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 *Amicus Curiae* of Gun Owners of America, Gun Owners Fdn., Gun Owners of Cal., America's Future, Free Speech Coal., Free Speech Def. and Ed. Fund, Citizens United, Citizens United Fdn., The Presidential Coalition, Tenn. Firearms Assoc., Tenn. Firearms Fdn., Heller Fdn., Va. Citizens Defense League, Grass Roots N.C., Rights Watch Int'l, Public Advocate of the U.S., Leadership Inst., U.S. Const. Rights Legal Defense Fund, Clare Boothe Luce Center for Cons. Women, The Senior Citizens League, and Conservative Legal Def. and Ed. Fund in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, America's Future, Free Speech Coalition, Free Speech Defense and Education Fund, Citizens United, Citizens United Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, Heller Foundation, Virginia Citizens Defense League, Grass Roots North Carolina, Rights Watch International, Public Advocate of the United States, Leadership Institute, U.S. Constitutional Rights Legal Defense Fund, Clare Boothe Luce Center for Conservative Women, The Senior Citizens League, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. The Presidential Coalition, LLC is a political committee under IRC section 527. Many of these *amici* also filed a brief *amicus curiae* in this case at the Petition stage.[2]

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] Brief *Amicus Curiae* of Gun Owners of America, Inc., *NRA v. Vullo*, U.S. Supreme Court No. 22-842 (May 24, 2023).

STATEMENT OF THE CASE

On April 19, 2018, Maria Vullo, then head of the New York State Department of Financial Services, issued "Guidance Letters" urging certain businesses providing banking and insurance services to Petitioner National Rifle Association of America ("NRA") to end those relationships. Soon thereafter, the NRA filed suit against Vullo and New York Governor Andrew Cuomo, alleging the use of government coercion to punish the NRA for its speech in support of the Second Amendment. Brief for Petitioner ("Pet. Br.") at 12. The district court allowed the NRA's First Amendment claim to proceed, on the theory that Defendants' enforcement actions were chilling the NRA's speech in favor of the Second Amendment. *NRA v. Cuomo*, 525 F. Supp. 3d 382, 400 (N.D.N.Y. 2021). The district court found that, "because Ms. Vullo's alleged implied threats to Lloyd's and promises of favorable treatment if Lloyd's disassociated with the NRA could be construed as acts of bad faith ... a question of material fact exists as to whether she is entitled to qualified immunity under New York law." *Id.* at 403.

On September 22, 2022, the Second Circuit reversed, dismissing NRA's First Amendment claim. *NRA v. Vullo*, 49 F.4th 700, 706 (2d Cir. 2022) ("*NRA*"). Justifying the dismissal of the NRA's entire complaint, the Second Circuit found that the Guidance Documents were written "in an evenhanded, nonthreatening tone and employed words intended to persuade rather than intimidate." *Id.* at 717. The Second Circuit alternatively concluded that even if the NRA had plausibly alleged a First Amendment

violation, Vullo was entitled to qualified immunity because the violation was not so clearly established that any reasonable official ought to have known that the conduct was a constitutional violation. *Id*. at 719. The Second Circuit remanded the case to the district court and instructed that judgment for Vullo be entered. *Id*. at 721.

Petitioner filed a Petition for Certiorari on February 7, 2023, which was granted on November 3, 2023.

SUMMARY OF ARGUMENT

New York Governor Cuomo and his appointees have succeed in threatening and bullying highly regulated insurance companies into refusing to sell insurance related to the exercise of a constitutional right. When challenged, New York characterized their overt threats as mere persuasion, which transparently false rationale the Second Circuit accepted.

New York contends that firearms are so terrifying and evil that allowing banks and insurance companies to provide services to gun advocacy groups will cause "reputational risk" that could result in investors losing money. Senior government officials who are chauffeured to and from work by armed guards might actually believe that Americans have no need for the primary means of self-defense. However, it is more likely that Petitioners fear and distrust an armed populace, causing them to become ideological opponents of the Second Amendment. Americans do not share Governor Cuomo's hostility to firearms.

Prior to being coerced, the executives running some of the nation's largest insurance companies had no problem selling firearms-related products. Nearly half of Americans report living in a home with a firearm, and those families would never think less of an insurance company selling insurance to gun owners or pro-gun organizations.[3] Indeed, many Americans likely will have less respect for a bank or insurance company that caves to pressure from politicized regulators. Nonetheless, the Second Circuit was willing to allow New York to hide behind this "reputational risk" rationalization even though federal courts have refused to allow its use to justify the deprivation of other constitutional rights.

Two constitutional rights are at stake here. New York has acted to deprive Petitioner of its First Amendment rights precisely because Petitioner's advocacy is in support of Second Amendment rights. Making matters even worse, at the same time that New York is threatening insurance companies to abandon the firearms market, it is working to enact legislation to require such insurance for carrying, and even owning firearms. New York's strategy to circumvent the Second Amendment is no longer hidden.

New York's efforts to silence political opponents are not an outlier, but rather illustrates how some incumbent office holders are weaponizing government power to censor political opponents. If New York is

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[3] *See* L. Saad, "What Percentage of Americans Own Guns?" *Gallup* (Nov. 13, 2020).

allowed to silence gun advocacy groups, what is to prevent pro-life states from using regulatory power to censor Planned Parenthood? There must be only one rule for advocacy groups in the nation, and that is — under the First Amendment, regulators may not abuse their government powers to silence their political opponents.

ARGUMENT

I. NEW YORK'S PATTERN OF BEHAVIOR DEMONSTRATES GOVERNMENT COERCION OF PRIVATE SPEECH.

Dismissing the NRA's First Amendment claim, the court of appeals flatly denied that there were any threats made against the NRA by the New York Department of Financial Services ("DFS"), denied that the DFS statements were any more than permissible government speech, and denied that DFS had any motivation other than public safety and health. Yet the court did not deny that DFS had urged regulated banking and insurance companies to refrain from doing business with the NRA, while concluding that the statements made were merely "attempts to convince," and not "attempts to coerce." None of the court's conclusions can be squared with the facts of this case.

Petitioner was required to devote 18 pages of its brief simply to recite the long train of DFS abuses against it. Pet. Br. at 2-19. The Second Circuit, however, viewed Petitioner's arguments that DFS' "statements and actions" were "'threatening'" and

"'coercive'" as mere "conclusory allegations" that were not "plausible." *See NRA* at 708, n.7. The court implied they were "'extravagantly fanciful.'" *Id*. at 713. In fact, even when New York's clear threats were set out in official documents in the record, they continued to be viewed as mere "allegations," causing the court to rely on "'its judicial experience and common sense'" to conclude that Defendants had only the most noble of motivations. *Id*. at 713. In so doing, the lower court claimed to have considered:

> the following factors when distinguishing between attempts to convince and attempts to coerce: (1) word choice and tone...; (2) the existence of regulatory authority...; (3) whether the speech was perceived as a threat....; and, perhaps most importantly, (4) whether the speech refers to adverse consequences. [*Id. at* 715.]

All four factors strongly support Petitioner's First Amendment claim.

A. Word Choice and Tone.

The Guidance Letters issued by DFS recounted that various organizations had "severed their ties with the NRA," lauding them as examples of "corporate social responsibility,"[4] thereby implying that a continued relationship with the NRA is irresponsible.

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[4] New York Department of Financial Services, "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations" (Apr. 19, 2018).

Specifically, DFS warned regulated companies of the alleged "reputational risk" of further "dealings with the NRA" given the "social backlash" against the group for its public support of the Second Amendment. *Id.* Thus, DFS "encourage[d]" regulated institutions to take "prompt actions to manag[e]" this "risk." *Id.*

In a press release issued the same day, Vullo "urge[d] all insurance companies and banks doing business in New York to ... discontinue[] their arrangements with the NRA."[5] In that same press release, New York Governor Andrew Cuomo explained his order for Vullo to move against the NRA, advising that the "risk" to companies in New York for doing business with the NRA was not simply a "matter of reputation." *Id.* There is no lack of clarity as to what Vullo or Cuomo were saying or meaning — they were issuing threats.

Moreover, Respondents' words do not exist in a vacuum, and thus the appropriate interpretation is "reading them in 'context, not in isolation.'" *Missouri v. Biden*, 83 F.4th 350, 382-383 (5th Cir. 2023). Governor Cuomo is a longtime vitriolic opponent of the NRA. In 2000, as then-Secretary of the U.S. Department of Housing and Urban Development, referring to the NRA, Cuomo stated, "[i]f we engage **the enemy** in Washington we will lose. They will

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[5] New York Department of Financial Services press release, "Governor Cuomo directs Department of Financial Services to urge companies to weigh reputational risk of business ties to the NRA and similar organizations" (Apr. 19, 2018) (hereinafter "DFS Press Release").

beat us in this town."[6] Instead, Cuomo suggested, "[w]e're going to beat them state by state, community by community." *Id.* Then, in 2014, after becoming governor, Cuomo went so far as to say that those who are "'pro-assault weapon'" "'**have no place in the state of New York**,'" because that's not who New Yorkers are.[7] It is hardly surprising that, four years later, Cuomo's DFS issued a press release announcing Cuomo's order to Vullo and the DFS to declare war on insurance companies doing business with "the enemy."

Viewed in this context, the statements are even more threatening:

> Governor Cuomo said[] "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 ... sends the wrong message** to their clients and their communities who often look to them for guidance.... **This is not just a matter of reputation, it is a matter of public safety**...."[8]

The release went on to say, "DFS is encouraging regulated entities to consider reputational risk and

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[6] U.S. Department of Housing and Urban Development, "Remarks by Secretary Andrew Cuomo" (June 20, 2000) (emphasis added).

[7] F. Dicker, "GOP blasts Cuomo's comments on conservatives," *New York Post* (Jan. 20, 2014) (emphasis added).

[8] DFS Press Release (emphasis added).

promote corporate responsibility.... A number of businesses have **ended relationships with the NRA** following the Parkland, Florida school shooting in order to realign their company's values." *Id. (*emphasis added). DFS was not just instructing companies to "consider reputational risk," but also to "promote corporate responsibility." DFS defined "promot[ing] corporate responsibility" as "**end[ing] relationships with the NRA**." *Id.* (emphasis added).

It is difficult to view these undenied statements (not disputed allegations) as constituting anything other than a threat to companies that would defy DFS's "urging" and continue daring to do business with a company Cuomo had identified as "the enemy," and those declared to "have no place in the state of New York."

Even after he issued his press release announcing the DFS measures, Cuomo stated on Twitter, "[t]he NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public."[9] Cuomo also referred to policies such as CarryGuard as "murder insurance."[10] Governor Cuomo continued to be quite open about the intent behind the DFS actions: "[s]hortly after the NRA filed this lawsuit, Governor Cuomo publicly reiterated that

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[9] https://twitter.com/NYGovCuomo/status/987359763825614848.

[10] K. Brown and L. Ellefson, "The NRA claims actions by New York state are harming its finances. Governor Cuomo's response: 'Too bad,'" *CNN* (Aug. 6, 2018).

the purpose of his regulatory actions against the NRA was to '**shut them down**.'" Pet. Br. at 10, n.5 (emphasis added).[11]

In short, Governor Cuomo's clear and repeated statements against the NRA have nothing to do with some purported "reputational risk" to regulated entities. Rather, the DFS guidance was issued at his command and was designed with one purpose in mind — to "engage" and "shut ... down" the Governor's political "enemy" that he believed "had no place in the State of New York."

B. The Existence of Regulatory Authority.

As Director of DFS, Vullo was not simply an anti-gun politician promoting her views as to what state gun policy ought to be. She was directly in a position to punish companies that might disregard her Guidance Letters. "She possessed the power to investigate them, revoke or deny their licenses, appoint monitors, impose massive fines, seek injunctive relief, or refer them for criminal prosecution," most of which actions she in fact took against NRA-affiliated insurers. Pet. Br. at 17.

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[11] The Governor could hardly contain his glee: "J.A. 21 (Aug. 3, 2018 tweet from Cuomo stating that '[t]he regulations NY put in place are working. We're forcing NRA into financial jeopardy. We won't stop until we shut them down'); J.A. 23 (Aug. 3, 2018 tweet from Cuomo stating, 'If I could have put the @NRA out of business, I would have done it 20 years ago.')." *Id.*

C. Threats Were Understood by the Regulated Companies.

The DFS press release went on to note that "Chubb, another DFS-regulated insurer, recently stopped underwriting the NRA-branded 'Carry Guard' insurance program."[12] Like Cuomo's statement, DFS' reference to companies that had stopped doing business with Petitioner also must be viewed in the light of DFS' actions against those companies. The statements were backed up with enforcement by DFS against the companies:

> Two weeks later, DFS announced the conclusion of its investigations into Chubb and Lockton, the insurers that had offered the Carry Guard policies. Vullo imposed multi-million-dollar fines on both companies, and obtained consent orders in which they agreed not only to halt the Carry Guard program, but also *never* to offer any affinity insurance programs with the NRA *again* ... "involving *any* line of insurance...." [Pet. Br. at 10-11.]

After the DFS actions against NRA-affiliated insurers, those companies admitted privately "that the decision to sever ties with the NRA arose from fear of regulatory hostility in New York." *Id*. at 11. As the NRA has tried to find a replacement insurance product with a new provider, "'nearly every carrier has indicated that it fears transacting with the NRA

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[12] DFS Press Release.

specifically in light of DFS's actions against Lockton, Chubb, and Lloyd's.'" *Id.* at 11-12.

> In addition, numerous banks withdrew bids for the NRA's business after Vullo issued the Guidance Letters.... Though the NRA "received enthusiastic responses from several banks" when it sought bids for "wholesale banking services necessary to the NRA's advocacy" in February 2018, ... "multiple banks withdrew their bids" after Vullo's Guidance Letters issued "based on concerns that any involvement with the NRA ... would expose them to regulatory reprisals." [*Id.* at 12.]

D. Adverse Consequences.

The NRA alleged that DFS' ability to impose sanctions including "fines of hundreds of millions of dollars" and subsequent enforcement against NRA-affiliated businesses caused multiple companies to cease doing business with the NRA. Pet. Br. at 4, 10-11. The NRA alleged that some of the companies privately admitted that it was the DFS threats that stopped them from doing business with the NRA. *Id.* at 11.

As Petitioner notes in its brief, "Firms are obligated to consider 'reputational risk,' and failure to do so adequately can and has resulted in multi-million-dollar fines." *Id.* at 18. The words of Cuomo, Vullo, and DFS were not helpful hints for risk management. They were reminders to the NRA-affiliated insurers

that failure to manage "risk" is a violation of the law. "DFS is encouraging regulated entities to consider reputational risk," the press release stated.[13] DFS' directive, in the form of a "Guidance Letter," instructing companies "to take prompt actions to managing these risks" is a clear threat, and was taken as such.

II. THE CIRCUIT COURT RELIED ON A REPUTATIONAL RISK RATIONALIZATION THAT THIS COURT REJECTED WITH RESPECT TO THE 1964 CIVIL RIGHTS ACT.

A. Reputational Risk.

The circuit court made a series of factual findings that were wholly inconsistent with its legal conclusion that Superintendent Vullo's actions did not constitute a First Amendment violation. The court admitted that Vullo's actions were part of her office's pre-planned "'**campaign against gun groups**'" and her personal scheme to "'**leverage [her] powers** to combat the availability of firearms'" by, among other things, convincing "banks and insurance companies" to "discontinu[e] their relationships with gun promotion organizations." *NRA* at 706, 708 (emphasis added). Likewise, the court below freely acknowledged that Vullo promised not to prosecute various offenses (that her office had trumped up ahead of time against the NRA's insurers), on the condition that the insurers "'ceased providing insurance to gun groups, especially

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[13] DFS Press Release.

the NRA.'" *Id*. at 718. Finally, the lower court readily conceded that Vullo's tactics could reasonably have been **perceived as direct threats** by the financial industry and, in fact, that these undisguised efforts by Vullo and her office yielded precisely the results intended, where "multiple entities indeed severed their ties or determined not to do business with the NRA." *Id*. at 706. Yet, according to the court of appeals, this somehow did "not cross the line between an attempt to convince and an attempt to coerce." *Id*. at 717.

Superintendent Vullo had "called upon banks and insurance companies doing business in New York to consider the risks, including '**reputational risks**,' that might arise from doing business with the NRA or 'similar gun promotion organizations,' and she urged the banks and insurance companies to 'join' other companies that had discontinued their associations with the NRA.... Thereafter, multiple entities indeed severed their ties or determined not to do business with the NRA." *NRA* at 706 (emphasis added). Similarly, the 2018 press release by former Governor Cuomo reported that "DFS is encouraging regulated entities to consider **reputational risk** and promote corporate responsibility in an effort to encourage strong markets and **protect consumers**." DFS Press Release (emphasis added). The court was willing to tolerate New York's threats based on the theoretical risk that investors in insurance companies would lose money when the public learned they were insuring the NRA and other gun groups.

To be sure, New York law provides that reputational risk is a valid concern, as, "[p]ursuant to

Insurance Law sections 1503(b), 1604(b), and 1717(b), an entity shall adopt a formal enterprise risk management function that identifies, assesses, monitors, and manages enterprise risk." 11 N.Y. Comp. Codes R. & Regs. § 82.2. It requires insurance companies to "address all reasonably foreseeable and relevant material risks including, as applicable, ... reputational ... and any other significant risks...." *Id*. The Federal Reserve describes reputational risk as "the potential that negative publicity regarding an institution's business practices, whether true or not, will cause a decline in the customer base, costly litigation, or revenue reductions." Federal Reserve, "Supervisory Policy and Guidance Topics, Legal/Reputational Risk." Likewise, as the Society of Actuaries notes, "[f]or insurance companies a positive reputation is not just a factor for their financial success but a necessary factor to survive in the market." S. Kamiya, J. Schmit & M. Rosenberg, "Determinants of Insurers' Reputational Risk," *Society of Actuaries* (Aug. 2010) at 2. Accordingly, "regulators restrict insurers' performance such as excessive risk-taking in investment and inappropriate underwriting practices." *Id*.

By way of illustration, a legitimate reputational risk might be avoiding engaging in business ventures with persons such as Ponzi scheme master Bernie Madoff or sex-offender Jeffrey Epstein. However, in those two cases, even after review, the banks continued to do business.[14] Now, reputational risk has

[14] "JPMorgan's compliance team started a 'wide-ranging review of its customers' at the end of 2008, after the Bernie Madoff Ponzi

taken on an entirely new meaning — to include the danger of doing business with an organization dedicated to protecting the exercise of a constitutionally enumerated right.

B. The Civil Rights Act of 1964.

The circuit court, knowingly or not, recycles from the dustbin of history the rationalization used by segregationists to attack the Civil Rights Act of 1964. When this Court began to apply the Civil Rights Act to dismantle institutionalized segregation, a common refrain of segregationists was that forcing white-owned hotels and restaurants to accommodate black patrons would inflict financial and property risk on the white businesses. In 1964, for example, the Court decided the twin cases of *Katzenbach v. McClung*, 379 U.S. 294 (1964), and *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), the former holding that the Civil Rights Act could compel white-owned restaurants to serve black patrons, and the latter holding the same with respect to hotels.

Katzenbach rejected the argument "that if [the restaurant] were required to serve Negroes it would lose a substantial amount of business." *Katzenbach* at

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scheme was revealed. JPMorgan had been Madoff's primary bank. During that review, compliance officers at JPMorgan, which had a relationship with Epstein from the late 1990s to 2013, flagged Epstein's accounts as 'potentially problematic' and recommended the bank drop him as a client. But the bank stuck with him." E. Stewart, "Why banks kept doing business with Jeffrey Epstein," *VOX* (Aug. 13, 2019).

297. Indeed, that lower court had adopted arguments nearly identical to those of the Second Circuit below, finding that the restaurant owners "have shown by evidence, that these requirements of title II will cause substantial and irreparable injury to their business. Thus, the substance of the allegations and proof is that the provisions of title II and the duty it imposes constitute a present injurious impingement upon the plaintiffs' property rights." *McClung v. Katzenbach,* 233 F. Supp. 815, 819 (N.D. Ala. 1964). Accordingly, the lower court upheld the restaurant's ability to bar black customers, reasoning that a rule allowing black customers would harm the business and the economy.

These same arguments were repeated in Congress. In debates on the Civil Rights Act, Rep. Albert Watson questioned "[w]hat happens to the innumerable establishments throughout the South such as public theaters, restaurants, and county fairs which will lose business as soon as integration occurs.... The motion picture theater in a small southern town will lose business because white parents will refuse to send their children."[15]

The Second Circuit was willing to accept a nearly indistinguishable argument from Vullo, noting that her "guidance letters" instructed "DFS-regulated entities to consider what they could do to reduce ... the

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[15] *See Civil Rights: Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before the H. Comm. on the Judiciary*, 88th Cong. 1713-1714 (1963) (statement of Rep. Albert W. Watson, South Carolina).

reputational risks of doing business with gun promotion groups." *NRA* at 715 (emphasis added). But, just as with the arguments used by segregationists of the past, Vullo's concern for business solvency is the thinnest of veneers for her "desire to leverage [her] powers to combat the availability of firearms." *Id.* at 708.

III. NEW YORK'S REGULATORY ABUSES IN VIOLATION OF THE FIRST AMENDMENT ALSO IMPLICATE PETITIONER'S SECOND AMENDMENT RIGHTS.

A. New York's Efforts to Require Firearms Insurance.

As discussed in Section I, *supra*, New York violated Petitioner's First Amendment rights by coercing regulated industries to both terminate existing insurance relationships, and agree not to enter into any insurance agreements in the future. New York's actions constituted a gross misuse of governmental power to squelch the voice, and destroy the lawful programs, of a political opponent of Governor Cuomo and his administration.[16] Thus far, New York's strategy has had substantial success in making it

[16] Matters have not changed under New York Governor Kathy Hochul, who also has pursued an anti-gun agenda. Governor Hochul described this Court's decision in *Bruen* as "reckless," "reprehensible," and "outrageous." *See* A. Buncombe, "New York governor leads angry reaction to 'outrageous' Supreme Court decision making it easier to carry handguns," *The Independent* (June 23, 2022).

impossible for the NRA to pursue its mission. However, there is another aspect of New York's strategy. There is reason to believe that rendering the NRA and its members uninsurable may be the first phase of a two-step strategy. Since this case was filed, the second component of that strategy has become manifest — New York's plan to require insurance even to possess a firearm. While only the first of these two stratagems is before this Court, these *amici* urge this Court to view the matter in context, which reveals that the Second Amendment is as much at stake in this case as is the First.

After Vullo's 2018 attack on NRA-affiliated insurers, New York's state legislature began efforts to enact legislation requiring New Yorkers to obtain insurance as a precondition to possessing firearms. Shortly after Vullo's imposition of consent agreements banning companies from offering "any affinity insurance programs with the NRA, including fully lawful offerings, in perpetuity," state Senator Kevin Parker sponsored S2857A, which would require any would-be gun owner to obtain a minimum $1 million insurance policy as a condition of owning a firearm.[17] That initial effort was unsuccessful, but in 2021, another New York Assembly member introduced legislation again requiring $1 million liability insurance as a condition of gun ownership, as S4946, and has been reintroduced in the current session as S6033.

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[17] *See* https://www.nysenate.gov/legislation/bills/2017/S2857.

Additionally, a bill has been introduced, A581, which would require proof of insurance to be provided to the state before the issuance or renewal of a license to carry a firearm, and if insurance is not maintained, would be grounds for revocation of that license.[18] *See* N.Y. Penal § 400.00(11). That bill has been reintroduced in both chambers for the 2023-2024 legislative session as A6652 and S5902.

An insurance expert at the R Street Institute noted: "New York now wants to require people to hold a kind of insurance that it sanctioned the NRA and an insurance broker ... for selling at all."[19] The New York State Firearms Association has explained the problem:

> it would be quite impossible to obtain this kind of insurance here in New York State under normal conditions. But after Cuomo attacked every organization in America that sold self-defense insurance — calling it murder insurance — it is now literally impossible to obtain the kind of coverage that A-581 would mandate.[20]

A mandatory insurance requirement would make the exercise of Second Amendment rights conditional

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[18] D. Wos, "New York Legislation Would Trap Gun Owners With New Liability Insurance Requirement," TheTruthAboutGuns.com (Mar. 7, 2021).

[19] https://twitter.com/raylehmann/status/1071086248360640512.

[20] A. Dorr, "Update in Albany: Liability Insurance for All Gun Owners!" New York State Firearms Association (Jan. 15, 2021).

upon insurance companies offering the type of insurance required by the law. If insurance companies choose not to offer such insurance, or if the state continued to threaten insurance companies to leave that market, the state insurance requirement would be the functional equivalent of a gun ban. If such insurance was technically available but only at high cost, or offered only as a rider to homeowners' insurance, that also would seriously infringe on Second Amendment rights.

Although the Second Amendment issue is not now before this Court, in the past it has explained that its "precedent[] sensibly forbid[s] an observer 'to turn a blind eye to the context in which [a government] policy arose.'" *McCreary County v. ACLU*, 545 U.S. 844, 866 (2005). New York has made crystal clear its hostility to the Second Amendment and to private possession and carrying of firearms. Thus, this Court should not consider Vullo's actions in isolation, but in the light of how its coercion could facilitate efforts to undermine the exercise of Second Amendment rights.

B. Other States and Localities.

New York is not alone in exploring a firearms insurance mandate. New Jersey has already enacted similar legislation, requiring minimum insurance coverage of $300,000 as a precondition to exercise of the Second Amendment right. Citizens who fail to obtain insurance "face over a year in jail, fines up to $10,000, and risk losing their right to carry in public." *Koons v. Platkin*, 2023 U.S. Dist. LEXIS 85235, at *126 (D. N.J. 2023). At present, it is unclear whether

such insurance is even available in New Jersey. State Sen. Declan O'Scanlon noted: "'It's a little disturbing to me that we don't have an easy answer. We did something that the state does on a pretty regular basis: We make law that has a mandate without verifying that the mandate can actually be satisfied.'"[21] The New Jersey insurance requirement was struck down as an unconstitutional infringement on the Second Amendment by a federal district court judge in 2023, and the court noted that "homeowners or renters insurance policies do not typically have firearm exclusions...." *Koons* at *127. The case is now on appeal to the Second Circuit. Massachusetts' and Minnesota's legislatures have also considered insurance mandate legislation.[22]

Such efforts are also proceeding at the local level. On February 8, 2022, the City of San Jose, California adopted an ordinance entitled "Reduction of Gun Harm — Liability Insurance Requirement and Gun Harm Reduction Fee."[23] The ordinance requires any resident of San Jose wishing to own a firearm in the city to obtain liability insurance, and provides for confiscation of firearms of any owner who fails to meet the insurance requirement. The San Jose requirement

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[21] N. Biryukov, "Official faces questions over 'unconstitutional' insurance mandate for gun carriers," *New Jersey Monitor* (May 17, 2023).

[22] *See, e.g.,* C. Eger, "Bill would require licenses for gun owners, registration, insurance," *Guns.com* (Feb. 22, 2022) (Minnesota); https://malegislature.gov/Bills/193/S1476 (Massachusetts).

[23] *See* https://records.sanjoseca.gov/Ordinances/ORD30716.pdf.

was upheld by a California district court in 2023. *See N.A. for Gun Rights, Inc. v. City of San Jose,* 2023 U.S. Dist. LEXIS 120797 (N.D. Cal. 2023).

Lastly, due to the prominence of New York in financial and insurance markets, threats by New York regulators against insurance providers have nationwide impact. When New York requires insurance companies to change policies sold in New York, those changes can be implemented across the country. The success of New York's unconstitutional efforts can be seen in a report from the Insurance Information Institute issued three months ago stating that "'[n]o major national or regional insurer offers separate gun liability coverage.'"[24]

IV. GOVERNMENT IS INCREASINGLY WEAPONIZING ITS REGULATORY POWERS TO SILENCE POLITICAL OPPONENTS.

Politicians who succeed in being elected to public office are entrusted with considerable discretionary power, but each has a fixed term so their power lasts only for a season. Laws against bribery operate to discourage the abuse of governmental power for financial gain. However, the techniques by which incumbent politicians abuse governmental power for political gain, by punishing and silencing their opponents, are rarely criminalized. Protection against this type of abuse primarily has come from judicial

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[24] E. Leefeldt and A. Danise, "Do Americans Need 'Gun Insurance'? Here's How To Get It," *Forbes* (Oct. 3, 2023).

enforcement of the First Amendment. As Justice Alito explained in *Knox v. SEIU*, 567 U.S. 298 (2012):

> The First Amendment creates "an open marketplace" in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.... **The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves**. [*Id*. at 309 (emphasis added) (citations omitted).]

The temptation to suppress the exercise of free speech by those with different political views by treating them as enemies of the state has existed since the country was founded. In 1798, the Sedition Act made it a crime, punishable by a $5,000 fine and five years in prison, to "'write, print, utter or publish ... any false, scandalous and malicious ... writings against the government ... with intent to defame ... or to excite against them ... the hatred of the good people of the United States.'"[25] Twenty-five people were prosecuted under the Act, only 10 convicted, and all those were pardoned by President Jefferson.

A century later, during World War I, President Woodrow Wilson pushed through Congress his own Sedition Act which "made it illegal to 'convey information with intent to interfere with the operation

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[25] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273-274 (1964).

or success of the armed forces of the United States or to promote the success of its enemies.' That sweeping language effectively criminalized most forms of anti-war speech."[26] Wilson threatened: "'If there should be disloyalty, it will be dealt with with **a firm hand of repression**.'" *Id.* (emphasis added). The Act carried a sentence of up to 20 years in prison, but was repealed after the end of the war.

With the passage of another century, a new generation of government officials have again manifested the desire to weaponize government power to squelch speech that offends the government. The problem is not limited to New York.

A. *Missouri v. Biden*.

Another case now before this Court clearly illustrates the broader problem. The Solicitor General's Petition was granted on October 20, 2023, and briefing is now underway in *Murthy v. Missouri*, U.S. Supreme Court Docket No. 23-411. The attorneys general of Missouri and Louisiana brought a challenge in 2022 to the Biden Administration's effort to coerce Big Tech companies to censor speech which the federal government found objectionable on issues such as the COVID pandemic response. After an extensive review of a voluminous record, the district court concluded that "the present case arguably involves the most massive attack against free speech in United States' history." *Missouri v. Biden,* 2023 U.S. Dist. LEXIS

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[26] D. Root, "When the Government Declared War on the First Amendment," *Reason* (Oct. 2017).

114585, at *3 (W.D. La. 2023) (aff'd. in part and rev'd. in part by *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023).

The Fifth Circuit agreed that the government's pressure campaign violated the First Amendment.[27] "We find that the White House ... likely (1) coerced the platforms to make their moderation decisions by way of intimidating messages and threats of adverse consequences, and (2) significantly encouraged the platforms' decisions by commandeering their decision-making processes, both in violation of the First Amendment." *Missouri v. Biden*, 83 F.4th 350, 381-382 (5th Cir. 2023). The Fifth Circuit found that federal officials were using tactics not much different from those used by New York here, which:

> **coerced** the platforms into direct action via urgent, uncompromising **demands to moderate content**. Privately, the officials were not shy in their requests — they asked the platforms to remove posts "ASAP" and accounts "immediately," and to "slow[] down" or "demote[]" content.... And, more importantly, the officials **threatened** — both expressly and implicitly — to **retaliate** against inaction. [*Id*. at 382 (emphasis added).]

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[27] Some of these *amici* filed an *amicus* brief supporting Missouri in the Fifth Circuit: "Brief *Amicus Curiae* of America's Future, *et al.*" in *Missouri v. Biden,* U.S. Court of Appeals for the Fifth Circuit, No. 23-30445 (Aug. 7, 2023).

Just as the New York authorities told the insurance companies they had to protect against "reputational risk," the Biden Administration told the Big Tech companies that they must guard against information coming from "Foreign Malign States." Neither rationale has withstood scrutiny. Both the Biden Administration and the Cuomo Administration have had the same objective — to target and silence domestic political opponents in violation of the First Amendment. "Altogether, these censorship activities by federal officials and agencies constitute a gargantuan federal 'Censorship Enterprise.' This enterprise is highly effective — it has stifled debate and criticism of government policy on social media about some of the most pressing issues of our time." *Missouri v. Biden*, Docket No. 22-1213 (D.La.), Plaintiffs' Supplemental Brief in Support of Motion for Preliminary Injunction, No. 212-2 at 2.

B. The "Censorship Industrial Complex."

After the *Missouri* case was decided in the Fifth Circuit, in November 2023, a whistleblower came forward with additional documentation revealing that the federal government's effort to control political debate is even broader than that litigated in *Missouri v. Biden*. Beginning in 2018, the government has funded a massive joint public-private coalition which forms what has been called the "Censorship Industrial Complex" ("CIC"). The CIC has been revealed to be "a network of over 100 government agencies and nongovernmental organizations that work together to urge censorship by social media platforms and spread

propaganda about disfavored individuals, topics, and whole narratives."[28]

Perhaps the CIC's most notable "success" was the suppression of the Hunter Biden laptop story as "Russian disinformation" in the days before the 2020 election. Moreover, those engaged in suppressing the story had no legitimate basis to question it, and it has been proven to be accurate. In October 2020, as the laptop story broke, then-Biden campaign adviser (now Secretary of State) Antony Blinken "played an active role in the origins" of a letter signed by 51 former intelligence officials, including former Obama CIA Director John Brennan, former Obama Director of National Intelligence James Clapper, and former CIA director, then-Defense Secretary Leon Panetta, which falsely and misleadingly claimed that the story had "all the classic earmarks of a Russian information operation."[29]

It is one thing for opposing political parties and candidates to square off in the political arena to persuade voters to vote them into office. It is quite another to allow incumbents to abuse government powers to censor or attack political opponents. The heavy hand of government must be removed from the

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[28] M. Shellenberger, A. Gutentag, and M. Taibbi, "CTIL Files #1: US And UK Military Contractors Created Sweeping Plan For Global Censorship In 2018, New Documents Show," *Public.Substack.com* (Nov. 28, 2023).

[29] *See* N. Bertrand, "Hunter Biden Story Is Russian Disinfo, Dozens of Former Intel Officers Say," *Politico* (Oct. 19, 2020).

political scale or the will of the people will never be truly known.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be reversed.

Respectfully submitted,

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January 16, 2024