No. 22-842

IN THE

Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

—v.—

MARIA T. VULLO, both individually and in her former official capacity,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER NATIONAL RIFLE ASSOCIATION OF AMERICA

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INTRODUCTION

Respondent waits until page 37 of her brief to begin to address whether the NRA plausibly stated a claim of unconstitutional coercion. That is not surprising. Petitioner's allegations about Maria Vullo's campaign to wield her considerable regulatory authority to punish the NRA for its gun promotion advocacy plainly amount to a First Amendment violation. As Vullo's boss and co-defendant then-Governor Andrew Cuomo tweeted in response to this lawsuit: "The 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. 21. The NRA's allegations are not only concrete, specific, and eminently plausible; many describe public and therefore undisputable acts. Vullo's belated efforts to construct an alternative narrative cannot be squared with the complaint's allegations, which must be accepted as true at this stage.

Because she cannot satisfactorily explain how her alleged actions are consistent with the First Amendment, Vullo spends much of her brief trying to concoct reasons *not* to address that question. But all those attempts fail.

First, repackaging an argument already rejected at the certiorari stage, Vullo contends that this Court thwarted its own jurisdiction by granting review on only one of the two questions the NRA presented: whether the complaint plausibly pleaded a First Amendment violation. But if the answer to that question is yes, the Second Circuit will need to reconsider its inextricably intertwined qualified immunity analysis. The Court did not inadvertently

erase the case or controversy presented here, and its decision will not be advisory.

Next, Vullo argues that holding her liable for the alleged blacklisting campaign would violate "absolute immunity" and ignore this Court's "law enforcement" retaliation caselaw. But Vullo has forfeited any absolute immunity defense to the NRA's First Amendment claims, having never asserted it below. In any event, there is no absolute immunity for what Petitioner alleged here: an official campaign to punish an organization for protected speech by pressuring its essential financial service providers. Nor do the retaliatory prosecution and arrest rules apply, as the NRA is not suing Vullo for any law enforcement actions against it, but for her campaign to coerce third parties into blacklisting the group. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), therefore governs.

When she finally gets to the core issue, Vullo's efforts to explain away her actions as innocent are belied by her own public and private statements, unsupported by the facts alleged, and inappropriate at this stage. She is free to advance her new theories at trial, but they do not justify the dismissal at issue here.

Finally, Vullo's suggestion that ruling for the NRA would release a flood of First Amendment claims is baseless. The allegations in this case are extreme. Vullo coerced her regulated entities to punish a nonprofit association *expressly for its political views,* publicly proclaiming her impermissible purpose; offered leniency to Lloyd's if it complied with her campaign to "weaken the NRA"; and extracted promises from the organization's affinity insurance partners never to provide it affinity insurance again—

even where it would be fully lawful to do so. Given these allegations, the floodgates swing in the opposite direction. If the Court were to bless what is alleged here, woe to any advocacy group that finds itself on the wrong side of a regulator's wrath.

ARGUMENT

I. The Court Has Jurisdiction

Vullo opens by arguing that this Court should dismiss the writ as improvidently granted because it deprived itself of jurisdiction when it granted certiorari only on Petitioner's First Amendment question presented. In her telling, merits review of the NRA's claim would be purely advisory because this Court did not simultaneously take up the Second Circuit's qualified immunity holding.

Vullo made essentially the same argument in opposing certiorari, BIO 1, without success. And this Court generally will not dismiss a case as improvidently granted for reasons it "originally rejected" at the certiorari stage. *United States v. Williams*, 504 U.S. 36, 40-41 (1992). Her effort to refashion the argument as "jurisdictional" also fails. Because "[a]n order limiting the grant of certiorari does not operate as a jurisdictional bar," this Court has latitude to reach beyond the question presented as it sees fit. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n.12 (1981).

In any event, there is no risk of an advisory opinion here. If the Court concludes that the NRA's allegations state a claim under *Bantam Books*, it would be appropriate to vacate the judgment below and remand for the Second Circuit to reconsider its

closely related qualified immunity holding. U.S. Br. 35 n.14 (suggesting this disposition).

Vullo argues remand would be futile because a 2024 decision cannot alter the Second Circuit's conclusion regarding what the First Amendment clearly prohibited in 2018. Resp. Br. 22; *see also* Fed. Cts. Scholars Br. 8 (same). But that is not so. The Court need not "break any new ground" in First Amendment law to find in the NRA's favor; it need only apply *Bantam Books*. First Am. Scholars Br. in Support of Petitioner 5. Doing so would support the NRA's claim that, in 2018, a reasonable regulator would have known she could not coerce regulated entities to shun the NRA for its political views. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) ("[I]t often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." (internal quotation omitted)).

Similarly, if the Court agrees with the NRA that the Second Circuit was too parsimonious in its assessment of the complaint's allegations on a motion to dismiss, it should vacate the qualified immunity holding below because the same parsimony infected its qualified immunity analysis. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (qualified immunity often "depends very much on the facts of the case").

Moreover, just as *Pearson*, 555 U.S. at 236, gives lower courts in qualified immunity cases the option to hold that a public official violated the Constitution even if they ultimately grant qualified immunity, this Court has "discretion" to address "each step" of the lower court's analysis, even when doing so is "not necessary to reverse an erroneous judgment." *Ashcroft*

v. al-Kidd, 563 U.S. 731, 735 (2011). Otherwise, lower courts could "insulate" constitutional decisions "from [this Court's] review" by operation of qualified immunity, *id.*, or require this Court to needlessly decide case-specific qualified immunity questions in order to address important merits questions.[1]

Finally, qualified immunity affords no defense to the NRA's claims for declaratory and injunctive relief. Pet. App. 239-240. The district court erroneously dismissed those claims under the Eleventh Amendment, *id.* at 93, and Vullo claims they are now out of the case. Resp. Br. 24. But because this case comes before the Court on interlocutory appeal with no final judgment, that dismissal remains appealable once final judgment issues. *See* Fed. R. Civ. P. 54(b). If the NRA is correct that Vullo's alleged actions violated the First Amendment, at a minimum it would be entitled to rescission of the Guidance Letters, which remain on DFS's website and continue to warn regulated entities to steer clear of the NRA because of its political views.[2] Thus, even if the grant of qualified

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[1] *Camreta v. Greene*, 563 U.S. 692 (2011), is not to the contrary. There, the Court recognized that public official defendants who *prevailed* on qualified immunity can nonetheless appeal adverse constitutional decisions under certain circumstances, but held that the case was moot because the private party respondent had no further interest in the litigation. *Id.* at 710-11. Here, the NRA lost on both questions below and has standing to seek reversal or vacatur of the opinion below to revive its claims for money damages and injunctive relief. And Vullo has an interest in defending the Second Circuit's merits ruling because reversal on that ground may unsettle her victory.

[2] *See* N.Y.S. DFS, *Industry Letters*, https://perma.cc/HDM6-H6M8.

immunity holds, this Court's decision is likely to have significant consequences for the underlying litigation.

II. This Case Falls Squarely Under *Bantam Books*, and the NRA Has Stated a Claim Under that Framework

A. The NRA Plausibly Alleged Coercion

The merits question before the Court is straightforward. Vullo indisputably urged the financial institutions under her supervision to avoid ties with the NRA because of its gun promotion advocacy. The question is whether the NRA has plausibly alleged that Vullo's blacklisting campaign was coercive. If so, under *Bantam Books*, it violated the First Amendment.

In answering that question, the Court must consider the totality of Vullo's actions, including her private exhortations, formal Guidance Letters, press releases, direction from then-Governor Cuomo, and extraction of extraordinary agreements from the three NRA affinity insurance providers never to provide such insurance to the NRA in New York ever again. Each of these actions reinforced the others, ensuring that reasonable regulated entities would perceive Vullo's actions as threatening serious consequences if they did not comply.

Like the Second Circuit, Vullo seeks to dismiss each one in isolation, without addressing their cumulative effects. But even considered independently, Vullo's efforts to explain away her actions fail.

i. Guidance Letters and Press Release

Vullo argues that the Guidance Letters did not explicitly threaten specific adverse consequences and that the nature of her regulatory authority should not carry significant weight in evaluating them. Resp. Br. 46-47. Those arguments fail to consider the letters against the backdrop of the Lloyd's meeting (which contained an *explicit* threat) and the consent orders (which *carried out* her threats by barring even lawful business relations with the NRA). But even standing alone, the Guidance Letters and accompanying press release plainly convey an *implicit* threat. And as Vullo acknowledges, Resp. Br. 47, a threat need not be explicit to violate the First Amendment.

Start with how Vullo chose to communicate. If she merely sought to persuade businesses of the inadvisability of serving the NRA because of its political views, Resp. Br. 41, she could have written an op-ed or held a press conference. Instead, she chose to exercise her unique authority under New York Financial Services Law Section 302(a) (Consol. 2021), to issue formal "guidance" directed to the CEOs of the thousands of entities she regulated. The purpose of such official guidance, Respondent admits, is not mere persuasion but to "remind regulated entities of existing *obligations*." Resp. Br. 5 (emphasis added); *see also* James P. Corcoran Br. 10-11 (agency guidance letters exert strong influence on regulated entities); Fin. & Bus. Law Scholars Br. 10-11 (in the federal context, regulated entities—particularly banks—are "likely to find themselves bound" by putatively non-binding "guidance").

Then consider the substance. The Guidance Letters did not simply express Vullo's opposition to

the NRA. They specifically cited the "risks, including the reputational risks" of associating with "the NRA or similar gun promotion organizations" and directed "regulated institutions" to "take prompt action to manag[e] these risks." Pet. App. 248, 251. In the accompanying press release, Vullo was even clearer, "urg[ing] all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA[.]" *Id.* at 244. Cuomo further emphasized this message, later proclaiming that "[t]he regulations NY put in place are working. We're forcing the NRA into financial jeopardy." *Id.* at 243-44.[3]

Vullo argues that her reference to reputational risk was toothless because "[o]perating with reputational risk is not illegal under New York law and cannot serve as the basis for a standalone enforcement action." Resp. Br. 48. But managing reputational risk is a legal obligation, *see, e.g.,* N.Y. Comp. Codes R. & Regs. tit. 11, § 82.2(a)(9), and Vullo's Guidance and press release make clear that she believed the proper way to satisfy that obligation would be to avoid ties

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[3] Governor Cuomo's tweet is subject to judicial notice. *See* Fed. R. Evid. 201(b); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (on motion to dismiss, "courts must consider the complaint in its entirety, as well as . . . matters of which a court may take judicial notice.").

Citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2000), Vullo argues that Cuomo's tweets cannot be ascribed to her. Resp. Br. 41-42. But *Iqbal* declined to attribute the actions of a subordinate to a supervisory official under *respondeat superior*. *See Iqbal*, 556 U.S. at 676. Here, by contrast, the NRA seeks to hold the subordinate accountable for her own actions. Her boss and co-defendant Cuomo's tweet sheds considerable light on the actions she took at his direction. *See also* Pet. App. 243 (Cuomo stating he directed Vullo to issue the Guidance Letters).

with the NRA and other gun promotion groups. Moreover, her audience knew that the head of DFS can take—and has taken—enforcement actions for failure to properly manage reputational risk. N.Y. Banking L. § 39(2) (McKinney 2019) (authorizing enforcement for "unsafe and unsound" practices, which include failure to manage risk); *see also* Julie Anderson Hill, *Regulating Reputational Risk*, 54 Ga. L. Rev. 523, 554-59 (2020) (discussing DFS's aggressive approach to reputational risk and its broad enforcement powers); Pet. Br. 3-4 (describing DFS consent orders against Goldman Sachs and Deutsche Bank for "unsafe and unsound" practices predicated, in part, on failure to manage reputational risk).[4]

Amici on both sides, as well as the United States, agree that the "failure to manage reputational risk," to the regulator's satisfaction, "leaves a financial institution susceptible to supervisory action," Brady Ctr. Br. 9; *see also* U.S. Br. 28; Fin. & Bus. Law Scholars Br. 11-12. And notably, Vullo did not add any disclaimer to counter the threat. *Compare* Bd. of Governors of the Fed. Rsrv. Sys., et al., *Joint Statement on Crypto-Asset Risks to Banking Organizations* (Jan. 3, 2023) ("Banking organizations are neither prohibited nor discouraged from providing banking services to customers of any specific class or type, as permitted by law or regulation."), https://perma.cc/EBP6-TPF6.

[4] While the fines against Deutsche Bank and Goldman Sachs cited in the NRA's opening brief were also prompted by money laundering, both consent orders cite failure to manage reputational risk in explaining the penalties.

ii. Consent Orders

Vullo reinforced the threat contained in the Guidance Letters when she publicly announced sweeping consent orders against Lockton and Chubb just two weeks later. These orders underscored that Vullo meant business. Sure enough, less than a week later, Lloyd's directed its underwriters to terminate all insurance programs associated with the NRA and stop providing insurance to the NRA in the future before ultimately entering into its own consent order. Pet. App. 224; Sealed Pet. App. 64.

The provisions in the consent orders with Lloyd's, Chubb, and Lockton barring even fully lawful affinity insurance in perpetuity have no conceivable basis in New York law. What possible interest does DFS have in permanently blocking *lawful* insurance? Yet these provisions are fully consistent with her and Cuomo's publicly announced campaign to blacklist the NRA for its political views.

Vullo counters that the NRA's invocation of the consent orders is an attempt to immunize itself against legitimate DFS enforcement actions for unlawful insurance products. But the NRA's First Amendment claims do not seek *any* relief from the fines imposed on its partners, or from orders requiring them to adhere to New York law; they focus on the provisions barring even wholly lawful affinity insurance with it. Nor does the NRA challenge the separate consent order it entered with DFS, which was consummated long after this lawsuit was filed and contains an express stipulation that it will not prejudice the present litigation (hence its omission from the parties' filings until Respondent's brief on the merits). N.Y.S. DFS, Consent Order, *In re The Nat'l*

Rifle Ass'n of Am., No. 2020-0003-C, at 11-12 (Nov. 13, 2020), https://perma.cc/6ZLA-2DSZ.

iii. Lloyd's Meeting

Finally, as the United States agrees, the NRA plausibly alleged that Vullo "did refer to adverse consequences"—*explicitly*—for failing to heed her warnings. U.S. Br. 21. During a backroom meeting with Lloyd's on February 27, 2018, she allegedly explained that she wanted to "leverage her authority" to "weaken the NRA" and "indicat[ed] that she would pursue 'technical regulatory infractions' unless Lloyd's 'ceased providing insurance to gun groups, especially the NRA.'" *Id.* (quoting Pet. App. 199-200); *see also* Pet. App. 223 (elaborating on the agreement Lloyd's and Vullo struck in response to the threat).

Vullo tries to dismiss this allegation by two misreadings of this Court's pleading standards precedents. First, she characterizes the allegation as "conclusory," citing *Iqbal* and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Resp. Br. 4. But this is no boilerplate assertion of the elements of an offense. It relates the details of specific statements, promises, and agreements. Neither *Iqbal* nor *Twombly* requires quotation marks to substantiate an allegation. It suffices that the NRA has identified a particular meeting and specifically conveyed the substance of what Vullo said privately—statements consistent with, and corroborated by, what she and Cuomo said publicly.

Vullo then argues the allegation is implausible in light of an alternative explanation offered for the first time before this Court and completely unsupported at this stage. She asserts that once Lockton announced on February 26 its intention to terminate its role as

administrator of the NRA's insurance, Lloyd's could not lawfully carry on as an underwriter for NRA-related insurance.

Far from supplying an obvious alternative explanation, this is implausible twice over. First, Lloyd's did not actually direct its syndicates to terminate business with the NRA until several months later, in May 2018, after Vullo issued the Guidance Letters, press release, and consent orders against Lockton and Chubb. Pet. App. 224. And in doing so, it cited regulatory risk from DFS related to associations with gun promotion groups—not Lockton's departure or the unavailability of a licensed excess-line broker—as the reason for cutting ties. Sealed Pet. App. 56, 64. Second, nothing about Lockton's announcement stopped Lloyd's from continuing to underwrite NRA insurance with any other excess line broker licensed by DFS.

Indeed, the contrast between this case and *Iqbal* could not be more stark. There, the Court held that allegations the Attorney General and Director of the FBI directed the detention and abuse of Arabs and Muslims on the basis of race and religion were implausible because the plaintiff cited no evidence of the defendants' purportedly impermissible intent and there was an "obvious alternative explanation"—namely, that the detentions were based on immigration violations and suspected ties to the September 11 terrorist attacks. *Iqbal*, 556 U.S. at 682 (internal quotation omitted). But had Iqbal been able to cite an official guidance document from Attorney General Ashcroft ordering discriminatory detention and abuse, surely his complaint could have proceeded. That is, in essence, what the NRA alleged here.

Vullo's contention that she "cannot have threatened to interfere with Lloyd's lawful arrangements with the NRA" because "the NRA has not plausibly alleged that Lloyd's had *any* arrangements with the NRA other than its unlawful affinity products" is equally baseless. Resp. Br. 33. The complaint alleged that Vullo agreed to limit her regulatory actions against Lloyd's affinity insurance programs generally, in exchange for which Lloyd's agreed to "scale back its NRA-related business." Pet. App. 223; *see also id.* at 199-200, 221. And Lloyd's followed through on the agreement by terminating *all* its relationships with the NRA nationwide, *id.* at 223-24, even though Vullo has no authority beyond New York and the NRA continues to lawfully operate affinity-insurance programs in many other states. *See* Sealed Pet. App. 56.

That Lloyd's was responding to Vullo's threats and not any insurance-law necessity is further corroborated by how other financial entities in New York responded. The complaint alleged that Vullo made similar representations to Lockton, Pet. App. 226, whose chairman then informed the NRA that he was cutting ties with the group out of "fear of 'losing [our] license' to do business in New York," *id.* at 209. It alleged that "nearly every [corporate insurance carrier] has indicated that it fears transacting with the NRA specifically in light of DFS's actions against Lockton, Chubb, and Lloyd's." *Id.* at 228.

These allegations, specifically citing fear of Vullo as the motivating force behind decisions not to do business with the NRA, also refute Vullo's unsupported speculation that the insurance companies and banks were responding to the

Parkland mass shooting and not her and Cuomo's orchestrated campaign.

Vullo is of course free—at trial—to put forth alternative explanations for her conduct and the insurers' responses. But where, as here, the NRA has plausibly pleaded a campaign to blacklist it for its views—one publicly announced, indeed celebrated, by Vullo and Cuomo—those alternative explanations are not a basis for dismissing a complaint.

* * *

Especially when considered as a whole, as they must be, the NRA's allegations leave no doubt as to Vullo's true objectives and the coercive nature of her campaign. She contends, against not only every reasonable inference but common sense, that these are merely coincidental "unrelated matters . . . that happened to occur on a similar timeline." Resp. Br. 49. But the close temporal and thematic connection of these events at least raises a plausible inference that they are related. And because they include implicit threats (Guidance Letters), an explicit threat (Lloyd's meeting), and the carrying out of a threat (consent order provisions), they more than suffice to state a First Amendment violation.

B. *Bantam Books* Provides the Appropriate First Amendment Standard Here, Not *Nieves*

Vullo next argues that "[t]his case is . . . nothing like *Bantam Books*" because she was responding to the NRA's violations of New York insurance law, not the group's protected advocacy. Resp. Br. 29. And she

contends that the NRA has therefore failed to allege causation under the standards governing damages claims for "retaliatory law-enforcement act[s]." *Id.* at 29-30 (citing *Nieves v. Bartlett*, 139 S. Ct. 1715, 1723 (2019)). Not so.

First, her effort to distinguish *Bantam Books* blinks reality. That case, too, was about a "law-enforcement" response to purported illegality: the Commission "investigat[ed] and recommend[ed] . . . prosecution" for distributing obscenity. *See Bantam Books*, 372 U.S. at 60-62. Yet nothing in the opinion turned on the booksellers being in legal compliance. After all, the Commission maintained in its briefings before this Court that characterizing their targets as "not obscene" would be a "gratuitous assertion." *Id.*, Br. for Appellees at *5, *Bantam Books, Inc. v. Sullivan* (No. 118), 1962 WL 115859 (U.S. Oct. 22, 1962). At oral argument, they conceded only that "*several*" of the books in question contained protected speech. *Bantam Books*, 372 U.S. at 64 (emphasis added). But even if some of the books were obscene, this Court held the campaign violated the First Amendment because it "deliberately set about to achieve the suppression of [protected speech] deemed 'objectionable,'" *id.* at 67—making precisely the kind of causal finding Vullo suggests is foreclosed here.

Nor was it any defense that some of the government's censorious actions—namely "recommend[ing] . . . prosecution of purveyors of obscenity," *id.* at 62, and "police visitations," *id.* at 68—involved law enforcement. Indeed, the Court noted that "[t]hreats of prosecution or of license revocation . . . have been enjoined in a number of cases." *Id.* at 67 n.8 (collecting cases). Rather, "the vice of the system" lay in the government's conjoined

threats and law enforcement actions because, when used to intimidate booksellers into "voluntary" censorship, they "plainly serve[d] as instruments of regulation independent of the laws against obscenity." *Id.* at 69.

So, too, here. Even if some of the NRA's conduct were illegal, it would not authorize Vullo's publicly acknowledged attempt to blacklist it for its constitutionally protected political views. And whether Vullo's viewpoint-discriminatory scheme included purportedly prosecutorial acts likewise does not alter the analysis.

For much the same reason, Vullo's invocation of this Court's caselaw governing retaliatory arrests and prosecutions is misplaced. Resp. Br. 29-31. The NRA is not challenging enforcement action against itself. Rather, as in *Bantam Books*, the NRA challenges Vullo's actions against *third parties* to force them to avoid ties with the NRA because of its disfavored speech.[5]

In that setting, *Bantam Books* governs. And to the extent Vullo seeks at trial to show that she would have taken all the same actions even without the censorious motive she publicly announced, *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S.

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[5] Moreover, the context-specific reasons underlying the special Section 1983 rules for retaliatory prosecutions and some arrests are not applicable to this case. In a retaliatory prosecution case, the prosecutor's presumption of regularity and the difficulties of assessing causation where the defendant is not actually the prosecutor herself justify a higher standard. *Hartman v. Moore*, 547 U.S. 250, 263 (2006). And *Nieves* is justified by the "split-second judgments" necessary for on-the-spot arrests, 139 S. Ct. at 1724. None of those concerns are present here.

274, 287 (1977), would apply. At this stage, all that is required is that the plaintiff's protected speech was allegedly a "substantial" or "motivating factor" in the government's decision to act against it. *See also Lozman v. City of Riviera Beach*, 585 U.S. 87, 100-101 (2018) (applying *Mt. Healthy* to claims based on an official policy of retaliation, even if carried out, in part, through law enforcement actions like arrests).[6]

Cuomo's and Vullo's own words admit that motive. The NRA's allegations provide ample basis to infer that Vullo's campaign was driven by its gun promotion views, not insurance infractions. The Guidance Letters cite only the NRA's advocacy, and do not even mention the insurance law infractions Vullo pursued. Pet. App. 246-48, 249-251. And Vullo allegedly asked Lloyd's to aid her campaign to weaken the NRA by terminating *all* ties with it; she did not ask it to halt only assertedly unlawful policies or practices. Pet. App. 199-200, 223. That is enough to survive a motion to dismiss—all the NRA seeks here—and the government may then have the opportunity to show that it would have taken the same adverse action "even in the absence of the protected" speech. *Mt. Healthy*, 429 U.S. at 287.

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[6] Vullo's reliance on *Nieves* and *Hartman* is misplaced for still another reason. What constitutes "a First Amendment violation" is distinct from what a plaintiff must prove in "a civil claim for damages as a statutory matter" under Section 1983. *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part). *Nieves* and *Hartman* establish requirements for the latter, not the former. *Id.* (probable cause does not "erase" underlying constitutional violation). The issue before this Court is whether the Second Circuit erred in holding that, as-pleaded, Vullo's conduct did not plausibly violate the First Amendment, a constitutional rather than statutory question. Pet. App. 26.

C. The Government Need Not Actually Silence a Speaker to Violate Their First Amendment Rights

Vullo also seeks to avoid *Bantam Books* on the ground that the blacklist she organized does not directly censor the NRA's speech. But First Amendment freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference," *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 309-310 (1964) (internal quotation omitted), including any penalty imposed for protected expression. Pet. Br. 21 (and cases cited therein); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000) (recognizing that burdens on speech infringe the First Amendment just as readily as outright bans).

In any event, the complaint alleged that Vullo succeeded in burdening the NRA's ability to speak because the loss of financial services imperils its ability to disseminate its message. Pet. App. 231. That, after all, was the whole point of the campaign—as Cuomo proudly announced in his August 2018 tweet quoted above. J.A. 21.

III. Vullo Forfeited Absolute Immunity Below, and It Would Not Apply Even If She Had Preserved It

For the first time in this case, Vullo raises absolute immunity as a defense to the NRA's First Amendment claims. She argues that the absolute immunity enjoyed by judges and prosecutors bars consideration of both the consent orders and the Lloyd's meeting in determining whether the NRA has plausibly alleged that she coerced her regulated entities to blacklist it.

Resp. Br. 25-28. The argument is without merit for multiple reasons.

A. Vullo Has Forfeited Her Absolute Immunity Defense

Vullo failed to assert this defense to the NRA's First Amendment claims in the district court, the court of appeals, or even in her brief in opposition to certiorari. She has therefore forfeited the defense. In the district court, she asserted absolute immunity *only* with respect to the NRA's distinct selective enforcement claim (Count 3). *See* Dkt. 211-1 at 12-17. As to the First Amendment claims (Counts 1 and 2), Vullo asserted only *qualified* immunity. *See id.* at 33-35; Pet. App. 42. Vullo also failed to raise absolute immunity at the Second Circuit, Pet. App. 16, and in her brief in opposition to certiorari. Absolute immunity is not jurisdictional, *Nevada v. Hicks*, 533 U.S. 353, 373 (2001), and her triple failure to invoke it amounts to forfeiture.

Nor should this Court excuse Vullo's repeated oversights. *Byrd v. United States*, 584 U.S. 395, 404 (2018) ("Because this is a court of review, not of first view, it is generally unwise to consider arguments in the first instance." (internal citation and quotation omitted)). Addressing Respondent's late-breaking absolute immunity defense would be particularly prejudicial here, because it would require this Court to address novel, fact-bound issues wholly unrelated to the question presented. The Court has never held that absolute prosecutorial immunity extends to high-level state financial regulators like Vullo—a question that turns in no small part on state law, *see Butz v. Economou*, 438 U.S. 478, 512 (1978) (discussing relevant factors)—much less to publicly-announced

campaigns to punish political enemies. *Cf. Buckley v. Fitzsimmons*, 509 U.S. 259, 276-78 (1993) (no absolute immunity for prosecutor's use of the bully pulpit). It should not do so now, without the benefit of full briefing or intermediate appellate consideration.

B. Absolute Immunity Would Not Bar the NRA's First Amendment Claims

In any event, absolute immunity does not protect Vullo's campaign to coerce banks and insurance companies into blacklisting the NRA merely because the campaign was carried out, in part, through administrative enforcement actions. After all, *Bantam Books* held that even follow-up "police visitations" provided contextual support for an inference of coercion, because they showed that the Commission's "suggestion" had teeth. 372 U.S. at 68. Under Vullo's theory, absolute immunity prevents a court from considering a regulator's own enforcement actions to determine whether her demands to penalize speech were coercive. This reasoning would mean that the officials most empowered to "make it hurt" are the least likely to be held accountable.

Moreover, Vullo *never* asserted below, even as to selective prosecution, that absolute immunity applies to her backroom threats to Lloyd's. She now argues those conversations are entitled to immunity because they were akin to plea bargaining. Resp. Br. 26-27. But absolute immunity applies only to conduct "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), in part because wrongful conduct can be reviewed in the criminal process itself, *id.* at 427. It does not apply to investigations, *Hartman v. Moore*, 547 U.S. 250, 262 n.8 (2006), and the February

meeting, some ten months before any consent order with Lloyd's, was plainly (and, at a minimum, plausibly) at the investigatory stage. *See* Sealed Pet. App. 56.

Nor does anything about absolute immunity require this Court to construe the Guidance Letters and press release or the Lloyd's meeting allegations without the context provided by the consent orders. As the United States notes, even if absolute immunity applied to the consent orders, it would only mean they "should not themselves be a basis for liability." U.S. Br. 34. It would not prevent this Court from "consider[ing] the enforcement actions and consent decrees as relevant context for Respondent's non-immune statements—as both parties and the courts below have done." *Id.* After all, if a prosecutor were sued for racially discriminatory employment decisions, the fact that she had also pursued racially discriminatory prosecutions could certainly support an inference of discriminatory animus without violating absolute immunity.

Finally, Vullo did not just enter consent orders with the regulated insurance companies—she issued press releases that trumpeted their sweeping prohibition on any "agreement or arrangement, including any affinity-type insurance program involving any line of insurance involving a contract of insurance involving the NRA, directly or indirectly." Pet. App. 109. Press releases are not protected by absolute immunity. *Buckley*, 509 U.S. at 277.

IV. Allowing the NRA's First Amendment Claims to Proceed Would Not Lead to a Parade of Horribles

Lastly, according to Vullo, a ruling in the NRA's favor "would chill speech necessary for a functional government." Resp. Br. 50. "Because the NRA's standard does not require any threat," she argues, "public officials will inevitably fear that making statements critical of (indirectly) regulated entities will be recast as retaliation." *Id.* Those fears are misplaced.

As a threshold matter, only efforts to penalize or censor *protected expression* state a First Amendment claim. This requirement readily distinguishes examples like the cryptocurrency guidance Vullo cites, Resp. Br. 51-52, which are not targeted at protected speech.

Moreover, the NRA agrees that non-coercive attempts to persuade do not, by themselves, violate the First Amendment. Public officials cross the constitutional line when they exercise their authority to coerce or induce compliance with efforts to punish speech. Pet. Br. 24-27. And the complaint here, of course, alleged implicit, explicit, and implemented threats.

Otherwise, government officials are free to express their views. For decades, countless public officials have criticized the NRA in the strongest possible terms. Last year, for instance, California Governor Gavin Newsom said: "I look forward to the day your trash organization is obsolete." Louis Casiano, *California Gov. Newsom Lashes Out at 'Trash Organization' NRA After Second Amendment 'Hypocrisy' Accusation*, Fox News (Jan. 25, 2023),

https://perma.cc/8FBG-W56K. Other public officials took enforcement action against the NRA with respect to some iterations of the Carry Guard insurance program, including Washington State. Morton Gstalter, *Washington State Deems NRA-Branded Insurance Program Illegal*, The Hill (Jan. 16, 2019), https://perma.cc/88S9-96PG.

Yet this is the only time the NRA has brought a *Bantam Books* claim. That's because Vullo (and Cuomo) crossed the line by effectively warning her regulated entities to blacklist the NRA, *or else*. That's what she said to Lloyd's in private. That's what she implied in her Guidance Letters and press releases. And that's what she underscored when she compelled the NRA's affinity insurance providers to promise never to provide such services, even if fully lawful, to the NRA ever again. To hold that those extreme facts raise a plausible inference that Vullo was engaged in a coercive blacklisting campaign would not create new law or new risks for government officials. It would simply restate what this Court held sixty years ago in *Bantam Books*.

If anything, the floodgates problem cuts in the opposite direction. Were the Court to bless Vullo's and Cuomo's conduct here, it would invite regulators across the country to pressure third parties to shun, punish, or silence whichever political organizations they personally oppose. That is anathema to the First Amendment.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be vacated and remanded to the Second Circuit so that it may reconsider qualified

immunity in light of this Court's resolution of Petitioner's First Amendment claim.[7]

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Respectfully submitted,

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[7] Petitioner agrees with the United States that vacatur is the appropriate course in light of the Court's decision not to grant certiorari on the qualified immunity question. U.S. Br. 35 n.14.