No. 22-842

In The
Supreme Court of the United States

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 *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing them for implementation in Ohio and replication nationwide. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3).

The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals. The Buckeye Institute frequently litigates to support the First Amendment rights of individuals and a free press. In this case, the allegations of the Petitioners and the substantial evidence adduced to support them, raises significant concerns regarding the blurring of lines between permissible government regulation and impermissible censorship schemes.

SUMMARY OF ARGUMENT

> And he found a new jawbone of an ass, and put forth his hand, and took it, and slew a thousand men therewith.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief.

> And Samson said, With the jawbone of an ass, heaps upon heaps, with the jaw of an ass have I slain a thousand men.

Judges 15:15–16 (King James).

The biblical story of Samson slaying a thousand men with the jawbone of an ass is meant to convey his divinely endowed strength. He could eviscerate an army, singlehandedly, wielding only a happenstance and improbable weapon. In the early 1960s, the term "jawboning" entered the political lexicon to describe a government official's ability to accomplish a similar feat of political strength—in this case stifling the speech and other advocacy of groups with disfavored views—through the seemingly innocuous tool of public statements. Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51, 57 (2015) (defining jawboning and noting the term's biblical origin). While Samson's prowess on the battlefield of Lehi was considerable, his supernatural strength pales in comparison to the modern regulatory state's power to smite the speech, stories, and ideas of the political philistines with whom it disagrees.

In the case at hand, however, jawboning takes on a new and even more dangerous dimension. In this case, the government officials at issue are not merely hinting at potential regulation if the regulated parties fail to police themselves satisfactorily, they are, like the black-listers of the McCarthy Era, seeking to remove disfavored individuals and organizations from public commerce, thus removing them from public debate. This is akin to wielding the jawbone of an ass in the digital age, where words and statements in

highly regulated industries—like insurance and finance—can have far-reaching consequences.

This type of government blacklisting, ostensibly in the service of protecting companies and their investors from the dangers of reputational risks, is an even more potent threat to First Amendment freedoms when the government—as here—creates the reputational risk on which it premises its action. The government disingenuously expands its power to protect against the threats that it creates. This is like an insurance company engaging in arson to highlight the need for its products.

This brief emphasizes the hazards of governance by jawboning, reflecting on some dark chapters of American history occasioned by it, and argues that governmental jawboning is inconsistent with the First Amendment's protections, the constitutionally mandated separation of powers, and the rule of law.

ARGUMENT

A. Jawboning's Unhappy Bipartisan History

Although at present, this case alleges a Democratic state government exerting influence on regulated entities to prevent trade with an organization typically perceived to be on the right, instances of power abuse through jawboning are not limited to a specific political affiliation. As history demonstrates, bipartisan tendencies and examples exist at the state, local, and federal levels. For example, President George W. Bush authorized the National Security Agency to conduct surveillance on Americans' international telephone calls and e-mail

traffic without obtaining either a Title III warrant or an order under the Foreign Intelligence Surveillance Act. Bambauer, *supra*, at 91. The telecom providers agreed to provide the information at the administration's request. Because lack of transparency is one of the bugs—or features—of jawboning, depending on one's point of view, it is impossible to know to what extent the telecom providers' acquiescence was motivated by fear of regulatory retaliation, a sense of patriotism in the wake of the 9/11 attacks, the wish to be "part of the solution," or a mosaic of motives. What is clear is that these third parties were willing to engage in investigative steps that the administration could not legally take directly.

The leverage of New York's Division of Financial Services ("DFS") over the entities it regulates is even greater and more direct than that exerted by the Bush administration over telecom companies. The financial and insurance entities at issue are regulated primarily by the state government. Moreover, unlike the Bush administration, which engaged in a less coercive type of jawboning and never actually engaged in regulation, the DFS has issued a stern warning that regulated entities that do business with the NRA do so at their peril.

Perhaps a closer analogy to the DFS's regulation by jawboning is the practice of industry blacklisting—most notably in Hollywood—of persons suspected of harboring communist sympathies. To be sure, legislative jawboning by members of the House Un-American Activities Committee and Senator Joseph McCarthy played a significant role in feeding

anticommunist paranoia. But the movement's roots stem from an executive pronouncement. With the Soviet Union's assertion of dominance over Eastern Europe and communism on the march worldwide, American policy makers became increasingly concerned over Soviet attempts to influence and subvert what they saw as American values through subtle propaganda and the infiltration of American government and private institutions.[2] In December 1947—more than two years before Senator Joseph McCarthy made his first public allegations of widespread communist infiltration of the federal government—the U.S. Attorney General published the "Attorney General's List of Subversive

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[2] While history didn't exactly repeat itself, it certainly rhymed when fears of Russian influence in the 2016 election came to the fore and served as a topic for politicians to jawbone. *See, e.g.,* Clare Foran, *Why Hillary Clinton Thinks She Lost the Election*, The Atlantic (May 2, 2016), https://www.theatlantic.com/politics/archive/2017/ 05/hillary-clinton-election-trump-fbi-russia-hacking/ 525183/. While the actual evidence of Russian "bots" influencing the election was slim, *see* Patrick Ruffini, *Why Russia's Facebook ad campaign wasn't such a success*, The Wash. Post (Nov. 3, 2017), https://www.washingtonpost.com/outlook/why-russias-facebook-ad-campaign-wasnt-such-success/2017/11/03/b8efacca-bffa-11e7-8444-a0d4f04b89eb_story.html, social media companies anxious to stave off the new Russian subversion and reassure users and regulators undertook a voluntary purge of thousands of suspected 'bot' accounts. Like Hollywood's blacklist, the action swept up innocents who had no connection to the Russian government. Alex Calderwood, Erin Riglin, and Shreya Vaidyanathan, *How Americans Wound Up on Twitter's List of Russian Bots*, Wired (Jul. 20, 2018), https://www.wired.com/story/how-americans-wound-up-on-twitters-list-of-russian-bots/.

Organizations" ("AGLOSO"). Robert Justin Goldstein, *Prelude to McCarthyism: The Making of a Blacklist*, 38 Prologue Mag., no. 3 (2006),https://www.archives.gov /publications/prologue/2006/fall/agloso.html.

The list imposed no direct sanctions on any of the organizations named. But "as various scholars wrote contemporaneously and subsequently, AGLOSO, which was massively publicized in the media, became what amounted to "an official blacklist." In the public mind it came to have "authority as *the* definitive report on subversive organizations," understood as a "proscription of the treasonable activity of the listed organizations" and the "litmus test for distinguishing between loyalty and disloyal organizations and individuals." *Id.* Notably, the list was never accompanied by any proof that any of the organizations on it had engaged in any criminal activity or sought to "subvert" the American government.

It was instead a list of the usual suspects. The list served its purpose of dissuading citizens from joining or associating with the groups on it. Many of the organizations folded. That same year, the House Un-American Activities Committee, which had formed in 1938, began investigating communist subversion in the motion picture industry.

Hollywood took the hint. The studio heads agreed among themselves not to hire actors and screenwriters who exercised their constitutional rights to decline to cooperate with the House Un-American Activities Committee as well as anyone with alleged ties to "subversive organizations." Because the studios were acting as private entities, simply trying

to act "responsibly" and enforcing their private preference to hire only patriotic Americans, there was no need for actual evidence of any ties to subversive groups like the one named on the AGLSO. Rumor and hearsay were sufficient. By 1956, even McCarthyism began to wane, *Elks Magazine* carried an article entitled "*What the Attorney General's List Means,*" which began by accurately noting that "there are few Americans who have not heard of 'the Attorney General's subversive list'" and concluded by declaring, "There is no excuse for any American citizen becoming affiliated with a group on the Attorney General's list today." *Id.*

Similarly, the DFS sees no excuse for any of its regulated entities to do business with the NRA. And, as discussed below, DFS's warning that the NRA presents a reputational risk to financial institutions is believable in large part because New York state officials have sought to create that reputational risk by characterizing the NRA as "extremist" and a "terrorist organization."

Moreover, the Red Scare purge of 1950s Hollywood highlights the insidious nature of government censorship by proxy. Blacklisting operates in the dark. Blacklisted screenwriters did not receive notice that they had been blacklisted or the opportunity to contest that designation in any type of hearing. They simply saw opportunities disappear. Likewise, the NRA—or any other organization or individual whose views the DFS disfavors—may find it difficult to renew its insurance or establish a banking relationship. Since private entities like the Hollywood studios of the 1950s and the regulated

institutions here owe no explanation, the lack of transparency allows the censors, both government and the regulated parties, to respond by gaslighting—simply denying that there are any restrictions in place or any communication between the government and the regulated entity. *See, e.g.,* the government's response in *Changizi v. Dep't of Health & Hum. Servs.*, 602 F. Supp. 3d 1031, 1048 (S.D. Ohio 2022) (No. 2:22-cv-1776).

The most significant commonality between McCarthy Era blacklisting and the DFS's actions here is how simple it was for the government to achieve goals that it could not have achieved directly. All that was needed was a list. The government could count on private actors to take it from there.

B. The Government is Disingenuously Creating the Reputational Risk That it Uses to Justify Its Blacklisting.

The government's action here is all the more alarming because the government itself created the "reputational risk," Cert. Pet. at 3, that it purports to warn against. As the NRA notes in its brief, former Governor Andrew Cuomo has stated that "firearms advocates 'have no place in the state of New York'" Pet'r's Merits Br. at 8. Other New York public officials have been more blatant. New York Attorney General Letitia James has called the NRA a "criminal enterprise" and a "terrorist organization." Jon Campbell, *NY AG Letitia James Called the NRA a 'Terrorist Organization.' Will It Hurt Her Case?*, USA Today (Aug. 19, 2020) https://www.usatoday.com/story/news/politics/2020/08/19/nra-lawsuit-ny-ag-letitia-james-past-comments/5606437002/. On her

Facebook page, current New York Governor Kathy Hochul has claimed that "The NRA is breaking the law and threatening the lives of New Yorkers." See Governor Kathy Hochul, Facebook (Aug. 6, 2018), https://www.facebook.com/ 1539436112984269/posts/ the-nra-is-breaking-the-law-and-threatening-the-lives-of-new-yorkers-governor-an /2109503782644163/. State Senator Sean Ryan (D-Buffalo) for his part has claimed that "Where the NRA was once viewed as an authority on gun safety, it has become an extremist organization that prioritizes political advocacy at the expense of safety. " Zach Williams, *Kathy Hochul Buffalo Ally Sen. Sean Ryan Takes Aim at NRA—But Beef Is Not About Gun Sales*, The N.Y. Post (Nov. 22, 2022), https://nypost.com/2022/11/22/kathy-hochul-buffalo-ally-sen-sean-ryan-takes-aim-at-nra-but-beef-is-not-about-gun-sales/.

These public officials are free to speak their mind about the NRA insofar as they do not engage in libel or slander. But the state's attempt to remove the NRA from the banking and insurance system based on the "reputational risk" the state suggests to regulated entities and their investors, when coupled with this type of inflammatory rhetoric is beyond the pale.

Indeed, the braying of these public officials and their purported concern over the NRA's reputation might harm those with whom it does business is reminiscent of Henry II's attempt to escape culpability for the murder of Thomas à Becket. Had Twitter been available to Thomas à Becket—Archbishop of Canterbury and Lord Chancellor to King Henry II in the 1160s— the separation of church and state that would become a cornerstone of liberal democracies

might have emerged centuries earlier. Still, limited to quill and scroll and horseback delivery, Becket and his defense of church independence against royal prerogative achieved the medieval equivalent of going viral. The King was enraged by, among other things, Becket's insistence that church authorities, rather than the Crown, had exclusive jurisdiction to try criminal cases against clergy. And although the King theoretically enjoyed absolute power, because Becket was a papal legate, the King was nevertheless politically constrained in what direct action he could take against Becket. So, like a state official, frustrated by political advocacy opposing the politician's policies, Henry reportedly complained to four of his knights — "will no one deliver me this turbulent priest?" *See* Robert Dodsley, *The Chronicle of the Kings of England, from William the Norman to the Death of George III* 27 (1821), https://archive.org/details/chroniclekingse00 addgoog.

The knights, eager to earn favor or avoid reprobation from their King—a man with significant power to influence their lives and fortunes—stepped in to solve Henry's problem by murdering Becket in Canterbury Cathedral. *Id*.

Setting aside for the moment the First Amendment's obvious legal constraints on the government's ability to censor political speech, the New York state government faces some political constraints just as Henry II did in dealing with Becket. Indeed, while the First Amendment allows certain limited types of censorship, such as the prevention of publication of national security secrets, politicians that use their influence to silence political

opponents or organizations opposing the politicians' policy positions undermine the public's confidence in the government. In the present case, faced with an organization that was espousing disfavored views—and one that New York state officials often complain is too often successful in its advocacy—the state actually warned private businesses against providing services to the NRA. And preventing a disfavored organization from obtaining critical business services destroys the organization's ability to speak, or even maintain its existence to fight the government seeking to destroy the organization.

Of course, the government cannot engage in censorship or denial of critical business services by proxy by inducing, encouraging, or promoting "private persons to accomplish what it is constitutionally forbidden from accomplishing." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973); *see also Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring) ("The government cannot accomplish through threats of adverse government action what the Constitution prohibits it from doing directly."). The government's influence over a private entity in suppressing speech constitutes a backdoor censorship that raises serious First Amendment concerns. The petition for writ of certiorari should therefore be granted.

C. The Allure and Danger of Censorship by Proxy

Just as despots of the Roman Empire relied on proscription to rid themselves of political enemies, the trend towards relying on third-party intermediaries to engage in conduct that the government cannot or that

might appear distasteful, seems to be a growing one. Because ancient Rome had no permanent police force, the authorities relied on citizens to take care of wrongdoers. Again, all that was needed was a list. The authorities would post a list of proscribed persons, and rewards were offered to anyone killing them. Anyone found harboring them was subject to severe penalties. *See*, *e.g.* Louis J. Sirico, Jr., *The Federalist and the Lessons of Rome*, 75 Miss. L.J. 431, 445 (2006)(describing proscription). *See also*, *Proscription*, Britannica, https://www.britannica.com/topic /proscription (last visited Jan. 11, 2024).

Today, governments have been successful in "recruiting proxy censors" in the online world. Working through proxies is particularly effective—and thus particularly dangerous—because it targets the "weakest link in the chain of communication." Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, & the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11, 27 (2006). Targeting financial service providers works because it "provides a mechanism for the exercise of authority over otherwise ungovernable conduct. Moreover, it does so at a discount: the cost of monitoring and sanctioning disfavored communications is largely externalized onto the intermediaries who are the subjects of direct regulation." *Id.* As Professor Bambauer explains, "[I]t is far easier and more effective to impose controls upon an intermediary than upon a host of dispersed speakers who may be difficult to identify, located outside the regulators' jurisdiction, or judgment-proof." Bambauer, *supra*, at 85–86.

Jawboning targeted at intermediaries is also especially pernicious because just as "platforms such as Google, Twitter, Facebook, and Instagram are the new gatekeepers for online content," financial institutions are even more vital to corporate existence See *id.* at 59–60.

Jawboning for "moderation" of internet speech, or here, to protect against reputational risks, when coupled with human nature and the natural incentives of power, creates a perilously slippery slope. Plainly, the state government is tasked with protecting the welfare of its jurisdiction and by extension its citizens. A government may see an urgent need to take action and engage in some benign jawboning to exert influence over corporations to achieve its policy goals. Thus, in addition to promoting the government's arguments, intermediaries may be expected to moderate or suppress arguments made against those policies.

This case presents an even greater First Amendment threat than the slippery slope of jawboning social media into "moderation." The state's actions here go beyond limiting a particular tweet or post and challenge the organization's ability to exist. Proceeding from the belief that its policies are the only solution for a particular societal problem, the government may view its continued governance as equally crucial, and that the silencing of opposing voices is therefore justified. Here, New York public officials believe strongly that firearm related deaths are best prevented by limiting the right to own or carry a gun. That policy may be wise or unwise. But as this case demonstrates, an unyielding belief in the

correctness of those policies can expand beyond simply trying to enact them into law and metastasize into an effort to use the whole of state government to not only silence dissenting views, but remove disfavored speakers from the marketplace.

Jawboning is also insidious because the more it is practiced, the easier it becomes. Psychology (as well as common sense and experience) teaches that once a person has crossed an ethical line, it becomes progressively easier to cross that line again. Thus, like a paperclip that is repeatedly bent, gaining the acquiescence of the regulated parties becomes easier and easier until no resistance is offered. This can be likened to a form of regulatory Stockholm Syndrome, where the regulated institutions, possibly initially cautious, may have progressively become more receptive and even eager to cooperate with the state's requests or recommendations. The regulated community *wants* to cooperate.

From the government's viewpoint, third parties' willingness to assist provides political cover. Even in the 1950s an act of Congress or Executive Order banning potential communist subversives from working in certain private industries where they could implant Marxist or other "un-American" ideas in the national psyche would have faced legal challenges and been seen as politically heavy-handedness. But if the government simply provided information, industry leaders who wished to appear responsible or patriotic might act on their own initiative. Simply put, "When the government can indirectly threaten or compel private actors to fall in line with its preferences, there is a threat to the constitutionally protected liberty to

exchange information that is checked poorly, if at all, by standard First Amendment doctrine." Derek E. Bambauer, *Orwell's Armchair*, 79 U. Chi. L. Rev. 863, 898–99 (2012). Again, it all begins with a list.

But the danger of censorship-by proxy is not merely that it violates the First Amendment, but that it degrades free speech and expression as a value worth protecting. A Knight Foundation survey on attitudes towards free speech and expression showed Americans are increasingly willing to value protection from misinformation and freedom from insult above free expression. *Free Expression in America Post-2020*, Knight Foundation (2022), http://knightfoundation .org/wp-content/uploads/2022/01/ F_Free_Expression_ 2022.pdf.

Historian Vincent Blasi suggests a type of national "pathology" regarding freedom of expression, defined by a "shift in basic attitudes, among certain influential actors if not the public at large, concerning the desirability of the central norms of the first amendment." Harold M. Wasserman, *Symbolic Counter-Speech*, 12 Wm. & Mary Bill Rts. J. 367, 402 (2004) (internal citation omitted). He posits "historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically." *Id.* A government that emphasizes moderation over open debate erodes public confidence in the value of free speech and threatens to usher in such an unwelcome age. At the same time, government intervention in the nation's dialogue—even when done by proxy—also decreases trust in government institutions.

Writing in 1958—one year after Joseph McCarthy's death—Justice Black reflected on the anti-communist hysteria, with its blacklists, loyalty oaths, and demands for intellectual conformity with words that resonate today: "The course which we have been following the last decade is not the course of a strong, free, secure people, but that of the frightened, the insecure, the intolerant." *Speiser v. Randall,* 357 U.S. 513, 532 (1958)(Black, J., concurring).

In a pluralistic constitutional republic, societal values exist in constant tension. Freedom is balanced against safety. Democracy and the will of the majority are balanced against individual liberties and minority rights. This often requires citizens, state governments, and even Presidential administrations to hold competing ideas in their heads simultaneously. Thus, in the same year that the Truman administration published its list of subversive organizations, the President's Committee on Civil Rights, convened by President Truman in 1946, published its report. Discussing the primacy of free speech and the right to dissent, the Committee, like Justice Black, saw free expression as the hallmark of a strong nation, confidant in the capacity of free people to reason together:

> This right is an expression of confidence in the ability of freemen to learn the truth through the unhampered interplay of competing ideas. Where the right is generally exercised, the public benefits from the selective process of winnowing truth from falsehood, desirable ideas from evil ones. If the people are to govern

> themselves their only hope of doing so wisely lies in the collective wisdom derived from the fullest possible information, and in the fair presentation of differing opinions.

To Secure These Rights: The Report of the President's Committee on Civil Rights, No. 47 (1947), https://www.trumanlibrary.gov/library/to-secure-these-rights#47.

New York state officials have no more business warning regulated entities against doing business with disfavored entities that the House Un-American Activities Committee did deciding who ought to write screenplays. The financial blacklisting of organizations with political advocacy disfavored by the government causes immediate irreparable harm as a violation of the First Amendment and may lead to longer-lasting irreparable harm through the continued erosion of the nation's commitment to the First Amendment's principles.

CONCLUSION

For all the foregoing reasons, amicus curiae The Buckeye Institute urges the Court to reverse the Court of Appeals' decision.

Respectfully submitted,

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