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Supervisory threats can violate the First Amendment

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In a unanimous decision, the Supreme Court held the NRA plausibly alleged that former DFS Commissioner Maria Vullo coerced DFS-regulated entities into cutting ties with the NRA based solely on the NRA's advocacy of Second Amendment rights.

The Supreme Court unanimously held in *NRA v. Vullo* that the National Rifle Association (NRA) had alleged facts that, if true, plausibly supported the NRA's claims that former Commissioner Maria Vullo of the New York Department of Financial Services (DFS) violated the NRA's First Amendment rights. The NRA's complaint against Vullo included claims that Vullo pressured DFS-regulated insurance companies to cease providing certain insurance products to the NRA. The NRA claimed that Vullo took these actions to thwart the NRA's Second Amendment advocacy efforts. Vullo moved to dismiss based on the NRA's failure to state a claim, a motion that requires a court to take as true the NRA's well-pleaded factual allegations. The district court denied the motion to dismiss. Upon appeal, the Second Circuit reversed the district court, holding that the NRA had not plausibly alleged a First Amendment claim against Vullo.

After the Supreme Court granted certiorari to hear the case, the American Civil Liberties Union (ACLU) agreed to represent the NRA before the Court. The ACLU argued that Vullo attempted to blacklist the NRA and deny it access to insurance products because of the NRA's Second Amendment advocacy. The United States Office of the Solicitor General also provided support for the NRA's case in an amicus brief and participated in oral arguments, where it argued that the Second Circuit should be reversed. In total, 20 amici briefs were filed in support of the NRA, including briefs from a wide range of Second Amendment and free speech advocacy groups. Former New York State Superintendent of Insurance James P. Corcoran as well as Professors Brian Knight and George Mocsary also lent their support to the NRA's case through amici briefs.

The Court cited to its 1963 ruling in *Bantam Books v. Sullivan*, where the Court had ruled that a Rhode Island commission violated the First Amendment rights of book publishers when the commission threatened legal sanctions against the distributors of the publishers' books. The Court affirmed in *Vullo* that "a government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." In its brief, the NRA raised how indirect speech suppression "'eliminate[s] the safeguards' associated with more formal and direct processes." The Court agreed with the NRA, stating that "the kind of intermediary strategy that Vullo purportedly adopted to target the NRA's advocacy" can be more effective because intermediaries are often more focused on a regulator's ire and less on the speaker's message.[1]

The decision provides a roadmap for how politically disfavored groups, of any persuasion, can bring First Amendment challenges against regulators that have pressured regulated entities to cut ties with those disfavored groups.

- ***First***, it clarifies that for such a group "[t]o state a claim that the government violated the First Amendment through coercion of a third party, [the prospective] plaintiff[s] must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff[s'] speech." The Court explained that a government regulator can suppress a plaintiff's speech even if the government targets "nonexpressive activity" like business relationships. As noted by Professor Knight in his blog post about the decision, "[t]he Court's opinion makes clear that financial regulators cannot use their power over regulated entities as conduits of coercion to do indirectly what they cannot do directly."

- ***Second***, the Court identified "[t]he power that a government official wields" as a factor that is relevant – though not dispositive – in determining "whether a reasonable person would perceive the official's communication as coercive."
- ***Last***, the Court held that though "Vullo can pursue violations of state insurance law, she cannot do so in order to punish or suppress the NRA's protected expression." Even where a regulator acts in furtherance of the law, the Court warned that the regulator cannot single out a group in retaliation for that group's viewpoints.

Certain issues not addressed by this decision may be raised by future plaintiffs. For instance, prudential regulators typically monitor financial institutions' exposure to reputational risks. Whether financial regulators can supervise their regulated entities' exposure to reputational risks was not addressed in this case. Professors Knight and Mocsary claim, though, that reputational risk regulation provides an "economic heckler's veto." Professor Julie Hill also has written extensively on this issue. In one law review article, she discussed how prudential regulators may invoke reputational risk when they want banks to reconsider providing banking products and services to certain politically disfavored groups. Professor Hill cited the NRA's case against Vullo as an example of how regulators can suppress politically disfavored groups through the guise of reputational risk monitoring. Politically disfavored groups could raise claims in the future against reputational risk regulation based on suppressing protected speech or interfering with other protected activities. Professor Knight raised the possibility that a politically disfavored group could make claims against reputational risk regulation of banks that results in the group losing access to banking products and services.

The case could provide support for broader challenges to bank regulatory or supervisory actions that prevent unpopular groups from having fair access to the banking sector. As noted in the amicus brief from Professors Knight and Mocsary, "[b]anking and insurance operate within a uniquely nebulous and opaque regulatory environment" that allows prudential regulators to pressure those financial institutions into cutting ties with certain disfavored groups. The Court, however, declined to reach the fair access points, focusing more narrowly on suppression of protected speech.

Beyond the litigation at bar, some legislators and regulators have fought to address fair access to financial services. While Brian Brooks was Acting Comptroller of the Currency, Brooks led the Office of the Comptroller of the Currency (OCC) in putting forward a fair access rule in January 2021 that would have required banks to conduct risk assessments of individual customers rather than deny entire classes of customers access to those banks' services. The OCC, however, decided to pause publication of the rule and allow the Biden administration's Comptroller of the Currency to determine whether to finalize the rule. Paul Grewal, Chief Legal Officer of Coinbase, highlighted Brooks's proposed fair access rule as "good policy" consistent with the *Vullo* decision. Section 10 of the SAFE Banking Act of 2023, which was introduced into the House in April 2023, also addresses fair access by prohibiting federal banking agencies from formally or informally requesting or ordering a depository institution to terminate a group of customer accounts.

Professor Knight has questioned whether fair access issues could be raised in future litigation, even if the coercive activities do not target protected speech. He has discussed how regulators could also pressure their regulated entities to cut ties with certain disfavored industries or groups, like "gun companies, or legal aid societies, or fossil fuel companies, or drug companies." Discrimination against these groups may not implicate the First Amendment as there is no viewpoint discrimination involved. These groups instead would need to rely upon a different cause of action to litigate alleged de-banking.

The case is now remanded back to the Second Circuit, which will determine whether Vullo is nonetheless entitled to a qualified immunity defense because the *Vullo* ruling was not clearly established as binding law when Vullo acted.

The NRA's allegations

The NRA's complaint against Vullo alleged the following facts, which, at this stage of the proceeding, must be considered to be true:

- In Fall 2017, DFS opened an investigation into Carry Guard, an insurance program offered by the NRA that insured its members against criminal liability for using a firearm in self-defense with excessive force – even if the insured individual was found to have acted with criminal intent. New York law makes it illegal to offer insurance for intentional criminal attacks.
  - Carry Guard was administered by Lockton Companies (Lockton) and underwritten by a subsidiary of the Chubb Corporation (Chubb).
  - DFS also uncovered that Lloyd's of London served as underwriter for 11 other NRA-endorsed programs with similar coverage.

- On February 14, 2018, a gunman tragically killed 17 people in a shooting at Marjory Stoneman Douglas High School in Parkland, Florida.
- Numerous companies began to speak out against, and cut ties with, the NRA.
  - On February 25, 2018, Lockton informed the NRA that it could no longer do business with the NRA out of fear of losing its license to provide insurance products in New York.
- On February 27, 2018, Vullo met with senior executives of Lloyd's of London to discuss its relationship with the NRA.
  - Vullo discussed with Lloyd's of London executives how DFS and then-Governor Andrew Cuomo wanted to leverage their powers to weaken the NRA.
  - Vullo noted to Lloyd's of London that "an array of technical regulatory infractions plagu[ed] the affinity-insurance marketplace." The NRA has argued that these infractions are implicated by affinity-insurance programs offered by other organizations.
  - Vullo stated that Lloyd's of London could avoid liability for infractions relating to any non-NRA affinity-insurance programs if it no longer provided insurance to gun groups like the NRA.
- On April 19, 2018, Vullo issued two identical guidance letters – one to DFS-regulated financial institutions and one to insurers – on DFS letterhead concerning the provision of financial services to gun promotion groups.
  - The letters noted the backlash after Parkland against gun promotion groups like the NRA and encouraged the banks and insurance firms to "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations."
  - That same day, Governor Cuomo and Vullo issued a press release where Vullo urged insurance companies and banks to "review any relationships they may have with the [NRA] or other similar organizations."
- In May 2018, Lockton and Chubb entered into consent decrees with DFS pursuant to which they (1) admitted the NRA-endorsed insurance programs violated New York law, (2) agreed to pay fines and (3) agreed to never enter into any agreement or program with the NRA to underwrite or participate in any affinity-type insurance program involving any line of insurance coverage to New York residents or entities.
  - Lloyd's of London entered into a similar consent decree in December 2018.

The holding

The Supreme Court distinguished permissible government speech from suppression of someone else's protected speech based on their viewpoints. The Court wrote that "Vullo was free to criticize the NRA and pursue the conceded violations of New York insurance law" but that Vullo "could not wield her power … to threaten enforcement actions against DFS-regulated entities in order to punish or suppress the NRA's gun-promotion advocacy." The Court described viewpoint-based suppression as "uniquely harmful to a free and democratic society."

The Court reiterated its longstanding precedent that the government "cannot coerce a private party to punish or suppress disfavored speech on [the government's] behalf." The NRA had argued in its petitioner's brief – which was written by the ACLU – that indirect censorship efforts "are particularly dangerous" because the private parties to whom regulatory pressure is applied "often have little if any incentive to protect a particular disfavored speaker." Agreeing with the NRA, the Court explained that the analytical framework first provided in *Bantam Books* should be applied to discern whether a plaintiff has plausibly alleged that a government actor has violated the plaintiff's First Amendment rights through coercion of a third party. The Court explained that "a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff's speech."

Applying the *Bantam Books* framework, the Court held that "the NRA plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities into disassociating with the NRA in order to punish or suppress the NRA's gun-promotion advocacy." The Court explained that it looks at the power wielded by a government official as one factor that may explain "whether a reasonable person would perceive the official's communication as coercive." The Court reiterated a point raised in the NRA's brief that "the greater and more direct the government official's authority, the less likely a person will feel free to disregard a directive from the official." The Court then found that Vullo's powers over DFS-regulated entities were expansive, citing her:

1. "direct regulatory and enforcement authority";

2. ability to “initiate investigations” and “refer cases for prosecution”; and
3. “power to notice civil charges and … enter into consent decrees that impose significant monetary penalties.”

Given Vullo’s extensive regulatory powers over insurance companies, the Court reasoned that Vullo’s alleged communications with Lloyd’s of London executives could “be reasonably understood as a threat or as an inducement.” The Court recast Vullo’s issuance of the guidance letters in light of Vullo’s pressure campaign, finding that they “singled out the NRA and other gun-promotion organizations.” The NRA’s brief had argued that the guidance letters’ invocation of reputational risks put the letters’ recipients on notice, as “failure to consider such risk can lead to multi-million-dollar fines.” DFS’s supervision of reputational risks has been criticized by some, including Professor Hill, who has argued that “New York’s regulatory guidance discourages controversial, but otherwise legal practices due to reputation risk.”

The Court took issue with the Second Circuit’s decision to “tak[e] the allegations in isolation and fail[ure] to draw reasonable inferences in the NRA’s favor.” The Second Circuit viewed each allegation separately and weighed whether there was an equally plausible alternative explanation for Vullo’s actions other than retaliation for the NRA’s Second Amendment advocacy. The Supreme Court instead took the allegations as a whole and drew inferences in a light most favorable to the NRA. In a concurring opinion, Justice Gorsuch explained that the Second Circuit’s error stemmed, in part, from its decision to apply a four-pronged, multifactor test to cases where *Bantam Books* is implicated. Justice Gorsuch wrote that these tests should serve only as guideposts.

The Court also rejected some of Vullo’s arguments.

- ***First***, the Court stated that it cannot credit the alternative explanations raised by Vullo for her actions to “defeat[] the plausibility of any coercive threat raising First Amendment concerns.” The Court instead affirmed that its *Twombly*/*Iqbal* precedent requires it to “assume the well-pleaded factual allegations in the complaint are true.”
- ***Second***, the Court held that “the conceded illegality of the NRA-endorsed insurance programs does not insulate Vullo from First Amendment scrutiny.” The Court reasoned that Vullo could not pursue violations of state insurance law “in order to punish or suppress the NRA’s protected expression.”
- ***Third***, the Court rejected the argument that Vullo targeted “nonexpressive activity” by allegedly interfering with “business practices and relationships.” The Court cited the Seventh Circuit’s decision in *Backpage.com v. Dart*[2] – written by Judge Richard Posner – which held that the Cook County sheriff impermissibly “interfered with a website’s business relationships with payment-service providers” in order to suppress the website’s content. Here, the Court emphasized that “the NRA relied on insurance and financing ‘to disseminate its message.’”
- ***Last***, the Court rebuffed the claim that a decision in favor of Vullo would “interfere with the government’s ability to function properly.” The Court stated that it was simply applying its existing *Bantam Books* precedent.

Implications and key takeaways

The ruling affirms that regulators cannot pressure regulated entities into suppressing disfavored speech. It also provides a framework that politically disfavored groups can leverage if they wish to claim that regulators have abridged their First Amendment rights by coercing regulated entities into cutting ties with those disfavored groups. The case also raises broader issues related to fair access.

Framework for future complaints

The Supreme Court in *Vullo* clarified the facts a plaintiff must allege in order to plausibly assert that a government actor has violated the plaintiff’s First Amendment rights by pressuring a third party to suppress the plaintiff’s speech.

- The Court held that a plaintiff ultimately must allege that the regulator has engaged in certain conduct that, viewed in context, “could be reasonably understood to convey a threat of adverse government action” against a private party in order to coerce the private party into suppressing the plaintiff’s speech. The regulator, though, does not have to directly suppress the plaintiff’s speech. The plaintiff can instead plead that the regulator has indirectly suppressed the plaintiff’s speech by directly targeting products or services that the plaintiff relies upon in order to disseminate its message.
- The Court then specifically held that “[t]he power that a government official wields” over the private party “is relevant to the objective inquiry of whether a reasonable person would perceive the official’s communication as coercive.”

For example, consider a plaintiff that possesses facts demonstrating that a prudential regulator violated the plaintiff’s First Amendment rights by pressuring banks under the regulator’s supervision to de-bank the plaintiff. The plaintiff could use

the framework supplied by the Court and analogize to some of the facts present in *Vullo* to make its case.

- ***First***, the plaintiff could plead that its speech has been suppressed because a regulator has targeted the plaintiff's business and financing relationships that it relies upon to disseminate its message.
- ***Second***, the plaintiff would need to show certain conduct by the prudential regulator that would be understood by banks under the direct supervision of the regulator to be a threat.
  - The brief from Professors Knight and Mocsary argued that a prudential regulator issuing "non-binding guidance" warning supervised institutions from engaging in relationships with certain industries could be seen as sufficiently threatening. They argued that "firms frequently feel that they risk sanction if they do not comply with nominally non-binding guidance."
  - A plaintiff could also cite to statements by a prudential regulator that banks should consider reputational risks before considering whether to provide banking products and services to an industry or subset of advocacy groups that includes the plaintiff. The Court cites Vullo's invocation of "reputational risks" as one of the communications that could have been reasonably understood by DFS-regulated entities as a threat to cut off ties with gun-promotion groups like the NRA.
- ***Third***, the plaintiff could point to the power wielded by prudential regulators over their supervised institutions in order to further demonstrate why those banks would perceive the regulator's communications as coercive. The Court cited to powers held by Vullo over DFS-regulated entities that are similar, if not weaker, than those wielded by prudential regulators over their supervised banks.
- ***Last***, the plaintiff would likely need to point to some causal relationship between the prudential regulator's conduct and animus held by the regulator towards the plaintiff's viewpoints. As Justice Jackson explained in her concurrence, a plaintiff must demonstrate how coercion of a third party violates the plaintiff's First Amendment rights. In *Vullo*, Justice Jackson argued that the NRA alleged retaliation by the government. In a retaliation claim, Justice Jackson wrote that a plaintiff must supply a "causal connection" between a retaliatory motive held by the government actor and the government actor's conduct.

Reputational risk regulation

The case did not address whether the regulation of reputational risks could run afoul of the First Amendment. The Court did not single out the guidance letters issued by Vullo that reminded DFS-regulated entities to "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations." Instead, the Court analyzed the guidance letters against the backdrop of other allegations in the NRA's complaint.

In the future, though, a group may raise constitutional concerns with reputational risk regulation if it can demonstrate that a financial regulator has used reputational risk regulation to cut off the group's access to financial services. The group would need to demonstrate some linkage between the regulator's actions and harm to the group's protected constitutional rights. For instance, the group could demonstrate that it was targeted because of its viewpoints or because it belongs to a protected class. The financial regulator would need to demonstrate that it acted out of a desire to ensure its regulated entities' safety and soundness rather than out of animus for the targeted group.

Professor Knight explains that other avenues may also be available for potential litigants that believe they have been harmed by reputational risk regulation. He argues that a group targeted by reputational risk regulation could argue that a regulator's use of reputational risk regulation is in excess of the regulator's statutory powers. For this point, Professor Knight cites *Gulf Federal Loan Association v. Federal Home Loan Bank Board*, where the Fifth Circuit held that the Federal Home Loan Bank Board exceeded its statutory mandate when it found that a savings and loan association engaged in an unsafe and unsound practice by failing to comply with the terms of contracts that it signed with borrowers. The Fifth Circuit held that the risk that the institution could face financial harm owing to a loss in public confidence was too attenuated to justify the invocation of the regulator's authority to supervise unsafe and unsound practices.

Professor Knight also argues that potential litigants could invoke the major questions doctrine when complaining against the use of reputational risk regulation. As noted in our primer on the topic, the major questions doctrine may be applied by a court when a regulator is attempting to assert authority over a topic of "economic and political significance." With regard to reputational risk regulation, Professor Hill has discussed how such regulation forces financial regulators to determine the import of politically divisive issues.

Fair access

The Court's holding in *Vullo* more broadly touches upon the issue of fair access in banking. Though not explicitly mentioned in the Court's holding, the importance of access to banking and other financial services is briefly alluded to in the opinion. The Court stated that "one can reasonably infer" that Vullo's conduct was aimed at "stifl[ing] the NRA's gun-promotion advocacy and advanc[ing] her views on gun control" because Vullo knew "that the NRA relied on insurance and financing 'to disseminate its message.'"

The issue of fair access to banking and financial services stems from a similar concern that without those services, certain institutions will be driven out of business based entirely on the fact that they are a part of a politically disfavored group. The amicus brief from Professors Knight and Mocsary and the article from Professor Hill point to instances in the past where prudential regulators have pressured banks to cut ties with certain groups through purportedly nonbinding guidance that highlights "reputational risks" associated with banking those groups. Both the brief and Professor Hill's article discuss Operation Choke Point, where the Department of Justice (DOJ) pressured banks to cut off certain companies' access to banking services. The DOJ leveraged guidance written by the Federal Deposit Insurance Corporation (FDIC) that cited certain industries – including firearms, payday lenders and tobacco – as possibly having higher incidents of fraud. The FDIC also released an article in that same time period where it cited certain types of merchants, including firearms dealers, coin dealers and payday lenders, as being associated with high-risk activities. Banks allegedly began to drop customers in the high-risk categories as defined by the FDIC.

Media reports of everyday Americans being de-banked has increased the relevance of fair access. Similarly, general fears that prudential regulators may again be targeting certain politically disfavored groups has made fair access a salient issue. In fact, in a prior client update, we touched upon how two recent district court decisions have made it easier for the Federal Reserve to increase the operating costs of banks that provide banking services to lawful but politically controversial businesses. Because the OCC has not acted upon Brooks's proposed fair access rule, lawmakers have taken it into their own hands to try to codify fair access to financial products and services. One such example of legislative initiative is the Fair Access to Banking Act, which was introduced by Senator Kevin Cramer (R-ND) in February 2023.

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1 The Court will issue a ruling later this term in *Murthy v. Missouri*, a related case that involves allegations that the Biden administration pressured social media companies into censoring users' speech on certain topics, such as the COVID-19 vaccine, under the guise of combatting misinformation.

2 807 F.3d 229 (7th Cir. 2015).