

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 FOR STATES OF HAWAI‘I, DELAWARE,
MARYLAND, MICHIGAN, MINNESOTA,
NEVADA, NEW MEXICO, OREGON, VERMONT,
AND WASHINGTON AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT.....	4
I. The States Have Broad Authority Both to Regulate and to Express Viewpoints in a Variety of Contexts	4
A. States Rely on Their Broad Police Powers to Provide for the Health, Safety, and Welfare of Their Residents.....	4
B. States Speak Through Their Public Officials to Accomplish Important Objectives.....	6
C. Government Speech Through Public Officials is Especially Important When the Speech Concerns Contro- versial Matters	13
II. The NRA’s Position Would Chill Legitimate Government Regulatory Action and Informal Guidance	20
CONCLUSION	29

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	24
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963)	20, 21, 26
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TABLE OF AUTHORITIES—Continued

	Page(s)
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<i>N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen</i> , 597 U.S. 1 (2022).....	13
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TABLE OF AUTHORITIES—Continued

	Page(s)
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TABLE OF AUTHORITIES—Continued

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<i>Wayte v. United States</i> , 470 U.S. 598 (1985).....	27
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INTERESTS OF AMICI CURIAE

Amici States have a substantial interest in promoting the safety and well-being of their residents in a range of contexts. Critical to this interest is Amici States' authority to regulate to protect public health and safety, and to promote the public good. And equally important is the States' ability to issue guidance, engage in dialogue with private organizations, and advocate particular policies and perspectives.

As this Court has long recognized, “[a] government entity has the right to ‘speak for itself.’” *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (citation omitted). It is entitled to “select the views that it wants to express.” *Id.* at 467-468. In fact, “[i]t is the very business of government to favor and disfavor points of view on (in modern times, at least) innumerable subjects.” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment). “Indeed, it is not easy to imagine how government could function if it lacked this freedom.” *Summum*, 555 U.S. at 468.

The broad view of coercion taken by the National Rifle Association (“NRA”) would impinge on this freedom, and chill the ability of the States and their officials to express important policy views and engage productively with private entities. It would also allow vague claims of coercion to interfere with legitimate regulatory action, even on matters of paramount public importance.

Amici States submit this brief to share their perspective, as sovereigns, on the importance of the States' ability to regulate for the health, safety, and welfare of their residents, and to express views, offer guidance, and engage in noncoercive discourse on

matters of public concern, even against the backdrop of regulatory authority.

SUMMARY OF ARGUMENT

The Second Circuit correctly held that the NRA did not plausibly allege a First Amendment coercion claim. The NRA's argument to the contrary would set a dangerous precedent—significantly hampering the States' ability to enforce critically important regulations and to speak out on issues of public importance.

First, in arguing that it has plausibly alleged a First Amendment coercion claim, the NRA places undue weight on guidance letters issued by Superintendent Vullo that encouraged insurers to consider the reputational risk of continuing to partner with the NRA. This Court's precedent and the Amici States' experience demonstrate that government communications urging private actors to amend policies or reconsider relationships with other private actors are a legitimate form of government speech that does not violate the First Amendment. And that is true even where the speech is made against the backdrop of regulatory authority; indeed, given the States' broad police powers, regulatory authority almost always exists when a state speaks.

The NRA also places too much weight on the allegations that several insurers decided to discontinue their insurance-related relationships with the NRA. The very purpose of issuing the type of guidance challenged here is to encourage or persuade private actors to change course. Government entities can persuade private actors to alter their behavior without coercing them. In any event, the insurance companies' private decisions here were, in most cases, made prior to any of the challenged government speech. And even if that were not the case, the decisions to end insurance

relationships with the NRA were made in the context of an intense public backlash against the NRA in the wake of a tragic school shooting. That context established a highly plausible alternative explanation for the insurers' decisions, requiring the NRA to have alleged with specificity how the challenged government speech caused the insurers to decide to end their relationships.

Second, adopting the NRA's expansive view of First Amendment coercion liability would significantly hinder legitimate government speech and interfere with the ability of the States to enforce their regulations. This Court has recognized the importance of State speech and held that the primary restraint on that speech is the democratic process, rather than the First Amendment. The States and the federal government have long utilized the "bully pulpit" to promote ideas, advance policies, and even criticize private conduct. They have also long engaged in discourse with industries, both to encourage responsibility and to help ensure that entities stay within the bounds of the law. Government speech is often most important when the issue at hand is one of significant public concern and debate—like gun safety. If adopted, the NRA's expansive theory of liability would undermine these important efforts. The threat of prolonged litigation, intrusive injunctions, and damages against government officials would chill government officials' speech. And, given the NRA's attempt to bolster its coercion claim by relying on the ongoing regulatory enforcement actions here, its theory would hinder the States' ability to enforce the very regulations they enact to promote the public good and protect people's lives.

ARGUMENT

I. The States Have Broad Authority Both to Regulate and to Express Viewpoints in a Variety of Contexts

A. States Rely on Their Broad Police Powers to Provide for the Health, Safety, and Welfare of Their Residents

Amici States' experience as regulators, law enforcers, and policymakers highlights the danger in the NRA's overly broad interpretation of how the First Amendment affects government speech. States have plenary police powers, *Torres v. Lynch*, 578 U.S. 452, 458 (2016), providing "broad authority to enact legislation for the public good," *Bond v. United States*, 572 U.S. 844, 854 (2014), and "promote the health, safety, and general welfare of their people," *Mountain Timber Co. v. Washington*, 243 U.S. 219, 238 (1917). Under this authority, States enact and enforce laws in a variety of areas, including criminal laws,¹ public health measures,² educational standards,³ laws designed to protect consumers⁴ and the environment,⁵ and regulations

¹ See *United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power . . . than the suppression of violent crime and vindication of its victims.").

² See, e.g., *New Orleans Gas Co. v. La. Light Co.*, 115 U.S. 650, 661 (1885); Haw. Dep't of Health, Dep't of Health Admin. Rules Title 11, <https://health.hawaii.gov/opppd/department-of-health-administrative-rules-title-11/> (last visited Feb. 21, 2024).

³ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 398 (1923).

⁴ See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (noting States' "traditional power to enforce otherwise valid regulations designed for the protection of consumers").

⁵ See, e.g., *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the

pertaining to financial institutions.⁶ Because of the breadth of the States’ police powers and law enforcement authority, when a State speaks to advocate for a given position or policy—a power this Court has long recognized, *see, e.g., Sumnum*, 555 U.S. at 467-468—it is frequently against the backdrop of regulatory authority in one form or another.

The States, as regulators, must also continually respond and adapt to new challenges as unprecedented societal concerns arise and new technology develops. For example, many States have begun exploring the regulation of social media companies and how their platforms are used in light of safety issues raised by social media’s ever-increasing role in today’s society.⁷ States also commonly adopt new regulatory and enforcement efforts to address emerging public health issues. During the COVID-19 pandemic, for example, every State issued some form of regulation to slow the spread of the infection.⁸ And many States have taken regulatory enforcement actions to address, among other

exercise of even the most traditional concept of what is compendiously known as the police power.”); Haw. Dep’t of Health Clean Water Branch, *Water Pollution Control*, <https://health.hawaii.gov/cwb/hawaii-administrative-rules-har/har-11-55/> (last updated Jan. 29, 2024).

⁶ *See, e.g., Noble State Bank v. Haskell*, 219 U.S. 104, 111-112 (1911); N.Y. State, Dep’t of Fin. Servs., *Regulatory and Legislative Activities*, https://www.dfs.ny.gov/industry_guidance/regulations (last visited Feb. 21, 2024).

⁷ *See* Ruth Reader, *States get serious about limiting kids’ social media exposure*, Politico (Jan. 13, 2024), <https://www.politico.com/news/2024/01/13/kids-online-states-social-media-00135390>.

⁸ *See Coronavirus Restrictions In Each State*, NPR (Dec. 2020), <https://www.npr.org/series/847328455/coronavirus-restrictions-in-each-state>.

things, the national opioid epidemic⁹ and the dangers posed by the marketing of e-cigarettes to minors.¹⁰

The police power is a vital aspect of State sovereignty. “Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly-populated community, the enjoyment of private and social life, and the beneficial use of property.” *Pearsall v. Great N. Ry. Co.*, 161 U.S. 646, 666 (1896) (citation omitted). “[S]o important is this power, and so necessary to the public safety and health, that it cannot be bargained away by the legislature.” *Id.* Nor “from its very nature,” is it capable “of any very exact definition or limitation.” *Id.* It is also vital to “the role of the States as laboratories for devising solutions to difficult legal problems,” a role this Court has warned “should not [be] diminish[ed] . . . absent impelling reason to do so.” *Oregon v. Ice*, 555 U.S. 160, 171 (2009).

B. States Speak Through Their Public Officials to Accomplish Important Objectives

In addition to their regulatory functions, Amici States and their officials frequently engage in speech designed to encourage certain behavior by residents,

⁹ See, e.g., N.Y. State Att’y Gen., *Opioid Settlements*, <https://ag.ny.gov/nys-opioid-settlement> (last visited Feb. 21, 2024); News Release, Haw. Dep’t of Att’y Gen., Attorney General Lopez Announces Multi-Million Dollar Settlement with National Marketing Firm Publicis Over Role in Opioid Epidemic (Feb. 2, 2024), <https://governor.hawaii.gov/newsroom/2024-07-ag-lopez-announces-multimillion-dollar-settlement-with-national-marketing-firm-over-role-in-opioid-epidemic/>.

¹⁰ See, e.g., News Release, Haw. Dep’t of Att’y Gen., Hawai’i Attorney General Sues E-Cigarette Giants JUUL and Altria (June 30, 2020), <https://ag.hawaii.gov/wp-content/uploads/2020/06/News-Release-2020-69.pdf>.

businesses, and other government actors. The First Amendment leaves ample room for such speech. *Summun*, 555 U.S. at 467 (“A government entity has the right to ‘speak for itself.’” (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000))); *Bond v. Floyd*, 385 U.S. 116, 135-136 (1966) (“The manifest function of the First Amendment in a representative government requires that” public officials “be given the widest latitude to express their views on issues of policy.”)¹¹ The government “must be able to ‘promote a program’ or ‘espouse a policy’ in order to function.” *Shurtleff v. City of Boston*, 596 U.S. 243, 248 (2022) (quoting *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015)). And “[w]hen a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others.” *Matal v. Tam*, 582 U.S. 218, 234 (2017). Indeed, “[i]t is the very business of government to favor and disfavor points of view,” *Finley*, 524 U.S. at 598 (Scalia, J., concurring in the judgment), especially since “some government programs involve, or entirely consist of, advocating a position,” *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559 (2005).

In Amici States’ experience, this government speech is valuable in protecting and improving public health and well-being. It is also often a means of engaging with regulated entities in a less formal manner to

¹¹ The NRA suggests that statements “issued by ‘the New York State Department of Financial Services’” rather than “Citizen Maria Vullo” “signal[] coercion” because they “did not merely express the personal perspectives of a public official.” Pet. Br. 32-33. This Court’s precedent has long recognized that *the government*—not solely its employees as private citizens—may speak, and the government, of course, can only speak through its employees.

further the same policy goals that may underlie State regulatory and enforcement action.

The States, for example, often issue guidance and recommendations to promote public health. This includes urging residents to abstain from legal, but harmful conduct, like smoking¹² and vaping,¹³ and encouraging companies to use best practices regarding opioid abuse,¹⁴ e-cigarettes,¹⁵ and the spread of communicable diseases.¹⁶ During the COVID-19 pandemic, States routinely issued guidance that operated in tandem with their legally-binding emergency regulations.¹⁷

¹² State-sponsored media campaigns, along with policy interventions, have been credited with a lower prevalence of smoking and related medical conditions in a number of States. *See, e.g.*, Erin Balogh et al., *Reducing Tobacco-Related Cancer Incidence & Mortality: Workshop Summary 48-53* (2013).

¹³ *See, e.g.*, Haw. Dep't of Health, State Living Healthy, *Understanding Youth Vaping in Hawaii*, <https://livinghealthy.hawaii.gov/tobacco-free/vaping/> (last visited Feb. 21, 2024); Tex. Dep't of State Health Serv., *Health Issues – What's the Harm?*, <https://www.dshs.texas.gov/vaping/what-is-vaping/health-issues-whats-the> (last visited Feb. 21, 2024).

¹⁴ *See, e.g.*, Or. Health Auth., Pub. Health Div., *Reducing Opioid Overdose and Misuse* (n.d.), <https://www.oregon.gov/OHA/PH/PreventionWellness/SubstanceUse/Opioids/Pages/index.aspx> (last visited Feb. 21, 2024); Pa. Dep't of Health, *Prescribing Guidelines*, <https://www.health.pa.gov/topics/disease/Opioids/Pages/Prescribing-Guidelines.aspx> (last visited Feb. 21, 2024).

¹⁵ Mich. Dep't of Health & Hum. Servs., *E-Cigarettes*, <https://www.michigan.gov/mdhhs/keep-mi-healthy/chronicdiseases/tobacco/e-cigarettes> (last visited Feb. 21, 2024).

¹⁶ *See, e.g.*, Haw., *COVID-19 Workplace Guidance*, <https://hawaiiicovid19.com/workplace-guidance/> (last visited Feb. 21, 2024).

¹⁷ *See, e.g.*, Haw. Dep't of Health, *Hawaii Quarantine and Isolation Guidelines*, <https://health.hawaii.gov/coronavirusdisease2019/hawaii-isolation-and-quarantine-guidelines/> (last visited Feb. 21, 2024); Mass. Dep't of Pub. Health, *COVID-19 Isolation*

And once vaccines for COVID-19 became widely available, States encouraged vaccination efforts.¹⁸

The States have also engaged in dialogue with social media companies to share information, express concerns, and urge companies to protect users—especially young people—from harm.¹⁹ In 2021, 44 State Attorneys General wrote to Facebook CEO Mark Zuckerberg with concerns about Facebook’s plans to launch a new version of Instagram specifically designed to appeal to children under the age of 13.²⁰ After receiving feedback from government officials, child welfare advocates, and other interested parties, Facebook suspended its plans for Instagram Kids.²¹ In 2022, another group of 44 State and territorial attorneys general encouraged TikTok and Snapchat to take additional steps to protect children and better facilitate parental controls on their

and Exposure Guidance for the General Public, <https://www.mass.gov/info-details/covid-19-isolation-and-exposure-guidance-for-the-general-public> (last visited Feb. 21, 2024).

¹⁸ Hemi Tewarson et al., *State Strategies for Addressing Barriers During the Early US COVID-19 Vaccination Campaign*, 111 *Am. J. Pub. Health* 1073, 1076 (2021) (“States are launching public information campaigns to communicate with the public about COVID-19 vaccine availability and safety.”).

¹⁹ *See, e.g.*, Press Release, Ariz. Off. of Att’y Gen., Terry Goddard Announces Agreement with Facebook to Better Protect Kids (May 8, 2008), <https://www.azag.gov/press-release/terry-goddard-announces-agreement-facebook-better-protect-kids>.

²⁰ Letter from Att’y Gen. to Mark Zuckerberg, Chief Exec. Officer, Facebook, Inc. (May 10, 2021), <https://www.naag.org/wp-content/uploads/2021/05/NAAG-Letter-to-Facebook-Final-1.pdf>.

²¹ Aaron Gregg & Elizabeth Dwoskin, *Facebook hits pause on Instagram Kids app amid growing scrutiny*, *Wash. Post* (Sept. 27, 2021), <https://www.washingtonpost.com/business/2021/09/27/facebook-instagram-kids/>.

platforms.²² And in response to reports from educators of vandalism, clogged toilets, and stolen property attributed to the viral “Devious Licks” TikTok challenge, as well as a new “Slap a Teacher” challenge that put educators at risk of physical harm, the Connecticut Attorney General invited TikTok’s CEO to meet with parents and teachers to hear first-hand the impact of their platforms on young people in Connecticut.²³

The States also routinely advocate for consumers, a practice which is particularly important during or immediately following disasters or emergencies. For example, during the COVID-19 pandemic, many states urged several large online marketplaces like Amazon,²⁴ Craigslist,²⁵ and eBay²⁶ to implement measures to crack down on price gouging, particularly for items essential to citizens’ efforts to protect themselves from the virus. And following the devastating wildfires in Lahaina, Maui, the State of Hawai‘i issued notices

²² Letter from Atty’s Gen. to Matthew Penarczyk and Michael O’Sullivan (Mar. 28, 2022), <https://ncdoj.gov/wp-content/uploads/2022/03/NAAG-Final-Letter-Parental-Control-App-44.pdf>.

²³ See, e.g., Press Release, Conn. Off. of Att’y Gen., Attorney General Tong Seeks TikTok Leadership Meeting to Discuss Harm to Mental and Physical Safety of Connecticut Students and Educators (Oct. 4, 2021), <https://portal.ct.gov/AG/Press-Releases/2021-Press-Releases/Attorney-General-Tong-Seeks-TikTok-Leadership-Meeting>.

²⁴ Letter from Att’ys Gen. to Jeff Bezos, Founder/CEO, Amazon (Mar. 25, 2020), <https://oag.dc.gov/sites/default/files/2020-03/Price-Gouging-Multistate-Letter-Amazon.pdf>.

²⁵ Letter from Att’ys Gen. to Jim Buckmaster, CEO, Craigslist (Mar. 25, 2020), <https://oag.dc.gov/sites/default/files/2020-03/Price-Gouging-Multistate-Letter-Craigslist.pdf>.

²⁶ Letter from Att’ys Gen. to Scott Schenkel, CEO, eBay (Mar. 25, 2020), https://oag.dc.gov/sites/default/files/2020-03/Price-Gouging-Multistate-Letter-Ebay_0.pdf.

warning residents of predatory practices, including fraudulent solicitations for donations²⁷ and unsolicited approaches by predatory homebuyers seeking to take advantage of the financial difficulties caused by the disaster to pressure individuals to sell their properties.²⁸

States also encourage officials at other levels of government to take action on a wide range of issues. For example, a bipartisan group of 26 State governors recently urged congressional leaders to continue funding the Affordable Connectivity Program, which provides households with discounts towards broadband internet services.²⁹ State officials have also encouraged Congress and the President to take action on climate change³⁰ and immigration reform.³¹ And they also

²⁷ News Release, Haw. Dep't of Att'y Gen., Attorney General Lopez Cautions Those Seeking to Donate to Victims of the Maui Wildfires to Avoid Scams (Aug. 9, 2023), <https://governor.hawaii.gov/newsroom/2023-35-attorney-general-lopez-cautions-those-seeking-to-donate-to-victims-of-the-maui-wildfires-to-avoid-scams/>.

²⁸ News Release, Haw. Dep't of Commerce and Consumer Affairs, Maui Homeowners Urged to Exercise Caution, Report Unsolicited Offers to Buy Their Properties (Aug. 15, 2023), <https://governor.hawaii.gov/newsroom/news-release-maui-homeowners-urged-to-exercise-caution-report-unsolicited-offers-to-buy-their-properties/>.

²⁹ Letter from State Govs. to Mike Johnson, Hakeem Jeffries, Chuck Schumer, and Mitch McConnell (Nov. 13, 2023), <https://governor.nc.gov/governors-acp-letter/open>.

³⁰ *See, e.g.*, Letter from State Govs. to Nancy Pelosi and Charles E. Schumer (Sept. 1, 2021), https://www.governor.ny.gov/sites/default/files/2021-09/Joint_Governors_Letter_to_Congressional_Leadership_090121.pdf; Letter from State Govs. to Donald J. Trump (May 3, 2017), https://www.georgetownclimate.org/files/report/Governors-letter-to-POTUS-Paris_Agreement_1.pdf.

³¹ Letter from State Govs. to Joseph R. Biden, Chuck Schumer, Mike Johnson, Mitch McConnell, and Hakeem Jeffries (Jan. 22,

routinely express their views in letters or comments to federal agencies.³²

As these examples demonstrate, States and their officials, no less than private entities and individuals, are vital participants in the “free and unhindered debate on matters of public importance—the core value of the Free Speech Clause[.]” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968). Indeed, by virtue of the positions they hold, public officials are often “the members of a community most likely to have informed and definite opinions” on matters of public concern. *Id.* at 572.

This Court’s precedent makes clear that governments may speak through public officials on such matters even if the speech is critical of others. “It is inevitable that government will adopt and pursue programs and policies” that are “contrary to the profound beliefs and sincere convictions of some of its citizens.” *Southworth*, 529 U.S. at 229. But “[i]f the citizenry objects,” it can elect different officials to “espouse some different or contrary position.” *Id.* at 235. “Democracy, in other words, ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what

2024), https://www.governor.ny.gov/sites/default/files/2024-01/Immigration_Reform_FINAL.pdf.

³² See, e.g., News Release, Haw. Dept. of Att’y Gen., Attorney General Lopez Joins Multistate Coalition Urging FCC Restrict Artificial Intelligence Use in Marketing Phone Calls (Jan. 19, 2024), <https://governor.hawaii.gov/newsroom/2024-03-attorney-general-lopez-urges-fcc-restrict-artificial-intelligence-use-in-tele-marketing/>; Letter from Roy Cooper, N.C. Gov. to Michael S. Reagan, Adm’r, U.S. Env’tl. Prot. Agency (Nov. 3, 2023), <https://governor.nc.gov/gov-cooper-epa-letter-113/open>.

government says, the next election will cancel the message.” *Johanns*, 544 U.S. at 575 (Souter, J., dissenting).

C. Government Speech Through Public Officials is Especially Important When the Speech Concerns Controversial Matters

Public officials’ license to comment on “innumerable subjects,” *Finley*, 524 U.S. at 598 (Scalia, J., concurring), includes matters of controversy and serious dispute, where speech may express ideas that others find “offensive or disagreeable,” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Government speech on such issues is particularly important, and public officials are often uniquely qualified to comment on matters of significant public debate because of the experience and access to information their positions provide. *See Lane v. Franks*, 573 U.S. 228, 240 (2014) (“[S]peech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.”); *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (“[M]atters concerning government policies that are of interest to the public at large” are “a subject on which public employees are uniquely qualified to comment.”).

One subject on which public officials have a particularly strong interest in sharing their views is gun regulation and safety. “[T]he United States suffers a disproportionately high rate of firearm-related deaths and injuries,” presenting States with a “complex problem,” *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 85, 90 (2022) (Breyer, J., dissenting), that deeply affects communities across the country and generates strident debate.

In the Amici States' experience, speech by public officials on gun safety is essential, especially in the aftermath of incidents of gun violence. State officials often play leading roles in the wake of these tragedies by consoling survivors, ordering formal investigations of the facts and circumstances, and pushing for policy changes—both within government and without—to prevent future violence.

On April 16, 2007, a Virginia Tech undergraduate student shot and killed 32 students and faculty, and wounded 17 more, at the school's campus in Blacksburg, Virginia.³³ After the shooting, Virginia Governor Tim Kaine, in coordination with Virginia Attorney General Bob McDonnell, issued an executive order instructing all executive branch agencies to begin including the names of dangerous individuals ordered to undergo involuntary mental health treatment in the database used to screen firearms sales.³⁴ Governor Kaine also formed the Virginia Tech Review Panel to perform an independent review of several issues relating to the shooting.³⁵ The panel—

³³ Va. Tech Review Panel, Mass Shootings at Virginia Tech April 16, 2007: Report of the Review Panel 1 (Aug. 2007), <https://scholar.lib.vt.edu/prevail/docs/VTRReviewPanelReport.pdf>.

³⁴ Press Release, Commonwealth of Va., Office of the Att'y Gen., Governor Kaine Issues Executive Order Expanding Background Checks for Gun Purchases (Apr. 30, 2007), http://www.oag.state.va.us/PRESS_RELEASES/NewsArchive/043007_Loophole.html [https://web.archive.org/web/20110501024717/http://www.oag.state.va.us/PRESS_RELEASES/NewsArchive/043007_Loophole.html]; Commonwealth of Va., Office of the Gov., Exec. Order No. 50 (2007), Reporting Critical Safety Data to the Central Criminal Records Exchange (Apr. 30, 2007).

³⁵ Va. Tech Review Panel, *supra* note 33, at vii-viii, 1, 5–6; Commonwealth of Va., Office of the Gov., Exec. Order No. 53 (2007), Virginia Tech Review Panel (June 18, 2007).

chaired by a former Virginia State Police Superintendent and including several academics and current and former state and federal officials—shared its findings and recommendations with the public in an August 2007 report.³⁶ The report made a number of recommendations, including enhancing the university’s security and emergency procedures,³⁷ changing Virginia law relating to mental health care³⁸ and background checks for firearms purchases,³⁹ and improving the Virginia Office of the Chief Medical Examiner.⁴⁰

Five years later, on December 14, 2012, a 20-year-old shot and killed 20 young children and six staff members at Sandy Hook Elementary School in Newtown, Connecticut.⁴¹ Following that tragedy, Connecticut Governor Dan Malloy promised to do “everything in [his] power to make sure that Connecticut is a national leader in preventing gun violence,” including “tak[ing] steps to make sure that our gun laws are as tight as they are reasonable, that our mental health system is accessible to those that need it, and our law enforcement personnel have all the tools they need to protect public safety, particularly in our schools.”⁴² The

³⁶ *Id.*

³⁷ Va. Tech Review Panel, *supra* note 33, at 19–20.

³⁸ *Id.* at 60–62.

³⁹ *Id.* at 76.

⁴⁰ *Id.* at 132–133.

⁴¹ Stephen J. Sedensky III, Report of the State’s Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012 1-2 (Nov. 25, 2013), <https://portal.ct.gov/-/media/DCJ/SandyHookFinalReportpdf.pdf>.

⁴² Press Release, Gov. Dannel P. Malloy, Gov. Malloy Statement on President Obama’s Proposals to Reduce Gun Violence (Jan. 16, 2013), <https://portal.ct.gov/Malloy-Archive/Press-Room/>

Governor also called for “leadership at the federal level,” and commended certain measures proposed by the President and Vice President.⁴³ And he appointed a 16-member Sandy Hook Advisory Commission to review and make recommendations regarding the state’s school safety, mental health, and gun violence prevention policies.⁴⁴ The Commission issued an interim report on March 18, 2013, prior to the start of that year’s session of the Connecticut General Assembly.⁴⁵ Less than a month later, Connecticut enacted comprehensive firearms legislation.⁴⁶ Amidst an intense national debate, other states followed.⁴⁷

Press-Releases/2013/01-2013/Gov-Malloy-Statement-on-President-Obamas-Proposals-to-Reduce-Gun-Violence.

⁴³ *Id.*

⁴⁴ Press Release, Gov. Dannel P. Malloy, Gov. Malloy Names Members of Sandy Hook Advisory Commission (Jan. 8, 2013), <https://portal.ct.gov/Malloy-Archive/Press-Room/Press-Releases/2013/01-2013/Gov-Malloy-Names-Members-of-Sandy-Hook-Advisory-Commission>.

⁴⁵ Sandy Hook Advisory Comm’n, Interim Report of Findings 1 (Mar. 18, 2013), https://portal.ct.gov/-/media/Malloy-Archive/Sandy-Hook-Advisory-Commission/SHACInterimReport20130318.pdf?sc_lang=en&hash=BAD161619DE82CF63CDD0A9C506D6350. A final report was issued two years later. Sandy Hook Advisory Comm’n, Final Report (Mar. 6, 2015), https://portal.ct.gov/-/media/Malloy-Archive/Sandy-Hook-Advisory-Commission/SHAC_Final_Report_3-6-2015.pdf?sc_lang=en&hash=BDF55EC4ACE382E87941870AD9BF2A34.

⁴⁶ Lateef Mungin & Brittany Brady, *Connecticut governor signs sweeping gun measure*, CNN (Apr. 4, 2013), <https://www.cnn.com/2013/04/04/us/connecticut-gun-law-overhaul/index.html>; see S.B. 1160, 2013 Reg. Sess. (Conn. 2013).

⁴⁷ See e.g., Thomas Kaplan, *Sweeping Limits on Guns Become Law in New York*, N.Y. Times (Jan. 15, 2013), <https://www>.

Particularly relevant to this case are the events of February 2018 in Parkland, Florida. “[A] shooter armed with a semiautomatic weapon opened fire at Marjory Stoneman Douglas High School,” killing “seventeen high school students and staff.” *Nat’l Rifle Ass’n v. Vullo*, 49 F.4th 700, 706, 708 (2d Cir. 2022). The Parkland tragedy, along with two other high-profile shootings in late 2017,⁴⁸ led “[m]any government officials and major American business institutions” to “sp[ea]k out against gun violence,” including by criticizing and publicly disassociating themselves from the NRA and other gun promotion organizations. *Id.* at 708.

As with previous incidents, State officials played a central role in the response. The week after the Parkland shooting, Florida Governor Rick Scott announced a proposal to improve school safety and prevent violent and mentally ill people from accessing weapons.⁴⁹ He stated that he wanted to make it “virtually impossible” for anyone “who is a danger to

[nytimes.com/2013/01/16/nyregion/tougher-gun-law-in-new-york.html](https://www.nytimes.com/2013/01/16/nyregion/tougher-gun-law-in-new-york.html); see S.2230/A.2388, 2013-2014 Reg. Sess. (N.Y. 2013).

⁴⁸ Andrew Blankstein et al., *Las Vegas Shooting: 59 Killed and More Than 500 Hurt Near Mandalay Bay*, NBC News (Oct. 1, 2017), <https://www.nbcnews.com/storyline/las-vegas-shooting/las-vegas-police-investigating-shooting-mandalay-bay-n806461> (October 2017 shooting in Las Vegas, the “worst mass shooting in modern American history”); David Montgomery et al., *Gunman Kills at Least 26 in Attack on Rural Texas Church*, N.Y. Times (Nov. 5, 2017), <https://www.nytimes.com/2017/11/05/us/church-shooting-texas.html> (November 2017 shooting in Sutherland Springs, Texas, the “deadliest mass shooting in the state’s history”).

⁴⁹ *Florida Gov. Rick Scott announces plan to improve school safety*, CBS News (Feb. 23, 2018), <https://www.cbsnews.com/news/florida-rick-scott-announcing-plan-to-improve-school-safety-live-stream/>.

themselves or others to use a gun.”⁵⁰ In March 2018, the Florida Legislature passed the Marjory Stoneman Douglas High School Public Safety Act, which raised the minimum age to purchase a firearm, extended the waiting period, imposed restrictions on the purchase of bump stocks, and broadened law enforcement’s power to seize weapons.⁵¹ The Act also established the Marjory Stoneman Douglas High School Public Safety Commission to “analyze information from the . . . shooting and other mass violence incidents and provide recommendations and system improvements to help mitigate the impacts from and prevent future school shootings.”⁵²

In addition to regulatory and policy changes, some states have sought to promote public safety in the wake of mass shootings by appealing to private industry directly. For example, in a letter to firearms dealers in December 2015, the Massachusetts Attorney General, referencing the Sandy Hook tragedy, explained her “commitment to keeping guns away from those who pose a danger to themselves and to others,” reminded the dealers of their obligations under state and federal firearms laws, and urged them to exercise “heightened vigilance” to help keep people safe.⁵³ And

⁵⁰ *Id.*

⁵¹ Patricia Mazzei, *Florida Governor Signs Gun Limits Into Law, Breaking With the N.R.A.*, N.Y. Times (Mar. 9, 2018), <https://www.nytimes.com/2018/03/09/us/florida-governor-gun-limits.html>; see S.B. 7026, 2018 Reg. Sess. (Fla. 2018).

⁵² Marjory Stoneman Douglas High Sch. Pub. Safety Comm’n, Initial Report 7-8 (Jan. 2, 2019), <http://www.fdle.state.fl.us/MSDHS/CommissionReport.pdf>.

⁵³ Letter from Maura Healy, Mass. Att’y Gen., to licensed firearms dealers of Mass. (Dec. 22, 2015), <https://www.mass.gov/doc/ag-healey-letter-to-ma-licensed-firearms-dealers/download>.

in September 2022, eleven State attorneys general wrote to the CEOs of three prominent credit card companies—American Express, Visa, and Mastercard—applauding their decision to adopt a new merchant category code for gun and ammunition sales that would assist in tracking sales and ultimately help “thwart mass shooting events before they occur.”⁵⁴ When the same companies walked back that commitment in March of the following year, an even larger coalition of attorneys general wrote to the companies condemning their decision to abort the plan and “urg[ing] [them] to stick to [their] original promise.”⁵⁵

In the Amici States’ experience, gun violence is one of the most pressing issues facing our country today. Mass shootings, like the tragic events described above, occur with devastating regularity and present a threat the States must be ever-prepared for. Gun suicides too, continue to rise to unprecedented levels,⁵⁶ and guns have become the leading cause of death for people under the age of 20.⁵⁷ All told, the rising tide of gun

⁵⁴ Letter from Att’y’s Gen. to Stephen J. Squeri, Michael Miebach, and Alfred F. Kelly, Jr. (Sept. 30, 2022), <https://oag.dc.gov/sites/default/files/2022-09/Multi-State-Letter-in-Support-of-MCC-%28FINAL%29-.pdf>.

⁵⁵ Letter from Att’y’s Gen. to Stephen J. Squeri, Michael Miebach, Ryan McNerny, and Roger C. Hochschild (Mar. 16, 2023), https://www.nj.gov/oag/newsreleases23/2023-0316_Multi-State%20Letter-re-MCC.pdf.

⁵⁶ Wojciech Kaczkowski et al., Notes from the Field, *Firearm Suicide Rates, by Race and Ethnicity — United States, 2019-2022*, 72 *Morbidity & Mortality Weekly Rep.* 1307 (Dec. 1, 2023), <https://www.cdc.gov/mmwr/volumes/72/wr/pdfs/mm7248-H.pdf>.

⁵⁷ U.S. Dep’t of Health and Hum. Serv., Eunice Kennedy Shriver Nat’l Instit. of Child Health and Hum. Dev., *Preventing Gun Violence, the Leading Cause of Childhood Death* (Jul. 5, 2022),

violence presents a formidable challenge to the States. It is therefore imperative, in the face of this epidemic, that the States and their officials retain the ability to voice their opinions, share their unique perspectives, and urge private action.

II. The NRA's Position Would Chill Legitimate Government Regulatory Action and Informal Guidance

The NRA's expansive view of First Amendment coercion would stifle government efforts to regulate and persuade. The government is "entitled to promote a program, to espouse a policy, or to take a position." *Walker*, 576 U.S. at 208. It may also criticize private conduct, *see e.g., X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 69 (2d Cir. 1999); *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1016 (D.C. Cir. 1991); *R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 89 (3d Cir. 1984), "advocate and defend its own policies," *Southworth*, 529 U.S. at 229, and attempt to convince or persuade a private actor to take adverse action against another, *McLaughlin v. Watson*, 271 F.3d 566, 573 (3d Cir. 2001) ("It is not enough that defendant speaks critically of plaintiff or even that defendant directly urges or influences the third party to take adverse action. Rather, defendant must 'threaten' or 'coerce' the third party to act.").

The NRA relies on the fact that "Superintendent Vullo [e]xercised [v]ast [r]egulatory [a]uthority" over insurers and asserts that "[e]ven a modicum of indirect authority may support an inference of coercion." Pet. Br. at 28, 29. But in so arguing, the NRA misapplies this Court's decision in *Bantam Books, Inc. v. Sullivan*,

https://www.nichd.nih.gov/about/org/od/directors_corner/prev_updates/gun-violence-July2022.

372 U.S. 58 (1963). There, the Rhode Island Commission to Encourage Morality in Youth violated the First Amendment by drawing up official lists of “objectionable” books and magazines, which it sent to publishers and distributors, along with notices that threatened criminal action against any who circulated the listed publications. *Id.* at 61-63. Rather than focusing on the extent of the Rhode Island Commission’s direct authority over the distributors, which was limited to the imposition of “informal sanctions,” *id.* at 67, this Court emphasized the threatening nature of the Commission’s conduct. Specifically, the Commission’s notices to the vendors were “phrased virtually as orders,” “invariably followed up by police visitations,” *id.* at 68, contained reminders that lists of the “objectionable” publications had been provided to local police departments, *id.* at 62-63, and stated that “[c]ooperative action” would “eliminate the necessity of . . . recommending prosecution to the Attorney General’s department,” *id.* at 62 n.5.

Adopting a standard under which a government could be held liable for an attempt to persuade a private actor based merely on the existence of some regulatory authority, without the type of coercive conduct present in *Bantam Books*, would sweep a vast amount of legitimate government speech within the ambit of First Amendment coercion claims. Given the States’ broad police powers, when a State advocates for a given policy, issues guidance, or discusses legal obligations or best practices with a private actor, it is commonly against the backdrop of regulatory authority, whether direct or indirect. If such regulatory authority is sufficient to find—or is weighed as a significant factor in finding—coercion, a whole array of legitimate government communications with private actors could be subject to First Amendment coercion lawsuits.

This concern is particularly acute given the NRA's insistence that any success by the government in effectuating change in the conduct of private actors weighs heavily towards finding coercion. *See* Pet Br. at 35-38. Although Amici States do not dispute that in some circumstances, the fact that a private party agrees to a government request may be informative, *see, e.g., Kennedy v. Warren*, 66 F.4th 1199, 1211 (9th Cir. 2023), it is not dispositive. The government is permitted to succeed in its efforts to persuade private actors. "A private party can find the government's stated reasons for making a request persuasive, just as it can be moved by any other speaker's message." *O'Handley v. Weber*, 62 F.4th 1145, 1158 (9th Cir. 2023). And "because businesses care about their public image, they may be *influenced* by public sentiment without being *coerced* by the government." *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1164 (10th Cir. 2021) (citing *R.C. Maxwell Co.*, 735 F.2d at 89).

Third party actors' responses to government requests or communications should also be given considerably less weight where, as here, there are other market forces that plausibly drove the private actors' decisions just as much as—if not more than—the challenged government communications. For example, courts have rejected claims of censorship through alleged coercion where there was already "growing public controversy" and "negative responses" from the public to a board game that the government had criticized and urged vendors not to sell, *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 38 (2d Cir. 1983), and where there had been "violent protests" in opposition to a conference at a resort in Colorado Springs before the City of Colorado Springs encouraged the resort not to host the conference, *VDARE*, 11 F.4th at 1167.

Similarly here, public reaction to the Parkland shooting and the resultant backlash against firearms-related businesses and gun promotion groups such as the NRA⁵⁸ led to a large-scale break-up with the NRA by companies in a number of different industries.⁵⁹ Many decisions to break ties were made not only before most of the allegedly coercive conduct in this case even took place, but also by companies that were subject to neither the Department of Financial Services’ (“DFS”) allegedly coercive statements nor its regulatory authority. For example, by late February of 2018, decisions to discontinue affiliations with the NRA had been announced by First National Bank of Omaha, Delta Airlines, United Airlines, various major rental car companies and hotel brands, and several information and cyber-security firms.⁶⁰ And of the three DFS-regulated institutions that are alleged to have broken ties with the NRA here (Lloyds, Lockton, and Chubb), two of them—Lockton and Chubb—severed their insurance-related relationships with the NRA shortly after DFS opened its investigation into Carry Guard, months prior to the Parkland shooting and well before DFS’s guidance letters were even issued. *Vullo*, 49 F.4th at 707-709.

This context helps explain why NRA’s allegations are not sufficient to plausibly allege a First Amendment

⁵⁸ See, e.g., Daniel Trotta, *Shunned by corporations, U.S. gun entrepreneurs launch start-ups*, Reuters (May 5, 2018), <https://www.reuters.com/article/idUSL1N1S9255/>.

⁵⁹ Amy Held, *One By One, Companies Cut Ties With The NRA*, NPR (Feb. 23, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/23/588233273/one-by-one-companies-cut-ties-with-nra>.

⁶⁰ *Id.*; Jacey Fortin, *A List of the Companies Cutting Ties With the N.R.A.*, N.Y. Times (Feb. 24, 2018), <https://www.nytimes.com/2018/02/24/business/nra-companies-boycott.html>.

coercion claim. In *VDARE*, the Tenth Circuit held that the plaintiff’s coercion allegations failed because they did not “acknowledge that the Resort may have cancelled its contract after observing news coverage” of the public protests against the conference. 11 F.4th at 1166. And the Tenth Circuit further noted that “[t]his likelihood matters because under *Iqbal*,⁶¹ we can’t infer that the Resort’s cancellation is attributable to the City based on just the possibility of its being so.” *Id.*

Corporations such as the DFS-regulated insurance companies here are “naturally sensitive to their images in the community,” *R.C. Maxwell Co.*, 735 F.2d at 89, and may adjust their behavior because it is in their interest to do so. The key stakeholders of public companies—customers, employees, and shareholders—increasingly expect companies to operate in an environmentally and socially responsible manner. *See, e.g.*, Alexander T. Kraik, *Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm*, 44 *Vt. L. Rev.* 493, 520-521 (2020); Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 *Va L. Rev.* 1163, 1185 (2022).⁶² These kinds of expectations, rather than government “coercion,” may lead to shared objectives between government and private entities.

Making the kind of unsupported inference that the Tenth Circuit warned against in *VDARE* would be especially harmful to the States here, in light of how

⁶¹ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁶² *See also* Sarah Landrum, *Millennials Driving Brands To Practice Socially Responsible Marketing*, *Forbes* (Mar. 17, 2017), <https://www.forbes.com/sites/sarahlandrum/2017/03/17/millennials-driving-brands-to-practice-socially-responsible-marketing/?sh=330104044990>.

the NRA characterizes the guidance letters issued by Superintendent Vullo, Pet. Br. at 32-33, which highlighted the potential reputational risk for financial institutions doing business with the NRA in light of the public backlash following the Parkland shooting. Official guidance letters to regulated entities advising on how to comply with the law and highlighting legal obligations are a common, and extremely important, function of both the States and the federal government. Such letters are sometimes triggered by the enactment of new regulations and the desire to ensure that covered entities are aware of their new obligations, such as the New York Office of the Attorney General’s letter of March 2022 to debt collectors regarding a new law set to go into effect the following month.⁶³ Other times, new industry initiatives spur public officials to issue guidance. For example, in 2023, the Attorneys General of Utah and Louisiana, along with 21 other Attorneys General, sent a letter to insurance companies that were members of the Net-Zero Insurance Alliance, questioning “the legality of [their] commitments to collaborate with other insurers and asset owners in order to advance an activist climate agenda.”⁶⁴ Guidance letters may also remind companies of legal obligations in response to significant public events.⁶⁵ In the financial sector specifically, the National Credit Union Administration routinely issues

⁶³ Letter from Alec Webley to Major Debt Collectors Operating in N.Y. State (Mar. 23, 2022), https://ag.ny.gov/sites/default/files/2022.03.23_-_debt_collector_letter_re_reg_f_ccfa.pdf.

⁶⁴ Letter from Att’y Gen. to Net-Zero Ins. All. (May 15, 2023), <https://attorneygeneral.utah.gov/wp-content/uploads/2023/05/2023-05-15-NZIA-Letter.pdf>.

⁶⁵ See, e.g., Letter from Maura Healy, Mass. Att’y Gen., to licensed firearms dealers of Mass., *supra* note 53.

risk management⁶⁶ and guidance letters⁶⁷ to federally insured credit unions, and state agencies, such as the Massachusetts Division of Banks, have issued letters advising regulated financial institutions of risks, including “ATM card skimming”⁶⁸ and consumer scams involving money transfer services,⁶⁹ and encouraged certain actions in response to those risks.

The authority of the government to issue guidance advising private parties of how to comply with laws and “avoid prosecution under them” was explicitly recognized by this Court in *Bantam Books*. 372 U.S. at 72. And as the Amici States’ experience demonstrates, a government’s issuance of guidance that serves these purposes and urges or encourages private entities to manage risks by taking a particular course of action—as the DFS did here—does not constitute such coercive conduct as to hold the State responsible for those entities’ independent decisions. Holding to the contrary and adopting the NRA’s broad view of coercion would significantly curtail the States’ abilities to serve these

⁶⁶ Letter from Todd M. Harper, Chairman, Nat’l Credit Union Admin., Re: Resumption of Federal Student Loan Payments (Oct. 2023), <https://ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/resumption-federal-student-loan-payments>.

⁶⁷ Letter from JoAnn Johnson, Chairman, Nat’l Credit Union Admin., Re: Impact of the Current Mortgage Market on Corporate Credit Unions (June 2008), <https://ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/impact-current-mortgage-market-corporate-credit-unions>.

⁶⁸ Letter from David J. Cotney, Mass. Comm’r of Banks, to Fin. Insts. (Feb. 26, 2016), <https://www.mass.gov/doc/letter-on-atm-skimming-fraud-0/download>.

⁶⁹ Letter from David J. Cotney, Mass. Comm’r of Banks, to CEOs of Money Transmitters (Apr. 8, 2016), <https://www.mass.gov/doc/letter-on-money-transfer-services-fraud-awareness-0/download>.

functions, as “there is the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.’” *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (brackets and citation omitted).

The fear of liability and burdensome litigation would hamper not just informal government speech but the enforcement of vital regulations. The NRA relies on DFS’s legitimate enforcement actions against the Carry Guard program—which involved conceded violations of New York law—as a basis for liability. *See* Pet. Br. at 35, 37. But weighing an official’s decision whether to prosecute for a legitimate violation as a factor in a First Amendment coercion claim would “threaten[] to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry.” *Wayte v. United States*, 470 U.S. 598, 607 (1985); *see also United States v. Armstrong*, 517 U.S. 456, 465 (1996) (explaining that “judicial deference to the decisions” of government officers as to whether to prosecute “stems from a concern not to unnecessarily impair the performance of a core executive constitutional function,” i.e., the enforcement of regulations). The use of Superintendent Vullo’s prosecutorial decisions as a basis for the NRA’s First Amendment claims would be particularly damaging in light of the unchallenged finding that those decisions—both to prosecute and to forgo prosecution—were entitled to absolute immunity. *See Nat’l Rifle Ass’n of Am. v. Cuomo*, 525 F. Supp. 3d 382, 394-400 (N.D.N.Y. 2021). This would strike at the heart of government officials’ prosecutorial discretion, creating a substantial risk of First Amendment liability despite a lack of evidence that the decisions were “objectively unreasonable.” *Nieves v. Bartlett*, 139 S. Ct. 1715, 1723 (2019).

The risk of important government speech or enforcement actions being stifled is not merely hypothetical. An overly expansive view of First Amendment coercion liability can lead courts to enter sweeping and intrusive injunctive relief prohibiting government entities from engaging with private entities in almost any form. In *Murthy v. Missouri*, 23-411 (U.S.), for example, the district court enjoined thousands of government officials in various federal agencies from engaging in almost any type of communication with social media companies “urging” or “encouraging” them to remove almost any type of content, or even “flagging” posts that the companies should consider removing. *Missouri v. Biden*, No. 3:22-CV-01213, 2023 WL 4335270 (W.D. La. July 4, 2023). This Court has stayed the injunction pending its judgment,⁷⁰ but such an injunction, and the broad view of First Amendment coercion liability it represents, would prohibit—on pain of contempt—government officials from engaging in the very type of important and protected government speech outlined by Amici States in this brief.

⁷⁰ *Murthy v. Missouri*, 144 S. Ct. 7 (2023).

CONCLUSION

The Court should affirm the Second Circuit's decision.

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FEBRUARY 2024