

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.)
- - - - -

Pages: 1 through 82

Place: Washington, D.C.

Date: March 18, 2024

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3 NATIONAL RIFLE ASSOCIATION)
4 OF AMERICA,)
5 Petitioner,)
6 v.) No. 22-842
7 MARIA T. VULLO,)
8 Respondent.)
9 - - - - -

10
11 Washington, D.C.
12 Monday, March 18, 2024
13

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

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4 the Petitioner.

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8 neither party.

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

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1 P R O C E E D I N G S

2 (11:49 a.m.)

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

6 Mr. Cole.

7 ORAL ARGUMENT OF DAVID D. COLE

8 ON BEHALF OF THE PETITIONER

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

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

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

24 Six weeks later, she issued guidance
25 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 the
6 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 theories -- 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.

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, et cetera.

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

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

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

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

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

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

1 entities their obligations.

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

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

15 JUSTICE BARRETT: Mr. Cole --

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

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

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

24 JUSTICE BARRETT: How does your
25 understanding of Bantam Books differ if at all

1 from Respondent's and from the SG's?

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

7 We believe that you do have to
8 demonstrate coercion. You have to demonstrate
9 some coercive threat, some invocation of
10 regulatory adverse action. We have that here.

11 We have it with the insurance law
12 enforcement. We have it with the invocation of
13 reputational risk. Reputational risk, she
14 didn't just say, you know, guns are bad, you
15 should reconsider your relation with the NRA.
16 She said guns are bad, you should reconsider
17 your relations with the NRA because it's a
18 reputational risk if you don't.

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

22 MR. COLE: Yeah.

23 JUSTICE KAGAN: It wasn't invented for
24 the NRA. There is a view that bank regulators
25 have that companies are supposed to look at

1 their reputational risks.

2 MR. COLE: Right, right.

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

9 So how -- where do you -- how do
10 you -- how do we know?

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

18 And the -- the invocation of
19 reputational risk is the use of coercion.
20 Whether or not it is, in fact, a reputational
21 risk or not, it is still the use of the coercive
22 authority of the state to encourage these
23 entities to punish the NRA because of its speech
24 to cut their ties. That's number one.

25 Number two, look at the Lloyd's

1 meeting. There's no discussion about
2 reputational risk there. She said --

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

11 MR. COLE: So it -- it -- it -- it
12 may well be. And in Bantam Books, the Court
13 says that there's a safe harbor for genuine
14 advice about -- about law enforcement. This was
15 not genuine advice about law enforcement.

16 Why would she spend four paragraphs,
17 you know, denouncing guns? That actually has
18 nothing to do with whether there's reputational
19 risk. That has everything to do with what she
20 said in the meeting with Lloyd's she was trying
21 to do, leverage her authority to weaken the NRA
22 because she disagreed with its political
23 viewpoints.

24 So, yes, reputational risk if it was
25 employed in a content-neutral way to -- to

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

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

18 And whether or not there is a
19 reputational risk or not I don't think
20 ultimately changes the outcome if you're using
21 coercive authority. Take Bantam Books.

22 Suppose in Bantam Books the -- the
23 Commission had, instead of sending the police to
24 visit and say, hey, how's it going, have you
25 taken the books down, they said, we're going to

1 send the police to the bookstores that continue
2 to sell these books and look into code
3 violations, building code violations, and they,
4 in fact, found code violations, and they
5 enforced those code violations against those
6 bookstores.

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

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

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

24 MR. COLE: Yeah. So I -- I don't
25 think the Nieves question is here at all because

1 this is a question about whether the First
2 Amendment, the scope of the First Amendment, was
3 violated by these actions.

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

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

25 And so -- so I think whether you're in

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

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

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

22 Well, they've admitted as much in
23 public statements, as well as private backdoor
24 meetings. So we clearly meet Mt. Healthy. And
25 it would be open to them on -- on -- at trial to

1 say, well, we have some alternative theories.
2 You'll hear my friend advance some various
3 alternative theories. Those are open to them at
4 trial.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 MR. COLE: But this is a motion to
8 dismiss.

9 CHIEF JUSTICE ROBERTS: Justice
10 Thomas, anything further?

11 Justice Alito?

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

20 At the other end, the -- the
21 government official who has no authority to do
22 anything for any practical purposes to the
23 entity that the government official is speaking
24 to says you should do this. It -- it would be a
25 good thing to do, you'd be a good citizen if you

1 did it.

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

10 So how do you define when it goes too
11 far along that line?

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

20 So the mere fact that someone
21 exercises regulatory power over you I don't
22 think is sufficient, but when combined with what
23 you have here, explicit requests to -- to punish
24 a group because of its advocacy and the
25 invocation of the very tools she has to make

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

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

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

23 Do you want to comment on that?

24 MR. COLE: Yes, thank you. Respondent
25 never asserted absolute immunity with respect to

1 the Bantam Books -- the First Amendment claims
2 in this case. Absolute immunity was only
3 asserted with respect to a separate selective
4 enforcement claim. They chose, with respect to
5 the First Amendment claims, to only assert
6 qualified immunity. That's number one.

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

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

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

21 But it seems to me you're trying to in
22 the way you're putting this. There's a lot
23 about the guidance letters that you agree
24 standing on their own would be okay. I'm still
25 not sure that if the February 18th meeting had

1 not happened, that standing alone, that guidance
2 letter, as written, would necessarily be
3 coercion.

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

12 So tell me -- so, standing alone, none
13 of these things might be coercive. I see this
14 as in light of --

15 MR. COLE: Yeah.

16 JUSTICE SOTOMAYOR: -- the February
17 18th meeting, these things now, which is how the
18 district court wrote it. So how would you write
19 it differently than the district court did,
20 number one, and, number two, how would you write
21 it differently than the SG would?

22 MR. COLE: I -- I -- I -- I would
23 write it that Bantam Books holds that when
24 government officials encourage third parties to
25 penalize a speaker because of its views, they

1 cannot use coercion to further that end. Here,
2 Respondent used coercion.

3 JUSTICE SOTOMAYOR: And what do you --

4 MR. COLE: She used coercion --

5 JUSTICE SOTOMAYOR: -- define as
6 coercion?

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

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

17 She invoked her authority to punish
18 organizations and financial institutions with
19 respect to failing to manage reputational risk
20 and made it clear that what she meant by "manage
21 reputational risk" was cut your ties with the
22 NRA. And then she very shortly thereafter
23 announced these consent orders with three of the
24 NRA's principal insurance providers in which she
25 not only punishes them for insurance infractions

1 but imposes an extraordinary ban, a lifetime
2 ban, in perpetuity. These organizations can
3 never provide affinity insurance to the NRA,
4 even if every T is crossed and every I is dotted
5 under New York law. And with respect to Chubb,
6 one of the three, she got them to agree not to
7 provide insurance to the NRA anywhere in the
8 country, not just in New York. She has no
9 jurisdiction out there.

10 So I think, when you look at those
11 three, and I think you -- you -- you -- under
12 Bantam Books, you have to look at the -- the --
13 the -- the -- the -- the government's action as
14 a whole, you see that she encouraged third
15 parties, insurance companies and banks --

16 JUSTICE SOTOMAYOR: I -- I --

17 MR. COLE: -- right?

18 JUSTICE SOTOMAYOR: You still haven't
19 told me how you're going to write it
20 differently than the SG.

21 MR. COLE: The only -- I think the
22 only difference between the SG and us is the SG
23 says the guidance letters might be a closer
24 question, but they support the allegation that
25 she targeted this group and sought to use

1 coercion. And then they say, with respect to
2 the consent letter, there was absolute immunity.
3 But, as I -- as I had the discussion with
4 Justice Alito, they didn't assert absolute
5 immunity with respect to the First Amendment
6 claim that comes out of the consent letter, so
7 --

8 JUSTICE SOTOMAYOR: All right. Thank
9 you.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?
11 Justice Gorsuch?

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

19 Do you see any daylight really between
20 those two standards?

21 MR. COLE: In terms of defining what
22 constitutes --

23 JUSTICE GORSUCH: Yeah.

24 MR. COLE: -- an adverse action?

25 JUSTICE GORSUCH: Right.

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

9 In that context, there's -- this is
10 clearly an adverse action under Title VII, under
11 any English-language understanding of adverse
12 action.

13 JUSTICE GORSUCH: Retaliation is a
14 familiar concept in -- in a lot of our case law,
15 is all I'm trying to point --

16 MR. COLE: Yes. No.

17 JUSTICE GORSUCH: -- out here. Yeah.

18 MR. COLE: And I think, look, you --
19 you could look at this --

20 JUSTICE GORSUCH: And they have gray
21 area cases, all of them.

22 MR. COLE: Right.

23 JUSTICE GORSUCH: Okay.

24 MR. COLE: And I think you -- I think,
25 you know, Bantam Books and retaliation are

1 slightly different, I think, in their -- the way
2 they -- they conceptualize the First Amendment
3 violation. Bantam Books, encouraging a third
4 party to punish speech with coercion.

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

9 MR. COLE: Yeah.

10 JUSTICE GORSUCH: And, certainly, you
11 don't want to be to be limited on remand to
12 arguing just the Lloyd's incident as your --
13 your case.

14 MR. COLE: Well, that's right. I
15 mean, you know, I think right now the most
16 significant harm to the NRA is that the DFS
17 continues to maintain on its website these
18 guidance letters, which essentially put a
19 scarlet letter on the NRA with respect to every
20 bank and every insurance company in New York.
21 Those should be taken down.

22 So we would urge you, both for
23 purposes of guidance to -- to others and because
24 it matters to -- to the -- to the ultimate
25 remedy in this case, to address the -- the --

1 the meeting with Lloyd's, the guidance letters,
2 and the subsequent enforcement action.

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

12 So I would urge you to address the
13 whole picture here, to -- to reinforce Bantam
14 Books, and to reverse on the -- on the merits.

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE KAVANAUGH: Quickly, your view
19 on the four-part test that some of the circuits
20 have developed?

21 MR. COLE: You know, I think it's a --
22 I think it's fine. I think --

23 JUSTICE KAVANAUGH: That's about all I
24 need.

25 (Laughter.)

1 MR. COLE: Yeah. I -- I don't -- I
2 think -- I think it gets --

3 JUSTICE KAVANAUGH: You can explain,
4 but --

5 MR. COLE: Yeah, and I would just say,
6 as long as -- as long as the ultimate inquiry is
7 has the government engaged in coercion, has it
8 invoked --

9 JUSTICE KAVANAUGH: Right.

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

12 JUSTICE KAVANAUGH: And what if New
13 York went to insurance companies and said, we
14 don't want you to continue insuring gun
15 manufacturers or sellers for the same reasons?
16 How does that constitutional analysis work?

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

19 JUSTICE KAVANAUGH: Why? What would
20 it be?

21 MR. COLE: -- there's a First -- but
22 it might --

23 JUSTICE KAVANAUGH: Would it be
24 anything?

25 MR. COLE: It might be a Second

1 Amendment problem. I don't know. But I -- I'm
2 not sure it would. I mean, it's -- if it's
3 focused -- if the government's coercion is
4 focused on conduct rather than speech, then it's
5 not a First Amendment problem.

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

13 But I guess I take your point that
14 Bantam Books, as long as the ultimate action is
15 against speech, it doesn't matter that the
16 intermediary is not itself a speech business.

17 MR. COLE: Yeah, I think the key is
18 it's this use of the third party to punish the
19 target. So, for example, in Bantam Books, if
20 they had said, we're going to encourage
21 insurance -- those -- those providers of
22 insurance, the bookstores --

23 JUSTICE KAVANAUGH: Yeah.

24 MR. COLE: -- to stop providing
25 insurance, that wouldn't be a speech

1 intermediary, but it would be the same problem.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

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

15 MR. COLE: Yeah. Yeah. Thank you.
16 No, this Court did not divest itself of
17 jurisdiction when it granted the case and asked
18 for briefing on only one of the two questions
19 presented.

20 If the Court reverses on the First
21 Amendment ground, it would be totally
22 appropriate to send it back to the Second
23 Circuit to reconsider the qualified immunity
24 question, which is, as Respondent herself argued
25 in the Second Circuit, inextricably intertwined

1 with the merits determination.

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

9 So the -- the Court has jurisdiction
10 over the case. It can reverse on the question
11 it took up and then it can ask the Second
12 Circuit --

13 JUSTICE BARRETT: What about the
14 injunction?

15 MR. COLE: And as to the injunction,
16 it was no final -- this was -- there was no
17 final order. There's no final judgment. And so
18 we have the right to appeal that and we will
19 appeal that when there's a final judgment. This
20 was an interlocutory appeal from a qualified
21 immunity holding only, so we had no obligation
22 to cross-appeal.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: So Justice Kavanaugh

1 picked up on what I think might be a critical
2 distinction, and I'm just trying to understand
3 it.

4 So he said here we have a situation in
5 which the government is not acting on a company
6 that is itself in the business of speech, which
7 is true, unlike Bantam Books, where it was.

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

20 MR. COLE: Yeah.

21 JUSTICE JACKSON: -- even though the
22 government was not coercing the speech itself in
23 the same way as Bantam Books.

24 So how do we avoid a world in which
25 advocacy organizations are exempt from

1 regulation?

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

9 JUSTICE JACKSON: But is it -- it --
10 it's not -- forgive me, but it's not punishing
11 speech. It is censoring speech.

12 MR. COLE: No, it's -- it's -- it's --
13 in -- in -- it's true in Bantam Books it was
14 about --

15 JUSTICE JACKSON: Right.

16 MR. COLE: -- censoring speech, but,
17 again, as I have said --

18 JUSTICE JACKSON: But why isn't that
19 relevant? I mean --

20 MR. COLE: Be -- be --

21 JUSTICE JACKSON: -- Justice Gorsuch
22 suggests that you might have a retaliation
23 claim, which is a kind of First Amendment, it's
24 a species of First Amendment. You allege it in
25 this case. And that makes perfect sense, right,

1 that they're -- they're punishing me because of
2 my speech. That's retaliation.

3 Censorship is something different.

4 And what I'm suggesting is that Bantam Books is
5 a -- basically a censorship case, that what
6 they're doing is forcing these companies to take
7 down or -- or remove speech that the government
8 objects to.

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

14 MR. COLE: Yeah. And -- and if there
15 were a distinction in the First Amendment
16 between censorship and burdening speech because
17 of its content, then maybe that would be
18 correct, but there is no such distinction.

19 The First Amendment requires strict
20 scrutiny when the government censors speech
21 because it doesn't like what it -- its content,
22 when it burdens speech because it doesn't like
23 its content.

24 And in this case, it sought to burden
25 rather than censor. But that doesn't -- it

1 doesn't in any way alter the -- the logic of
2 Bantam Books, the way Bantam Books has been
3 applied for 60 years. It has been applied
4 consistently to situations in which government
5 officials --

6 JUSTICE JACKSON: I've never seen any
7 other situation like this. All of the other
8 Bantam Books situations --

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

10 JUSTICE JACKSON: -- are censorship
11 situations.

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

14 JUSTICE JACKSON: Backpage?

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

22 JUSTICE JACKSON: All right. Thank
23 you.

24 MR. COLE: -- and he did it through
25 coercive means.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. McDowell.

4 ORAL ARGUMENT OF EPHRAIM McDOWELL
5 FOR THE UNITED STATES, AS AMICUS CURIAE,
6 SUPPORTING NEITHER PARTY

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

9 Government officials may criticize
10 private speech that they deem harmful and
11 persuade citizens not to support that speech,
12 but government officials may not threaten to
13 take adverse action against private parties to
14 coerce those parties into penalizing a
15 disfavored speaker.

16 Taking Petitioner's allegations as
17 true, that is what Respondent did here. In the
18 Lloyd's meeting, she explicitly threatened to
19 bring an enforcement action against Lloyd's
20 unless Lloyd's "ceased providing insurance to
21 gun groups, especially the NRA."

22 The Court should find a
23 straightforward First Amendment violation under
24 Bantam Books, but in recognizing the First
25 Amendment claim here, the Court should take care

1 to avoid suggesting any new limits on the
2 government's ability to speak to the public or
3 its ability to provide ordinary legal guidance
4 to regulated entities.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Could the government,
7 rather than coerce a third-party, simply entice
8 them to reach the same suppression -- do the
9 exact same thing and suppress speech?

10 MR. McDOWELL: Well, it depends,
11 Justice Thomas, what you mean by "entice." If
12 it doesn't rise to the level of significant
13 encouragement under --

14 JUSTICE THOMAS: What's the
15 difference?

16 MR. McDOWELL: Well, Blum requires
17 that significant encouragement essentially
18 overwhelm the -- the judgment of the
19 independent -- the intermediary, whereas entice
20 --

21 JUSTICE THOMAS: And what would that
22 look like in this case?

23 MR. McDOWELL: In -- in this case, I
24 mean, I think you could kind of -- I think you
25 could think of the offer of leniency that Vullo

1 made to Lloyd's as either a form of significant
2 encouragement because you're saying we will go
3 easy on you for some legal violations or as a
4 threat basically saying we will bring these
5 enforcement actions against you if you do not
6 stop doing business with gun groups.

7 So coercion and significant
8 encouragement are two sides of the same coin, as
9 Mr. Fletcher said earlier.

10 CHIEF JUSTICE ROBERTS: Counsel,
11 there's considerable overlap obviously with the
12 first case. Could you articulate what the
13 significant differences are between your
14 position in this case and the office's position
15 in the prior case?

16 MR. McDOWELL: There are no
17 differences as to the legal principles. The
18 difference here is that there is a specific
19 coercive threat, particularly in the Lloyd's
20 meeting, where she threatened adverse action in
21 the form of an enforcement action so that
22 Lloyd's would comply with a specific instruction
23 to cut ties with all gun groups, especially the
24 NRA, whereas, in Murthy, the plaintiffs did not
25 identify any instance in which a government

1 official threatened to take adverse action
2 against a social media company to get the social
3 media company to engage in specific content
4 moderation. They just point to generic
5 references to legislative reforms that were
6 untethered from any content moderation request.

7 CHIEF JUSTICE ROBERTS: So is it --
8 are you focusing on the specificity of the
9 government action or -- or what?

10 MR. McDOWELL: In Murthy, there was no
11 threat at all. There was no threat of adverse
12 action at all. There were just talks about
13 legislative reforms, but they were not connected
14 to any specific instruction.

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

19 And that was not in the record in
20 Murthy. It is in the record -- or according to
21 the complaint here with respect to the Lloyd's
22 meeting in particular.

23 JUSTICE ALITO: So does that mean that
24 really the New York officials could have
25 achieved what they wanted to achieve if they

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

16 MR. McDOWELL: No, Your Honor. What
17 we're -- we're primarily --

18 JUSTICE ALITO: Well, what -- if I --
19 if what they did was what I just outlined, would
20 that be a violation of Bantam Books?

21 MR. McDOWELL: Probably not because
22 there would be an attenuation between the
23 invocation of legal consequences and the
24 instruction or the message. But we think the
25 first four paragraphs of the guidance letters,

1 standing alone, are permissible government
2 speech because those four paragraphs involved
3 criticisms of the NRA and urging third parties
4 not to support the NRA. That's the classic form
5 of government speech that falls within
6 longstanding tradition. President Reagan
7 expressly criticized the KKK and urged citizens
8 not to support or associate with the KKK.

9 That's what the first four paragraphs
10 are doing.

11 JUSTICE ALITO: Well, and if they had
12 said everything in those first four paragraphs
13 in some other format, it would be a different
14 matter, but this is a guidance letter.

15 MR. McDOWELL: I take the point that
16 --

17 JUSTICE ALITO: I mean, they
18 understand what a guidance letter is about,
19 right?

20 MR. McDOWELL: I take the point that
21 the fact that it's in a guidance letter is
22 highly unusual. You would expect to see this in
23 an op-ed or -- or a press conference. And that
24 is a factor, I think, in going to the implicit
25 coercive analysis.

1 But, without the fifth paragraph,
2 there's no invocation of an adverse action at
3 all. So the first four paragraphs standing
4 alone, although unusual, would still be
5 permissible government speech.

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

11 (Laughter.)

12 JUSTICE ALITO: If you do it in a more
13 sophisticated manner, you can achieve what you
14 want to achieve.

15 MR. McDOWELL: I -- I don't know,
16 Justice Alito, because I don't know that
17 insurance companies and banks would feel that
18 their will was overborne or that they were
19 really at risk of experiencing adverse action in
20 your hypothetical. That's the question. Are
21 the -- are the parties able to exercise their
22 own independent judgment?

23 JUSTICE ALITO: I mean, seriously, you
24 think that sophisticated insurance companies are
25 not taking into account adverse risks? They

1 probably had heard about the Parkland shooting
2 and the aftermath of it. You think they hadn't
3 already taken this into account, and didn't they
4 already know all the power that Ms. Vullo had
5 over them?

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

12 JUSTICE GORSUCH: You -- you agree,
13 though, the fifth paragraph changes the
14 calculus?

15 MR. McDOWELL: Yes, Your Honor, but I
16 want to be -- I want to say something to make it
17 very clear. We think that this has to be
18 considered alongside the press release and the
19 tweet. We think that's one unit of governmental
20 communication, so it's -- we would not look at
21 the guidance letters alone.

22 And we would look at the guidance
23 letters particularly as a way to reinforce the
24 allegations about the Lloyd's meeting rather
25 than considering the guidance letters as a

1 standalone matter.

2 JUSTICE KAGAN: And why are you so --

3 JUSTICE GORSUCH: Do you -- I'm sorry.

4 Go ahead.

5 JUSTICE KAGAN: No, go ahead.

6 JUSTICE GORSUCH: Just to finish up,
7 do you -- do you view this as -- as Justice
8 Barrett asked, as a clearcut case under existing
9 law?

10 MR. McDOWELL: Yes, Your Honor,
11 especially with the -- with the Lloyd's meeting,
12 absolutely.

13 JUSTICE KAGAN: Why are you so
14 concerned about only looking at the guidance
15 letters in combination with everything else?
16 What would be wrong with looking at the guidance
17 letters alone, given that there is this fifth
18 paragraph?

19 MR. McDOWELL: Yeah. The fifth
20 paragraph, I think, takes you pretty far. And
21 we're not saying that it would be impossible to
22 conclude that that would be a threat alone, but
23 this was one unit of government communication
24 because it was in the same 24-hour period and
25 they were all discussing the same thing.

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

10 And then the Cuomo tweet says the NRA
11 is an extremist organization, and he's urging
12 companies to revisit any ties they have to the
13 NRA and consider their reputations.

14 And our broader concern is just that
15 plaintiffs will -- if the Court were to focus on
16 the guidance letter alone, it could allow
17 plaintiffs to try to cobble together First
18 Amendment claims by pointing to disparate
19 statements of government speech and trying to
20 connect them up to invocations of legal
21 obligations. Obviously, it's easier here
22 because it's in one document, but that's our
23 broader concern.

24 And these are also just very unusual
25 documents, the guidance letters, and it's kind

1 of hard to interpret them in isolation because
2 it is very odd to see this sort of government
3 speech in a guidance document.

4 JUSTICE ALITO: If this case goes back
5 for trial, do -- do you claim that the guidance
6 letters and the enforcement actions would not be
7 relevant and admissible?

8 MR. McDOWELL: No, Your Honor. We
9 think the guidance letters would be relevant.
10 As I said, they reinforce the plausibility --

11 JUSTICE ALITO: Yeah. Okay.

12 MR. McDOWELL: -- of the allegations.

13 JUSTICE ALITO: What about the -- the
14 consent decrees? What about the enforcement
15 actions and the consent decrees?

16 MR. McDOWELL: So the district court
17 did -- did hold that she was entitled for
18 absolute immunity for those. We also think that
19 they were targeting conduct because they appear
20 to have been based on bona fide violations of
21 New York insurance law. So we don't see a free
22 speech concern independently with them.

23 But I do think that the Lloyd's
24 consent decree, again, could bear on the
25 plausibility of the allegations with respect to

1 the Lloyd's meeting in the following way:
2 There's a term in the Lloyd's consent decree
3 that broadly bans Lloyd's from doing even lawful
4 business with the NRA, and that sheds light on
5 the plausibility of the allegation that in the
6 meeting, Vullo was trying to coerce Lloyd's into
7 stopping even lawful business with gun groups.

8 JUSTICE ALITO: Has this Court ever
9 held that every federal and state officer who is
10 the head of an executive department or the head
11 of an independent regulatory agency with
12 enforcement powers has absolutely immunity?

13 MR. McDOWELL: No, Your Honor. But
14 this was a -- the holding of the district court
15 was that this was a -- she was exercising
16 prosecutorial function with respect to the
17 enforcement actions at issue --

18 JUSTICE ALITO: Yeah. Have we ever
19 held that all of those officials have absolute
20 prosecutorial immunity?

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

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas, anything further?

2 Justice Alito?

3 Justice Sotomayor?

4 JUSTICE SOTOMAYOR: So I already
5 previewed what my question would be. How do you
6 see them writing -- wanting the opinion and how
7 do you want it? And tell me what the
8 differences are and why they're important.

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

16 It's just a straightforward way of
17 resolving this case. And as I said, the
18 guidance letters reinforce the plausibility of
19 those allegations because the guidance letters
20 were sent not only to insurance companies but
21 also to banks. And there's no suggestion that
22 the NRA was doing unlawful business with banks.

23 And, of course, the guidance letters
24 also expressly urge insurance companies and
25 banks to cut all ties with the NRA, not just the

1 lawful business. So that -- those aspects of
2 the guidance letters reinforce the allegation
3 that in the Lloyd's meeting, she was trying to
4 coerce Lloyd's to stop all of its business with
5 gun groups, not just to target unlawful conduct.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?
7 Justice Gorsuch?
8 Justice Kavanaugh?
9 Justice Barrett?

10 JUSTICE BARRETT: No.

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

17 MR. McDOWELL: So, Justice Jackson,
18 that gets to, I think, something Mr. Cole was
19 talking about. There are two kind of aspects of
20 this sort of claim. There's the coercion
21 question, and then there's the First Amendment
22 harm question. Here, the First Amendment harm
23 is based on viewpoint discrimination. So, yes,
24 they would have to show that she was motivated
25 by the -- the targeting of a particular

1 viewpoint, as opposed to the targeting of
2 conduct.

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

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Katyal.

16 ORAL ARGUMENT OF NEAL K. KATYAL

17 ON BEHALF OF THE RESPONDENT

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

20 The key fact in this case is the
21 conceded illegal conduct. As Justice Sotomayor
22 said, the three insurers and the NRA broke the
23 law. They were selling intentional criminal act
24 insurance, and all of the products they offered
25 were unlawful because the NRA refused to get a

1 license. That's why Bantam Books is miles away
2 from this case, and it's why the court below
3 found qualified immunity protects Vullo.

4 In this posture, Iqbal demands courts
5 ask, as between the invidious coercion asserted
6 or the obvious explanation she was enforcing the
7 law, is coercion plausible? When illegal action
8 is present, the plausibility burden is higher.
9 To use Mr. Cole's phrase, the government is more
10 likely responding to conduct than, not speech.

11 And four separate doctrines explain
12 why.

13 First, Iqbal held plausibility rules
14 are "especially important in suits where
15 government defendants assert qualified immunity
16 because they must be neither deterred nor
17 distracted from rigorous performance by
18 disruptive discovery. Second, the presumption
19 of irregularity is at its height. Third,
20 absolute immunity protects enforcement actions.
21 And, fourth, causation is more difficult.

22 That is particularly so after
23 Parkland, which led many businesses that
24 Ms. Vullo has no control over, such as United
25 Airlines and Avis Cars, to sever ties with the

1 NRA.

2 For this Court to accept this thin
3 complaint and the teeth of the conceded illegal
4 conduct, it would empower strike suits to enjoin
5 valid enforcement and open sensitive discovery.
6 That's why the courts traditional test here is
7 right.

8 A government official crosses the line
9 from coercion to persuasion when; one, they are
10 objective -- when they are threatening as
11 opposed to encouraging and; two, there is no
12 objectively reasonable basis for their action.

13 The NRA can't meet that test. And
14 that's why they are seeking to weaponize the
15 First Amendment and exempt themselves from the
16 rules that govern you and me, simply because
17 they're a controversial speaker.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Would you spend just
20 a small amount of time explaining why you think
21 the conduct, all of this is infected by, I
22 guess, the one illegal insurance product
23 involved here?

24 MR. KATYAL: So, Justice Thomas, our
25 position and Ms. Vullo's position throughout has

1 been there's not one illegal insurance product,
2 it's all illegal. And the attachments to the
3 complaint attach the consent orders which make
4 that clear.

5 The NRA never got a license for all of
6 the affinity products. It's their burden to
7 prove -- I know the word "lawful insurance
8 product" is in the complaint. They never
9 identified it in the complaint.

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

19 JUSTICE SOTOMAYOR: Sorry, these
20 affinity programs could have been altered. And
21 these consent decrees and what she was seeking
22 was a ban, even of potentially lawful affinity
23 programs.

24 I mean, if they had taken out the
25 intentionality provision or the criminal

1 activity provision and just insured for
2 accidents with guns or things like that, those
3 would have been lawful.

4 MR. KATYAL: So --

5 JUSTICE SOTOMAYOR: She went further
6 and said you can't even have --

7 MR. KATYAL: And DFS and regulators do
8 that all the same, Justice Sotomayor. So there
9 are two buckets of illegal activity, serious
10 illegal activity that Ms. Vullo isolated. And
11 they're at issue in the consent orders by name.

12 One is the provision of intentional
13 act insurance, sometimes called murder
14 insurance. That violates public policy in New
15 York, as almost every state.

16 Second, the fact NRA was doing all of
17 these affinity products without a license. Now,
18 just without a license alone, DFS routinely
19 imposes massive sanctions, including life-time
20 bans.

21 For example, MetLife, which we cite in
22 our brief, in 2014, they were offering -- did
23 the same thing, offering unlicensed insurance
24 with a partner, lifetime ban. Lifetime bans are
25 not unusual. They happen all the time. In

1 securities regulation, you can have a lifetime
2 ban for a meeting.

3 What normally happens, Justice
4 Sotomayor, in these cases is if the NRA ever
5 decided that they wanted to get a license and
6 offer a lawful plan, they then come back and
7 seek a modification of the consent order, but
8 there is nothing unusual whatsoever about a
9 punishment like this.

10 What is unusual is to allow a strike
11 suit like this. Remember, this case was filed
12 during the investigation, in May of 2018, in
13 order to stop it from going forward.

14 The consent orders then happened. And
15 so now they are here trying to effectively undo
16 that enforcement action. And the worry here,
17 it's not just about this case. It's about any
18 case. Because everyone can allege, you know,
19 can stop a plea negotiation or consent set of
20 negotiations by saying you're retaliating
21 against me.

22 I mean, you know, if you just think
23 about what Dinesh D'Souza said publicly and in
24 his filings or Michael Avenatti about the
25 President, I'm being retaliated because of me --

1 because of my speech. And that's the danger.

2 And that's why there has always been an
3 objective unreasonability standard.

4 And Mr. Cole says in his brief at page
5 23, in his reply brief, oh, don't worry, the NRA
6 will never do this, we've only filed one suit on
7 Bantam Books before in our history and it's this
8 one. That's wrong.

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

16 JUSTICE SOTOMAYOR: Counsel, you've
17 answered my question.

18 CHIEF JUSTICE ROBERTS: Mr. Katyal,
19 what do you do about your friend's argument that
20 you've waived this, not raising it in the
21 district court or the court of appeals or in the
22 brief in opposition?

23 MR. KATYAL: So, the -- he has a
24 couple of waiver arguments, which is the "this,"
25 the absolute immunity point?

1 CHIEF JUSTICE ROBERTS: I'm sorry,
2 yes.

3 MR. KATYAL: Yes. So on absolute
4 immunity, I don't think that we waived it. So,
5 first of all, everything I just said before
6 doesn't turn on absolute immunity or not.

7 I'm explaining why this wasn't
8 coercive, what happened in either the Lloyd's
9 meeting or the consent orders.

10 Now, we do think there is a separate
11 argument about absolute immunity. And there is
12 good reason to reach it. It was ventilated down
13 below. And I think it is squarely before this
14 Court.

15 So here is what the district court
16 said at Petition Appendix 53A. This is its
17 holding. "Vullo's decision to enter into the
18 Lockton, Lloyd's, and Chubb consent orders and
19 their precise terms are all entitled to absolute
20 immunity because they are prosecutorial actions
21 premised on enforcement decisions intimately
22 associated with the judicial process."

23 Now, it's fair, as he says, we raised
24 that in the selective enforcement claim, but not
25 in the First Amendment one, but there is good

1 reason for that. Because at that point in the
2 district court, their First Amendment claims
3 were focused entirely or almost entirely on the
4 letters and the press release and absolute
5 immunity we're not claiming attend -- attended
6 to those acts. We're saying it explains what
7 happened in the consent orders and in the 2/27
8 Lloyd's meeting.

9 JUSTICE KAVANAUGH: Mr. Katyal, it's a
10 bit jarring, I guess, for me that the Solicitor
11 General is on the other side from you in this
12 case, given that the Solicitor General
13 represents the United States, and as we know
14 from the last case, has a strong interest in not
15 expanding Bantam Books.

16 So how should we think about that?

17 MR. KATYAL: Yeah. I think, you know,
18 I don't want to characterize their motivations
19 or anything. I just think ultimately when they
20 get to, you know, what -- their test is not
21 different than our test.

22 I think we're all basically in
23 agreement that, for example, that the Second
24 Circuit got it right. The Second Circuit's test
25 is government officials cannot use their

1 regulatory powers to coerce individuals or
2 entities into refraining from protected speech.

3 At the beginning of the --

4 JUSTICE KAVANAUGH: Are you okay with
5 that four-part test?

6 MR. KATYAL: Absolutely. Fine with
7 that.

8 JUSTICE KAVANAUGH: Yes.

9 MR. KATYAL: I think the difference is
10 that we do have to insist on an objective
11 reasonability when you're dealing with
12 enforcement actions, that second prong that I
13 started with.

14 Because otherwise you're opening the
15 door to, as Nieves points out, anyone can --
16 anyone will be highly incentivized if they are
17 the target of an investigation to say I am being
18 retaliated against. So you need to show
19 objective unreasonability. And it's here where
20 their claims fall apart.

21 They were doing massively illegal
22 things. New York enforces that all the time.
23 If their complaint pled something like
24 jaywalking and said: Look, you're not enforcing
25 it, except against us, that states a claim.

1 That's not this complaint.

2 JUSTICE GORSUCH: I'm sorry, Mr.
3 Katyal, just to follow up on Justice Kavanaugh's
4 original question, it seems like we're all in
5 agreement that the law here is clearly
6 established under Bantam Books. And it's just a
7 matter of application. Is that right?

8 MR. KATYAL: So I certainly think the
9 law is clearly established in terms of what I
10 read to you at the Second Circuit.

11 JUSTICE GORSUCH: The standard, yeah?

12 MR. KATYAL: Second Circuit standing.

13 JUSTICE GORSUCH: You think that's
14 clearly established. Okay, thank you.

15 MR. KATYAL: Yes. So the concern is
16 without an objective reasonability test, you
17 open the door to people filing strike suits
18 against enforcement actions all the time.

19 Now, I guess they then say: Well,
20 okay, it's not the 2/27 meeting with Lloyd's or
21 the consent orders themselves. You have got to
22 read that in light of the guidance letters, the
23 guidance letters.

24 We think absolutely, you should look
25 at them all together, as the Solicitor General

1 says.

2 JUSTICE KAVANAUGH: And I think they
3 do say the meeting itself is enough.

4 MR. KATYAL: Yeah. And if that
5 meeting is enough, Justice Kavanaugh, every
6 meeting, every plea negotiation's enough.
7 That's literally what they are. They're done in
8 secret, behind a closed door, to use their
9 insidious language. That's the natural give and
10 take.

11 What Vullo said, according to their
12 own allegations, is we've got some goods on you,
13 and we are willing to look past some in order to
14 make a resolution here.

15 Now, it's true that she and -- and
16 Governor Cuomo have said things about the NRA.
17 There's nothing that ties that give-and-take in
18 the complaint, and certainly not plausibly so,
19 to the -- to the feelings about the NRA.

20 And, by the way, the tweets that my
21 friend has been referring to from Governor Cuomo
22 aren't even in the complaint and were issued
23 months after the complaint was even filed.

24 So I think it's very natural that in a
25 2/27 meeting about resolving these issues,

1 you're going to say: Look, I'm going to look
2 past some issues in order to strike a
3 resolution. That's all that is.

4 JUSTICE JACKSON: Mr. Katyal, can I
5 just ask you about the standards again? So
6 suppose I agree with you that illegality was
7 sort of at the heart of what was going on here,
8 that all of the products were illegal. Let's
9 just assume that I agree with you for a second
10 on that.

11 Doesn't that go less to coercion than
12 to the next question, which is whether or not
13 that coercion of a third party affected a
14 violation of the First Amendment?

15 I mean, the fact that the business was
16 illegal doesn't necessarily mean that the
17 February meeting wasn't coercive. I think
18 government action in enforcing the law is
19 coercive. So isn't it just that she has a good
20 defense to the argument that there's a problem
21 here under the First Amendment?

22 MR. KATYAL: I -- I agree with almost
23 everything except your last sentence, Justice
24 Jackson --

25 JUSTICE JACKSON: Okay.

1 MR. KATYAL: -- and the same point
2 you made in the first argument.

3 JUSTICE JACKSON: Yes.

4 MR. KATYAL: Coercion by itself is not
5 illegal. The government coerces all the time,
6 in plea negotiations, in bringing criminal
7 charges, and the like. What makes it illegal is
8 if you're retaliating against someone's speech.
9 And it's that where the complaint falls apart.

10 JUSTICE JACKSON: Do you concede that
11 in this case?

12 MR. KATYAL: That we retaliated --

13 JUSTICE JACKSON: That if she was
14 coercing -- coercing them under these
15 circumstances, it was retaliation?

16 MR. KATYAL: Well, no. No.

17 JUSTICE JACKSON: Okay.

18 MR. KATYAL: So we think that it was
19 an exercise of legitimate law enforcement. We
20 think they're absolutely fine to bring a
21 complaint that has some direct evidence that
22 says, oh, no, she is -- actually, this is not a
23 prosecution that would ordinarily be brought.
24 This is, rather, a selective targeting of me,
25 that's of course what they lost --

1 JUSTICE JACKSON: But that's at the
2 summary judgment stage, right? I mean, that's
3 not a --

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

5 JUSTICE JACKSON: -- motion to
6 dismiss.

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

17 What they've said in the complaint is
18 we have some comparators, the Optometrists
19 Association, the New York City Bar offers
20 insurance. And they -- I guess they allege
21 there are technical violations there. None of
22 those folks are doing what the NRA --

23 JUSTICE ALITO: I mean --

24 MR. KATYAL: -- was doing, what --

25 JUSTICE ALITO: -- Mr. Katyal, you're

1 shifting the burden to them. This is a First
2 Amendment case. They -- all they need to do is
3 to show that the desire to suppress speech was a
4 motivating factor. They don't have to prove
5 that the -- the regulatory action would have
6 been taken even if Ms. Vullo didn't have this
7 motivation.

8 MR. KATYAL: So -- so I think, Your
9 Honor, that Nieves directly says no to that.
10 What Nieves says is precisely because
11 allegations against enforcement are so easy to
12 allege and difficult to disprove, and because it
13 bumps up against the presumption of regularity,
14 and because it opens the door to massive
15 discovery and to sensitive government files, and
16 because it incentivizes people to make
17 controversial speech and then claim an
18 exemption, no, you insist that this be in the
19 pleading itself.

20 And that's -- and, you know, that's
21 consistent, of course, with like, for example,
22 Iqbal and Twombly, which said similar things
23 even outside of the retaliation context.

24 JUSTICE ALITO: I -- I mean, really
25 this is kind of -- suppose the allegation was we

1 had a meeting with Ms. Vullo and she pulled out
2 a -- a -- a pistol and she held it to our heads,
3 and she said I'm going to blow your brains out
4 unless you stop writing insurance for the NRA.

5 That would not be enough to even
6 allege a Bantam Books violation because she
7 might have taken that same regulatory action --
8 she might have taken regulatory action for a
9 perfectly legitimate reason.

10 MR. KATYAL: Your Honor, there, the
11 government's conduct would be objectively
12 unreasonable, and it would flunk our test. So
13 we think this is not a hard test. We're not
14 seeking to change the law. We're just pointing
15 out that when you're in a situation like this,
16 of conceded illegality, that there is an obvious
17 alternative explanation for what Ms. Vullo was
18 doing here, which was enforcing the law.

19 And this is the worst case in order
20 for you to say this should go past 12(b)(6)
21 because if you allow this case with its conceded
22 illegality to go past -- go past 12(b)(6), then
23 I think any plaintiff will be able to do this.

24 The government --

25 JUSTICE SOTOMAYOR: Sorry. What was

1 the conceded illegality?

2 MR. KATYAL: Yeah, so in the
3 complaint, it attaches the three consent orders
4 by the insurers, all of which say we agree, we
5 were offering illegal insurance. And --

6 JUSTICE SOTOMAYOR: All right. Those
7 are those three.

8 MR. KATYAL: Yes.

9 JUSTICE SOTOMAYOR: And what does that
10 have to do with the NRA and cutting ties with
11 it?

12 MR. KATYAL: Because they -- they were
13 offering -- what they said was illegal was the
14 insurance products with the NRA. That the NRA
15 refused to get a license. And so all of the
16 insurance --

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

21 MR. KATYAL: Yeah. So --

22 JUSTICE SOTOMAYOR: It could use a
23 licensed broker to --

24 MR. KATYAL: If they -- well, once --
25 once the NRA was acting in this way as a bad

1 actor, Ms. Vullo entered a -- entered into a
2 consent order with them for a broader
3 prophylactic set of sanctions. This goes back
4 to your first question. That happens all the
5 time. And the reason for that --

6 JUSTICE SOTOMAYOR: All right. Then
7 stop. And why are the other program --
8 insurance carriers that are -- have these
9 similar policies, the New York State Bar
10 Association, all the other people who have
11 similar policies, why are they different?

12 MR. KATYAL: Because they didn't do
13 what the NRA did here and the three insurers,
14 which was not just act as unlicensed but offer
15 this -- these insurance policies that seriously
16 violate public policy, called -- so-called
17 murder insurance, that cover intentional
18 criminal acts.

19 And when you have those two things
20 together, this enforcement action --

21 JUSTICE SOTOMAYOR: I thought some
22 other did, but I can check the record. Okay.

23 MR. KATYAL: So our -- our position
24 here is that the Court shouldn't -- should
25 absolutely look at both of the -- you know, all

1 the different conduct together. We think any
2 one of them individually doesn't add up to
3 something that's coercive. And together, they
4 don't add up to something that's coercive.

5 The other thing -- other point I would
6 like to make, and this goes back to Justice
7 Alito, to your points about Iqbal and Twombly --
8 the standard about -- at the pleading stage. I
9 think it's relevant to note that in Twombly
10 itself, there were two alternative explanations
11 for what was going on with these big behemoth
12 government -- big -- big behemoth companies.
13 One was that they were conspiring and illegally
14 agreeing to divvy up the market. The other was
15 that they made individual determinations on
16 their own to do that. Here --

17 JUSTICE GORSUCH: And -- and Mr.
18 Katyal, you're right, Twiqbal says you have to
19 look at the whole of the allegations to
20 determine whether it's plausible or not, right?
21 So here, doesn't that mean that we have to look
22 all of the allegations in the complaint?

23 MR. KATYAL: Correct.

24 JUSTICE GORSUCH: Okay.

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

1 think the only -- the one we haven't talked
2 about yet is this reputational risk, these
3 industry guidance letters. And we think these
4 industry guidance letters are so far removed
5 from Bantam Books, we'd urge you to look at
6 footnote 5 in Bantam Books and hold them up
7 against the reputational risk letters.

8 So in that -- in there -- in those
9 letters, they -- doesn't say anywhere, anything
10 like we're going to sue you or we're going to
11 regulate, unlike what the threat was in Bantam
12 Books at footnote 5, bringing in the Attorney
13 General, bringing in the chiefs of police. They
14 don't say that she's even investigating the
15 companies for anything.

16 There's no reference whatsoever to an
17 investigative body. It doesn't even actually
18 say, as the Second Circuit points out, that
19 there is any reputational risk with the banks
20 and insurers maintaining their ties. It says if
21 any reputational risk.

22 And I think the most important
23 point -- and Justice Kagan, this goes to
24 something you said to my friend earlier -- is
25 that these letters are viewed -- you know, these

1 aren't the only industry letters DFS sends.
2 They send them all the time and -- including
3 reputational risk letters. And you have amici
4 after amici before you saying these are
5 milquetoast reputation risk letters.

6 And if you want a good example, take a
7 look at the one they cite in their brief about
8 -- about crypto-currency at page 23. That says
9 companies have, quote, "legally uncertain
10 practices, they make inaccurate or misleading
11 representations and disclosures, and that
12 agencies are evaluating the legal permissibility
13 and compliance with applicable laws and
14 regulations."

15 Of course, if you're going to issue
16 something like that, you're going to have a
17 disclaimer like the one that they point out in
18 the reply brief. This milquetoast industry
19 letter is the opposite. And the concern we have
20 is that if you point to that as part of a Bantam
21 Books claim, then you're going to disincentivize
22 people to issue reputation risk letters, which
23 are obviously important as the amici briefs say.

24 CHIEF JUSTICE ROBERTS: You're --
25 you're not suggesting -- I'm skipping back a few

1 minutes. You're not suggesting that if, for
2 example, after the initial conduct by Ms. Vullo
3 and the reaction of the National Rifle
4 Association, if she instructed her staff to go
5 through these policies and find something, you
6 know, that violates some regulation in there,
7 that she could then defend against -- the basis
8 of terminating all that, on the basis of those
9 newly discovered violations?

10 MR. KATYAL: Right. So there, there
11 would be an objectively unreasonable. That's
12 like going through to try and selectively target
13 one person. Nieves says that's going to be
14 impermissible. The difference, Mr. Chief
15 Justice, with this case is they didn't point to
16 a comparator.

17 What Nieves is asking is, is this an
18 outlier prosecution or not? Their only claim
19 is, as Justice Sotomayor was saying, the
20 Optometrists Association and the like, those
21 folks were not doing the same thing at all. At
22 most, they were offering an unlicensed affinity
23 product. They certainly weren't offering
24 something as dramatically dangerous to public
25 policy as so-called murder insurance.

1 That's why what Ms. Vullo was doing
2 here was absolutely explainable. There's an
3 obvious alternative explanation, to use the
4 Twiqbal words. And that's why, if you let this
5 complaint going forward, you will be then saying
6 to government regulators everywhere that you
7 have to be careful about the speech you say.
8 So, for example, last week some of you heard the
9 President say, you know, we beat the NRA, we're
10 going to beat the NRA again.

11 You heard my -- in the first argument,
12 a discussion about TikTok and -- and, you know,
13 a government -- a hypothetical in which the
14 government attacks TikTok and criticizes it.
15 The -- all of those things -- those statements
16 now will be used as -- in examples in
17 affirmative litigation to -- to issue strike
18 suits to stop enforcement actions by the FTC, by
19 the Justice Department, by states, and the like.

20 And, Justice Kavanaugh, I am troubled
21 by the fact the Solicitor General isn't
22 embracing that, but I do think it's important to
23 point out many states are. You have before you
24 a brief by ten different individuals. I take
25 what the Solicitor General's done is to read

1 paragraph 5 of the reputational risk letter so
2 broadly that it becomes coercive.

3 And we just don't think that opinion
4 can write, that if you tried to do that, you
5 would be opening the door to something very,
6 very dangerous and destructive down the road,
7 which is this case will be cited and they've
8 already had a track record of using a Bantam
9 Books situation in other -- to stop other
10 enforcement actions, not just this one.

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

13 CHIEF JUSTICE ROBERTS: Justice
14 Thomas?

15 Justice Alito?

16 JUSTICE ALITO: You say, in your
17 brief, this case is not even close. Do you
18 stand by that?

19 MR. KATYAL: I do. I do. Under the
20 existing law, yes.

21 JUSTICE ALITO: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 Justice Kagan?

25 Justice Gorsuch?

1 Justice Kavanaugh?

2 Justice Barrett?

3 Justice Jackson? Okay.

4 Thank you, counsel.

5 Rebuttal, Mr. Cole?

6 REBUTTAL ARGUMENT OF DAVID D. COLE

7 ON BEHALF OF THE PETITIONER

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

10 (Laughter.)

11 MR. COLE: With respect to Nieves,
12 he's -- he's taking a particular standard that
13 this Court adopted in the particular context of
14 retaliatory arrests, tens of thousands occur
15 every day, and adopted a particular rule with
16 respect to 1985 -- 1983 damage actions.

17 This is a First Amendment question.
18 It's not a 1983 question. It's a First
19 Amendment question that's before you. This is
20 not a retaliatory arrest case. There is -- this
21 is a case that arises very rarely. We have
22 looked at Bantam Books, and in 60 years, there
23 have been about 20 to 40 cases in the courts of
24 appeals over 60 years involving attempts by the
25 government to coerce a third party to punish

1 somebody else's speech. That's very different
2 from the Nieves situation.

3 So that's just not in the law. You
4 would have to change the law substantially to
5 adopt that.

6 Secondly, with respect to the Cuomo
7 tweets, they were issued after the first
8 complaint, but they were issued before the
9 second amended complaint, which is the operative
10 complaint here. And under Tellabs, they are
11 perfectly appropriate to consider at the motion
12 to dismiss stage, judicial notice. Nobody
13 disputes that he said exactly what he said.
14 They want them out of the case because they
15 demonstrate the impermissible motive.

16 Carry Guard, Carry Guard is a
17 red-herring here. The Carry Guard program was
18 suspended by Locktons and the NRA in November
19 2017. Everything else -- everything that we're
20 talking about here happened after November 2017.
21 Her meeting with Lloyd's, Lloyd's did not
22 underwrite Carry Guards. And her meeting with
23 Lloyd's says cut your ties with gun groups,
24 especially the NRA, because I'm trying to weaken
25 them. Gun groups don't have Carry Guard. Only

1 the NRA did. It wasn't even operative at that
2 point.

3 The guidance letters say nothing about
4 Carry Guard. This is not a guidance letter
5 about insurance infractions. This is a guidance
6 letter about the NRA and other gun promotion
7 organizations.

8 The NRA's insurance was not all
9 illegal. No, the NRA didn't have an insurance
10 license in New York because it's not an
11 insurance company. Nor does the ABA. Nor does
12 the American Ophthalmologists Association, but
13 they all have affinity insurance, and it's just
14 run by brokers, as Justice Sotomayor said, in
15 New York. That's perfectly legitimate.

16 There were some infractions in terms
17 of how it was marketed, how the compensation
18 structures, that were actually quite commonplace
19 in the industry. And she enforced them against
20 them and not against -- against others.

21 Finally, the notion that this is
22 business as usual, business as usual for a -- a
23 -- a government official to speak with a private
24 party and say we'll go easy on you if you aid my
25 campaign to weaken the NRA. That is not

1 business as usual. That is not an ordinary plea
2 negotiation.

3 CHIEF JUSTICE ROBERTS: Thank you.

4 MR. COLE: Nor the is the guidance
5 letter.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 The case is submitted.

9 (Whereupon, at 1:04 p.m., the case was
10 submitted.)

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