to be heard by January 2, 1962. *NAACP v. Gallion*, 368 U.S. 16, 16 (1961). Finally, five years after the issuance of the restraining order, the NAACP obtained a hearing on the merits, after which the Circuit Court of Montgomery County "permanently enjoined the Association and those affiliated with it from doing any further business of any description or kind in Alabama and from attempting to qualify to do business there." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 292 (1964) (quotation marks omitted). The Supreme Court of Alabama affirmed the judgment on procedural grounds without considering the merits, *NAACP v. State*, 274 Ala. 544 (Ala. 1963), and this Court granted certiorari. After determining that the Supreme Court of Alabama's ruling was in error, "in view of what has gone before"—*i.e.*, the Alabama courts' defiance of this Court and unjust treatment of the NAACP—this Court "proceed[ed] to the merits." *Flowers*, 377 U.S. at 302.

This Court held that none of Alabama's 11 offered reasons—including alleged violations of the law and breaches of the peace—justified the NAACP's ouster. *Id.* at 302–09. The Court recognized that, "in truth,"

the case "involve[d] not the privilege of a corporation to do business in a State, but rather the freedom of individuals to associate for the collective advocacy of ideas. 'Freedoms such as [this] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Id.* at 309–10 (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)). Thus, "[t]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.'" *Id.* at 307 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940)). Alabama unduly infringed on the NAACP's right of association, so the restraining order was invalidated.

After eight years and four favorable decisions from this Court, the NAACP was finally able to qualify to do business and resume operations in Alabama.

3. *Louisiana v. NAACP*

In 1956, Louisiana sought to "enjoin [the NAACP] from doing business in the State" for failing to comply with two statutes. *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 294 (1961). One statute—which allegedly had not been enforced against any other organization for about three decades—required the Association to file a complete list of its members' and officers' names and addresses with the State. *Id.* at 295. The other required the Association to file annually an affidavit that none of its officers or members of its board of directors was a member of a communist, communist-front, or subversive organization. *Id.* at 294–95.

This Court held the laws violative of the First Amendment, noting that "regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *Id.* at 297.

4. *NAACP v. Button*

In 1956, Virginia Governor Thomas B. Stanley signed a "package of anti-integration measures," including "a half dozen bills designed to curb the National Association [for the Advancement] of Colored People in promoting school segregation court tests." *School, NAACP Bills Signed by Gov. Stanley*, WASH. POST, Sept. 30, 1956, at B1. "The 'NAACP' laws require[d] pressure groups attempting to influence racial legislation or litigation to register with the State Corporation Commission and report information on finances and membership. They also prohibit[ed] such groups from soliciting litigation." *Id.*

Most of the laws were held unconstitutional by lower courts. *See NAACP v. Button*, 371 U.S. 415, 418 (1963). This Court considered one that forbade the NAACP's method of soliciting legal business:

> the legislature amended . . . the provisions of the Virginia Code forbidding solicitation of legal business by a 'runner' or 'capper' to include, in the definition of 'runner' or 'capper,' an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability.

Id. at 423.

This Court held that the law violated the "protected freedoms of expression and association." *Id.* at 437. As the Court emphasized, the First Amendment "protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Id.* at 429. The "abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *Id.* at 439 (quoting *Patterson I*, 357 U.S. at 461).

Concurring, Justice Douglas pointed out that the law "is not applied across the board to all groups . . . but instead reflects a legislative purpose to penalize the N.A.A.C.P. because it promotes desegregation of the races." *Id.* at 445 (Douglas, J., concurring).

This case bears several similarities to the *NAACP* cases. Just as Louisiana's enforcement of the membership disclosure statute applied only to the NAACP, Vullo's investigation "targeted none of the available self-defense insurance products except" the NRA-endorsed product, Pet. App. 207, and Vullo's "affinity-insurance enforcement action" focused "solely on those syndicates which served the NRA," *id.* at 223. Just as Alabama retaliated against the NAACP "because it promotes desegregation of the races," *Button*, 371 U.S. at 445 (Douglas, J., concurring), Vullo "retaliate[d] against the NRA for" its "political advocacy," Pet. App. 198. And just as Virginia intended to cripple the NAACP by outlawing its method of soliciting legal business, *Button*, 371 U.S. at 423, Vullo intended to jeopardize the NRA's "existence as a not-for-profit organization and [its ability to] fulfill its advocacy objectives," Pet. App. 203.

This case presents merely a different approach to penalizing an organization for lawful advocacy that the government disfavors—*i.e.*, one of the "varied forms of governmental action" that constitutes an "abridgment of [First Amendment] rights." *Button*, 371 U.S. at 439 (quoting *Patterson I*, 357 U.S. at 461). While here the government actions were coercion through backchannel threats, guidance documents, and press releases, "regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *Louisiana ex rel. Gremillion*, 366 U.S. at 297.

According to the Second Circuit's decision, the southern states could have circumvented this Court's decisions and dismantled the NAACP by simply financially blacklisting the Association. As explained in the *amici curiae* brief of the Financial and Business Law Scholars, the notion that a "guidance" threat letter to highly regulated businesses is noncoercive is implausible. Financial and Business Law Scholars Br. 3–27; *see also* George A. Mocsary, *Administrative Browbeating and Insurance Markets*, 68 VILL. L. REV. 579, 597 (2023) (noting that the New York Department of Financial Services "is widely viewed as one of the nation's most aggressive state regulators") (quotation marks omitted). Therefore, if this Court's now universally revered freedom of association decisions protecting the NAACP's advocacy remain good law, the decision below must be reversed.

II. Financial devastation has become a weapon of oppressive government officials seeking to stifle and penalize First and Second Amendment rights.

In recent decades, government officials have sought to stifle disfavored advocacy and activities through financial ruin. Like the southern states that assailed the NAACP, these officials sought to punish lawful conduct that they disapproved of. Specifically, government officials brought abusive lawsuits to coerce and bankrupt firearms manufacturers and retailers; the IRS delayed the processing of applications from conservative groups seeking tax-exempt status to hamper their ability to fundraise and collectively advocate; and the Department of Justice threatened financial institutions that served firearms merchants with federal investigations and litigation. Although these actions were roundly denounced as unconstitutional, Superintendent Vullo's actions at issue here shared the same objective: to make it financially impossible to engage in lawful conduct that the government disfavors.

Notably, Andrew Cuomo, while Secretary of Housing and Urban Development in the late 1990s, spearheaded efforts to throttle lawful conduct through financial ruin. During the events that gave rise to this litigation, Vullo was serving as Cuomo's appointee and at his pleasure, as the head of a department Cuomo created as New York's governor. Pet. App. 198 n.15, 201–02.

A. Abusive litigation by Andrew Cuomo and other government officials sought to bankrupt the firearms industry.

When legislatures declined to enact as much gun control as some executive branch officials desired, the officials brought abusive lawsuits aimed at coercing and bankrupting firearms manufacturers and retailers. The lawsuits attempted to hold lawful firearms manufacturers and retailers responsible for the criminal misuse of their products. Starting in 1998, a coordinated series of lawsuits were filed by dozens of local governments. Andrew Cuomo, as the Secretary of Housing and Urban Development, organized federally funded housing authorities to bring additional suits. *The HUD Gun Suit*, WASH. POST, Dec. 17, 1999. Although rarely successful, the litigation imposed heavy legal costs on the firearms industry and made it impossible for many manufacturers to obtain loans.

Secretary Cuomo threatened manufacturers with "death by a thousand cuts." Walter Olson, *Plaintiffs Lawyers Take Aim at Democracy*, WALL ST. J., Mar. 21, 2000. Bridgeport, Connecticut, mayor Joseph Ganim described his lawsuit as "creating law with litigation." Fred Musante, *After Tobacco, Handgun Lawsuits*, N.Y. TIMES, Jan. 31, 1999. "The Bridgeport suit named 12 American firearms manufacturers, three handgun trade associations, and a dozen southwestern Connecticut gun dealers, and asked for damages in excess of $100 million." *Id.* (internal quotations omitted).

Bridgeport's lawsuit was typical in that it sued firearms trade associations, including the National

Shooting Sports Foundation. These trade associations did not manufacture or sell firearms. Rather, they were standard trade associations: advocating for their industry and promoting best practices within the industry. The suits were retaliation for the trade associations' often-successful public advocacy and thus assailed the freedom of speech.

Brought in as many jurisdictions as possible and well-designed to resist consolidation, the lawsuits were organized to destroy: "If twenty cities do bring suits, defending against them, according to some estimates, could cost the gun manufacturers as much as a million dollars a day." Peter Boyer, *Big Guns*, NEW YORKER, May 17, 1999.

Plaintiffs' attorney John Coale aimed for "critical mass . . . where the costs alone of defending these suits are going to eat up the gun companies." Fox Butterfield, *Lawsuits Lead Gun Maker to File for Bankruptcy*, N.Y. TIMES, June 24, 1999. In Coale's words, "the legal fees alone are enough to bankrupt the industry." Sharon Walsh, *Gun Industry Views Pact as Threat to Its Unity*, WASH. POST, Mar. 18, 2000.

As intended, some manufacturers did go bankrupt, including Sundance Industries, Lorcin Engineering, and Davis Industries. Paul Barrett, *Lawsuits Trigger Gun Firms' Bankruptcy*, WALL ST. J., Sept. 13, 1999. Davis Industries was "one of the 10 largest makers of handguns." Butterfield, *Lawsuits Lead Gun Maker to File for Bankruptcy*.

The most venerable manufacturers were driven to the brink. Colt's Manufacturing Company stopped producing handguns for the public. Facing "28

lawsuits from cities and counties hoping to punish gun makers . . . the company could no longer get loans to finance manufacturing because the lawsuits 'could be worth zero, or a trillion dollars.'" Mike Allen, *Colt's to Curtail Sale of Handguns*, N.Y. TIMES, Oct. 11, 1999.

Owned by a British conglomerate, Smith & Wesson was ordered to accept the Cuomo demands in exchange for immunity from some of the litigation. "Smith & Wesson made it clear . . . that the company was driven to the agreement by the lawsuits. The settlement would ensure 'the viability of Smith & Wesson as an ongoing business entity in the face of the crippling cost of litigation,' the company said in a statement." Jonathan Weisman, *Gun maker, U.S. reach agreement*, BALT. SUN, Mar. 18, 2000.

"[T]he litigants vowed to press on until all the manufacturers joined." *Id.* Indeed, "to get more aggressive." *Id.* Alex Panelas, Mayor of Miami-Dade County, Florida, warned that the Smith & Wesson deal would be "'a floor, not a ceiling' for any other gun maker that wants to sign on." *Id.*

Under the terms accepted by Smith & Wesson, the company's practices would be perpetually controlled by a five-member Oversight Commission. The cities, counties, and states that joined the litigation would select three members, while those that had declined to sue were excluded. The ATF would select one member, leaving gun manufacturers with only one member of their own. Walter Olson, THE RULE OF LAWYERS 125–26 (2003). In effect, corporate control would be removed from the stockholders and given to the new gun control committee.

No other company signed the agreement. Glock came closest. As the company was wavering, New York Attorney General Eliot Spitzer warned a Glock executive: "if you do not sign, your bankruptcy lawyers will be knocking at your door." 146 Cong. Rec. H2017 (Apr. 11, 2000) (Rep. Stearns). Spitzer and Connecticut Attorney General Richard Blumenthal announced they would sue other manufacturers for shunning Smith & Wesson—for instance, by no longer sharing joint legal defense with them. Olson, THE RULE OF LAWYERS, at 127. This would have been "the first antitrust action in history aimed at punishing smaller companies for not cooperating with the largest company in the market in an agreement restraining trade." *Id.* Blumenthal did not have evidence of illegal behavior; "the point was sheer intimidation." *Id.*

As Florida Representative Cliff Stearns explained, "the government lawyers and private lawyers" were "conspiring to coerce private industry into adopting public policy changes through the threat of abusive litigation. The option? Adopt our proposals or you will go bankrupt." 146 Cong. Rec. H2017 (Apr. 11, 2000). Stearns would go on to co-sponsor the Protection of Lawful Commerce in Arms Act, which protects the firearms industry from abusive litigation. Pub. L. No. 109–92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901–7903). By the time that legislation was enacted in 2005, "Thirty-three State legislatures [had already] acted to block similar lawsuits," 151 Cong. Rec. S8910 (July 26, 2005) (Sen. Sessions), reflecting widespread recognition that the suits represented a malicious attack on lawful activity. One reason federal legislation was necessary was that the New York

legislature, never friendly to Second Amendment rights, had taken no corrective action.

B. The IRS delayed the processing of conservative nonprofit applications and imposed burdensome requirements to stifle their advocacy.

In 2010, according to a U.S. Treasury Department Inspector General report, the Internal Revenue Service began using "inappropriate criteria that identified for review Tea Party and other organizations applying for tax-exempt status based upon their names or policy positions[.]" *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, U.S. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, May 14, 2013, at i.[2] "These criteria included names such as 'Tea Party,' 'Patriots,' or '9/12' or policy positions concerning government spending or taxes, education of the public to 'make America a better place to live,' or statements criticizing how the country was being run." *Attorney General Jeff Sessions Announces Department of Justice has Settled with Plaintiff Groups Improperly Targeted by IRS*, U.S. DEPARTMENT OF JUSTICE, Oct. 26, 2017.[3]

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[2] https://www.tigta.gov/sites/default/files/reports/2022-06/201310053fr_0.pdf.

[3] https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-announces-department-justice-has-settled-plaintiff-groups.

Consequently, as the U.S. Attorney General later acknowledged, "the IRS transferred hundreds of applications to a specifically designated group of IRS agents for additional levels of review, questioning and delay." *Id.* As part of the additional review, the IRS requested highly sensitive information, "including requests for the identities of donors, identification of issues important to the organization and the organization's position(s) on those issues, the type of conversations and discussions members and participants had during organizational activities, whether officers or directors planned to run for public office, political affiliations of officers and directors, and information about other organizations." Consent Order at 6, *Linchpins of Liberty v. United States*, No. 1:13-cv-00777 (D.D.C. Dec. 11, 2017), ECF No. 143.

In addition to the expense and intrusion of complying with the requests, the processing time for the applications was sometimes more than 1,000 days—far longer than the 121 days the IRS set as its goal for ordinary applications—with "some [applications] crossing two election cycles." *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications*, at 1, 14. All the while, the organizations were denied their freedoms of speech and association.

Tea Party and other conservative groups filed lawsuits against the United States and IRS alleging, among other allegations, violations of rights protected by the First and Fifth Amendments. Second Amended Complaint at 61–65, *Linchpins of Liberty v. United States*, No. 1:13-cv-00777 (D.D.C. Oct. 18, 2013), ECF No. 51; Second Amended Class Action Complaint at

58–66, *Norcal Tea Party Patriots v. IRS*, No. 1:13-cv-00341 (S.D. Ohio Oct. 7, 2014), ECF No. 114. The Department of Justice settled a class-action suit that included 428 members and another lawsuit brought by 41 plaintiffs.

The class-action suit resulted in a multimillion-dollar settlement. Settlement Agreement at 4–5, *Norcal Tea Party Patriots v. IRS*, No. 1:13-cv-00341 (S.D. Ohio Mar. 13, 2018), ECF No. 414. The other case resulted in an IRS acknowledgment that "the First Amendment generally prohibits the government from discriminating against citizens on the basis of the viewpoint(s) of their protected speech and/or their protected associational interests" and a "sincere apology" for discriminating against conservative groups. Consent Order at 11, *Linchpins of Liberty v. United States*.

Consistent with the Second Circuit's decision here, the federal government instead of going to all the trouble of extra review for nonprofit applications could have lawfully and permanently dismantled the disfavored groups by sending a "guidance" threat to their banks and insurers.

C. The Department of Justice choked off lawful firearms businesses through "Operation Choke Point."

In 2013, the Department of Justice initiated "Operation Choke Point." The "ostensible goal" of the Operation was "to combat mass-market consumer fraud by foreclosing fraudsters' access to payment systems." *The Department of Justice's "Operation*

Choke Point": Illegally Choking Off Legitimate Businesses?, U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, May 29, 2014, at 2.[4] In fact, as the U.S. House Committee on Oversight and Government Reform discovered, the true goal was "to 'choke out' companies the [Obama] Administration consider[ed] a 'high risk' or otherwise objectionable, despite the fact that they are legal businesses." *Id.* at 1.

Under the Operation, "merely providing normal banking services to certain merchants create[d] a 'reputational risk' that [wa]s an actionable violation under Section 951" of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. *Id.* at 8. "Suddenly, doing business with a 'high-risk' merchant" became "sufficient to trigger a subpoena by the Department of Justice" and a "threat of a federal investigation." *Id.* at 8–9. Banks were thus "put in an unenviable position: discontinue longstanding, profitable relationships with fully licensed and legal businesses, or face a potentially ruinous lawsuit by the Department of Justice." *Id.* at 9.

"Firearm Sales" and "Ammunition Sales" were among the merchant categories associated with "high-risk" activity. *Id.* at 8. Consequently, many federally licensed firearms merchants "abruptly had their bank accounts frozen or terminated." *Id.* According to one firearms manufacturer whose account was dropped by Bank of America, "thousands of small gun-shop

[4] https://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf.

owners across the country were in the same situation." Kelly Riddell, *Targeted? Gun sellers' 'high risk' label from feds cuts banking options, hurts business*, WASH. TIMES, May 18, 2014. A firearms training and supply business whose account was closed by BankUnited N.A., received an explanatory email stating: "This letter in no way reflects any derogatory reasons for such action on your behalf. But rather one of industry. Unfortunately your company's line of business is not commensurate with the industries we work with." *Id.*

The House Committee concluded that because Operation Chokepoint was an illegitimate exercise of the Department of Justice's legal authorities that "unfairly harm[ed] legitimate merchants and individuals . . . . it is necessary to disavow and dismantle Operation Choke Point." *The Department of Justice's "Operation Choke Point": Illegally Choking Off Legitimate Businesses?*, at 11.

After years of public criticism, Congressional investigations, and litigation challenging the Operation's legality, the Department of Justice committed to ending Operation Choke Point in 2017. *See* Letter from Assistant Attorney General Stephen E. Boyd to Chairman of the Committee on the Judiciary Bob Goodlatte, Aug. 16, 2017.[5]

Government officials have attempted to circumvent the Constitution by imposing financial burdens that make it impossible to engage in advocacy and activities they oppose. This Court may take

[5] Available at https://alliedprogress.org/wp-content/uploads/2017/08/2017-8-16-Operation-Chokepoint-Goodlatte.pdf.

cognizance of the determinations of lower courts and Congress that the federal government's actions violated the Constitution. Vullo's regulatory abuse is no different.

III. Then-Governor Cuomo gloated about possibly bankrupting the NRA through Vullo's regulatory actions.

As the NRA alleged and demonstrated, Superintendent Vullo and her then-boss Governor Cuomo undertook their regulatory actions to "retaliate against the NRA's core political speech." Pet. App. 234; *see also id.* at 195–99. In addition to Cuomo's efforts to bankrupt the firearms industry through the HUD-orchestrated lawsuits, *supra* Part II.A, Cuomo described right to arms advocates as "the enemy," *Remarks by Secretary Andrew Cuomo: Handgun Control, Inc*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, June 20, 2000.[6] And he declared that "pro-assault-weapon" conservatives have "no place in the state of New York." Jessica Chasmar, *Gov. Cuomo: Pro-life, pro-gun conservatives 'have no place' in New York*, WASH. TIMES, Jan. 19, 2014.[7]

After Vullo threatened New York banks and insurance businesses with adverse regulatory action if they serve the NRA, Cuomo tweeted, "The regulations

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[6] https://archives.hud.gov/remarks/cuomo/speeches/handguncontrl.cfm.

[7] https://www.washingtontimes.com/news/2014/jan/19/gov-cuomo-pro-life-conservatives-have-no-place-new/.

NY put in place are working. We're forcing the NRA into financial jeopardy. We won't stop until we shut them down." Andrew Cuomo (@andrewcuomo), TWITTER (Aug. 3, 2018, 12:57 PM).[8] Hours later, linking to an article about this case, he declared, "If I could have put the @NRA out of business, I would have done it 20 years ago." Governor Andrew Cuomo (@NYGovCuomo), TWITTER (Aug. 3, 2018, 3:35 PM).[9] The following day, Governor Cuomo bragged that "NY is forcing the NRA into financial crisis. It's time to put the gun lobby out of business. #BankruptTheNRA." Andrew Cuomo (@andrewcuomo), TWITTER (Aug. 4, 2018, 8:47 AM).[10] From his government account that same day, he taunted: "If the @NRA goes bankrupt because of the State of New York, they'll be in my thoughts and prayers." Governor Andrew Cuomo (@NYGovCuomo), TWITTER (Aug. 4, 2018, 2:09 PM).[11]

The next day, he tweeted, "New York has the NRA on the brink. Together, we can end the gun lobby's stranglehold on American politics. And I'll be sure to remember them in my thoughts and prayers." Andrew

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[8] https://twitter.com/andrewcuomo/status/1025455632755908608.

[9] https://twitter.com/NYGovCuomo/status/1025495433504849923.

[10] https://twitter.com/andrewcuomo/status/1025755155688513538.

[11] https://twitter.com/NYGovCuomo/status/1025836151930798082.

Cuomo (@andrewcuomo), TWITTER (Aug. 5, 2018, 11:00 AM).[12]

Asked in an interview that day whether his regulatory actions threaten the NRA's existence, Governor Cuomo replied, "I would like to believe it's true, to tell you the truth. . . . I'm hoping to extend this all across the country. . . . I think we could make a serious dent on their coffers and that would be good for everyone." Merrit Kennedy, *Is Cuomo Threatening NRA's Existence? He Says: 'I'd Like To Believe It's True,'* NPR, Aug. 5, 2018.[13]

Two days later, on August 7, 2018, Governor Cuomo tweeted a video about his actions "draining [the NRA's] bank account" while asking, "Did you think it was impossible to stop the @NRA? Think again." Andrew Cuomo (@andrewcuomo), TWITTER (Aug. 7, 2018, 10:39 AM).[14]

On August 13, 2018, Governor Cuomo called Donald Trump and the NRA "bankrupt bedfellows: literally and morally," and declared, "Unlike Trump, I'm not afraid to take on the NRA." Governor Andrew Cuomo (@NYGovCuomo), TWITTER (Aug. 13, 2018, 6:38 PM).[15] On April 29, 2019, then-President Trump accused Governor Cuomo of "illegally using the State's

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[12] https://twitter.com/andrewcuomo/status/1026150941211455490.

[13] https://www.npr.org/2018/08/05/635789292/is-cuomo-threatening-nras-existence-he-says-i-d-like-to-believe-it-s-true.

[14] https://twitter.com/andrewcuomo/status/1026870403501883392.

[15] https://twitter.com/NYGovCuomo/status/1029165362783379456.

legal apparatus to take down and destroy this very important organization [the NRA]," to which Governor Cuomo responded, "Unlike you, NY is not afraid to stand up to the NRA. As for the NRA, we'll remember them in our thoughts and prayers." Governor Andrew Cuomo (@NYGovCuomo), TWITTER (Apr. 29, 2019, 9:04 AM).[16] Finally, on February 29, 2020, Governor Cuomo tweeted that "The NRA are a bunch of political bullies," and repeated his standard insult, "If the NRA goes away, I'll remember them in my thoughts and prayers." Governor Andrew Cuomo (@NYGovCuomo), TWITTER (Feb. 29, 2020, 2:55 PM).[17]

These statements were made in addition to many others blaming the NRA for crimes and accidents involving firearms. *See, e.g.*, Governor Andrew Cuomo (@NYGovCuomo), TWITTER (Mar. 15, 2018, 12:13 PM)[18] (blaming the NRA for several school shootings); Governor Andrew Cuomo (@NYGovCuomo), TWITTER (Mar. 20, 2018, 12:24 PM)[19] (same).

Governor Cuomo has long been explicit about his desire to stifle gun rights advocacy, and he specifically targeted the NRA. Cuomo's longtime colleague and appointee, Vullo, acted at his behest. *See* Pet. App. 198–99. The Second Circuit erred by failing to consider

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[16] https://twitter.com/NYGovCuomo/status/1122879423378804736.

[17] https://twitter.com/NYGovCuomo/status/1233873446666473473.

[18] https://twitter.com/NYGovCuomo/status/974347925366149121.

[19] https://twitter.com/NYGovCuomo/status/976162510389891074.

the retaliatory motives demonstrated in the complaint, which are buttressed by the statements above.

IV. Vullo's threats targeted and continue to imperil all gun rights advocacy organizations.

While Cuomo and Vullo harbor a peculiar animus against the NRA, their threats targeted all gun rights organizations, including *amicus* Second Amendment Foundation.

Superintendent Vullo issued Guidance Letters to the heads of all licensed financial institutions and insurers doing business in New York, entitled, "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations." Pet. App. 246, 249. Pointing to "the social backlash against the National Rifle Association . . . and similar organizations that promote guns that lead to senseless violence," *id.*, Vullo directed insurers to consider the "reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations," and "to review any relationships they have with the NRA or similar gun promotion organizations," *id.* at 248, 251.

In a press release entitled, "Governor Cuomo Directs Department of Financial Services to Urge Companies to Weigh Reputational Risk of Business Ties to the NRA and Similar Organizations," Governor Cuomo declared, "I am directing the Department of Financial Services 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 and their communities[.]" *Id.* at 243–44.

Thus, Vullo's regulatory abuse threatened all gun rights organizations, and consistent with the Second Circuit's decision, could still be weaponized against them. Moreover, liberty-oriented think tanks that advocate for the right to arms, along with many other issues, could be targeted under the same rationale. Pro-gun advocacy could be largely expelled from public discourse—at least by any speakers who need banking services, which is to say all of them.

As detailed by ACLU National Legal Director David Cole, associations dedicated to constitutional ideals—including the ACLU, NRA, NAACP, Freedom to Marry, and Center for Constitutional Rights—are essential, for they foster civic engagement defending and advancing constitutional rights. "Associations of citizens dedicated to constitutional ideals help ensure that 'liberty lies in the hearts of men and women.'" David Cole, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW, Kindle Pos. 318 (rev. ed. 2017) (quoting Judge Learned Hand, *The Spirit of Liberty*, Address at "I Am an American Day" (May 21, 1944)).[20]

The same regulatory abuses at issue in this case can easily be weaponized against all sorts of citizen associations and activists—if this Court, by upholding the Second Circuit, signals that the *NAACP* cases are now easy to evade. In states where political incentives

[20] *See* https://www.thefire.org/research-learn/spirit-liberty-speech-judge-learned-hand-1944.

are different from those in New York, the potential targets will include organizations that advocate for abortion rights, for rights of unlawful aliens, or for "defund the police" and similar ideas. In states where political incentives are similar to New York's, the groups on the opposite side of the above issues could be prime targets.

The Second Circuit has created an untenable legal distinction between explicit threats and obvious implied ones. Suppose one organized crime underboss tells a building contractor, "If you keep buying cement from that company we do not like, you will be swimming with the fishes"; and a more clever underboss says, "Just some friendly non-binding guidance: if you keep doing business with that cement supplier, you might get a bad reputation. They're not very popular around here." This Court should not condone threat-laundering, especially to very heavily regulated businesses.

Regulatory retribution for protected free speech defies this Court's assurance that "the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." *Button*, 371 U.S. at 444–45.

CONCLUSION

For the above reasons, and those stated by the Petitioner, the decision below should be reversed.

Respectfully submitted,

JOSEPH G.S. GREENLEE
Counsel of Record
GREENLEE LAW, PLLC
PO Box 4061
McCall, ID 83638
(208) 271-2494
joseph@greenlee.law

DAVID B. KOPEL
INDEPENDENCE INSTITUTE
727 E. 16th Ave.
Denver, CO 80203
(303) 279-6536
david@i2i.org

JONATHAN D. GUZE
JOHN LOCKE FOUNDATION
4800 Six Forks Rd., Ste. 220
Raleigh, NC 27609
(919) 375-2021
jguze@lockehq.org