

Government Coercion of Private Speech: *National Rifle Association (NRA) v. Vullo*

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On May 30, 2024, the Supreme Court released its opinion in *National Rifle Association (NRA) v. Vullo*, a case addressing the First Amendment limitations on coercive government speech. Although the First Amendment does not generally prevent the government from expressing its own viewpoints, there are some instances in which government speech may infringe on private individuals' First Amendment rights. As such, courts must draw fine lines between permissible government attempts to “convince” others and advocate for or against a viewpoint, and prohibited attempts to “coerce” private entities in order to punish or suppress disfavored speech.

In *Vullo*, an appeal from the Second Circuit, the Court held in a unanimous opinion that the NRA had plausibly alleged in its complaint that a New York state government official violated the First Amendment by coercing regulated entities into disassociating from the NRA in order to punish or suppress the NRA's gun-promotion advocacy. While the Court reiterated that its decision did not “break new ground” according to existing precedent, *Vullo* may provide helpful guidance in determining the bounds within which government officials may advocate for certain positions. The outcome in the case may have implications for federal government officials, including Members of Congress, in their communications with private entities. This Legal Sidebar discusses relevant First Amendment principles and case background, summarizes the Court's opinion, and provides some potential considerations for Congress.

First Amendment Background

The [Free Speech Clause](#) of the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech . . .” The First Amendment protects against not only state or federal government action that seeks to restrict or censor protected speech, but also [retaliation](#) by a government official against a person exercising their First Amendment rights. For example, government action that is taken because of an individual's expressive activity and that adversely affects the speaker—such as action resulting in dismissal from a job or criminal prosecution—may be grounds for a First Amendment challenge. Government action falling short of actual punishment, such as threats or intimidation, may also implicate the First Amendment by causing a “[chilling effect](#)” on speech.

The First Amendment, the Supreme Court has observed, “restricts government regulation of private speech; [it does not regulate government speech.](#)” Under the [government speech doctrine](#), the government

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is entitled to “speak for itself” and to “select the views that it wants to express.” The Court [has said that](#) the government would not be able to function without the ability to favor and disfavor points of view.

While the government is free to favor some viewpoints over others in its own speech, [it is not free](#) to punish or threaten private actors for expressing different views. Nor may the government use its power to induce private parties to suppress the speech of others through attempts at [indirect censorship](#). The distinction between the government’s right to speak for itself and the First Amendment’s prohibition on government censorship of speech often comes down to whether the government is attempting to “convince” versus attempting to “coerce.” This inquiry originated in the Supreme Court’s 1963 decision, [Bantam Books, Inc. v. Sullivan](#). In *Bantam Books*, the Court reviewed the actions of a Rhode Island commission that was created to educate the public regarding published material that may contain obscenity or indecent material for minors. The commission sent notices to book distributors in the state designed to notify them that certain books or magazines they distributed had been deemed objectionable for minors, and that the lists of objectionable materials had been sent to local police departments. The commission requested the distributors’ cooperation in preventing the distribution of these materials and reminded them the commission had a duty to recommend cases to the Attorney General for prosecution of “purveyors of obscenity.” Police then followed up with distributors to ensure compliance with the notices.

The Court held that the notices constituted a “system of informal censorship” designed to intimidate distributors into removing materials in violation of the First Amendment. The commission’s “threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation” helped the commission achieve its objective of suppressing publications, which the Court referred to as a “system of prior administrative restraints of expression.” The Court explained, however, that not all informal government communication with third parties regarding speech violate the Constitution, indicating that “consultation” that “is genuinely undertaken with the purpose of aiding” third parties in complying with the law would be constitutionally permissible.

Numerous lower court cases have grappled with the principles set forth in *Bantam Books*, including [one 2023 case](#) from the Ninth Circuit in which the court explained that “*Bantam Books* and its progeny draw a line between coercion and persuasion: The former is unconstitutional intimidation while the latter is permissible government speech.” Courts have acknowledged that it is not always clear [where to draw that line](#), and making the determination often requires an examination of the totality of the circumstances. [Multiple circuit courts](#), including the Second Circuit in its decision in *NRA v. Vullo*, have utilized a nonexclusive four-factor test to distinguish between attempts to convince and attempts to coerce: (1) word choice and tone, (2) the existence of regulatory authority, (3) whether the government’s speech was perceived as a threat, and (4) whether the government’s speech refers to adverse consequences.

As discussed in this separate [Legal Sidebar](#), attempts by government actors to influence private action by threat of future regulation can be considered coercive. Some scholars have used the term “[jawboning](#)” to [refer to](#) informal pressure or persuasion by regulators, including Members of Congress or officials in the executive branch, to influence or encourage self-regulation by private entities. Jawboning [may present constitutional issues](#) when the government’s informal attempts to encourage third-party regulation involve matters concerning speech.

***NRA v. Vullo*: Background**

NRA v. Vullo involved allegations of government coercion of private entities for the purpose of suppressing a disfavored viewpoint. The plaintiff, the NRA, claimed that defendant Maria Vullo, while serving as the superintendent of the New York State Department of Financial Services (DFS), encouraged insurance companies to discontinue their relationship with the NRA in an effort to retaliate against and chill the NRA’s gun rights advocacy. DFS oversees insurance companies and financial services institutions doing business in the State and has the authority to initiate investigations and civil

enforcement actions against regulated entities. DFS also may refer potential criminal violations for prosecution.

In 2017, DFS opened an investigation into the insurance practices of an NRA-endorsed affinity insurance program that was allegedly offering insurance coverage for intentional criminal acts involving firearms, in violation of New York insurance law. In the midst of the investigation, and following a school shooting in Parkland, Florida, [Vullo allegedly met](#) with an insurance company involved in the investigation and “presented her views on gun control and her desire to leverage her powers to combat the availability of firearms.” During that meeting, Vullo allegedly explained that the company could “avoid liability” for various regulatory infractions unrelated to its business with the NRA if it ceased providing insurance to gun groups, including the NRA. Vullo also issued a pair of guidance letters to DFS-regulated insurance entities and financial institutions, advising the entities to continue to evaluate and manage risks, including [reputational risks](#), that could arise from associations with the NRA. In the wake of the Parkland shooting, multiple financial institutions severed ties with the NRA, and some banks withdrew their bids for the group’s business. The NRA claimed it encountered difficulty obtaining corporate insurance coverage to replace the coverage it lost.

Two of the insurance companies involved in the DFS investigation also entered into consent decrees in which they admitted liability for providing illegal insurance coverage and agreed not to provide any NRA-endorsed insurance programs in the future. At least one of the insurance companies publicly severed ties with the NRA.

The NRA sued, claiming that Vullo violated the First Amendment by coercing DFS-regulated entities to punish or suppress the NRA’s “pro-second Amendment viewpoint.” The NRA asserted both censorship and retaliation First Amendment claims. Vullo moved to dismiss, arguing that the conduct alleged in the NRA’s complaint did not amount to impermissible coercion. The [district court](#) denied Vullo’s motion to dismiss, ruling that the facts pled in the complaint could plausibly be “interpreted as a veiled threat to regulated industries to disassociate with the NRA or risk DFS enforcement action.”

[The Second Circuit reversed](#), concluding that Vullo’s actions, as alleged in the complaint, constituted permissible government speech and legitimate enforcement of New York law. Acknowledging the distinction between government officials’ “attempts to convince and attempts to coerce,” the Second Circuit utilized the four-factor test described above to analyze Vullo’s actions and ultimately concluded they did not cross a constitutional line.

NRA v. Vullo: Supreme Court Opinion

In a unanimous opinion authored by Justice Sotomayor, the Supreme Court reversed the Second Circuit, [holding](#) that the NRA had plausibly alleged that Vullo “violated the First Amendment by coercing regulated entities to terminate their business relationships with the NRA in order to punish or suppress gun-promotion advocacy.” According to the Court, it was not “[break\[ing\] new ground](#)” in deciding the case; rather, it was reaffirming general principles from *Bantam Books*.

The Court [agreed](#) that Vullo was “free to criticize the NRA” and could do so “forcefully in the hopes of persuading others to follow her lead,” but she was prohibited from using “the power of the State to punish or suppress disfavored expression.” In applying the *Bantam Books* framework, the Court [acknowledged](#) the four-factor test as a “helpful guidepost[] in answering the question whether an official seeks to persuade or, instead, to coerce.” The Court viewed the factors as useful in analyzing the [ultimate question](#) of whether the NRA “plausibly alleged conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the [NRA’s] speech.”

Accepting the factual allegations of the complaint as true at this stage in the litigation, the Court concluded that the NRA had “plausibly alleged that Vullo violated the First Amendment.” The Court

focused on Vullo's authority, observing that "the greater and more direct the government official's authority, the less likely a person will feel free to disregard a directive from the official." As the DFS superintendent, Vullo had direct regulatory authority over insurance companies in New York, which included the ability to initiate investigations, refer cases for prosecution, and impose monetary penalties.

Considering her alleged actions against the backdrop of her broad authority, the Court emphasized Vullo's alleged communications with one insurance company in which she suggested she may be inclined to ignore other unrelated infractions if the company ceased providing insurance to gun groups. This sent a "loud and clear" message that the insurance company "could avoid liability for unrelated infractions" if it aided DFS's campaigns against gun groups by terminating its business relationships with them."

According to the Court, these communications could be "reasonably understood as a threat or an inducement," either of which could be considered coercive.

This incident, plus other allegations in the complaint "viewed in context," reinforced the NRA's claim that Vullo coerced the third-party insurance companies. The Court indicated that the Second Circuit was only able to reach its contrary conclusion "by taking the allegations in isolation and failing to draw reasonable inferences in the NRA's favor." In the Court's view, this approach failed to heed long-standing precedent on the standards for evaluating a motion to dismiss. Nevertheless, the Court acknowledged that while at the pleading stage the NRA had plausibly alleged a First Amendment claim, discovery or other developments in litigation could ultimately lead to a different outcome for the NRA.

In reaching its decision, the Court also emphasized the overarching First Amendment concerns with the "intermediary strategy" Vullo used to target advocacy. According to the Court, this type of coercive conduct would effectively allow government officials to "expand their regulatory jurisdiction to suppress the speech of organizations that they have no control over." The Court reiterated that government officials may "forcefully condemn[] views with which they disagree" and that the "ballot box" remains the most effective check on viewpoint discrimination in government speech. When the government attempts to use private intermediaries to suppress disfavored speech, however, there is no similar check on governmental viewpoint discrimination.

Justice Gorsuch wrote separately in a concurrence to reiterate that the four factors utilized by the Second Circuit and discussed in the majority opinion are "just" guideposts and that lower courts should focus on the "critical" question of "whether the plaintiff has 'plausibly alleged conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff's speech.'"

Justice Jackson, while concurring with the majority opinion, also wrote separately to discuss her view of the relationship between government coercion and a First Amendment violation. While Justice Jackson agreed that coercion of a third party can be "the means by which the government violates the First Amendment," she suggested that courts must also assess how that coercion actually violates a speaker's First Amendment rights. This case, according to Justice Jackson, "focused almost exclusively on whether Vullo's conduct was coercive." In her view, the lower courts should also independently evaluate the NRA's stated grounds for its First Amendment claims: censorship and retaliation.

Considerations for Congress

The First Amendment considerations discussed in *Vullo* may be relevant to Members of Congress who engage with third parties to express their views on particular matters. Government officials, including legislators, retain the right to select the views they want to express, and courts have held that legislators generally share the same First Amendment rights as members of the public. Those rights, however, are limited by the principles from *Bantam Books* and now *Vullo*: a government official cannot coerce a private party with threats of regulation in order to punish or censor disfavored speech.

Members of Congress have been subject to lawsuits in which plaintiffs alleged their actions constituted unconstitutional coercion under the *Bantam Books* framework. The factual circumstances in some of these cases involved statements made or letters sent by Members to private companies encouraging them to take certain action. While [some courts](#) have evaluated the merits of these claims under the *Bantam Books* framework, other courts have [dismissed claims](#) for procedural reasons such as lack of standing. In at least one case, the court found that the Member was [entitled to immunity](#) under the Speech or Debate Clause, discussed in this [CRS Report](#), which provides Members with immunity for “legislative acts” taken in the course of their official responsibilities.

The First Amendment principles addressed in *Vullo* may also be relevant to Congress’s oversight of agency regulators who may engage in “jawboning.” Executive branch “jawboning” was at issue in the Court’s recent [Murthy v. Missouri](#) decision. In *Murthy*, the plaintiffs alleged that federal government officials violated the First Amendment when they coerced social media companies to remove content from their platforms. Among other allegations, the plaintiffs claimed that the government officials directly communicated with social media companies through emails and meetings, or publicly denounced the social media companies’ actions in a threatening and coercive manner, in order to further particular policy objectives. The Court issued its decision on June 26, 2024, holding that the plaintiffs failed to establish they had standing to bring their case. Justice Alito, however, [wrote in dissent](#) that he would have applied the *Bantam Books* and *Vullo* principles to determine whether the defendants had engaged in coercion.

Ultimately, the Court’s decision in *Vullo*, while not “break[ing] new ground” in the words of the Court, may provide helpful guidance in evaluating whether government officials’ communications cross the line from convincing to coercing. Although the Court suggested that the four-factor test various circuit courts have utilized provides “helpful guideposts,” it declined to adopt a rigid test going forward. Thus, it appears that the line between permissible speech and unconstitutional coercion continues to be governed by the general fact-bound and contextual principles of *Bantam Books* and its progeny. In his *Murthy* dissent, however, Justice Alito observed that the *Vullo* decision utilized “[three leading factors](#)” to distinguish between permissible persuasion and unconstitutional coercion: “(1) the authority of the government officials who are alleged to have engaged in coercion, (2) the nature of statements made by those officials, and (3) the reactions of the third party alleged to have been coerced.” Although his dissent is not binding law, it may provide insight into how the Court will apply *Vullo* in future cases.

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