

## What the Supreme Court's NRA v. Vullo Free Speech Ruling Means for Municipal Employees

A unanimous Supreme Court recently reaffirmed the longstanding principle that government officials who use the power of their office to punish or suppress the views of private organizations by threatening their business partners violate the First Amendment. This is true even if the official is investigating “concededly illegal” activities.

This case was brought by the National Rifle Association (NRA) against Maria Vullo, the former superintendent of the New York Department of Financial Services (DFS). The NRA claimed that Vullo violated the NRA's First Amendment rights by taking regulatory action to urge financial companies to stop managing or underwriting insurance policies the NRA offered to its members.

As the head of DFS, Vullo could initiate investigations, refer cases for prosecution, announce civil charges, and enter consent decrees with financial institutions operating in New York. In conversations with companies that administered or underwrote NRA-provided insurance policies, Vullo allegedly indicated that DFS would be less likely to investigate or pursue regulatory enforcement actions if those companies ceased doing business with the NRA. DFS also issued letters to regulated entities urging them to “review any relationships” they have with the NRA and to “take prompt action” to manage any associated risks. After several insurance companies did cut ties, Vullo and Governor Cuomo issued a joint press release encouraging others to follow their lead.

The Supreme Court noted that while government officials may share their views and forcefully criticize the NRA, they may not use the state's regulatory power to convince private organizations to terminate business relationships with the NRA to “punish or suppress disfavored speech.”

### What Separates Speech from Coercion?

There is no bright line separating allowable government speech from coercion that violates the First Amendment. Courts analyze the facts of each case, often considering the circumstances surrounding the speech to draw inferences about whether the private organization could perceive communication as threatening or compelling action, including:

- specific word choice and tone
- whether the official had direct authority over the entity
- references to consequences that may follow the conversation
- the reaction of the party

No one factor is determinative. The Court found that the NRA stated a First Amendment claim despite the polite tone of Vullo's communications. Moreover, the Court held that promises of regulatory *inaction* can be just as coercive. “The Constitution does not distinguish between ‘comply or I'll prosecute’ and ‘comply and I'll look the other way.’” Promising to drop a regulatory action is equally unacceptable as threatening to initiate one — both can improperly threaten or induce action in a private party.

The fact that the insurance companies were violating New York law also did not prevent Vullo's actions from being coercive. The “conceded illegality” of the insurance companies did not “insulate Vullo from First Amendment scrutiny.” After receiving a tip, DFS investigated Carry Guard, an insurance product that the NRA offered its members. DFS determined that Carry Guard policies unlawfully covered costs of “intentional criminal acts” that injured or killed another person, and entered consent decrees with the financial institutions that administered and underwrote the policies. Vullo then publicly urged other financial services institutions to consider and manage the risks of being associated with the NRA and suggested that DFS would be less interested in pursuing further investigations of “technical infractions” of insurance law by organizations without NRA connections. The Court notes that “although Vullo can pursue violations of state insurance law, she cannot do so in order to punish or suppress the NRA's protected expression.” If Vullo wielded regulatory power to suppress the NRA's gun promotion activities, it would violate the First Amendment even if the ensuing enforcement of unlawful insurance policies were sound.

Finally, it did not matter that Vullo attempted to regulate the NRA's business partners rather than the organization itself. The Court found Vullo's “intermediary strategy” of allegedly targeting the NRA's connections to stifle its gun-promotion activities raised the same

constitutional concerns as directly suppressing the NRA's speech. The court raised concerns that allowing Vullo's actions risked government officials attempting to "expand their regulatory jurisdiction" to suppress the speech of organizations they did not directly oversee. The ruling affirms that an official "cannot do indirectly what she is barred from doing directly."

#### What Does This Mean for Municipal Employees?

The Supreme Court's decision confirmed that government officials may not use, or threaten to use, their enforcement discretion to suppress the speech of private organizations with whom they disagree. This is the case even where the official does not interact with the private organization directly but instead attempts to starve the private organization of its business partners. Even if a regulatory investigation is lawful, the motivation behind it may still make it impermissible.

The ruling makes clear that the inquiry into whether a government official's expression of her point of view crossed into coercion is highly contextual and fact dependent. Municipal employees worried that their speech or conduct may approach this ill-defined line should consult with counsel.

The *Vullo* decision is available [here](#).

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