

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL RIFLE ASSOCIATION)
OF AMERICA,)
Petitioner,)
v.) No. 22-842
MARIA T. VULLO,)
Respondent.)
- - - - -

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NATIONAL RIFLE ASSOCIATION)

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v.) No. 22-842

MARIA T. VULLO,)

Respondent.)

- - - - -

Washington, D.C.

Monday, March 18, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:49 a.m.

1 APPEARANCES:

2

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4 the Petitioner.

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7 United States, as amicus curiae, supporting
8 neither party.

9 NEAL K. KATYAL, ESQUIRE, Washington, D.C.; on behalf
10 of the Respondent.

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P R O C E E D I N G S

(11:49 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-842, National Rifle Association versus Vullo.

Mr. Cole.

ORAL ARGUMENT OF DAVID D. COLE

ON BEHALF OF THE PETITIONER

MR. COLE: Mr. Chief Justice, and may it please the Court:

Government officials are free to urge people not to support political groups they oppose. What they cannot do is use their regulatory might to add "or else" to that request.

Respondent Vullo did just that. Not content to rely on the force of her ideas, she abused the coercive power of her office. In February 2018, she told Lloyd's, the insurance underwriter, that she'd go easy on its unrelated insurance violations if it aided her campaign to weaken the NRA by halting all business with the group. Lloyd's agreed.

Six weeks later, she issued guidance letters and a press release directing the

1 thousands of banks and insurance companies that
2 she directly oversees to cut off their ties with
3 the NRA not because of any alleged illegality
4 but because they promote guns.

5 In the accompanying press release,
6 Vullo's boss and co-defendant, Governor Andrew
7 Cuomo, said he directed Vullo to issue the
8 guidance because doing business with the NRA
9 "sends the wrong message." Shortly thereafter,
10 Vullo extracted legally binding consent orders
11 from the NRA's three principal insurance
12 providers, barring them from ever providing
13 affinity insurance to the group ever again, no
14 matter how lawfully they do so.

15 These actions worked as multiple
16 financial institutions refused to do business
17 with the NRA, citing Vullo's threats. This was
18 not about enforcing insurance law or mere
19 government speech. It was a campaign by the
20 state's highest political officials to use their
21 power to coerce a boycott of a political
22 advocacy organization because they disagreed
23 with its advocacy.

24 Governor Cuomo essentially conceded as
25 much in two tweets responding to this lawsuit in

1 which he said, and I quote, "The regulations New
2 York put in place are working. We're forcing
3 the NRA into financial jeopardy. We won't stop
4 until we shut them down. It's time to put the
5 gun lobby out of business. Hashtag, Bankrupt
6 the NRA."

7 At the motion to dismiss stage, the
8 only question is whether these allegations,
9 taken as a whole, plausibly plead a First
10 Amendment claim. Because Vullo chose coercion
11 over persuasion, they do.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Mr. Cole, what is the
14 speech here, protected speech, that you allege
15 has been suppressed?

16 MR. COLE: Promoting guns, advocating
17 for gun rights, sending the wrong message. It
18 is -- it is that -- it was -- it's precisely the
19 speech of the NRA which caused Vullo and Cuomo
20 to decide to target their -- their partners and
21 seek to coerce them into boycotting the NRA. So
22 they are seeking to penalize the NRA because of
23 its speech advocating for gun rights.

24 JUSTICE THOMAS: So your argument is
25 that the sanctions on a third party suppress the

1 speech of NRA?

2 MR. COLE: Yeah, it doesn't -- Your
3 Honor, it doesn't -- the Court's First Amendment
4 jurisprudence does not require proof of
5 suppression. It requires proof of burden. If
6 Vullo had imposed a \$1 fine on the NRA for
7 promoting guns, it would be unquestionably
8 unconstitutional even though it wouldn't
9 actually suppress their speech.

10 But, here, we have actually alleged --
11 and this is at the motion to dismiss stage, the
12 allegations are true -- that the NRA has been --
13 has cost -- it has cost the NRA millions of
14 dollars as a result of the kinds of -- of -- of
15 coercion that has been put in place here and
16 that the NRA, like any other advocacy group,
17 relies on banks, relies on insurance companies
18 to be able to do their business. And what is
19 their business? Political advocacy.

20 JUSTICE JACKSON: Isn't the issue of
21 coercion different, though, than the First
22 Amendment question? I mean, you are relying on,
23 I think, Bantam Books, is that correct?

24 MR. COLE: Yes.

25 JUSTICE JACKSON: As I read that case,

1 there were really two different things going on.
2 There was an unconstitutional prior restraint,
3 and the Court recognized that. And there was
4 the implementation of that unconstitutional
5 restraint through the means of government
6 coercion.

7 So, if I'm right about that in terms
8 of how we should be thinking about Bantam Books,
9 then don't we have two different questions here,
10 the first being did Vullo actually coerce any
11 regulated entities to do something vis-à-vis the
12 NRA, and then was that something a violation of
13 the NRA's First Amendment rights, say, through
14 retaliation or censorship, which are the two
15 theory -- First Amendment theories that I pick
16 up from your complaint?

17 MR. COLE: Yeah. Justice Jackson, I
18 think what Bantam Books stands for is that
19 government officials are free to encourage
20 people to take -- to take down speech or to --
21 to penalize a group. What they are not free to
22 do is to use coercion to that end.

23 Here, there's no question on this
24 record that they encouraged people to punish the
25 NRA precisely because and only because of its

1 political views.

2 JUSTICE JACKSON: No, I understand
3 that, but --

4 MR. COLE: So the question is, is
5 there coercion? That's the whole --

6 JUSTICE JACKSON: No, no, but -- but
7 -- but -- but there are two different pieces,
8 right? You have to show that there's coercion,
9 and you alleged that, but you also have to show
10 that that coercion resulted in a First Amendment
11 violation.

12 Bantam Books is saying you can't do
13 indirectly what you can't -- right, what you
14 can't do directly. But the direct thing in
15 Bantam Books was a prior restraint. This here
16 doesn't look like a prior restraint. So what is
17 your -- this is sort of Justice Thomas's
18 question again, right? What is your theory of
19 the First Amendment?

20 MR. COLE: Again, it's the same answer
21 as to Justice Thomas. The First Amendment -- of
22 course, the First Amendment prohibits absolute
23 censorship or suppression of speech, but it also
24 prohibits the imposition of any burden on speech
25 because of its content.

1 You know, even if the government
2 denies a contract to an entity because it
3 disapproves of what that entity says --

4 JUSTICE JACKSON: Right, but isn't the
5 hard part figuring out whether the burden is
6 being imposed because of the content of the
7 speech or because of the conduct?

8 MR. COLE: Well, in my --

9 JUSTICE JACKSON: I mean, that's -- so
10 -- so that's why we have to be really careful
11 about what you're alleging is the First
12 Amendment problem because the government can
13 regulate conduct, correct?

14 MR. COLE: I agree. And if this was a
15 case in which the government had said, you know,
16 the NRA is violating the law left and right and
17 we have to respond to that and here are the
18 legal obligations, that would be one thing.

19 That is not what they said. They said
20 we want to shut the NRA down, we want to put the
21 gun lobby out of business. Why -- the title of
22 the guidance letters that she issues are
23 Guidance Regarding the NRA and Other Gun
24 Promotion Organizations. The whole guidance is
25 saying, I don't like the fact that people use

1 guns. I don't like the fact that people
2 advocate for the use of guns. We need to stop
3 this. We need to stop this now.

4 JUSTICE JACKSON: Isn't that her
5 motivation? I mean, I understand, that sounds
6 to me more like a retaliation kind of First
7 Amendment theory, as opposed to something that's
8 happening in Bantam Books, which is pressure
9 being applied to actual entities that themselves
10 are speech distributors so that those entities
11 are censoring the speech as -- you know, as in
12 their power because they are the kinds of
13 things -- they're book distributors or et
14 cetera.

15 These are insurance companies who are
16 being pressured, and so it's at least attenuated
17 in that sense, the -- the impact on speech,
18 correct?

19 MR. COLE: So, if the government were
20 providing insurance, it had a contract with --
21 let's say it provided some sort of insurance to
22 advocacy organizations, and it said we'll give
23 insurance to some, but we're not going to give
24 it to advocacy organizations that disagree with
25 us and that, for example, promote guns, that

1 would be a clear violation of the First
2 Amendment. It would not be censorship. It
3 would not be suppression. But it would be a
4 penalty imposed because of the viewpoint
5 expressed by the organization.

6 In this case, Maria Vullo herself and
7 Governor Cuomo made it absolutely clear both in
8 closed-door meetings with Lloyd's and in public
9 guidance letters and in tweets about this case
10 that they were singling out the NRA not for
11 insurance law violations; they were singling out
12 the NRA because it promoted guns, and they were
13 against the promotion of guns.

14 They can advocate against the
15 promotion of guns. They can encourage people
16 not to support groups that like the NRA. What
17 they can't do is then invoke the coercive
18 authority of her office.

19 And look at the guidance letters.
20 She -- she could have written an op-ed if she
21 was, you know, moved by the -- the -- the
22 problems of gun violence, but she didn't. She
23 invoked her statutory authority, unique
24 statutory authority, to issue guidance letters.
25 What are guidance letters? According to

1 Respondent, they are designed to tell regulated
2 entities their obligations.

3 Then, in that guidance letter, what
4 she does is go on for four paragraphs about how
5 bad guns are and then, in the fifth paragraph,
6 says, in light of the above, we urge you to
7 reconsider your relations with the NRA and other
8 gun promotion organizations, no evidence that
9 any other gun promotion organizations are
10 involved in any insurance illegality or
11 anything, and reconsider your risks and manage
12 those risks, take prompt action.

13 And then she issues a press release
14 that same day in which she says, cut your ties
15 --

16 JUSTICE BARRETT: Mr. Cole --

17 MR. COLE: -- in order to manage your
18 risk.

19 JUSTICE BARRETT: -- can I ask you a
20 question? Are you asking the Court to break any
21 new ground in this case?

22 MR. COLE: Absolutely not. This is a
23 -- this is about as square corners a Bantam
24 Books case as you can imagine.

25 JUSTICE BARRETT: How does your

1 understanding of Bantam Books differ if at all
2 from Respondent's and from the SG's?

3 MR. COLE: So the SG, as you'll note,
4 is essentially on our side in this case,
5 formerly in support of neither party but taking
6 our time because they're supporting reversal on
7 the merits question.

8 We believe that you do have to
9 demonstrate coercion. You have to demonstrate
10 some coercive threat, some invocation of
11 regulatory adverse action. We have that here.
12 We have it with the insurance law enforcement.
13 We have it with the invocation of reputational
14 risk.

15 Reputational risk, she didn't just
16 say, you know, guns are bad, you should
17 reconsider your relation with the NRA. She said
18 guns are bad, you should reconsider your
19 relations with the NRA because it's a
20 reputational risk if you don't.

21 JUSTICE KAGAN: But that idea of
22 reputational risk, Mr. Cole, that is a real
23 idea, right?

24 MR. COLE: Yeah.

25 JUSTICE KAGAN: It wasn't invented for

1 the NRA. There is a view that bank regulators
2 have that companies are supposed to look at
3 their reputational risks.

4 MR. COLE: Right, right.

5 JUSTICE KAGAN: And so how do we know
6 -- I mean, I take -- there's obviously a lot
7 about guns in that letter. But it might be that
8 gun advocacy groups, gun companies do impose
9 reputational risks of the kind that bank
10 regulators are concerned about.

11 So how -- where do you -- how do
12 you -- how do we know?

13 MR. COLE: So I don't think -- I don't
14 think you actually have to make that decision,
15 Justice Kagan. The question under Bantam Books,
16 there's two elements to Bantam Books. Did the
17 government urge third parties to penalize or
18 suppress speech, one, and two, did they use
19 coercion to effectuate that encouragement.

20 And the -- the invocation of
21 reputational risk is the use of coercion.
22 Whether or not it is, in fact, a reputational
23 risk or not, it is still the use of the coercive
24 authority of the state to encourage these
25 entities to punish the NRA because of its

1 speech, to cut their ties. That's number one.

2 Number two, look at the Lloyd's
3 meeting. There's no discussion about
4 reputational risk there. She said --

5 JUSTICE KAGAN: So I -- I put the
6 Lloyd's meeting in a different category and was
7 really more interested in -- in -- I think that
8 this is a closer one just because if -- if -- if
9 -- reputational risk is a real thing, and if gun
10 companies or gun advocacy groups impose that
11 kind of reputational risk, isn't it a bank
12 regulator's job to point that out?

13 MR. COLE: So it -- it -- it -- it
14 may well be. And in Bantam Books, the Court
15 says that there's a safe harbor for genuine
16 advice about -- about law enforcement.

17 This was not genuine advice about law
18 enforcement. Why would she spend four
19 paragraphs, you know, denouncing guns? That
20 actually has nothing to do with whether there's
21 reputational risk. That has everything to do
22 with what she said in the meeting with Lloyd's
23 she was trying to do: leverage her authority to
24 weaken the NRA because she disagreed with its
25 political viewpoints.

1 So, yes, reputational risk, if it was
2 employed in a content-neutral way to -- to
3 address conduct across the board that raises
4 reputational risk, that's one thing. If you use
5 it -- it's a very broad term. If you use it to
6 target a particular political group because you
7 disagree with its point of view and you announce
8 that, you know, in your -- in the very document
9 in which you're doing it and in the press
10 release in which, again, Andrew Cuomo says, I
11 directed her to issue the guidance because doing
12 business with the NRA sends the wrong message,
13 that is not creates reputational risk. That is
14 it -- it supports an organization that I as
15 governor disagree with.

16 And he can disagree with it. He can
17 urge people not to support it. What he can't do
18 is, again, invoke the coercive power of the
19 state in this way.

20 And whether or not there is a
21 reputational risk or not I don't think
22 ultimately changes the outcome if you're using
23 coercive authority.

24 Take Bantam Books. Suppose in Bantam
25 Books the -- the Commission had, instead of

1 sending the police to visit and say, hey, how's
2 it going, have you taken the books down, they
3 said, we're going to send the police to the
4 bookstores that continue to sell these books and
5 look into code violations, building code
6 violations, and they, in fact, found code
7 violations, and they enforced those code
8 violations against those bookstores.

9 They -- that would be a legal
10 activity. The code violations is a legal
11 activity. There's nothing illegitimate about
12 looking into code violations. But, if you're
13 doing it to give force, give coercive power to
14 a -- a -- a -- a government effort to encourage
15 a third party to suppress speech, it violates
16 the First Amendment.

17 JUSTICE BARRETT: Mr. Cole, speaking
18 of violations, your friends on the other side
19 complain that you haven't made the adequate
20 showing for a retaliation claim.

21 So how do you distinguish between a
22 Bantam Books claim like the one that you're
23 bringing and a retaliation claim under Nieves?
24 And is it just a pleading choice, or do you want
25 to say a little bit more about that?

1 MR. COLE: Yeah. So I -- I don't
2 think the Nieves question is here at all because
3 this is a question about whether the First
4 Amendment, the scope of the First Amendment, was
5 violated by these actions.

6 Nieves is about -- as you know, is
7 about Section 1983, where there's a particular
8 remedy, a particular damages remedy. We have an
9 injunctive relief claim in this case which
10 continues to be live and which would, I think,
11 appropriately require taking down the guidance
12 letters, which remain on the New York DFS
13 website to this day warning businesses not to do
14 business with the NRA.

15 So we have an injunctive claim. That
16 takes it out altogether. But I -- so I don't
17 think it's appropriate, but if you're in Nieves
18 land at all, this is a Lozman case. This is a
19 case where, remember, Lozman says where the --
20 where the -- where government officials have
21 adopted an official policy of targeting speech
22 on a matter of concern, public concern for
23 retaliation, that's a straightforward
24 retaliation case, Mt. Healthy. It doesn't --
25 the -- the -- the -- the requirements in Nieves

1 don't -- don't apply.

2 And so -- so I think whether you're in
3 Nieves land or not, this case would have to --
4 would have to go forward. But I don't think
5 it's appropriate -- it wasn't raised --
6 discussed below, wasn't raised in the Op, and
7 they waive Nieves. They don't really make a
8 Nieves argument. They waive a Nieves argument.

9 And then, finally, I would say this
10 Court -- Nieves and Hartman were identified as
11 narrow exceptions to the Mt. Healthy rule for
12 particular criminal contexts. This Court has
13 never extended it to the administrative law
14 enforcement context that we have here, and I
15 think there would be very serious questions
16 about -- about doing that.

17 And as to Mt. Healthy, we've clearly
18 made out a case. All you have to demonstrate is
19 that, as Justice Alito was saying in the former
20 case, that you have identified that they have
21 targeted you for some adverse action and that
22 the -- they did so, the substantial motivating
23 factor was your speech.

24 Well, they've admitted as much in
25 public statements, as well as private backdoor

1 meetings. So we clearly meet Mt. Healthy. And
2 it would be open to them on -- on -- at trial to
3 say, well, we have some alternative theories.
4 You'll hear my friend advance some various
5 alternative theories. Those are open to them at
6 trial.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 MR. COLE: But this is a motion to
10 dismiss.

11 CHIEF JUSTICE ROBERTS: Justice
12 Thomas, anything further?

13 Justice Alito?

14 JUSTICE ALITO: On the question of the
15 meaning of coercion, I can think of a -- of a
16 spectrum, and on one end of the spectrum, a
17 government official says, look, suppress this
18 speech and, if you don't do it, I have legal
19 weapons I can use against you and I'm going to
20 punish you using those. That's very clear
21 suppression -- coercion.

22 At the other end, the -- the
23 government official who has no authority to do
24 anything for any practical purposes to the
25 entity that the government official is speaking

1 to says you should do this. It -- it would be a
2 good thing to do, you'd be a good citizen if you
3 did it.

4 And in between, there are a lot of
5 different gradations, particularly when the
6 official who's making this request has that
7 power and you have to assume that the person or
8 the entity to whom or to which the request is
9 being made knows that, just as I -- I am sure
10 that these insurance companies were well aware
11 of the power of Ms. Vullo.

12 So how do you define when it goes too
13 far along that line?

14 MR. COLE: So I do think that the
15 power of the official over those to whom she is
16 speaking is a relevant factor in the assessment,
17 but the assessment is, at the end of the day,
18 would a reasonable person in these -- in this
19 situation feel that the government is coercing
20 it, that it is implying some sort of threat of
21 action against it, of adverse action against it.

22 So the mere fact that someone
23 exercises regulatory power over you I don't
24 think is sufficient, but when combined with what
25 you have here, explicit requests to -- to punish

1 a group because of its advocacy and the
2 invocation of the very tools she has to make
3 life miserable for them, you're not managing
4 reputational risk, we might fine you, or, you
5 know, you've got these technical insurance
6 infractions, we might go after your partners and
7 -- and require them to never provide you
8 affinity insurance ever again, this is on the --
9 you know, the first end of the spectrum that you
10 identified, Justice Alito.

11 So I agree there are hard cases in the
12 middle, and that's true with any standard that
13 at end of the day looks at coercion. You know,
14 in the --- in the -- the context of confessions,
15 coerced confessions, there are some hard, hard
16 lines to draw. This one is not.

17 JUSTICE ALITO: Okay. The -- the
18 Solicitor General urges us not to consider the
19 enforcement -- enforcement actions against
20 Lloyd's, Lockton, and Chubb's and the consent
21 decrees, and it argues that the district court
22 held that those actions are entitled to absolute
23 prosecutorial immunity, and Petitioner has not
24 challenged that holding here.

25 Do you want to comment on that?

1 MR. COLE: Yes. Thank you.
2 Respondent never asserted absolute immunity with
3 respect to the Bantam Books -- the First
4 Amendment claims in this case. Absolute
5 immunity was only asserted with respect to a
6 separate selective enforcement claim. They
7 chose, with respect to the First Amendment
8 claims, to only assert qualified immunity.
9 That's number one.

10 So it was not asserted below. It was
11 not asserted in the court of appeals. It was
12 not raised in the BIO. It's not appropriate for
13 this Court to decide at this -- at this -- at
14 this stage.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 JUSTICE SOTOMAYOR: Tell me how -- and
19 I'm going to ask the SG this question -- how do
20 we write this case for you and that would differ
21 from how the -- you think the SG would write it?
22 Because Justice Barrett asked you whether you
23 were breaking new ground, and you say I'm not.

24 But it seems to me you're trying to in
25 the way you're putting this. There's a lot

1 about the guidance letters that you agree
2 standing on their own would be okay.

3 I'm still not sure that if the
4 February 18th meeting had not happened, that
5 standing alone, that guidance letter, as
6 written, would necessarily be coercion.

7 I'm not sure the consent decrees could
8 be viewed as selective prosecution when there is
9 no question, I don't believe, that the Carry
10 Guard had provisions, the Carry Guard insurance
11 policies, had provisions that violated New York
12 law. They reimbursed for criminal activity and
13 they reimbursed for intentional acts, which New
14 York insurance law clearly says you can't do.

15 So tell me -- so, standing alone, none
16 of these things might be coercive. I see this
17 as in light of --

18 MR. COLE: Yeah.

19 JUSTICE SOTOMAYOR: -- the February
20 18th meeting, these things now, which is how the
21 district court wrote it. So how would you write
22 it differently than the district court did,
23 number one? And, number two, how would you
24 write it differently than the SG would?

25 MR. COLE: I -- I -- I -- I would

1 write it that Bantam Books holds that when
2 government officials encourage third parties to
3 penalize a speaker because of its views, they
4 cannot use coercion to further that end. Here,
5 Respondent used coercion.

6 JUSTICE SOTOMAYOR: And what do you --

7 MR. COLE: She used -- she --

8 JUSTICE SOTOMAYOR: -- define as
9 coercion?

10 MR. COLE: The threat, implicit or
11 explicit -- and my friend agrees they can be
12 implicit or explicit -- of -- of government --
13 of coercive government action. That's -- that's
14 -- that's coercion.

15 And, here, she explicitly threatened
16 that to Lloyd's. She said, I'll go easy on you
17 if you cut your ties with the NRA. That's the
18 same as I'll go hard on you if you don't cut
19 your ties with the NRA.

20 She invoked her authority to punish
21 organizations and financial institutions with
22 respect to failing to manage reputational risk
23 and made it clear that what she meant by "manage
24 reputational risk" was cut your ties with the
25 NRA.

1 And then she very shortly thereafter
2 announced these consent orders with three of the
3 NRA's principal insurance providers in which she
4 not only punishes them for insurance infractions
5 but imposes an extraordinary ban, a lifetime
6 ban, in perpetuity.

7 These organizations can never provide
8 affinity insurance to the NRA, even if every T
9 is crossed and every I is dotted under New York
10 law. And with respect to Chubb, one of the
11 three, she got them to agree not to provide
12 insurance to the NRA anywhere in the country,
13 not just in New York. She has no jurisdiction
14 out there.

15 So I think, when you look at those
16 three -- and I think you -- you -- you -- under
17 Bantam Books, you have to look at the -- the --
18 the -- the -- the -- the government's action as
19 a whole, you see that she encouraged third
20 parties, insurance companies and banks --

21 JUSTICE SOTOMAYOR: I -- I --

22 MR. COLE: -- right?

23 JUSTICE SOTOMAYOR: You still haven't
24 told me how you're going to write it
25 differently than the SG.

1 MR. COLE: The only -- I think the
2 only difference between the SG and us is the SG
3 says the guidance letters might be a closer
4 question, but they support the allegation that
5 she targeted this group and sought to use
6 coercion. And then they say, with respect to
7 the consent letter, there was absolute immunity.
8 But, as I -- as I had the discussion with
9 Justice Alito, they didn't assert absolute
10 immunity with respect to the First Amendment
11 claim that comes out of the consent letter, so
12 --

13 JUSTICE SOTOMAYOR: All right. Thank
14 you.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?
16 Justice Gorsuch?

17 JUSTICE GORSUCH: We've gone back and
18 forth all morning about the standard. But
19 you've got a First Amendment retaliation claim
20 in this case. And we often look at retaliation
21 in -- in the Title VII context in just the
22 manner you described, the effect it would have
23 on a reasonable person in this circumstance.

24 Do you see any daylight really between
25 those two standards?

1 MR. COLE: In terms of defining what
2 constitutes --

3 JUSTICE GORSUCH: Yeah.

4 MR. COLE: -- an adverse action?

5 JUSTICE GORSUCH: Right.

6 MR. COLE: I'm not -- I'm not sure
7 that there is. I -- I think -- I don't know
8 that for this case one has to look very hard to
9 see adverse action when you see a -- a concerted
10 campaign, million-dollar fines, the -- the --
11 you know, an explicit threat to a major
12 insurance provider, we're going to go hard on
13 you if you don't cut your ties with the NRA.

14 In that context, there's -- this is
15 clearly an adverse action under Title VII, under
16 any English-language understanding of adverse
17 action.

18 JUSTICE GORSUCH: Retaliation is a
19 familiar concept in -- in a lot of our case law,
20 is all I'm trying to point --

21 MR. COLE: Yes. No.

22 JUSTICE GORSUCH: -- out here. Yeah.

23 MR. COLE: And I think, look, you --
24 you could look at this --

25 JUSTICE GORSUCH: And they have gray

1 area cases, all of them.

2 MR. COLE: Right.

3 JUSTICE GORSUCH: Okay.

4 MR. COLE: And I think you -- I think,
5 you know, Bantam Books and retaliation are
6 slightly different, I think, in their -- the way
7 they -- they conceptualize the First Amendment
8 violation. Bantam Books, encouraging a third
9 party to punish speech with coercion.

10 JUSTICE GORSUCH: Can we look at the
11 Lloyd's incident in isolation or -- I mean, you
12 have a complaint, we're at the motion to dismiss
13 stage, we have to take inferences in your favor.

14 MR. COLE: Yeah.

15 JUSTICE GORSUCH: And, certainly, you
16 don't want to be to be limited on remand to
17 arguing just the Lloyd's incident as your --
18 your case.

19 MR. COLE: Well, that's right. I
20 mean, you know, I think, right now, the most
21 significant harm to the NRA is that the DFS
22 continues to maintain on its website these
23 guidance letters, which essentially put a
24 scarlet letter on the NRA with respect to every
25 bank and every insurance company in New York.

1 Those should be taken down.

2 So we would urge you, both for
3 purposes of guidance to -- to others and because
4 it matters to -- to the -- to the ultimate
5 remedy in this case, to address the -- the --
6 the -- the meeting with Lloyd's, the guidance
7 letters, and the subsequent enforcement action.

8 And the other thing I would say about
9 the meeting with Lloyd's is it was in private.
10 It was in private. So that, we -- we -- the NRA
11 might have -- have suffered some damages
12 vis-à-vis Lloyd's with respect to that meeting.
13 But the real damage in terms of the -- you know,
14 putting the scarlet letter on the NRA comes from
15 her public actions and Governor Cuomo's public
16 actions to issue these guidance letters.

17 So I would urge you to address the
18 whole picture here, to -- to reinforce Bantam
19 Books, and to reverse on the -- on the merits.

20 JUSTICE GORSUCH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

23 JUSTICE KAVANAUGH: Quickly, your view
24 on the four-part test that some of the circuits
25 have developed?

1 MR. COLE: You know, I think it's a --
2 I think it's fine. I think --

3 JUSTICE KAVANAUGH: That's about all I
4 need.

5 (Laughter.)

6 MR. COLE: Yeah. I -- I don't -- I
7 think -- I think it gets --

8 JUSTICE KAVANAUGH: You can explain,
9 but --

10 MR. COLE: Yeah, and I would just say,
11 as long as -- as long as the ultimate inquiry is
12 has the government engaged in coercion, has it
13 invoked --

14 JUSTICE KAVANAUGH: Right.

15 MR. COLE: -- its coercive authority
16 in some way, shape, or form?

17 JUSTICE KAVANAUGH: And what if New
18 York went to insurance companies and said, we
19 don't want you to continue insuring gun
20 manufacturers or sellers for the same reasons?
21 How does that constitutional analysis work?

22 MR. COLE: Well, that wouldn't be a
23 First Amendment problem because I don't think --

24 JUSTICE KAVANAUGH: Why? What would
25 it be?

1 MR. COLE: -- there's a First -- but
2 it might --

3 JUSTICE KAVANAUGH: Would it be
4 anything?

5 MR. COLE: It might be a Second
6 Amendment problem. I don't know. But I -- I'm
7 not sure it would. I mean, it's -- if it's
8 focused -- if the government's coercion is
9 focused on conduct rather than speech, then it's
10 not a First Amendment problem.

11 JUSTICE KAVANAUGH: And that's then my
12 last question. On Bantam Books, this a little
13 bit unusual, obviously, because it's not going
14 to -- the government's not going to a
15 communications company, a bookstore, a social
16 media company, to say, take down that speech,
17 but it's going to an insurance company.

18 But I guess I take your point that
19 Bantam Books, as long as the ultimate action is
20 against speech, it doesn't matter that the
21 intermediary is not itself a speech business.

22 MR. COLE: Yeah, I think the key is
23 it's this use of the third party to punish the
24 target. So, for example, in Bantam Books, if
25 they had said, we're going to encourage

1 insurance -- those -- those providers of
2 insurance, the bookstores --

3 JUSTICE KAVANAUGH: Yeah.

4 MR. COLE: -- to stop providing
5 insurance, that wouldn't be a speech
6 intermediary, but it would be the same problem.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 JUSTICE BARRETT: I just want to give
11 you a chance, Mr. Cole, to address your friends
12 on the other side's arguments that we shouldn't
13 reach the merits because we lack jurisdiction on
14 the -- because we denied cert on the qualified
15 immunity question. And then they also say that
16 the injunct -- claim for an injunction is no
17 longer in the case because you didn't
18 cross-appeal it. I just wanted you -- to give
19 you a chance to address that.

20 MR. COLE: Yeah. Yeah. Thank you.
21 No, this Court did not divest itself of
22 jurisdiction when it granted the case and asked
23 for briefing on only one of the two questions
24 presented.

25 If the Court reverses on the First

1 Amendment ground, it would be totally
2 appropriate to send it back to the Second
3 Circuit to reconsider the qualified immunity
4 question, which is, as Respondent herself argued
5 in the Second Circuit, inextricably intertwined
6 with the merits determination.

7 The Court's assessment of the merits
8 here is basically disregard of what happened at
9 Lloyd's. It's adopting every inference in favor
10 of Vullo and against the NRA with respect to the
11 guidance letters. All of that infected not just
12 the merits determination but the qualified
13 immunity determination.

14 So the -- the Court has jurisdiction
15 over the case. It can reverse on the question
16 it took up, and then it can ask the Second
17 Circuit --

18 JUSTICE BARRETT: What about the
19 injunction?

20 MR. COLE: And as to the injunction,
21 it was no final -- this was -- there was no
22 final order. There's no final judgment. And so
23 we have the right to appeal that and we will
24 appeal that when there's a final judgment. This
25 was an interlocutory appeal from a qualified

1 immunity holding only, so we had no obligation
2 to cross-appeal.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

5 JUSTICE JACKSON: So Justice Kavanaugh
6 picked up on what I think might be a critical
7 distinction, and I'm just trying to understand
8 it. So he said here we have a situation in
9 which the government is not acting on a company
10 that is itself in the business of speech, which
11 is true, unlike Bantam Books, where it was.

12 And so what I'm worried about is your
13 position ultimately reducing to anytime a
14 regulator enforces the law against an entity
15 that does business with an advocacy
16 organization, we have a First Amendment
17 violation because it seemed like your answer to
18 him was, well, what gets this into the First
19 Amendment column, unlike other scenarios, is
20 that the NRA advocates for guns, and it's an
21 advocacy organization, and so action taken
22 against it makes it a First Amendment
23 violation --

24 MR. COLE: Yeah.

25 JUSTICE JACKSON: -- even though the

1 government was not coercing the speech itself in
2 the same way as Bantam Books.

3 So how do we avoid a world in which
4 advocacy organizations are exempt from
5 regulation?

6 MR. COLE: Yeah. So we're definitely
7 not asking for a, you know, advocacy
8 organization exemption from regulation or even
9 from regulation of third parties. What Bantam
10 Books requires is that the government encourage
11 third parties to punish speech. Once they've
12 done that, it --

13 JUSTICE JACKSON: But is it -- it --
14 it's not -- forgive me, but it's not punishing
15 speech. It is censoring speech.

16 MR. COLE: No, it's -- it's -- it's --
17 in -- in -- it's true in Bantam Books it was
18 about --

19 JUSTICE JACKSON: Right.

20 MR. COLE: -- censoring speech, but,
21 again, as I have said --

22 JUSTICE JACKSON: But why isn't that
23 relevant? I mean --

24 MR. COLE: Be -- be --

25 JUSTICE JACKSON: -- Justice Gorsuch

1 suggests that you might have a retaliation
2 claim, which is a kind of First Amendment, it's
3 a species of First Amendment. You allege it in
4 this case. And that makes perfect sense, right,
5 that they're -- they're punishing me because of
6 my speech. That's retaliation.

7 Censorship is something different.
8 And what I'm suggesting is that Bantam Books is
9 a -- basically a censorship case, that what
10 they're doing is forcing these companies to take
11 down or -- or remove speech that the government
12 objects to.

13 And that I don't quite see happening
14 here, as opposed to the other theory that you do
15 allege, which is they don't like what it is that
16 we do and they're using the levers of government
17 to prevent us from operating.

18 MR. COLE: Yeah. And -- and if there
19 were a distinction in the First Amendment
20 between censorship and burdening speech because
21 of its content, then maybe that would be
22 correct. But there is no such distinction.

23 The First Amendment requires strict
24 scrutiny when the government censors speech
25 because it doesn't like what it -- its content,

1 when it burdens speech because it doesn't like
2 its content.

3 And in this case, it sought to burden
4 rather than censor. But that doesn't -- it
5 doesn't in any way alter the -- the logic of
6 Bantam Books, the way Bantam Books has been
7 applied for 60 years. It has been applied
8 consistently to situations in which government
9 officials --

10 JUSTICE JACKSON: I've never seen any
11 other situation like this. All of the other
12 Bantam Books situations --

13 MR. COLE: Well, no, I think --

14 JUSTICE JACKSON: -- are censorship
15 situations.

16 MR. COLE: No, I don't think so, with
17 all due respect. Backpage is -- is exact --

18 JUSTICE JACKSON: Backpage?

19 MR. COLE: Backpage is -- the Seventh
20 Circuit decision by Judge Posner is -- is very
21 similar. It was a sheriff who was -- didn't
22 like what a particular social media platform was
23 doing, and what he did was he encouraged credit
24 card companies not to do business with that
25 platform --

1 JUSTICE JACKSON: All right. Thank
2 you.

3 MR. COLE: -- and he did it through
4 coercive means.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MR. COLE: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. McDowell.

9 ORAL ARGUMENT OF EPHRAIM McDOWELL
10 FOR THE UNITED STATES, AS AMICUS CURIAE,
11 SUPPORTING NEITHER PARTY

12 MR. McDOWELL: Thank you, Mr. Chief
13 Justice, and may it please the Court:

14 Government officials may criticize
15 private speech that they deem harmful and
16 persuade citizens not to support that speech,
17 but government officials may not threaten to
18 take adverse action against private parties to
19 coerce those parties into penalizing a
20 disfavored speaker.

21 Taking Petitioner's allegations as
22 true, that is what Respondent did here. In the
23 Lloyd's meeting, she explicitly threatened to
24 bring an enforcement action against Lloyd's
25 unless Lloyd's "ceased providing insurance to

1 gun groups, especially the NRA."

2 The Court should find a
3 straightforward First Amendment violation under
4 Bantam Books, but in recognizing the First
5 Amendment claim here, the Court should take care
6 to avoid suggesting any new limits on the
7 government's ability to speak to the public or
8 its ability to provide ordinary legal guidance
9 to regulated entities.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Could the government,
12 rather than coerce a third-party, simply entice
13 them to reach the same suppression -- do the
14 exact same thing and suppress speech?

15 MR. McDOWELL: Well, it depends,
16 Justice Thomas, what you mean by "entice." If
17 it doesn't rise to the level of significant
18 encouragement under --

19 JUSTICE THOMAS: What's the
20 difference?

21 MR. McDOWELL: Well, Blum requires
22 that significant encouragement essentially
23 overwhelm the -- the judgment of the
24 independent -- the intermediary, whereas entice
25 --

1 JUSTICE THOMAS: And what would that
2 look like in this case?

3 MR. McDOWELL: In -- in this case, I
4 mean, I think you could kind of -- I think you
5 could think of the offer of leniency that Vullo
6 made to Lloyd's as either a form of significant
7 encouragement because you're saying we will go
8 easy on you for some legal violations or as a
9 threat basically saying we will bring these
10 enforcement actions against you if you do not
11 stop doing business with gun groups.

12 So coercion and significant
13 encouragement are two sides of the same coin, as
14 Mr. Fletcher said earlier.

15 CHIEF JUSTICE ROBERTS: Counsel,
16 there's considerable overlap obviously with the
17 first case. Could you articulate what the
18 significant differences are between your
19 position in this case and the office's position
20 in the prior case?

21 MR. McDOWELL: There are no
22 differences as to the legal principles. The
23 difference here is that there is a specific
24 coercive threat, particularly in the Lloyd's
25 meeting, where she threatened adverse action in

1 the form of an enforcement action so that
2 Lloyd's would comply with a specific instruction
3 to cut ties with all gun groups, especially the
4 NRA, whereas, in Murthy, the plaintiffs did not
5 identify any instance in which a government
6 official threatened to take adverse action
7 against a social media company to get the social
8 media company to engage in specific content
9 moderation. They just point to generic
10 references to legislative reforms that were
11 untethered from any content moderation request.

12 CHIEF JUSTICE ROBERTS: So is it --
13 are you focusing on the specificity of the
14 government action or -- or what?

15 MR. McDOWELL: In Murthy, there was no
16 threat at all. There was no threat of adverse
17 action at all. There were just talks about
18 legislative reforms, but they were not connected
19 to any specific instruction.

20 So coercion in our view requires a
21 threat of adverse action connected to a specific
22 instruction such that it's saying, if you don't
23 do X, we will do Y to you.

24 And that was not in the record in
25 Murthy. It is in the record -- or according to

1 the complaint here with respect to the Lloyd's
2 meeting in particular.

3 JUSTICE ALITO: So does that mean that
4 really the New York officials could have
5 achieved what they wanted to achieve if they
6 hadn't done it in such a ham-handed manner? So,
7 instead of having the meeting with Lloyd's and
8 -- they just gave speeches about the terror --
9 about guns and how bad the NRA is and they spoke
10 about social backlash against guns and those who
11 advocate for gun rights in the wake of the
12 terrible Parkland shooting, but in all of that,
13 they don't mention anything about any regulatory
14 authority, and then, after harping on that for a
15 while, then they make general statements about
16 the importance of every insurance company taking
17 into account reputational risk, and then they
18 sit back and they see whether that's achieved
19 the desired result, basically, that's what your
20 position is, isn't it?

21 MR. McDOWELL: No, Your Honor. What
22 we're -- we're primarily --

23 JUSTICE ALITO: Well, what -- if I --
24 if what they did was what I just outlined, would
25 that be a violation of Bantam Books?

1 MR. McDOWELL: Probably not because
2 there would be an attenuation between the
3 invocation of legal consequences and the
4 instruction or the message. But we think the
5 first four paragraphs of the guidance letters,
6 standing alone, are permissible government
7 speech because those four paragraphs involved
8 criticisms of the NRA and urging third parties
9 not to support the NRA. That's the classic form
10 of government speech that falls within
11 longstanding tradition. President Reagan
12 expressly criticized the KKK and urged citizens
13 not to support or associate with the KKK.

14 That's what the first four paragraphs
15 are doing.

16 JUSTICE ALITO: Well, and if they had
17 said everything in those first four paragraphs
18 in some other format, it would be a different
19 matter, but this is a guidance letter.

20 MR. McDOWELL: I take the point that
21 --

22 JUSTICE ALITO: I mean, they
23 understand what a guidance letter is about,
24 right?

25 MR. McDOWELL: I take the point that

1 the fact that it's in a guidance letter is
2 highly unusual. You would expect to see this in
3 an op-ed or -- or a press conference. And that
4 is a factor, I think, in going to the implicit
5 coercive analysis.

6 But, without the fifth paragraph,
7 there's no invocation of an adverse action at
8 all. So the first four paragraphs standing
9 alone, although unusual, would still be
10 permissible government speech.

11 JUSTICE ALITO: Yeah. So they -- they
12 gilded the lily or whatever the phrase is. I
13 mean, they were ham-handed about this. The
14 people up in New York are rubes. They don't
15 really understand how to do this.

16 (Laughter.)

17 JUSTICE ALITO: If you do it in a more
18 sophisticated manner, you can achieve what you
19 want to achieve.

20 MR. McDOWELL: I -- I don't know,
21 Justice Alito, because I don't know that
22 insurance companies and banks would feel that
23 their will was overborne or that they were
24 really at risk of experiencing adverse action in
25 your hypothetical. That's the question. Are

1 the -- are the parties able to exercise their
2 own independent judgment?

3 JUSTICE ALITO: I mean, seriously, you
4 think that sophisticated insurance companies are
5 not taking into account adverse risks? They
6 probably had heard about the Parkland shooting
7 and the aftermath of it. You think they hadn't
8 already taken this into account, and didn't they
9 already know all the power that Ms. Vullo had
10 over them?

11 MR. McDOWELL: They certainly knew
12 about the authority that DFS had, but without
13 any invocation of that authority and a tying of
14 that authority to a specific instruction like we
15 have in the guidance letters, I don't think we
16 would get to coercion. I also --

17 JUSTICE GORSUCH: You -- you agree,
18 though, the fifth paragraph changes the
19 calculus?

20 MR. McDOWELL: Yes, Your Honor, but I
21 want to be -- I want to say something to make it
22 very clear. We think that this has to be
23 considered alongside the press release and the
24 tweet. We think that's one unit of governmental
25 communication, so it's -- we would not look at

1 the guidance letters alone.

2 And we would look at the guidance
3 letters particularly as a way to reinforce the
4 allegations about the Lloyd's meeting rather
5 than considering the guidance letters as a
6 standalone matter.

7 JUSTICE KAGAN: And why are you so --

8 JUSTICE GORSUCH: Do you -- I'm sorry.
9 Go ahead.

10 JUSTICE KAGAN: No, go ahead.

11 JUSTICE GORSUCH: Just to finish up,
12 do you -- do you view this as -- as Justice
13 Barrett asked, as a clearcut case under existing
14 law?

15 MR. McDOWELL: Yes, Your Honor,
16 especially with the -- with the Lloyd's meeting,
17 absolutely.

18 JUSTICE KAGAN: Why are you so
19 concerned about only looking at the guidance
20 letters in combination with everything else?
21 What would be wrong with looking at the guidance
22 letters alone, given that there is this fifth
23 paragraph?

24 MR. McDOWELL: Yeah. The fifth
25 paragraph, I think, takes you pretty far. And

1 we're not saying that it would be impossible to
2 conclude that that would be a threat alone, but
3 this was one unit of government communication
4 because it was in the same 24-hour period and
5 they were all discussing the same thing.

6 And I think the press release is
7 measurably more explicit. It says it "urges
8 businesses to join the companies that have
9 already discontinued their arrangements with the
10 NRA and to take prompt actions to manage their
11 risks." So it's pointing back to the risk
12 management obligations from the guidance letter,
13 and it's putting it into one sentence to make it
14 very clear.

15 And then the Cuomo tweet says the NRA
16 is an extremist organization, and he's urging
17 companies to revisit any ties they have to the
18 NRA and consider their reputations.

19 And our broader concern is just that
20 plaintiffs will -- if the Court were to focus on
21 the guidance letter alone, it could allow
22 plaintiffs to try to cobble together First
23 Amendment claims by pointing to disparate
24 statements of government speech and trying to
25 connect them up to invocations of legal

1 obligations. Obviously, it's easier here
2 because it's in one document, but that's our
3 broader concern.

4 And these are also just very unusual
5 documents, the guidance letters, and it's kind
6 of hard to interpret them in isolation because
7 it is very odd to see this sort of government
8 speech in a guidance document.

9 JUSTICE ALITO: If this case goes back
10 for trial, do -- do you claim that the guidance
11 letters and the enforcement actions would not be
12 relevant and admissible?

13 MR. McDOWELL: No, Your Honor. We
14 think the guidance letters would be relevant.
15 As I said, they reinforce the plausibility --

16 JUSTICE ALITO: Yeah. Okay.

17 MR. McDOWELL: -- of the allegations.

18 JUSTICE ALITO: What about the -- the
19 consent decrees? What about the enforcement
20 actions and the consent decrees?

21 MR. McDOWELL: So the district court
22 did held -- did hold that she was entitled for
23 absolute immunity for those. We also think that
24 they were targeting conduct because they appear
25 to have been based on bona fide violations of

1 New York insurance law. So we don't see a free
2 speech concern independently with them.

3 But I do think that the Lloyd's
4 consent decree, again, could bear on the
5 plausibility of the allegations with respect to
6 the Lloyd's meeting in the following way:
7 There's a term in the Lloyd's consent decree
8 that broadly bans Lloyd's from doing even lawful
9 business with the NRA, and that sheds light on
10 the plausibility of the allegation that in the
11 meeting, Vullo was trying to coerce Lloyd's into
12 stopping even lawful business with gun groups.

13 JUSTICE ALITO: Has this Court ever
14 held that every federal and state officer who is
15 the head of an executive department or the head
16 of an independent regulatory agency with
17 enforcement powers has absolutely immunity?

18 MR. McDOWELL: No, Your Honor. But
19 this was a prime -- the holding of the district
20 court was that this was a -- she was exercising
21 prosecutorial function with respect to the
22 enforcement actions at issue.

23 JUSTICE ALITO: Yeah. Have we ever
24 held that all of those officials have absolute
25 prosecutorial immunity?

1 MR. McDOWELL: No, Your Honor. We're
2 not taking a position on the merits of the
3 absolute immunity question to be clear.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas, anything further?

7 Justice Alito?

8 Justice Sotomayor?

9 JUSTICE SOTOMAYOR: So I already
10 previewed what my question would be. How do you
11 see them writing -- wanting the opinion and how
12 do you want it? And tell me what the
13 differences are and why they're important.

14 MR. McDOWELL: So our first order
15 preference is, as I said, to use the guidance
16 letters as a way to reinforce the plausibility
17 of the allegations about the Lloyd's meeting and
18 to hinge the First Amendment analysis on the
19 Lloyd's meeting because that's an explicit
20 threat.

21 It's just a straightforward way of
22 resolving this case. And as I said, the
23 guidance letters reinforce the plausibility of
24 those allegations because the guidance letters
25 were sent not only to insurance companies but

1 also to banks. And there's no suggestion that
2 the NRA was doing unlawful business with banks.

3 And, of course, the guidance letters
4 also expressly urge insurance companies and
5 banks to cut all ties with the NRA, not just the
6 lawful business. So that -- those aspects of
7 the guidance letters reinforce the allegation
8 that in the Lloyd's meeting, she was trying to
9 coerce Lloyd's to stop all of its business with
10 gun groups, not just to target unlawful conduct.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 Justice Gorsuch?

13 Justice Kavanaugh?

14 Justice Barrett?

15 JUSTICE BARRETT: No.

16 JUSTICE JACKSON: Just one quick
17 clarification. You say the Lloyd's meeting is
18 an explicit threat. So, fine, let's say they
19 state a claim. What's next in terms of proof?
20 Don't they have to show something about her
21 motivation?

22 MR. McDOWELL: So, Justice Jackson,
23 that gets to, I think, something Mr. Cole was
24 talking about. There are two kind of aspects of
25 this sort of claim. There's the coercion

1 question, and then there's the First Amendment
2 harm question. Here, the First Amendment harm
3 is based on viewpoint discrimination. So, yes,
4 they would have to show that she was motivated
5 by the -- the targeting of a particular
6 viewpoint, as opposed to the targeting of
7 conduct.

8 We just think that the complaint
9 alleges that that's what her motive was because,
10 on page 223, it says -- I think says it most
11 explicitly, 223 of the Petition Appendix, she
12 was engaging in this threat in order to get
13 Lloyd's to aid DFS's campaign against gun
14 groups. So there's a focus on the speech aspect
15 of the NRA, as opposed to any conduct that it
16 was engaging in.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Katyal.

21 ORAL ARGUMENT OF NEAL K. KATYAL
22 ON BEHALF OF THE RESPONDENT

23 MR. KATYAL: Thank you, Mr. Chief
24 Justice, and may it please the Court:

25 The key fact in this case is the

1 conceded illegal conduct. As Justice Sotomayor
2 said, the three insurers and the NRA broke the
3 law. They were selling intentional criminal act
4 insurance, and all of the products they offered
5 were unlawful because the NRA refused to get a
6 license. That's why Bantam Books is miles away
7 from this case, and it's why the court below
8 found qualified immunity protects Vullo.

9 In this posture, Iqbal demands courts
10 ask, as between the invidious coercion asserted
11 or the obvious explanation she was enforcing the
12 law, is coercion plausible? When illegal action
13 is present, the plausibility burden is higher.
14 To use Mr. Cole's phrase, the government is more
15 likely responding to conduct than, not speech,
16 and four separate doctrines explain why.

17 First, Iqbal held plausibility rules
18 are "especially important in suits where
19 government defendants assert qualified immunity
20 because they must be neither deterred nor
21 distracted from vigorous performance by
22 disruptive discovery.

23 Second, the presumption of regularity
24 is at its height.

25 Third, absolute immunity protects

1 enforcement actions.

2 And, fourth, causation is more
3 difficult.

4 That is particularly so after
5 Parkland, which led many businesses that
6 Ms. Vullo has no control over, such as United
7 Airlines and Avis Cars, to sever ties with the
8 NRA.

9 For this Court to accept this thin
10 complaint and the teeth of the conceded illegal
11 conduct, it would empower strike suits to enjoin
12 valid enforcement and open sensitive discovery.
13 That's why the court's traditional test here is
14 right. A government official crosses the line
15 from coercion to persuasion when, one, they are
16 objective -- when they are threatening as
17 opposed to encouraging and, two, there is no
18 objectively reasonable basis for their action.

19 The NRA can't meet that test, and
20 that's why they are seeking to weaponize the
21 First Amendment and exempt themselves from the
22 rules that govern you and me, simply because
23 they're a controversial speaker.

24 I welcome the Court's questions.

25 JUSTICE THOMAS: Would you spend just

1 a small amount of time explaining why you think
2 the conduct, all of this, is infected by, I
3 guess, the one illegal insurance product
4 involved here?

5 MR. KATYAL: So, Justice Thomas, our
6 position and Ms. Vullo's position throughout has
7 been there's not one illegal insurance product,
8 it's all illegal. And the attachments to the
9 complaint attach the consent orders which make
10 that clear.

11 The NRA never got a license for all of
12 the affinity products. It's their burden to
13 prove -- I know the word "lawful insurance
14 product" is in the complaint. They never
15 identified it in the complaint.

16 Our red brief spent, obviously, a huge
17 amount of time on this and called them out. To
18 this day, they haven't explained one lawful
19 product that was ever issued by these three
20 insurers, and that's why we think, if you're
21 asking yourself under Iqbal and Twombly is there
22 an obvious likely explanation for what's going
23 on, that's what it is. That's why the consent
24 orders read the do -- the way they do.

25 JUSTICE SOTOMAYOR: Sorry, these

1 affinity programs could have been altered. And
2 these consent decrees and what she was seeking
3 was a ban even of potentially lawful affinity
4 programs.

5 I mean, if they had taken out the
6 intentionality provision or the criminal
7 activity provision and just insured for
8 accidents with guns or things like that, those
9 would have been lawful.

10 MR. KATYAL: So --

11 JUSTICE SOTOMAYOR: She went further
12 and said you can't even have --

13 MR. KATYAL: And DFS and regulators do
14 that all the same, Justice Sotomayor. So there
15 are two buckets of illegal activity, serious
16 illegal activity that Ms. Vullo isolated, and
17 they're at issue in the consent orders by name.

18 One is the provision of intentional
19 act insurance, sometimes called murder
20 insurance. That violates public policy in New
21 York, as almost every state.

22 Second, the fact NRA was doing all of
23 these affinity products without a license. Now,
24 just without a license alone, DFS routinely
25 imposes massive sanctions, including lifetime

1 bans.

2 For example, MetLife, which we cite in
3 our brief, in 2014, they were offering -- did
4 the same thing, offering unlicensed insurance
5 with a partner, lifetime ban. Lifetime bans are
6 not unusual. They happen all the time. In
7 securities regulation, you can have a lifetime
8 ban for a meeting.

9 What normally happens, Justice
10 Sotomayor, in these cases is, if the NRA ever
11 decided that they wanted to get a license and
12 offer a lawful plan, they then come back and
13 seek a modification of the consent order. But
14 there's nothing unusual whatsoever about a
15 punishment like this.

16 What is unusual is to allow a strike
17 suit like this. Remember, this case was filed
18 during the investigation, in May of 2018, in
19 order to stop it from going forward.

20 The consent orders then happened. And
21 so now they're here trying to effectively undo
22 that enforcement action. And the worry here,
23 it's not just about this case. It's about any
24 case because everyone can allege, you know, can
25 stop a plea negotiation or a consent set of

1 negotiations by saying you're retaliating
2 against me.

3 I mean, you know, if you just think
4 about what Dinesh D'Souza said publicly in his
5 filings or Michael Avenatti about the President,
6 I'm being retaliated against because of me --
7 because of my speech. And that's the danger,
8 and that's why there's always been an objective
9 unreasonability standard.

10 And Mr. Cole says in his brief at page
11 23, in his reply brief, oh, don't worry, the NRA
12 will never do this, we've only filed one suit on
13 Bantam Books before in our history and it's this
14 one.

15 That's wrong. In five minutes of
16 Internet research, we found another case in
17 which the NRA sued San Francisco on exactly that
18 theory. And if you look at his amici briefs, at
19 least 10 of them admit they want to do this to
20 open up lawsuits for when Chick-Fil-A isn't
21 being zoned in the right place --

22 JUSTICE SOTOMAYOR: Counsel, you've
23 answered my question.

24 CHIEF JUSTICE ROBERTS: Mr. Katyal,
25 what do you do about your friend's argument that

1 you've waived this, not raising it in the
2 district court or the court of appeals or in the
3 brief in opposition?

4 MR. KATYAL: So the -- he has a couple
5 of waiver arguments. Which is the "this," the
6 absolute immunity point?

7 CHIEF JUSTICE ROBERTS: Yeah. I'm
8 sorry, yes.

9 MR. KATYAL: Yes. So, on absolute
10 immunity, I don't think that we -- we waived it.
11 So, you know, first of all, everything I just
12 said before doesn't turn on absolute immunity or
13 not. I'm explaining why this wasn't coercive,
14 what happened in either the Lloyd's meeting or
15 the consent orders.

16 Now we do think there's a separate
17 argument about absolute immunity and there's
18 good reason to reach it. It was ventilated down
19 below, and I think it's squarely before this
20 Court.

21 So here's what the district court said
22 at Petition Appendix 53A. This is its holding.
23 "Vullo's decision to enter into the Lockton,
24 Lloyd's, and Chubb consent orders and their
25 precise terms are all entitled to absolute

1 immunity because they are prosecutorial actions
2 premised on enforcement decisions intimately
3 associated with the judicial process."

4 Now it's fair, as he says, we raised
5 that in the selective enforcement claim but not
6 in the First Amendment one, but there is good
7 reason for that because, at that point in the
8 district court, their First Amendment claims
9 were focused entirely or almost entirely on the
10 letters and the press release and absolute
11 immunity we're not claiming attended -- attended
12 to those acts. We're saying it explains what
13 happened in the consent orders and in the 2/27
14 Lloyd's meeting.

15 JUSTICE KAVANAUGH: Mr. Katyal, it's a
16 bit jarring, I guess, for me that the Solicitor
17 General is on the other side from you in this
18 case given that the Solicitor General represents
19 the United States and, as we know from the last
20 case, has a very strong interest in not
21 expanding Bantam Books.

22 So how should we think about that?

23 MR. KATYAL: Yeah. I think, you know,
24 I don't want to characterize their motivations
25 or anything. I just think ultimately, when they

1 get to, you know, what -- their test is not
2 different than our test.

3 I think we're all basically in
4 agreement that, for example, that the Second
5 Circuit got it right. The Second Circuit's test
6 is government officials cannot use their
7 regulatory powers to coerce individuals or
8 entities into refraining from protected speech.

9 At the beginning of the --

10 JUSTICE KAVANAUGH: Are you okay with
11 that four-part test?

12 MR. KATYAL: Absolutely. Fine with
13 that.

14 JUSTICE KAVANAUGH: Yes.

15 MR. KATYAL: I think the difference is
16 that we do have to insist on an objective
17 reasonability when you're dealing with
18 enforcement actions, that second prong that I
19 started with, because, otherwise, you're opening
20 the door to, as Nieves points out, anyone can --
21 anyone will be highly incentivized if they're
22 the target of an investigation to say I'm being
23 retaliated against. So you need to show
24 objective unreasonability, and it's here where
25 their claims fall apart.

1 They were doing massively illegal
2 things. New York -- New York enforces that all
3 the time. If their complaint pled something
4 like jaywalking and said: Look, you're not
5 enforcing it, except against us, that states a
6 claim.

7 JUSTICE GORSUCH: Mr. -- Mr. --

8 MR. KATYAL: That's not this
9 complaint.

10 JUSTICE GORSUCH: I'm sorry, Mr.
11 Katyal, just to follow up on Justice Kavanaugh's
12 original question, it seems like that we're all
13 in agreement that the law here is clearly
14 established under Bantam Books and it's just a
15 matter of application. Is that right?

16 MR. KATYAL: So I -- I certainly think
17 the law is clearly established in terms of what
18 I read to you at the Second Circuit is fine.

19 JUSTICE GORSUCH: The standard, yeah?

20 MR. KATYAL: Second Circuit standing.

21 JUSTICE GORSUCH: Yeah, you think
22 that's clearly established. Okay, thank you.

23 MR. KATYAL: Yes. So -- so the
24 concern is, without an objective reasonability
25 test, you open the door to people filing strike

1 suits against enforcement actions all the time.

2 Now I guess they then say: Well,
3 okay, it's not the 2/27 meeting with Lloyd's or
4 the consent orders themselves. You've got to
5 read that in light of the guidance letters, the
6 guidance letters.

7 We think absolutely you should look at
8 them all together, as the Solicitor General
9 says.

10 JUSTICE KAVANAUGH: And I think they
11 do say the meeting itself is enough.

12 MR. KATYAL: Yeah. And if that
13 meeting is enough, Justice Kavanaugh, every
14 meeting, every plea negotiation's enough.
15 That's literally what they are. They're done in
16 secret, behind a closed door, to use their
17 insidious language. That's the natural give and
18 take.

19 What Vullo said, according to their
20 own allegations, is we've got some goods on you,
21 and we are willing to look past some in order to
22 make a resolution here.

23 Now it's true that she and -- and
24 Governor Cuomo have said things about the NRA.
25 There's nothing that ties that give-and-take in

1 the complaint, and certainly not plausibly so,
2 to the -- to the feelings about the NRA.

3 And, by the way, the tweets that my
4 friend has been referring to from Governor Cuomo
5 aren't even in the complaint and were issued
6 months after the complaint was even filed.

7 So I think it's very natural that in a
8 2/27 meeting about resolving these issues,
9 you're going to say: Look, I'm going to look
10 past some issues in order to strike a
11 resolution. That's all that is.

12 JUSTICE JACKSON: Mr. Katyal, can I
13 just ask you about the standards again? So
14 suppose I agree with you that illegality was
15 sort of at the heart of what was going on here,
16 that all of the products were illegal. Let's
17 just assume that I agree with you for a second
18 on that.

19 Doesn't that go less to coercion than
20 to the next question, which is whether or not
21 that coercion of a third party affected a
22 violation of the First Amendment?

23 I mean, the fact that the business was
24 illegal doesn't necessarily mean that the
25 February meeting wasn't coercive. I think

1 government action in enforcing the law is
2 coercive. So isn't it just that she has a good
3 defense to the argument that there's a problem
4 here under the First Amendment?

5 MR. KATYAL: I -- I agree with almost
6 everything except your last sentence, Justice
7 Jackson --

8 JUSTICE JACKSON: Okay.

9 MR. KATYAL: -- and the same point
10 you made in the first argument.

11 JUSTICE JACKSON: Yes.

12 MR. KATYAL: Coercion by itself is not
13 illegal. The government coerces all the time,
14 in plea negotiations, in bringing criminal
15 charges, and the like. What makes it illegal is
16 if you're retaliating against someone's speech,
17 and it's that where the complaint falls apart.

18 JUSTICE JACKSON: Do you concede that
19 in this case?

20 MR. KATYAL: That we retaliated --

21 JUSTICE JACKSON: That if she was
22 coercing -- coercing them under these
23 circumstances, it was retaliation?

24 MR. KATYAL: Well, no. No.

25 JUSTICE JACKSON: Okay.

1 MR. KATYAL: So we think that it was
2 an exercise of legitimate law enforcement. We
3 think they're absolutely fine to bring a
4 complaint that has some direct evidence that
5 says, oh, no, she is -- actually, this is not a
6 prosecution that would ordinarily be brought.
7 This is, rather, a selective targeting of me.
8 That's, of course, what they lost --

9 JUSTICE JACKSON: But that's at the
10 summary judgment stage, right? I mean, that's
11 not a --

12 MR. KATYAL: Well, it could be --

13 JUSTICE JACKSON: -- motion to
14 dismiss.

15 MR. KATYAL: -- done at 12(b)(6), as
16 it was here, and, indeed, the selective
17 enforcement claim was thrown out. And -- and
18 our point to you is, in order for them to state
19 a claim -- and Nieves says this, you've got to
20 plead and prove. That's the language, "plead
21 and prove." You've said it four times in the
22 decision. And this complaint does not plead and
23 prove that enforcement wouldn't be ordinary --
24 wouldn't -- wouldn't be ordinarily done.

25 What they've said in the complaint is

1 we have some comparators, the Optometrists
2 Association, the New York City Bar offers
3 insurance. And they -- I guess they allege
4 there are technical violations there. None of
5 those folks are doing what the NRA --

6 JUSTICE ALITO: I mean --

7 MR. KATYAL: -- was doing and what
8 Vullo said.

9 JUSTICE ALITO: -- Mr. Katyal, you're
10 shifting the burden to them. This is a First
11 Amendment case. They -- all they need to do is
12 to show that the desire to suppress speech was a
13 motivating factor. They don't have to prove
14 that the -- the regulatory action would have
15 been taken even if Ms. Vullo didn't have this
16 motivation.

17 MR. KATYAL: So -- so I think, Your
18 Honor, that Nieves directly says no to that.
19 What Nieves says is precisely because
20 allegations against enforcement are so easy to
21 allege and difficult to disprove, and because it
22 bumps up against the presumption of regularity,
23 and because it opens the door to massive
24 discovery into sensitive government files, and
25 because it incentivizes people to make

1 controversial speech and then claim an
2 exemption, no, you insist that this be in the
3 pleading itself.

4 And that's -- and, you know, that's
5 consistent, of course, with, like, for example,
6 Iqbal and Twombly, which said similar things
7 even outside of the retaliation context.

8 JUSTICE ALITO: I -- I mean, really,
9 this is kind of -- suppose the allegation was we
10 had a meeting with Ms. Vullo and she pulled out
11 a -- a -- a pistol and she held it to our heads
12 and she said, I'm going to blow your brains out
13 unless you stop writing insurance for the NRA.

14 That would not be enough to even
15 allege a Bantam Books violation because she
16 might have taken that same regulatory action --
17 she might have taken regulatory action for a
18 perfectly legitimate reason.

19 MR. KATYAL: Your Honor, there, the
20 government's conduct would be objectively
21 unreasonable, and it would flunk our test. So
22 we think this is not a hard test. We're not
23 seeking to change the law. We're just pointing
24 out that when you're in a situation like this of
25 conceded illegality that there is an obvious

1 alternative explanation for what Ms. Vullo was
2 doing here, which was enforcing the law.

3 And this is the worst case in order
4 for you to say this should go past 12(b)(6)
5 because, if you allow this case with its
6 conceded illegality to go past -- go past
7 12(b)(6), then I think any plaintiff will be
8 able to do this.

9 The government --

10 JUSTICE SOTOMAYOR: I'm sorry. What
11 was the conceded illegality?

12 MR. KATYAL: Yeah. So, in the
13 complaint, it attaches the three consent orders
14 by the insurers, all of which say we agree, we
15 were offering illegal insurance. And --

16 JUSTICE SOTOMAYOR: All right. Those
17 are those three.

18 MR. KATYAL: Yes.

19 JUSTICE SOTOMAYOR: And what does that
20 have to do with the NRA and cutting ties with
21 it?

22 MR. KATYAL: Because they -- they were
23 offering -- what they said was illegal was the
24 insurance products with the NRA, that the NRA
25 refused to get a license. And so all of the

1 insurance --

2 JUSTICE SOTOMAYOR: But what made it
3 illegal for -- NRA didn't have to or it could
4 offer its products to someone else? Just --
5 that's where I'm confused.

6 MR. KATYAL: Yeah. So --

7 JUSTICE SOTOMAYOR: It could use a
8 licensed broker to --

9 MR. KATYAL: -- if they -- well, once
10 -- once the NRA was acting in this way as a bad
11 actor, Ms. Vullo entered a -- entered into a
12 consent order with them for a broader
13 prophylactic set of sanctions. This goes back
14 to your first question. That happens all the
15 time. And the reason for that --

16 JUSTICE SOTOMAYOR: Yeah. All right.
17 Then stop. And why are the other program --
18 insurance carriers that are -- have these
19 similar policies, the New York State Bar
20 Association, all the other people who have
21 similar policies, why are they different?

22 MR. KATYAL: Because they didn't do
23 what the NRA did here and the three insurers,
24 which was not just act as unlicensed but offer
25 this -- these insurance policies that seriously

1 violate public policy, called -- so-called
2 murder insurance, that cover intentional
3 criminal acts.

4 And when you have those two things
5 together, this enforcement action --

6 JUSTICE SOTOMAYOR: I thought some of
7 them did, but I can check the record. Okay.

8 MR. KATYAL: So our -- our position
9 here is that the Court shouldn't -- should --
10 should absolutely look at both of the -- you
11 know, all the different conduct together. We
12 think any one of them individually doesn't add
13 up to something that's coercive, and together,
14 they don't add up to something that's coercive.

15 The other thing -- other point I'd
16 like to make, and this goes back to, Justice
17 Alito, to your points about Iqbal and Twombly --
18 the standard about -- at the pleading stage. I
19 think it's relevant to note that in Twombly
20 itself, there were two alternative explanations
21 for what was going on with these big behemoth
22 government -- big -- big behemoth companies.
23 One was that they were conspiring and illegally
24 agreeing to divvy up the market. The other was
25 that they made individual determinations on

1 their own to do that. Here, it's in what --

2 JUSTICE GORSUCH: And -- and, Mr.

3 Katyal, you're right, Twiqbal says you have to

4 look at the whole of the allegations to

5 determine whether it's plausible or not, right?

6 So, here, doesn't that mean that we have to look

7 all of the allegations in the complaint?

8 MR. KATYAL: Correct.

9 JUSTICE GORSUCH: Okay.

10 MR. KATYAL: And when you do that, I

11 think the only -- the one we haven't talked

12 about yet is this reputational risk, these

13 industry guidance letters, and we think these

14 industry guidance letters are so far removed

15 from Bantam Books, we'd urge you to look at

16 Footnote 5 in Bantam Books and hold them up

17 against the reputational risk letters.

18 So, in that -- in there -- in those

19 letters, they -- doesn't say anywhere anything

20 like we're going to sue you or we're going to

21 regulate, unlike what the threat was in Bantam

22 Books at Footnote 5, bringing in the Attorney

23 General, bringing in the chiefs of police. They

24 don't say that she's even investigating the

25 companies for anything.

1 There's no reference whatsoever to an
2 investigative body. It doesn't even actually
3 say, as the Second Circuit points out, that
4 there is any reputational risk with the banks
5 and insurers maintaining their ties. It says if
6 any reputational risk.

7 And I think the most important
8 point -- and, Justice Kagan, this goes to
9 something you said to my friend earlier -- is
10 that these letters are viewed -- you know, these
11 aren't the only industry letters DFS sends.
12 They send them all the time and -- including
13 reputational risk letters. And you have amici
14 after amici before you saying these are
15 milquetoast reputation risk letters.

16 And if you want a good example, take a
17 look at the one they cite in their brief about
18 crypto -- about cryptocurrency at page 23. That
19 says companies have "legally uncertain
20 practices, they make inaccurate or misleading
21 representations and disclosures, and that
22 agencies are evaluating the legal permissibility
23 and compliance with applicable laws and
24 regulations."

25 Of course, if you're going to issue

1 something like that, you're going to have a
2 disclaimer like the one that they point out in
3 their reply brief. This milquetoast industry
4 letter is the opposite. And the concern we have
5 is that if you point to that as part of a Bantam
6 Books claim, then you're going to disincentivize
7 people to issue reputation risk letters, which
8 are obviously important, as the amici briefs
9 say.

10 CHIEF JUSTICE ROBERTS: You're --
11 you're not suggesting -- I'm skipping back a few
12 minutes. You're not suggesting that if, for
13 example, after the initial conduct by Ms. Vullo
14 and the reaction of the National Rifle
15 Association, if she instructed her staff to go
16 through these policies and find something, you
17 know, that violates some regulation in there,
18 that she could then defend against -- the basis
19 of terminating all that, on the basis of those
20 newly discovered violations?

21 MR. KATYAL: Right. So, there, it
22 would be objectively unreasonable. That's like
23 going through to try and selectively target one
24 person. Nieves says that's going to be
25 impermissible. The difference, Mr. Chief

1 Justice, with this case is they didn't point to
2 a comparator.

3 What Nieves is asking is, is this an
4 outlier prosecution or not? Their only claim
5 is, as Justice Sotomayor was saying, the
6 Optometrists Association and the like. Those
7 folks were not doing the same thing at all. At
8 most, they were offering an unlicensed affinity
9 product. They certainly weren't offering
10 something as dramatically dangerous to public
11 policy as so-called murder insurance.

12 That's why what Ms. Vullo was doing
13 here was absolutely explainable. There's an
14 obvious alternative explanation, to use the
15 Twiqbal words. And that's why, if you let this
16 complaint go forward, you will be then saying to
17 government regulators everywhere that you have
18 to be careful about the speech you say. So, for
19 example, last week, some of you heard the
20 President say, you know, we beat the NRA, we're
21 going to beat the NRA again.

22 You heard my -- in the first argument
23 a discussion about TikTok and -- and, you know,
24 a government -- a hypothetical in which the
25 government attacks TikTok and criticizes it.

1 The -- all of those things -- those statements
2 now will be used as -- in examples in
3 affirmative litigation to -- to issue strike
4 suits to stop enforcement actions by the FTC, by
5 the Justice Department, by states and the like.

6 And, Justice Kavanaugh, I am troubled
7 by the fact the Solicitor General isn't
8 embracing that, but I do think it's important to
9 point out many states are. You have before you
10 a brief by 10 different individuals. I take
11 what the Solicitor General's done is to read
12 paragraph 5 of the reputational risk letter so
13 broadly that it becomes coercive.

14 And we just don't think that opinion
15 can write, that if you tried to do that, you
16 would be opening the door to something very,
17 very dangerous and destructive down the road,
18 which is this case will be cited, and they've
19 already had a track record of using a Bantam
20 Books situation in other enforce -- to stop
21 other enforcement actions, not just this one.

22 And it's not just the NRA today. It's
23 every regulated party tomorrow from TikTok on.

24 CHIEF JUSTICE ROBERTS: Justice
25 Thomas?

1 Justice Alito?

2 JUSTICE ALITO: You say in your brief
3 this case is not even close. Do you stand by
4 that?

5 MR. KATYAL: I do. I do under the
6 existing law, yes.

7 JUSTICE ALITO: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor?

10 Justice Kagan?

11 Justice Gorsuch?

12 Justice Kavanaugh?

13 Justice Barrett?

14 Justice Jackson?

15 Okay. Thank you, counsel.

16 Rebuttal, Mr. Cole?

17 REBUTTAL ARGUMENT OF DAVID D. COLE

18 ON BEHALF OF THE PETITIONER

19 MR. COLE: Yes. So I agree with my
20 friend on one point. This case is not close.

21 (Laughter.)

22 MR. COLE: With respect to Nieves, he
23 -- he's -- he's taking a -- a particular
24 standard that this Court adopted in the
25 particular context of retaliatory arrests, tens

1 of thousands occur every day, and adopted a
2 particular rule with respect to 1985 -- 1983
3 damage actions.

4 This is a First Amendment question.
5 It's not a 1983 question. It's a First
6 Amendment question that's before you. This is
7 not a retaliatory arrest case. There is -- this
8 is a case that arises very rarely. We've looked
9 at Bantam Books, and in 60 years, there have
10 been about 20 to 40 cases in the courts of
11 appeals over 60 years involving attempts by the
12 government to coerce a third party to punish
13 somebody else's speech. That's very different
14 from the Nieves situation.

15 So that's just not in the law. You
16 would have to change the law substantially to
17 adopt that.

18 Secondly, with respect to the Cuomo
19 tweets, they were issued after the first
20 complaint, but they were issued before the
21 second amended complaint, which is the operative
22 complaint here. And under Tellabs, they are
23 perfectly appropriate to consider at the motion
24 to dismiss stage, judicial notice. Nobody
25 disputes that he said exactly what he said.

1 They want them out of the case because they
2 demonstrate the impermissible motive.

3 Carry Guard, Carry Guard is a red
4 herring here. The Carry Guard program was
5 suspended by Locktons and the NRA in November
6 2017. Everything else -- everything that we're
7 talking about here happened after November 2017.
8 Her meeting with Lloyd's, Lloyd's did not
9 underwrite Carry Guards. And her meeting with
10 Lloyd's says cut your ties with gun groups,
11 especially the NRA, because I'm trying to weaken
12 them. Gun groups don't have Carry Guard. Only
13 the NRA did. It wasn't even operative at that
14 point.

15 The guidance letters say nothing about
16 Carry Guard. This is not a guidance letter
17 about insurance infractions. This is a guidance
18 letter about the NRA and other gun promotion
19 organizations.

20 The NRA's insurance was not all
21 illegal. No, the NRA didn't have an insurance
22 license in New York because it's not an
23 insurance company. Nor does the ABA. Nor does
24 the American Ophthalmologists Association. But
25 they all have affinity insurance, and it's just

1 run by brokers, as Justice Sotomayor said, in
2 New York. That's perfectly legitimate.

3 There were some infractions in terms
4 of how it was marketed, how the compensation
5 structures, that were actually quite commonplace
6 in the industry, and she enforced them against
7 them and not against -- against others.

8 Finally, the notion that this is
9 business as usual, business as usual for a -- a
10 -- a government official to speak with a private
11 party and say we'll go easy on you if you aid my
12 campaign to weaken the NRA, that is not business
13 as usual. That is not an ordinary plea
14 negotiation.

15 CHIEF JUSTICE ROBERTS: Thank you.

16 MR. COLE: Nor is the guidance letter.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 The case is submitted.

20 (Whereupon, at 1:04 p.m., the case was
21 submitted.)

22

23

24

25

Official - Subject to Final Review

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