No. 22-842

In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,

v.

MARIA T. VULLO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE STATE OF MONTANA, 22 OTHER STATES, AND THE ARIZONA STATE LEGISLATURE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

AUSTIN KNUDSEN
Attorney General

CHRISTIAN B. CORRIGAN
Solicitor General

PETER M. TORSTENSEN, JR.
Deputy Solicitor General
Counsel of Record

MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
peter.torstensen@mt.gov
(406) 444-2026

Counsel for Amicus Curiae State of Montana

(Additional Signatories listed on signature page)

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INTEREST OF AMICI CURIAE[1]

Freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937); *see also Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). But that freedom is "under attack." *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2302-03 (2019) (Alito, J., concurring). Even a cursory review of this Court's docket—which includes a case addressing a related First Amendment state action issue arising when federal officials pressure social media platforms to suppress disfavored speech[2]—shows that free speech concerns are top of mind. Beyond this Court's docket, examples abound of the waning influence of our historically robust commitment to free-speech values, including episodes of students across the country shouting down and disrupting events with controversial speakers.

When attacks on that freedom come in the form of government expression that abridges or regulates private speech, federal courts must police the lines between genuine government speech and "surreptitious[] regulation of private speech." *Shurtleff* v. *City of Boston*, 142 S. Ct. 1583, 1595-96 (2022) (Alito, J., concurring in the judgment) (citation and quotation marks omitted). And carefully drawing that line is vital for state officials, who may still advise regulated

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

[2] *See Murthy* v. *Missouri*, No. 23-411 (U.S. Oct. 20, 2023).

parties of their obligation to comply with applicable laws and even forcefully criticize those parties' views and policy positions without violating the First Amendment. *See Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 71-72 (1963); *Penthouse Int'l, Ltd.* v. *Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991).

To ensure that a vibrant and robust right of free private expression remains "ringed about with adequate bulwarks," *see Bantam Books*, 372 U.S. at 66, the States of Montana, Alabama, Alaska, Arkansas, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wyoming, and the Arizona State Legislature file this amicus brief in support of petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns troubling allegations of governmental abuse of power. As plausibly alleged, Maria Vullo, the head of New York's Department of Financial Services ("DFS"), a state agency tasked with sweeping regulatory authority over financial institutions, leveraged her official authority to stifle the NRA's constitutionally protected political speech. Even though Vullo's politically motivated campaign involved press releases, official regulatory guidance, and ongoing investigations that targeted financial institutions doing business with the NRA, she steered clear of any explicit threats in these communications—at least to the "disinterested ear." *NLRB* v. *Gissel*

Packing, Co., 395 U.S. 575, 619 (1969). But behind closed doors, Vullo threatened several insurance executives with increased regulatory scrutiny if they continued providing services to the NRA. Pet'r.Br.7-12. And the financial institutions picked up the not-so-subtle hint: drop the NRA or else. *See* Pet'r.Br.36-37, 42. After *Bantam Books*, these "informal sanctions" cannot evade First Amendment scrutiny. *See* 372 U.S. at 66-67. Yet the Second Circuit's decision did just that: sidestepping *Bantam Books*' clear instruction and enabling state officials to target and crackdown on their political opponents' protected speech.

Bantam Books rejected a myopic focus on whether officials expressly threaten adverse consequences, instead focusing on whether officials' statements and conduct cross the line between permissible persuasion and impermissible coercion. To do that, courts consider all relevant context, including the official's actual (or apparent) regulatory authority, the specific language in the official's statements, and whether the targeted individuals or entities reasonably perceive the statements as threats. Faithful application of *Bantam Books*' context-based inquiry yields a clear result here: Vullo's politically motivated campaign against the NRA crossed the line from persuasion to impermissible coercion.[3]

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[3] Besides coercion, government officials also become responsible for private conduct when they cross the line from mere persuasion to "significant encouragement." *See Blum* v. *Yaretsky*,

Despite this Court's clear warning to "exercise great caution before extending [the] government-speech precedents," the Second Circuit charged ahead and demonstrated that doctrine's "susceptib[ility] to dangerous misuse." *Matal* v. *Tam*, 137 S. Ct. 1744, 1758 (2017). Rather than safeguarding private expression against government regulation, the decision below subtly shifts the emphasis to safeguarding government expression, opening the door for governments to use the "government-speech doctrine … as a cover for censorship." *Shurtleff*, 142 S. Ct. at 1595 (Alito, J., concurring in the judgment). In its wake, recent federal court decisions have pushed that door wide open.

The Second Circuit's decision gives government officials license to financially cripple their political opponents, or otherwise stifle their protected speech—whether those rivals advocate for environmental protections, school choice, abortion rights, religious liberty, or anything else. As the ACLU observed, the decision gives "[p]ublic officials … a readymade playbook for abusing their regulatory power to harm disfavored advocacy groups without triggering judicial scrutiny."[4] This Court should reverse.

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457 U.S. 991, 1004 (1982). Whether or not *Vullo* crossed that line, she certainly crossed the line from persuasion to coercion.

[4] Br. of Amicus Curiae ACLU in Support of Pl.'s Opp. to Def.'s Mot. to Dismiss, *Nat'l Rifle Ass'n* v. *Cuomo*, No. 18-cv-0566, ECF No. 49-1 (N.D.N.Y. Aug. 24, 2018) ("ACLU.Br."), at 4.

ARGUMENT

I. *Bantam Books*' contextual approach for informal censorship claims requires courts to distinguish between permissible persuasion and impermissible coercion.

Sixty years ago, this Court held that a state commission, without formal authority to "regulate or suppress obscenity," violated the First Amendment when it sought to "suppress[] … publications deemed 'objectionable'" through "informal sanctions," such as the "threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation." *Bantam Books*, 372 U.S. at 66-67. Since then, federal courts evaluate informal censorship claims by distinguishing between "attempts to convince" and "attempts to coerce." *Backpage.com, LLC* v. *Dart*, 807 F.3d 229, 230 (7th Cir. 2015). To draw those distinctions, courts weigh the defendants' actual or apparent regulatory authority over the targeted entity, the language used in the alleged threat, and whether the targeted entity reasonably perceived the statement as a threat. *See id.* at 230-32; *see also infra* Sect.I.B.

But the Second Circuit's decision below flipped this contextual approach on its head, focusing on whether Vullo's statements explicitly threatened adverse regulatory consequences. *See* Appendix, Pet. for Writ of Certiorari ("App."), at 28-29, *Nat'l Rifle Ass'n of Am.* v. *Vullo*, No. 842 (U.S. Feb, 7, 2023) (Vullo's remarks weren't threatening because they "were written in an evenhanded, non-threatening tone," "employed words

intended to persuade rather than intimidate," and "did not refer to any pending investigations or possible regulatory action"). Yet the court dismissed the relevance of Vullo's "direct regulatory authority over the target audience" and the likelihood that some "may have perceived [her] remarks as threatening." *See* App.29. In effect, the court required NRA to point to explicit threats to support its claim. And that myopic focus on explicit threats departs from *Bantam Books*' contextual approach and hands government officials a powerful tool to crack down on disfavored political speech.

A. *Bantam Books* forbids government actors from using implicit threats and other coercive practices to stifle protected speech.

In *Bantam Books*, four New York publishers and a wholesale distributor raised a First Amendment challenge to a state commission's practice of investigating and declaring certain publications "objectionable for sale." 372 U.S. at 61. As part of its practice, the commission issued notices to distributors on official letterhead, flagging certain publications as "objectionable"; thanking the distributor for his "cooperation"; noting its obligation to refer "purveyors of obscenity" for prosecution; and advising the distributor that a list of objectionable publications had been circulated to local police departments. *Id.* at 61-63 & n.5. After receiving the commission's notices, local police officers often visited the distributor to see what actions he had taken. *Id.* at 63. And the distributor complied to "avoid becoming involved in a 'court proceeding' with

a 'duly authorized organization," ceasing further circulation of the listed publications and refusing to fill new orders. *Id.*

Even though the commission had no authority to "regulate or suppress obscenity" and it never expressly threatened to institute criminal proceedings against the distributor, this Court held that the commission's practices violated the First Amendment. *See id.* at 65-68. It "look[ed] through forms to the substance" and concluded that the commission's use of informal methods to suppress the "publications [it] deemed 'objectionable'"—*i.e.*, "threat[s]," "coercion," "intimidation"—violated the First Amendment. *Id.* at 66-67. Nor did the lack of explicit threats, or the distributor's "free[dom]" to ignore the commission's notices, render the distributor's compliance with the commission's directives voluntary. *Id.* at 68. That is, because "[p]eople do not lightly disregard public officers' thinly-veiled threats to institute criminal proceedings," "[i]t would be naïve to credit the State's assertion that these blacklists are in the nature of mere legal advice." *See id.* at 68-69.

Yet the Court was careful to distinguish between "scheme[s] of state censorship" and "private consultation between law enforcement officers and distributors" designed to advise the distributors of their obligation to comply with applicable laws. *See id.* at 71-72 ("[private] consultation … genuinely undertaken with the purpose of aiding [a target entity] to comply with [the] laws and avoid prosecution … [does] not [impair] the full enjoyment of First

Amendment freedoms"). Government officials need not "renounce all informal contacts with persons suspected of violating [the] law[]," *see id.*, but they must avoid the temptation to use "instruments of regulation" divorced from the procedural safeguards of applicable law, *see id.* at 69-70. Even so, government officials must be able to alert regulated parties, publicly or privately, about potential violations of the law.

B. Until recently, lower courts evaluated informal censorship claims using *Bantam Books*' context-specific analysis.

Federal courts evaluating whether government officials have employed coercive means to stifle protected expression "look through forms to the substance," and focus on whether, in context, the official's words and conduct can be reasonably interpreted to threaten adverse consequences. *See id.* at 67.

1. For example, in *Okwedy* v. *Molinari*, a public official sent a letter to a private entity, asking it to remove a controversial message from one of its billboards. 333 F.3d 339, 341-42 (2d Cir. 2003). But in that letter, the official invoked his formal title, hinted that the entity "derive[d] substantial economic benefits from [other billboards]" in the area, and asked the entity to contact his "legal counsel and Chair of my Anti-Bias Task Force." *Id.* Based on that letter, the Second Circuit found that the target entity could have reasonably believed that the official "intended to use his official power to retaliate against it if it did not respond positively to his entreaties." *Id.* at 344; *see also Rattner* v. *Netburn*, 930 F.2d 204, 209-10 (2d Cir.

1991) (letter to target entity reasonably viewed as "veiled threat of boycott or reprisal" and target entity perceived it as such). It didn't matter that the official "lacked direct regulatory control over the billboards." *Okwedy*, 333 F.3d at 344. Instead, the question was whether the defendant "threaten[ed] to employ coercive state power to stifle protected speech," whether through "direct regulatory or decisionmaking authority" or "in some less-direct form." *Id.*

Likewise, in *Backpage.com*, the Sheriff sent a letter to Visa and Mastercard demanding that they cease processing payments for ads on Backpage because some of those "ads might be for illegal sex-related products or services." 807 F.3d at 230. That letter—sent on official letterhead—included an ominous reference to the federal money laundering statute, suggesting that the credit card companies could be subject to prosecution if they didn't comply. *Id.* at 231, 234. Despite the Sheriff's lack of formal authority to regulate the credit card companies, the Seventh Circuit found that the Sheriff's misuse of official authority to "attempt to intimidate" and "threaten[]" those companies violated the First Amendment. *See id.* at 236-37. Because the Sheriff's letter requested a "cease and desist," invoked the companies' legal obligations to cooperate with law enforcement, and required ongoing contact with the companies, the court found that the Sheriff's actions reasonably implied that the companies would face *some* government sanction if they didn't comply. *See id.* at 236. And large companies like Visa and Mastercard face significant incentives to cave to such threats, especially

given the limited value of individual clients and the potential for significant liability or negative press if they refuse to comply. *See id.*

Similarly, in *Blankenship* v. *Manchin*, a coal executive publicly opposed a state constitutional amendment supported by the state governor. 471 F.3d 523, 525-26 (4th Cir. 2006). The governor responded, in a newspaper article, that "tougher scrutiny of [the executive's] business affairs" was "justified." *Id.* A few days after the measure failed, the threat of added regulatory scrutiny materialized. *Id.* at 526-27. In considering whether the governor's remarks were "threatening, coercive, or intimidating," the Fourth Circuit examined the "full context" of his remarks, including the increased regulatory scrutiny. *Id.* at 528-30 (citation omitted). Given that context, the court found that the governor's remarks could reasonably be seen as "activat[ing] the 'punitive machinery of the government' against" a political opponent, and thus "a threat of increased regulatory scrutiny." *See id.* at 529-30 (quoting *Garcia* v. *City of Trenton*, 348 F.3d 726, 727-28 (8th Cir. 2003)).

2. Even when federal courts rejected informal censorship claims, they evaluated government officials' statements in context. For example, in *Hammerhead Enters.* v. *Brezenoff*, a New York government official responsible for administering the provision of welfare benefits sent a letter to several department stores urging them not to carry a board game ridiculing the so-called "welfare bureaucracy." 707 F.2d 33, 34, 36-37 & n.2 (2d Cir. 1983). The Second Circuit held that the

official's letter did not cross the line from persuasion to coercion because it referred to no adverse consequences (at all) for noncompliance, the official had no authority to impose sanctions on the department stores, and no department store was even influenced by the letter. *See id.* at 39-40.

Likewise, in *R.C. Maxwell Co.* v. *Borough of New Hope*, a city council urged the owner of a billboard site to cancel its existing leases and remove the billboards. 735 F.2d 85, 86-87 & n.2 (3d Cir. 1984). The lessee sued, claiming that the city council's "exerti[on of] its sovereign power, coerced [the owner] to order the billboards removed," in violation of its First Amendment rights. *Id.* at 87. The Third Circuit held that the city council's statements and conduct did "not rise to the level of state-coerced action." *See id.* at 88-89. Critical to its analysis was the city council's lack of regulatory authority or conduct suggesting adverse consequences would follow noncompliance. *See id.* And the recipient of the alleged threats denied feeling "coerced or intimidated," but claimed that his decision was made to "secure the good graces of the [city council]." *Id.* (actions taken "to create a receptive climate for future [business] plans do[] not rise to the level of state-coerced action"). The city council's letters, "devoid as they were of any enforceable threats, amounted to nothing more than a collective expression of the local community's distaste for the billboards." *Id.* at 89.

Similarly, in *Am. Fam. Ass'n, Inc.* v. *City & Cnty. of S.F.*, the city adopted a resolution criticizing plaintiff's advertising campaign and urging local television

stations not to air those messages. 277 F.3d 1114, 1119-20 (9th Cir. 2002). Apart from criticizing plaintiff's speech and urging television stations not to air it, "there was no sanction or threat of sanction" if the television stations "[ignored the] request and aired the advertisements." *Id.* at 1125. Nor was there evidence that local television stations perceived the resolution as a threat. *See id.* Because "public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of government power or sanction," the Ninth Circuit rejected plaintiff's First Amendment claim. *Id.* at 1124-25.

And in *Penthouse Int'l, Ltd.* v. *Meese*, a commission tasked with studying the societal effects of pornography—without direct legal or regulatory authority—sent a letter giving companies accused of distributing pornography the opportunity to respond to those allegations before the commission drafted the final report and identified distributors. 939 F.2d 1011, 1012-13 (D.C. Cir. 1991). Recognizing that the commission may have come "close to implying more authority than it had or explicitly claimed," the D.C. Circuit considered the commission's statements and conduct in context and found no "threat[] to use the coercive power of the state against the recipients of the letter." *Id.* at 1015. The Court also rejected the argument that the letter was an implicit threat to blacklist distributors because, at most, the commission threatened potential embarrassment. *See id.* at 1016 (expressing doubt that without a threatened sanction "the

government's criticism or effort to embarrass the distributor threatens anyone's First Amendment rights.").

3. Neither direct regulatory authority nor explicit threats are necessary to state an informal censorship claim. But to be sure, the presence of either (or both) makes the inquiry easier. Even so, the question for courts is whether a government official's statements and conduct reasonably suggest that a target entity's failure to comply with his or her requests will be met with *some* form of coercive state power. After all, the commission in *Bantam Books*, the public official in *Okwedy*, and the Sheriff in *Backpage.com* all lacked direct regulatory authority over their targets, but the courts still found that each implicitly threatened their targets with the use of some coercive state power. *See Bantam Books*, 372 U.S. at 68-69; *Okwedy*, 333 F.3d at 344; *Backpage.com*, 807 F.3d at 233, 236. If the *lack* of direct regulatory authority didn't preclude finding a First Amendment violation in those cases, the *existence* of such authority only makes it easier to find one.

The same goes for explicit threats. There's little doubt that courts will find impermissible coercion when an official refers to adverse consequences—like an "or else" statement—for failure to comply. *See, e.g.*, *Carlin Commc'ns, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1295 (9th Cir. 1987) (prosecutor "exercised coercive power" by threatening telecommunications company with prosecution if it failed to terminate communication company's service). But courts need not ignore government officials' "thinly-

veiled threats" that noncompliance will be met with some government sanction or official harassment. *Bantam Books*, 372 U.S. at 68-69; *see also Okwedy*, 333 F.3d at 344; *Backpage.com*, 807 F.3d at 236-37.

Backpage.com highlights another relevant concern with government officials threatening speech intermediaries. Given the limited value of an individual client to a targeted entity's bottom line—like Visa and Mastercard—the potential for significant liability or negative press for retaining that client often pushes speech intermediaries to cave to official's threats, when the disfavored speakers themselves have much more incentive to resist. *See* 807 F.3d at 236 (arguing that Visa and Mastercard may have "knuckle[d] under to a sheriff" because "Backpage's adult ads must have been a small fraction of their overall revenue"). And many, if not most, informal censorship cases involve government officials targeting, not the disfavored speaker, but the "necessary conduit" to the protected speech. *See LSO, Ltd.* v. *Stroh*, 205 F.3d 1146, 1153

(9th Cir. 2006).[5] "Jawboning"[6] is no doubt tempting to government officials: it enables them to "suppress disfavored speech by dissuading speech intermediaries … from carrying it" without the need for legislation, "essentially evad[ing] the First Amendment's restrictions on government censorship."[7] But government officials may not implement a "scheme of informal censorship" through speech intermediaries, any more than they may directly censor speech they oppose. *See Bantam Books*, 372 U.S. at 69 n.9, 71; *see also Norwood* v. *Harrison*, 413 U.S. 455, 465 (1973) ("'[A] state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'").

Even with these concerns about government jawboning, "government officials need not renounce all

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[5] *See also, e.g.*, *Bantam Books*, 372 U.S. at 61-63 & n.5 (targeted distributor, not publishers); *Okwedy*, 333 F.3d at 341-42 (targeted billboard owner, not plaintiffs who designed controversial message); *Hammerhead*, 707 F.2d at 36-37 & nn.1-2 (targeted department stores, not board game creator); *R.C. Maxwell*, 735 F.2d at 86-87 & n.2 (targeted billboard owner, not lessee); *American Family*, 277 F.3d at 1119-20 (targeted television stations, not plaintiffs who created controversial ads); *VDARE*, 11 F.4th at 1157 (targeted resort hosting an event for a controversial group, but not the group itself); App.3-4 (Vullo targeted financial institutions servicing disfavored group, but not the group itself).

[6] Will Duffield, *Jawboning Against Speech*, CATO POL'Y ANALYSIS, no. 934, Sept. 12, 2022, at 2 (defining jawboning as "the use of official speech to compel private action").

[7] *See id.* at 2, 5.

informal contacts with intermediaries."[8] *Bantam Books* clarified that "consultation genuinely undertaken with the purpose of aiding" an intermediary does not flout First Amendment protections. 372 U.S. at 71-72. Government officials remain free to express their views and to forcefully criticize other speakers and policy positions. *Bond* v. *Floyd*, 385 U.S. 116, 135-36 (1966) ("The manifest function of the First Amendment in a representative government requires that [government officials] be given the widest latitude to express their views on issues of policy."); *see also, e.g.*, *Penthouse*, 939 F.2d at 1015 (government officials are "free to speak out to criticize practices, *even in a condemnatory fashion*, that they might not have the statutory or even constitutional authority to regulate" (emphasis added)). And government officials do not violate the First Amendment simply because they warn regulated parties that they will prosecute—even vigorously so—conduct in violation of the laws they have lawful authority to enforce.[9]

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[8] Jennifer Jones & Mayze Teitler, Missouri v. Biden: *An Opportunity to Clarify Messy First Amendment Doctrine*, KNIGHT FIRST AMEND. INST. (Sept. 27, 2023), https://perma.cc/8PTF-3HRK.

[9] State attorneys general often advise regulated entities, in public letters, that certain practices and conduct may violate state or federal law and encourage those entities to comply with those applicable laws. *See, e.g.*, Letter from Sean D. Reyes, Att'y Gen. Utah & Ken Paxton, Att'y Gen. Texas, to Gary Retelny, President & CEO, Institutional S'holder Servs., Inc., & Kevin Cameron, Exec. Chairman, Glass, Lewis & Co., (Jan. 23, 2023) (advising entities of their obligations under federal and state laws governing proxy advisors), https://perma.cc/3N7A-ALV6; Letter from Karl Racine, Att'y Gen. D.C. to Ann Lesser, Vice President – Lab.,

C. Recently, federal courts—including here—have departed from *Bantam Books*' context-specific inquiry, essentially requiring explicit threats.

Over the past few years, two federal circuits have departed from *Bantam Books*' context-specific inquiry. In their wake, other courts have subtly shifted the inquiry's emphasis to things like "word choice," "tone," and specific references to adverse consequences. The result: enterprising political officials can jawbone speech intermediaries with impunity so long as they avoid making explicit threats.

1. In a split decision, the Tenth Circuit stepped out of line first. *See VDARE Found.* v. *City of Colo. Springs*, 11 F.4th 1151 (10th Cir. 2021). *VDARE* involved a political advocacy group that maintained controversial views on U.S. immigration policy and reserved a resort in Colorado Springs for a future conference. *See id.* at 1156. A few months after VDARE reserved the resort, in August 2017, violence erupted at a political rally in Charlottesville, Virginia. *Id.* at 1157. Two days later, Colorado Springs' mayor issued a statement urging "local businesses to be attentive to the types of events they accept and the groups they invite to our great city," and he said that

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Emp., and Elections, Am. Arb. Ass'n (Nov. 12, 2019) (advising entity of its obligations under state consumer protection and disclosure laws), https://perma.cc/39L2-394P. This practice falls squarely within *Bantam Books*' exception for "consultation genuinely undertaken with the purpose of aiding" a target entity's compliance with the law. *See* 372 U.S. at 71-72.

the city "will not provide *any support or resources to this event*."[10] *Id.* (emphasis added). The mayor didn't specify *which* event, but the next day, the resort announced that it would not host the conference and it cancelled its contract with VDARE. *Id.* VDARE sued, arguing that the mayor's statement, considered in context, constituted a "'threat' or 'warning' to 'local businesses' not to contract with VDARE," and thus violated its First Amendment rights. *See id.* at 1057-60 (cleaned up).[11]

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[10] The mayor issued the following statement:

> The City of Colorado Springs does not have the authority to restrict freedom of speech, nor to direct private businesses like the Cheyenne Mountain Resort as to which events they may host. That said, I would encourage local businesses to be attentive to the types of events they accept and the groups that they invite to our great city.
>
> The City of Colorado Springs will not provide any support or resources to this event, and does not condone hate speech in any fashion. The City remains steadfast in its commitment to the enforcement of Colorado law, which protects all individuals regardless of race, religion, color, ancestry, national origin, physical or mental disability, or sexual orientation to be secure and protected from fear, intimidation, harassment and physical harm.

VDARE, 11 F.4th at 1157.

[11] *VDARE* relied on *Blum* v. *Yaretsky*, 457 U.S. 991 (1982), to find that the mayor's statement didn't constitute state action. *See* 11 F.4th at 1160-61, 1164-68. In doing so, it considered whether the mayor's statement threated to use the state's coercive power, *see id.* at 1164-68—in effect, the same analysis required under *Bantam Books*. *See* 372 U.S. at 66-69.

Rather than analyze the entire context of the mayor's statement to determine whether it constituted an implicit threat, the *VDARE* majority painstakingly analyzed each sentence of that statement in isolation. *See id.* at 1164-68. But even if the majority ostensibly considered the surrounding context, it labored to construe VDARE's allegations in the mayor's favor. *See id.* And the majority's finding that the statement was not a "thinly veiled threat" anchored its conclusions that there was no state action and that VDARE failed to allege a viable First Amendment claim. *See id.* at 1164-68, 1170-75.

The majority rejected VDARE's claims because it found the statement wasn't "*significantly* encouraging or coercive." *Id.* at 1167. But to get there, the majority played ostrich, reading each sentence in isolation and ignoring the natural import of the mayor's words. In doing so, the majority found that mayor's statement included no plausible threats because he simply referenced the limits of his authority, never specifically mentioned VDARE or any distaste for its speech, and merely referenced Colorado law. *See id.* at 1164-66. The majority thought the third sentence, which said that the City "will not provide any support or resources to this event and does not condone hate speech in any fashion," was a closer call. *See id.* at 1166. But it found that the natural import of the resort's cancellation—considering the Charlottesville context—was that the resort could have cancelled its contract with VDARE, not because of the mayor's statement, but "*after observing news coverage of th[e] Charlottesville event*." *See id.* (emphasis added).

The majority, however, buried its head in the sand regarding key aspects of the mayor's statement: (i) he singled out the resort; (ii) in the next sentence, he referred to withholding resources from "this event" and referenced hate speech; and (iii) he invoked Colorado law protecting against "fear, intimidation, harassment and physical harm." *See id.* at 1164-66. What other "event" at the resort involving possible "hate speech" was the mayor's statement referring to if not to VDARE's event?

Judge Hartz dissented, arguing that the most (if not the only) reasonable construction of the mayor's statement that the city "will not provide any resources to this event" was that no police or fire resources would be provided for VDARE's event at the resort. *Id.* at 1175-76 (Hartz, J., dissenting). In his view, VDARE plausibly alleged "[a] government effort to punish or deter disfavored speech" because, in context, the mayor's announcement that he was withholding police services from the event was "an open invitation to those inclined to violence." *Id.* at 1176-77 (citing *Bantam Books*, 372 U.S. at 61-63); *see also id.* at 1177 (arguing that it was "more plausible that the Charlottesville violence enhanced the coercive force" of the mayor's statement "by highlighting the danger to the Resort from the denial of police protection").

2. In this case, the Second Circuit joined the Tenth Circuit in departing from *Bantam Books*' contextual inquiry. *See* App.3-5. The NRA alleged, in part, that the powerful head of New York's DFS leveraged her

regulatory authority to pressure financial institutions to cut ties with the NRA. App.3-15.

Over several months, Vullo pledged to use her regulatory power to combat the availability of firearms, and she investigated technical violations of insurance firms providing services to the NRA, threatened financial institutions behind closed doors to cease providing services for NRA-endorsed affinity-insurance programs, and issued formal guidance and a press release calling on financial institutions to sever their ties with the NRA. App.3-15. Feeling the heat, many of these institutions complied and severed ties with the NRA. App.3-4.

The Second Circuit considered whether Vullo's statements in the private meetings, guidance letters, press release, and consent decrees were "implied threats to employ coercive state power to stifle protected speech." App.22 (quoting *Hammerhead*, 707 F.2d at 39). So far, so good. But when flagging the factors courts consider in this inquiry—like word choice and tone, regulatory authority, perception of a threat—it characterized "whether the speech refers to adverse consequences" as the most important factor, effectively requiring the NRA to show an explicit threat. *See* App.24-25.

Like *VDARE*, *Vullo* applied a diluted version of *Bantam Books*' contextual inquiry, separately evaluating Vullo's statements in the press release, formal guidance, Lloyd's meeting, and consent decrees. *See* App.26-34. *First*, it held that the press release and guidance documents were not threatening—even

though the court conceded they could be perceived as such—because they didn't "refer to any pending investigations or possible regulatory action" (just the "reputational risks" of doing business with the NRA), and they "were written in an evenhanded, nonthreatening tone and employed words intended to persuade rather than intimidate." *See* App.28-31. But by phrasing its warning as one of "reputational risk," DFS communicated to regulated institutions that business relationships with the NRA were off limits. Pet'r.Br.42-45; *see Gissel Packing*, 395 U.S. at 619 (regulated entities "pick up intended implications … more readily dismissed by a disinterested ear").

Second, looking to the meetings and consent decrees, the court found that Vullo's alleged statement in the Lloyd's meeting—that she was more interested in Lloyd's ending its business relationship with the NRA than in pursuing its technical infractions—was made more (not less) reasonable by the investigation into affinity insurance violations. *See* App.31-34; *but see* Cert.Pet.22 (applying selective regulatory scrutiny to the NRA, a political adversary, made Vullo's speech *more* coercive).

Not only did the Second Circuit improperly parse Vullo's statements to conclude that they were "evenhanded" and used "words intended to persuade rather than intimidate," *see* App.29, but it disregarded the vast regulatory authority at Vullo's disposal. *R.C. Maxwell and Penthouse* both rejected informal censorship claims in part because of the *lack* of direct

regulatory authority. *See, e.g.*, *R.C. Maxwell*, 735 F.2d at 88 ("The quantum of governmental authority brought to bear against [the target entity] was far less than that faced by Rhode Island's booksellers [in *Bantam Books*]."); *Penthouse*, 939 F.2d at 1015 (commission had no "prosecutorial power nor authority to censor publications"). But unlike *Bantam Books*, *Okwedy*, and *Backpage.com*—which found plausible allegations of informal threats based on *indirect power* the officials allegedly threatened to wield—Vullo possessed direct regulatory authority over the entities she allegedly threatened with regulatory scrutiny.

The line between persuasion and coercion necessarily depends on context, and one contextual cue is whether government officials have regulatory authority over the entities or individuals they target. By turning a blind eye to Vullo's vast regulatory authority and formalistically relying on her "evenhanded" word choice and tone, *Vullo* cast aside its obligation to look to the substance and blessed government officials' talismanic invocation of certain words and phrases that would be perceived as threats by interested parties but "more readily dismissed by a disinterested ear." *See Gissel Packing*, 395 U.S. at 619.

Both *Vullo* and *VDARE* diluted *Bantam Books*' contextual inquiry and recast it as a formalistic inquiry into whether government officials "formally" banned a speaker from expressing his or her views. *See* App.28-30; *VDARE*, 11 F.4th at 1167, 1172. In so doing, the Second and Tenth Circuits elevated form over function, precisely what *Bantam Books*

instructed courts not to do. *See* 372 U.S. at 67 (courts must "look through forms to the substance").

3. In recent months, both the Fifth and Ninth Circuits have applied *Vullo*'s analytical framework for informal censorship claims, including its emphasis on "whether the speech refers to adverse consequences." *See Missouri* v. *Biden*, 83 F.4th 350, 378 (5th Cir. 2023), *cert. granted sub nom. Murthy* v. *Missouri*, No. 23-411 (U.S. Oct. 20, 2023); *Kennedy* v. *Warren*, 66 F.4th 1199, 1211 (9th Cir. 2023). But the Fifth and Ninth Circuits' reliance on the so-called "most important[]" factor in *Missouri* and *Kennedy*, respectively, posed no real concern in those cases. Yet if that emphasis is uncritically applied elsewhere, it risks handing government officials tools to mask their efforts to crackdown on disfavored political speech.

On one hand, in *Missouri*, the Fifth Circuit catalogued an extensive list of "urgent, uncompromising demands" from White House and Surgeon General officials to different social media platforms to remove posts and user accounts. *See* 83 F.4th at 381-82. When the platforms failed to comply, the official responded with express and implicit threats of retaliation, including "the prospect of legal reforms and enforcement actions." While the court believed this evidence "alone may be enough for us to find coercion," it worked through *Vullo*'s four-factor inquiry for completeness. *Id.* at 382. In considering "perhaps [the] most important factor," *see id.* at 385 (citing App.25)—whether the official refers to adverse consequences for failure to comply—the court had little

difficulty finding that the officials' messages were coercive because they "made express threats," "leaned into the inherent authority of the President's office, and responded to noncompliance with threats of "regulatory changes and increased enforcement actions." *See id.* at 385-87.

Turning to the FBI officials, *Missouri* found the FBI's communications coercive in significant part because "the FBI's requests came with the backing of clear authority over the platforms"—thus, the FBI's "takedown requests" could reasonably be viewed as coercive. *See id.* at 388. Even though the FBI communications did not plainly reference adverse consequences, its inherent authority "*intimate*[*d*] that some form of punishment [would] follow compliance." *Id.* While ostensibly applying *Vullo*'s four-factor test, *Missouri*'s analysis tracks *Bantam Books*' contextual inquiry. And unlike *Vullo*, which largely ignored the significant regulatory authority at Vullo's disposal, *see* App.28-30, *Missouri* recognized that such authority should bear heavily in analyzing whether an official's statements are coercive, *see* 83 F.4th at 388-89. So *Missouri*'s use of *Vullo*'s four-factor test, while potentially concerning in closer cases, provides little opportunity for lower courts to work any mischief.[12]

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[12] Indeed, if applied correctly (as in *Missouri*), there is little daylight between *Vullo*'s four-factor test and *Bantam Books*' contextual inquiry. Problems arise (as in *Vullo*) when courts treat the lack of explicit adverse consequences as dispositive rather than one factor among many.

On the other hand, in *Kennedy*, the facts supporting coercive express or implied threats were much weaker. Senator Warren sent a letter to Amazon's CEO raising concerns that it promoted books containing false information about COVID and vaccines. *See* 66 F.4th at 1204. In that letter, she suggested that Amazon's algorithms promoted those books, which she suggested was "an unethical, unacceptable, and potentially unlawful course of action." *Id.* And she concluded the letter by asking Amazon to review its algorithms, provide a public report detailing the extent to which those algorithms direct consumers to misinformation, and a plan to modify them. *See id.* at 1205. She issued a press release on her website the next day, attaching the letter. *Id.* Working through *Vullo*'s four-factor test, *Kennedy* observed that Warren's letter, which included some "strong rhetoric," was merely an attempt to persuade Amazon to change its policies. *See id.* at 1207-10 Not only that, but as a single legislator removed from the "levers of power," she neither had the authority to sanction Amazon, nor was there any evidence that Amazon perceived her letter as a threat. *See id.* at 1210-11. Looking to the letter and Senator Warren's conduct, *Kennedy* found no evidence of an express threat or any "unspoken 'or else.'" *See id.* at 1211-12. The best plaintiffs could offer was "that Amazon could reasonably have construed the letter as implying that Senator Warren could refer Amazon for criminal prosecution as an accomplice to homicide"—a construction the district court and Ninth Circuit rightly dismissed as the product of "vivid imagination." *Id.* at 1212. On these facts,

Kennedy's application of *Vullo*'s four-factor test largely mirrored *Bantam Books*' contextual inquiry. But in cases like *Vullo* and *VDARE*, where official threats are more subtle, overemphasizing whether an official's statements expressly refer to adverse consequences gives government officials more opportunities to mask efforts to stifle protected speech.

And emphasizing the need for express—or strongly implied—references to adverse consequences leaves disfavored speakers' free speech rights in limbo. Both *Vullo* and *VDARE* showed that government officials can easily package clear threats in "evenhanded" language that targeted entities pick up but which seems anodyne to the "disinterested ear." *Gissel Packing*, 395 U.S. at 619; *see also* App.28-31; *VDARE*, 11 F.4th 1164-68. Rather than overemphasizing explicit threats, this Court should reaffirm *Bantam Books*' contextual inquiry, which focuses on the defendants' actual or apparent regulatory authority over the targeted entity, the language used in the alleged threat, and whether the targeted entity reasonably perceived the statement as a threat. *Backpage.com*, 807 F.3d 230-32.

II. *Vullo*'s and *VDARE*'s expansion of the government speech doctrine risks eroding First Amendment safeguards for political speech.

Both *Vullo* and *VDARE* endorse a subtle expansion of the government speech doctrine that threatens to erode vital First Amendment protections for private political speech. *See Matal*, 137 S. Ct. at 1758 (explaining that the doctrine "is susceptible to dangerous

misuse" and calling for "great caution before extending [this Court's] government-speech precedents"); *see also Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 232 (2015) (Alito, J., dissenting) (majority's extension of the government speech doctrine to Texas' specialty license plate program took "a large and painful bite out of the First Amendment"). As it is, the government speech doctrine operates as an exception to the general rule that government officials may not discriminate against speech based on its content or message. *See Iancu*, 139 S. Ct. at 2299 (citing *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995)).

Shifting away from *Bantam Books*' context-based inquiry for informal censorship claims—which considers whether, in context, a government official is regulating private expression, *see* 372 U.S. at 66-67—*Vullo* and *VDARE* conceive of the government speech doctrine as a collision of "[t]wo sets of free speech rights … : those of private individuals and entities and those of government officials." *See* App.22-23; *VDARE*, 11 F.4th at 1156, 1168. But the "government-speech doctrine is not based on the view—which [this Court] ha[s] neither accepted nor rejected—that governmental entities have First Amendment rights." *Shurtleff*, 142 S. Ct. at 1599 (Alito, J., concurring in the judgment). Instead, it's based on the commonsense notion that government communications do not ordinarily "restrict the activities of … persons acting as private individuals." *Id.* (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 198-99 (1991)). It's no doubt true that the government is "exempt from First

Amendment scrutiny" when it "speak[s] for itself"—"[i]ndeed, it is not easy to imagine how government could function if it lacked this freedom." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467-68 (2009) (citations and quotation marks omitted). The government may select its own views, *see id.*, and promote its own programs and policies, *see Walker*, 576 U.S. at 207-08; *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 559 (2005). But it isn't "exempt from First Amendment attack if it uses a means that restricts private expression." *Shurtleff*, 142 S. Ct. at 1599 (Alito, J., concurring in the judgment).

Practical considerations also support "exercising great caution before extending … [the] government speech precedents." *See Matal*, 582 U.S. at 235. The First Amendment secures private parties' speech rights from government encroachment, not the other way around. U.S. Const. amend. I ("*Congress* shall make no law … abridging the freedom of speech[.]"); *cf. Columbia Broad. System* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* the government; it confers no analogous protection *on* the government"). And government officials don't need the same First Amendment safeguards as private parties because various immunity doctrines—like qualified immunity—shield them from liability in close cases. Even if a state official violates a private party's constitutional right, courts must also find that the right was "clearly established" at the time and that a "reasonable official would understand that what he [was] doing" was unlawful. *See District of Columbia*

v. *Wesby*, 583 U.S. 48, 63 (2018) (quotation marks omitted). Extending this Court's "government speech" precedents to safeguard state official's speech rights gives them one more tool that risks converting the First Amendment into a cudgel for the government rather than a right for the governed.

Even so, this Court's "government speech" cases provide little cover here. To qualify as "government speech," the government must engage in "speech"—"expressive activity that is 'intended to be communicative'" and perceived as such—and the relevant act of communication must be official government action. *See Shurtleff*, 142 S. Ct. at 1598 (quoting *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) and citing *Garcetti* v. *Ceballos*, 547 U.S. 410, 421 (2006)). But this Court's "government speech" cases focus on whether a relevant act of communication was a government message or a private message. *See, e.g.*, *Walker*, 576 U.S. at 208 (specialty license plates are government speech); *Summum*, 555 U.S. at 470 (permanent monuments accepted and displayed on public property are government speech); *Johanns*, 544 U.S. at 562 (beef marketing is government speech); *Shurtleff*, 142 S. Ct. at 1593 (temporary flagpole use is private speech). And, unlike here, each case involved a single expressive conduit (*i.e.*, license plate, monument, beef ads, flags) and concerned the speaker's identity (*i.e.*, government or private party).

But these cases are a poor fit for determining whether a government official's speech simply expresses the government's views and policy positions or

instead regulates private expression. *See VDARE*, 11 F.4th at 1176 (Hartz, J., dissenting) (explaining that government-speech doctrine is invoked to determine whether government control over a forum regulates private speech or simply involves the government determining its own message). The "real question in government-speech cases," then, is "whether the government is *speaking* instead of regulating private expression." *Shurtleff*, 142 S. Ct. at 1595 (Alito, J., concurring in the judgment).

And that's where *Vullo* and *VDARE* got off track. In *Vullo*, the court observed that "[t]wo sets of free speech rights are implicated," and when drawing the line between permissible government persuasion and impermissible coercion, it suggested that the most important factor for determining whether the government lost *its free speech rights* is whether it employed explicit threats in carrying out its duties. App.22-25. Likewise, in *VDARE*, the court explained that "permissible government speech" means that officials are "entitled to speak for themselves [and] express their own views, including disfavoring certain points of view." 11 F.4th at 1168; *see also id.* (arguing that the mayor's speech was "itself protected" and had to "be egregious to be plausibly retaliatory"). But rather than safeguarding private expression, both *Vullo* and *VDARE* subtly shift the emphasis to safeguarding government expression—leaving the door open for governments to use the "government-speech doctrine … as a cover for censorship." *Shurtleff*, 142 S. Ct. at 1595 (Alito, J., concurring in the judgment).

The Ninth Circuit's recent decision in *O'Handley* v. *Weber*, 62 F.4th 1145 (9th Cir. 2023) pushed that door wide open. Petitioner alleged that state officials retaliated against him for disfavored speech—questioning California's election integrity—by "flagging" his account to Twitter, which the officials knew would earn misinformation labels, decreased visibility, and ultimately suspension. *Id.* at 1163. But the court concluded that the officials' speech, behind closed doors directly to Twitter, was protected "government speech" and thus could not sustain a First Amendment retaliation claim. *See id.* at 1163–64. Why? Because flagging posts that violate a "private company's content moderation policy" is a "form of government speech that we have refused to construe as 'adverse action' because doing so would *prevent government officials from exercising their own First Amendment rights*." *Id.* at 1163 (emphasis added).[13] Nor did the state officials' flagging so-called "misinformation" behind closed doors "dilute its speech rights or transform permissible speech into problematic adverse action." *Id.* at 1163-64.[14] Far from subtly shifting the

[13] In *VDARE* and *Vullo*, the Second and Tenth Circuits both construed government officials' statements as mere attempts to persuade, even though the statements could be read to threaten adverse consequences for failure to comply. *See supra* Sect.I.C.1-2. This appears to be another concerning aspect of the government speech doctrine's expansion, which likely provides government officials another tool to suppress disfavored speech.

[14] Whether a government official's statements are private (*O'Handley*), public (*VDARE*), or a mix of public and private (*Vullo*), *Bantam Books*' inquiry requires courts to consider whether the way those statements are delivered would affect a

emphasis to safeguarding government expression, the Ninth Circuit's decision leaves the government speech doctrine boundless and in need of correction. This Court should therefore take this opportunity to clarify the metes and bounds of the government speech doctrine.

CONCLUSION

Freedom of speech "is essential to free government" because "free and fearless reasoning and communication of ideas" enables the "discover[y] and spread [of] political and economic truth." *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940). Government officials may advocate preferred policy positions and criticize contrary positions, but they may not use "the government-speech doctrine" to "surreptitiously engage[] in the 'regulation of private speech.'" *Shurtleff*, 142 S. Ct. at 1595-96 (Alito, J., concurring in the judgment) (quoting *Summum*, 555 U.S. at 467).

Bantam Books' context-based inquiry places the emphasis where it should be—whether an official's statements and conduct cross the line from persuasion to coercion. But *Vullo*'s and *VDARE*'s emphasis on explicit threats, and *Vullo*'s disregard for the relevance of direct regulatory authority, hands "[p]ublic officials … a readymade playbook for abusing their regulatory power to harm disfavored advocacy groups without triggering judicial scrutiny." ACLU.Br.4. In *Vullo*, that meant pairing backroom threats with

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target entity's perception of the message. That is, whether it would make the official's message more or less coercive.

public guidance documents and press releases that seemed anodyne to the general public but which made clear to the targeted insurance companies that business relationships with the NRA were off limits. *See* App.26-34. In *VDARE*, like in *Backpage.com*, it meant pairing subtle threats with formal criticism of disfavored speech or conduct the official wants to eradicate. *See VDARE*, 11 F.4th at 1157, 1164-68; *see also Backpage.com*, 807 F.3d at 237-38 ("The judge was giving official coercion a free pass because it came clothed in what in the absence of any threatening language would have been a permissible attempt at mere persuasion.").

If the Second Circuit's decision is left standing, government officials will likely employ similar tactics to stifle disfavored speakers.[15] As in *Vullo*, officials could target financial institutions that advocacy groups depend on to engage in robust political advocacy—whether related to school choice, abortion, religious liberty, or environmental issues—or, like in *VDARE*, they could simply target private facilities that host events for such groups. In either case, the path forward is clearly marked. *Bantam Books* and its progeny recognize that government officials' subtle threats to use coercive state power can snuff out disfavored speakers as, if not more, effectively than explicit threats. If this Court doesn't shut down that path,

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[15] Duffield, *Jawboning Against Speech*, *supra* note 6, at 5-6 ("Using threats of prosecution or regulation to compel private speech suppression simply launders state censorship through private intermediaries.").

"where would such official bullying end … ?" *Backpage.com*, 807 F.3d at 235. This Court should reverse the Second Circuit's decision.

Respectfully submitted.

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AUSTIN KNUDSEN
Attorney General
CHRISTIAN B. CORRIGAN
Solicitor General
PETER M. TORSTENSEN, JR.
Deputy Solicitor General
Counsel of Record
MONTANA DEPARTMENT
OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
(406) 444-2026
peter.torstensen@mt.gov

Counsel for Amicus Curiae
State of Montana

ADDITIONAL SIGNATORIES

STEVE MARSHALL
Attorney General of Alabama

TREG TAYLOR
Attorney General of Alaska

TIM GRIFFIN
Attorney General of Arkansas

CHRISTOPHER M. CARR
Attorney General of Georgia

RAÚL R. LABRADOR
Attorney General of Idaho

BRENNA BIRD
Attorney General of Iowa

KRIS KOBACH
Attorney General of Kansas

RUSSELL COLEMAN
Attorney General of Kentucky

LIZ MURRILL
Attorney General of Louisiana

ANDREW BAILEY
Attorney General of Missouri

MICHAEL T. HILGERS
Attorney General of Nebraska

JOHN M. FORMELLA
Attorney General of New Hampshire

DREW H. WRIGLEY
Attorney General of North Dakota

DAVE YOST
Attorney General of Ohio

GENTNER F. DRUMMOND
Attorney General of Oklahoma

ALAN WILSON
Attorney General of South Carolina

MARTY J. JACKLEY
Attorney General of South Dakota

JONATHAN SKRMETTI
Attorney General and Reporter of Tennessee

SEAN D. REYES
Attorney General of Utah

JASON MIYARES
Attorney General of Virginia

PATRICK MORRISEY
Attorney General of West Virginia

BRIDGET HILL
Attorney General of Wyoming

WARREN PETERSON
President of the Arizona Senate

BEN TOMA
Speaker of the Arizona House of Representatives