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 OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, NATIONAL COALITION AGAINST CENSORSHIP, THE RUTHERFORD INSTITUTE AND FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER AND REVERSAL

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QUESTION PRESENTED

Does the First Amendment allow a government regulator to threaten regulated entities with adverse regulatory actions if they do business with a controversial speaker, as a consequence of (a) the government's own hostility to the speaker's viewpoint or (b) a perceived "general backlash" against the speaker's advocacy?

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INTEREST OF *AMICI CURIAE*[1]

The **Foundation for Individual Rights and Expression** (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases implicating expressive rights. *E.g.*, Brief of FIRE *et al.* as *Amici Curiae* in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021); Brief of FIRE as *Amicus Curiae* in Support of Petitioner and Reversal, *Counterman v. Colorado*, No. 22-138, 600 U.S. 66 (2023).

The **National Coalition Against Censorship** (NCAC), founded in 1974, is an alliance of more than 50 national non-profit educational, professional, labor, artistic, religious, and civil liberties groups united in their commitment to freedom of expression. NCAC, through direct advocacy and education, has long opposed government attempts to censor or criminalize protected expression. The positions advocated in this brief do not necessarily reflect the views of NCAC's member organizations.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed money intended to fund preparing or submitting this brief.

The **Rutherford Institute** is a nonprofit civil liberties organization. Founded in 1982 by its President, John Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been violated and educates the public about constitutional freedoms and human rights. The Rutherford Institute works to ensure that the government abides by the rule of law and is held accountable when it infringes Americans' rights.

The **First Amendment Lawyers Association**, comprised of attorneys whose practices emphasize defense of Freedom of Speech and of the Press, advocates against all forms of government censorship. Since its founding its members have been involved in many of the nation's landmark free expression cases and have frequently addressed First Amendment issues *amicus curiae*.

SUMMARY OF ARGUMENT

The United States is justifiably proud of its First Amendment jurisprudence, which provides that speech is presumptively protected from governmental control and requires any regulation of expression be narrow, precisely defined, and governed by due process. But those formal legal protections count for little if public officials can evade them simply by couching censorship demands as veiled threats and vague demands for cooperation.

The problem of informal censorship was well understood by the founding generation. Benjamin Edes and John Gill, firebrand publishers of the *Boston Gazette,* and principal opponents of the Stamp Act, were threatened with more than direct legal sanctions

for their incendiary words. On one occasion in 1757 they were summoned by Boston's selectmen, who were put off by the duo's writings that were said to "reflect grossly upon the receivd religious principles of this People which is verry Offensive." Noting the *Gazette* derived income from its printing business for the town, Boston's elders warned "if you go on printing things of this Nature you must Expect no more favours from us." Stephen D. Solomon, REVOLUTIONARY DISSENT 57–58 (St. Martin's Press 2016). The editors initially backed off, promising to "take more care for the future, & publish nothing that shall give any uneasiness to any Persons whatever." But in the following years the *Boston Gazette* would become a leading voice for the Revolution. *Id.* at 58–59.

Such experiences colored the Framers' conception of what it means to abridge the freedoms of speech and press, and it is well settled today that the First Amendment bars the government from withholding official business as a sanction for taking the "wrong" political position. *Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668 (1996); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996). But overt retaliation of this sort only scratches the surface of the indirect means public officials may use to bring the press and public to heel.

This case exemplifies the creative ways government actors may regulate speech without resort to "official" means. New York's superintendent of the Department of Financial Services, Maria Vullo, urged insurance and financial institutions to reconsider their ties to the National Rifle Association

(NRA) because doing business with such groups "sends the wrong message." This warning, backed by the Governor and accompanied by vague threats of regulatory and reputational risks, did the trick: The institutions cut off the NRA as the state requested.

Indirect and informal methods of censorship have proliferated in recent years, with examples from across the political spectrum. While New York leaned on businesses to cut ties with the conservative NRA, Florida's governor acted to revoke favorable tax status for what he called the "woke" Walt Disney Corporation because it had the temerity to oppose his education initiatives. State attorneys general have threatened retail stores for selling LGBTQ-themed merchandise, while governors have threatened "aggressive enforcement action" against both public and private colleges that fail to crack down on campus speech. Both then-President Trump and President Biden have threatened to revoke online platforms' immunity under Section 230 of the Communications Decency Act due to their displeasure over company policies.

These efforts occur at all levels of government and take myriad forms, but all are attempts to fly under the First Amendment's radar. Recognizing that coercion, persuasion, and intimidation can regulate speech every bit as much as formal regulations, this Court drew a line against informal censorship in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). But it has been 60 years since then, and the Court has not elaborated on the standards for recognizing and limiting off-the-books censorship.

This Court has forged strong substantive and procedural protections for freedom of expression, but those formal protections can be circumvented if informal speech restrictions are not kept in check. The First Amendment cannot become a Maginot Line. It is vital for this Court to reaffirm the principles set forth in *Bantam Books* but also to clearly articulate standards for drawing "the distinction between attempts to convince and attempts to coerce." *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003).

The Court should revisit this area, drawing on the analyses of the various circuit courts, and establishing that informal censorship can be recognized using a four-factor test that considers the government speaker's word-choice and tone; whether the speech was perceived as a threat; the existence of regulatory authority; and whether the speech references adverse consequences. It should reverse the decision below as a misapplication of the relevant test and make clear government officials cannot evade the rule of law by framing censorship demands as informal requests.

ARGUMENT

I. THIS CASE ILLUSTRATES THE DANGERS OF INFORMAL CENSORSHIP.

New York State officials punished the NRA for its advocacy by warning businesses that engaging with the group meant risking regulatory consequences. The tactic was successful—and unlawful.

The government generally is "entitled to say what it wants to say—but only within limits." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 235 (7th

Cir. 2015). While the public has an interest in hearing the views of public servants and elected officials, the government "is not permitted to employ threats to squelch the free speech of private citizens." *Id.* Just as the First Amendment bars government officials from directly censoring disfavored or dissenting speakers, it likewise prohibits using indirect means to accomplish the same unconstitutional ends. Backdoor censorship is no more permissible than its formal counterpart.

Unfortunately, this case is but one instance of many. Government officials from either side of the political divide are all too willing to abuse their offices by "jawboning"—that is, "bullying, threatening, and cajoling"—those over whom they wield power into suppressing speech.[2] To preserve the First Amendment's essential limits on governmental overreach, these brazen efforts to evade constitutional constraints must fail.

A. New York Regulators Used Indirect Means to Achieve a Result the First Amendment Prohibits.

The First Amendment does not permit the government to censor speech via informal or indirect means. When government officials "invok[e] legal sanctions and other means of coercion, persuasion, and intimidation" to chill disfavored speech, they impose "a scheme of state censorship" just as unlawful as

[2] Will Duffield, *Jawboning against Speech: How Government Bullying Shapes the Rules of Social Media*, CATO INSTITUTE (Sept. 12, 2022), https://www.cato.org/policy-analysis/jawboning-against-speech.

direct regulation. *Bantam Books*, 372 U.S. at 67, 72. Wielding the bully pulpit "not to advise but to suppress" violates the First Amendment. *Id.* at 72; *see also Dart*, 807 F.3d at 230–31.

But that's exactly what New York state officials did here. The Superintendent of the New York State Department of Financial Services used the power of her position to pressure insurance companies into ceasing business with the NRA because of its advocacy and views.

In the wake of the February 2018 mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, Superintendent Vullo met with Lloyd's of London executives to "present[] [her] views on gun control and [her] desire to leverage [her] powers to combat the availability of firearms." *NRA of Am. v. Vullo*, 49 F.4th 700, 708 (2d Cir. 2022). She told them she believed the company's underwriting of NRA-endorsed insurance policies violated state law—but suggested the company could "avoid liability" if it ended dealings with the organization and joined her agency's "campaign against gun groups." *Id.* at 708.

Superintendent Vullo presented Lloyd's an unconstitutional choice: disassociate from the NRA's advocacy and advance the state's views, or face legal consequences. The company publicly broke ties with the NRA a few months later.

The Superintendent ensured other businesses got the message, too. In a pair of guidance letters, she instructed insurance companies and financial institutions—entities directly regulated by her agency—to "continue evaluating and managing their

risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations." *Id.* at 709. In other words: Think twice about the company you keep and the views they express.

To underscore the point, former New York State Governor Andrew Cuomo issued a press release announcing the letters and stating he had directed the agency to "urge insurers and bankers statewide to determine whether any relationship they may have with the NRA or similar organizations sends the wrong message to their clients and their communities who often look to them for guidance and support." *Id.* In the Governor's press release, Superintendent Vullo explicitly called for "all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA, and to take prompt actions to manage these risks and promote public health and safety." *Id.*

The Superintendent's letters and statements sent an unmistakable signal to the entities her agency regulates: doing business with organizations holding the wrong views risks the state's ire. New York sought to punish the NRA for its advocacy by threatening to impose costs on its partners and actively campaigning for companies to sever ties. And as Superintendent Vullo told Lloyd's, the State would smile upon those who chose correctly.

Of course, the State's preferred outcome—an isolated NRA, abandoned by erstwhile partners because of the government's disapproval of its views—could not be achieved by direct restrictions.

New York cannot itself censor the NRA's advocacy. The First Amendment flatly prohibits the government from silencing speech based on viewpoint. *See, e.g., Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) ("The government may not discriminate against speech based on the ideas or opinions it conveys."). If "the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban," banning that book would be unconstitutional as a "classic example[] of censorship." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 337 (2010).

Nor may New York directly penalize private companies it regulates for associating with organizations expressing views the state doesn't like. When the government takes action to render association with a disfavored group "less attractive," it raises "First Amendment concerns about affecting the group's ability to express its message." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006). And "regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *La. Ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961).

Barred by the First Amendment's prohibition of direct censorship, New York resorted to indirect means. This case thus presents the Court an opportunity to reinforce that "'informal censorship' working by exhortation and advice" violates the First Amendment just as surely as more straightforward efforts. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 n.8 (1975) (quoting *Bantam Books*, 372 U.S. at 71). And such clarity is sorely needed. Government

officials in red and blue states alike have proven willing to evade the First Amendment by jawboning others into doing their censorial dirty work.

B. This is Far From an Isolated Example.

New York's tactics are not an anomaly. Government actors from across the country and the ideological spectrum seek to evade constitutional constraints using the same methods.

1. In March 2022, for example, Florida Governor Ron DeSantis signed legislation limiting instruction regarding sexual orientation and gender identity in the state's public schools. After an outcry by employees, Disney—one of the State's largest employers—publicly opposed the bill. In response, Governor DeSantis told supporters: "If Disney wants to pick a fight, they chose the wrong guy."[3]

The First Amendment constrains Governor DeSantis' ability to "fight" Disney via direct censorship. So—like Superintendent Vullo—he instead attempted to punish Disney indirectly for dissenting, using the power of his office to turn the screws.

Backed by Republican state legislators, Governor DeSantis stripped Disney of its special tax status and seized control of the board overseeing the special

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[3] Susan Milligan, *DeSantis Takes On Disney With Taxpayers in the Middle*, U.S. NEWS & WORLD REP. (Apr. 22, 2022), https://www.usnews.com/news/the-report/articles/2022-04-22/desantis-takes-on-disney-with-taxpayers-in-the-middle.

improvement district containing Walt Disney World.[4] "There's a new sheriff in town," the governor boasted.[5]

Florida lawmakers took action to protect Disney's tax status once it became clear that without it, local taxpayers would be on the hook for bond debt estimated at over a billion dollars.[6] Undeterred, Governor DeSantis next threatened to build "more amusement parks" or even "another state prison" next door to Disney's Magic Kingdom.[7]

One can debate the merits of Disney's tax status, the Florida's chief executive's power to appoint the board overseeing Disney's improvement district, and Florida's need for more amusement parks—or prisons. But those policy decisions have nothing to do with Disney's First Amendment right to criticize legislation without facing coercive pressure and retaliation from governmental officials. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (government "may

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[4] Kimberly Leonard, *DeSantis strips Disney World of its self-governing power in Florida: 'There's a new sheriff in town'*, BUSINESS INSIDER (Feb. 27, 2023), https://www.businessinsider.com/ron-desantis-control-disney-world-special-district-dont-say-gay-2023-2.

[5] *Id.*

[6] Winston Cho, *Disney to Keep Perks Under Florida Bill Allowing Gov. Ron DeSantis to Assume Control of Special Tax District*, HOLLYWOOD REPORTER (Feb. 7, 2023), https://www.hollywoodreporter.com/business/business-news/disney-to-keep-special-perks-under-florida-bill-allowing-gov-ron-desantis-to-assume-control-of-special-tax-district-1235320186.

[7] Steve Contorno, *DeSantis threatens retaliation over Disney's attempt to thwart state takeover*, CNN (Apr. 17, 2023), https://www.cnn.com/2023/04/17/politics/desantis-disney-takeover-florida/index.html.

not deny a benefit to a person on a basis that infringes his constitutionally protected interest, especially his interest in freedom of speech"); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech"). Governor DeSantis' ham-handed tactics are indirect attempts to accomplish what he could not do directly: silence a critic.

Disney filed a lawsuit against the governor and several of his appointees, alleging unconstitutional retaliation in violation of the First Amendment.[8] But Governor DeSantis had already claimed victory. "Since our skirmish last year, Disney has not been involved in any of those issues," he told reporters after the suit's filing. "They have not made a peep."[9]

2. Silencing dissent isn't the only aim of government officials attempting to censor via bank shot. They have also targeted speech about sexuality—despite its full First Amendment protection. For example, last July, attorneys general from Arkansas, Idaho, Indiana, Kentucky, Mississippi, Missouri, and South Carolina wrote Target, the national retail chain, to warn it about

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[8] Complaint, *Walt Disney Parks & Resorts U.S., Inc. v. DeSantis, et al.*, No. 4:23-cv-00163 (N.D. Fl. Apr. 26, 2023).

[9] Armando Tinoco, *Ron DeSantis Says Disney Has "Not Made A Peep" Since Skirmish Over "Don't Say Gay" Law: "The Party Is Over For Them"*, DEADLINE (May 6, 2023), https:// deadline.com/ 2023/05/ron-desantis-disney-not-made-a-peep-skirmish-dont-say-gay-law-party-is-over-1235358563.

selling pro-LGBTQ attire and donating to GLSEN, an advocacy organization for LGBTQ students.[10]

Writing in their capacities as "Attorneys General committed to enforcing our States' child-protection and parental-rights laws and our States' economic interests as Target shareholders," their letter warned Target's President and CEO about the company's "promotion and sale of potentially harmful products to minors, related potential interference with parental authority in matters of sex and gender identity, and possible violation of fiduciary duties by the company's directors and officers." Letter from Attorneys General to Brian C. Cornell, Chairman and CEO, Target Corp. (July 5, 2023), https://content.govdelivery.com/attachments/INAG/2023/07/06/file_attachments/2546257/Target%20Letter%20Final.pdf.

Noting pointedly that their states' "child-protection laws penalize the 'sale or distribution . . . of obscene matter,'" the attorneys general expressed particular "concern" about "LGBTQIA+ promotional products" available at Target, singling out T-shirts with the phrases "Girls Gays Theys" and "Satan Respects Pronouns." *Id.* The group further suggested the chain's "directors and officers may be negligent in undertaking the 'Pride' campaign, which negatively affected Target's stock price." *Id.*

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[10] Lucy Kafanov, *7 Republican AGs write to Target, say Pride month campaigns could violate their state's child protection laws*, CNN (July 8, 2023), https://www.cnn.com/2023/07/08/business/target-attorneys-general-pride-month/index.html.

The attorneys general could scarcely have been clearer about their distaste for Target's views, positing that the retailer's "Pride Campaign alienates whereas Pride in our country unites." *Id.* The letter suggested—with all the subtlety of a brick through the window—that "[i]t is likely more profitable to sell the type of Pride that enshrines the love of the United States." *Id.* And while the group admitted deep in a footnote that the state obscenity laws they cited "may not," in fact, "be implicated by Target's recent campaign," the letter's overarching purpose was as unmistakable as a brushback fastball, high and inside. *Id.*

Both Target's merchandise and charitable donations are lawful and fully protected by the First Amendment. Despite the thick insinuations and loaded citations, the attorneys general didn't mount a credible argument to the contrary. But they wanted Target's leadership to think long and hard about the risks the company might run by expressing messages powerful government officials didn't like. And just like Superintendent Vullo in her campaign against the NRA, they were willing to wield the power of their offices to chill speech.

The attorneys general should have known better—and not just because they serve as their states' chief law enforcement agents.

3. One of the letter's signatories, the Attorney General of Missouri, is leading a First Amendment challenge to the federal government's own efforts to jawbone social media companies into removing a range of conservative viewpoints from their platforms. And just the day before the group sent Target its

heavy-handed warning, a federal district court issued a preliminary injunction prohibiting several government agencies and officials from communicating in certain ways with social media platforms. *Missouri v. Biden*, No. 3:22-CV-01213, ___ F. Supp. 3d ___, 2023 WL 4335270, at *73 (W.D. La. July 4, 2023).

The United States Court of Appeals for the Fifth Circuit later narrowed the injunction, *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023), and it is stayed by this Court, which will hear the case this Term. *Murthy v. Missouri*, 217 L.Ed.2d 178 (U.S. 2023). *Amici* look forward to addressing in separate briefing the unique and important First Amendment issues that case raises. For present purposes, however, the role of Missouri's Attorney General as both jawboning practitioner *and* opponent illustrates that the threat of informal governmental censorship is not limited to either side of our partisan divide.[11]

4. Former Superintendent Vullo is not the only New York State official willing to pressure private actors into suppressing controversial or simply unpopular expression. In December, congressional hearings on campus anti-Semitism, following Hamas' attack on Israel and the ensuing conflict, focused on students chanting the phrases "intifada" and "from the river to the sea," which some lawmakers

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[11] To paraphrase the celebrated civil libertarian Nat Hentoff: "Jawboning for me, but not for thee." *See* Nat Hentoff, FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER (HarperCollins 1992).

characterized as calls for genocide.[12] Shortly thereafter, Governor Kathy Hochul sent a letter warning the presidents of all colleges and universities in New York—both public and private—that failing to discipline students "calling for the genocide of any group" would violate both state and federal law.[13] Governor Hochul threatened "aggressive enforcement action" against any institution failing to prohibit and punish such speech.

While many find the phrases deeply offensive, that alone does not remove them from constitutional protection. To be sure, colleges and universities can and should punish "calls for genocide" that fall into the narrowly defined categories of unprotected speech, including true threats, incitement, and discriminatory harassment. But absent more, phrases like "intifada" are protected speech, and blanket bans on "calls for genocide" would result in censorship.[14] The governor did not specify, nor could she, how institutions might enforce such bans without stifling protected political expression.

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[12] Annie Karni, *Questioning University Presidents on Antisemitism, Stefanik Goes Viral*, N.Y. TIMES (Dec. 7, 2023), https://www.nytimes.com/2023/12/07/us/politics/elise-stefanik-antisemitism-congress.html.

[13] Letter from Governor Kathy Hochul to New York State College and University Presidents (December 9, 2023), https://www.governor.ny.gov/sites/default/files/2023-12/SchoolsV2.pdf.

[14] *See* Will Creeley & Eugene Volokh, *Opinion: The trouble with Congress or college presidents policing free speech on campuses*, L.A. TIMES (Dec. 10, 2023), https:// www.latimes.com/opinion/story/2023-12-10/antisemitism-campus-speech-penn-president-liz-magill-resigns-harvard-mit.

Moreover, the private universities that received the Governor's warning are *protected* by the First Amendment's guarantee of associational rights and possess broad freedom to promulgate their own standards regarding student speech. Governor Hochul cannot commandeer private institutions by wielding the threat of "aggressive enforcement action" under state law to force censorship of protected expression. Doing so violates the First Amendment twice over.

C. Jawboning Tactics Take Varying Forms.

As the above examples illustrate, informal censorship can take many forms. That's the point—such tactics are not governed by statutory definitions, limits, or procedural requirements. They are by nature shadowy and vague. Given the power of their offices, government officials seeking to censor by other means may choose from a dismaying variety of methods.

1. Government officials issue threats. In 2020, for example, former President Donald Trump—angered by Twitter's decision to append fact-checks to his posts—promised "big action" against the company and other social media platforms, threatening to "strongly regulate" or "close them down."[15] He demanded federal agency action to weaken the protection against liability afforded the companies by Section 230 of the

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[15] Cristiano Lima and Meridith McGraw, *Trump to sign executive order on social media amid Twitter furor*, POLITICO (May 27, 2020), https://www.politico.com/news/2020/05/27/trump-executive-order-social-media-twitter-285891.

1996 Communications Decency Act,[16] even going so far as to issue an executive order demanding the National Telecommunications and Information Administration file a petition with the Federal Communications Commission to "expeditiously propose regulations to clarify" the statute.[17] After Commissioner Michael O'Rielly voiced skepticism—remarking in a speech that the First Amendment protects private companies, too—former President Trump withdrew his renomination.[18]

2. Government officials pound on the bully pulpit, demanding action by private entities against protected speech. In an October 12 letter to social media platforms, for example, New York Attorney General Letitia James demanded the companies "describe in detail" what the platforms are doing to "stop the spread of hateful content" related to the Israel-Hamas war and report back to her about their editorial policies and practices.[19] In response, *amicus*

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[16] Leah Nylen *et al.*, *Trump pressures head of consumer agency to bend on social media crackdown*, POLITICO (Aug. 21, 2020), https://www.politico.com/news/2020/08/21/trump-ftc-chair-social-media-400104.

[17] Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020), *repealed by* Exec. Order No. 14,029, 86 Fed. Reg. 27,025 (May 14, 2021).

[18] Ted Johnson, *White House Withdraws Nomination of FCC Commissioner Michael O'Rielly, Who Doubted Donald Trump's Executive Order on Social Media*, DEADLINE (Aug. 3, 2020), https://deadline.com/2020/08/donald-trump-fcc-michael-orielly-1203003221.

[19] Susanna Granieri, *New York AG Spars With FIRE Over Social Media Moderation of 'Hateful Content'*, FIRST AMENDMENT WATCH (Oct. 20, 2023), https://firstamendmentwatch.org/new-

FIRE—which represents social media platform Rumble in an ongoing challenge to a New York law that forces websites and apps to address "hateful" online speech—argued the demand violates a then- and still-extant federal district court injunction. *See Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023). The Attorney General rescinded the letter as to Rumble shortly thereafter.[20]

3. Government officials order punitive investigations into protected speech. In 2022, Florida officials launched an investigation into a performing arts center after a Christmas-themed drag performance.[21] Public records requests later revealed Governor DeSantis' chief of staff had tried to prevent the event from taking place at all, asking colleagues: "Is there any way to stop this from happening tomorrow?"[22] Although undercover state investigators present at the event had concluded no "lewd acts" took

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york-ag-spars-with-fire-over-social-media-moderation-of-hateful-content.

[20] FIRE, *VICTORY: A day after FIRE's intervention, New York rescinds letter demanding social media platform Rumble censor users over Israel-Hamas war* (Oct. 20, 2023), https://www.thefire.org/news/victory-day-after-fires-intervention-new-york-rescinds-letter-demanding-social-media-platform.

[21] Ana Ceballos and Kirby Wilson, *DeSantis administration investigating 'A Drag Queen Christmas' event in Broward*, TAMPA BAY TIMES (Dec. 28, 2022), https://www.tampabay.com/news/florida-politics/2022/12/28/desantis-administration-investigating-drag-queen-christmas-event-broward.

[22] C.J. Ciaramella, *Inside Ron DeSantis' Crackdown on Drag Shows*, REASON (Nov. 9, 2023), https://reason.com/2023/11/09/inside-ron-desantis-crackdown-on-drag-shows.

place in the performance,[23] the state still sought to revoke the liquor license of a Miami hotel that hosted it,[24] later imposing a $5,000 fine.[25] Meanwhile, a federal district court enjoined Florida's state law regulating drag performances, declaring it "dangerously susceptible to standardless, overbroad enforcement which could sweep up substantial protected speech." *HM Fla.-Orl, LLC v. Griffin*, No. 6:23-cv-950-GAP-LHP, 2023 WL 4157542, at *9 (M.D. Fla. June 23, 2023).

4. And if jawboning doesn't succeed in silencing speech, government officials may initiate sham prosecutions as a form of intimidation. Federal lawmakers argued the French film "Cuties"—a Sundance award-winning drama "about an 11-year-old Senegalese immigrant in France who joins other pre-teen girls in a school dance group called 'the cuties'"—constituted child pornography for which Netflix should face prosecution for streaming

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[23] Ana Ceballos and Nicholas Nehamas, *Florida undercover agents reported no 'lewd acts' at drag show targeted by DeSantis*, TAMPA BAY TIMES (Mar. 20, 2023), https://www.tampabay.com/news/florida-politics/2023/03/20/desantis-drag-show-lewd-liquor-license-complaint-lgbtq.

[24] Matt Lavietes, *DeSantis attempts to revoke Miami hotel's liquor license over drag show*, NBC NEWS (Mar. 15, 2023), https://www.nbcnews.com/nbc-out/out-politics-and-policy/desantis-attempts-revoke-miami-hotels-liquor-license-drag-show-rcna75077.

[25] Ana Ceballos, *Miami venue settles with Florida over drag show, will pay $5,000 fine*, TAMPA BAY TIMES (Nov. 29, 2023), https://www.tampabay.com/news/florida-politics/2023/11/29/hyatt-regency-miami-drag-queen-show-desantis-minors-settlement-fine.

domestically.[26] Netflix refused to be bullied out of streaming the film, the content of which was plainly protected by the First Amendment. But an enterprising Texas district attorney nevertheless sought and obtained a criminal indictment against the company. After years of litigation, the Fifth Circuit last month determined the prosecutor "had no hope of obtaining a valid conviction," concluding Netflix "has an obvious interest in the continued exercise of its First Amendment rights, and the State has no legitimate interest in a bad-faith prosecution." *Netflix, Inc. v. Babin*, 88 F.4th 1080, 1100 (5th Cir. 2023).

Netflix stood strong against jawboning and successfully fought back when its First Amendment rights were threatened. But not all on the receiving end of aggressive government coercion will be able to withstand it or to ultimately vindicate their rights. To ensure government officials are no more able to censor indirectly than they are directly, this Court should take this opportunity to clarify the line between persuasion and coercion.

II. THIS COURT MUST PROVIDE CLEAR GUIDANCE TO FORESTALL INFORMAL CENSORSHIP.

Some jawboning attempts succeed while others fail, yet all constitute unconstitutional attempts to evade the First Amendment and the rule of law. Clear

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[26] Juliegrace Brufke, *Republicans call for DOJ to prosecute Netflix executives for releasing 'Cuties'*, THE HILL (Sept. 18, 2020), https://thehill.com/homenews/house/517145-republicans-call-for-doj-to-prosecute-netflix-executives-for-releasing-cuties.

standards are essential to bolster the law's formal protections and to enable reviewing courts to recognize when government bullying goes too far.

A. This Court has Forged Strong First Amendment Protections Based on Clear Guidance and Strategic Protections.

Over the past ninety-three years, this Court has developed strong protections for freedom of expression as the essential liberty guaranteed by the Bill of Rights. *E.g.*, *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("the opportunity for free political discussion" is "a fundamental principle of our constitutional system"); *Near v. Minnesota*, 283 U.S. 697, 716–17 (1931) ("The conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration."). This constitutional safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Consequently, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Securing these basic freedoms has required the Court to devise both substantive and procedural safeguards for speech. This begins with the understanding that the First Amendment

presumptively protects speech from government control unless it falls within certain limited and narrowly defined categories. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 817 (2000); *United States v. Stevens*, 559 U.S. 460, 468–69 (2010). It continues with the recognition that "[l]aws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United*, 558 U.S. at 336. And it depends on strong due process requirements and judicial oversight to prevent government actors from exceeding the limits of their power. *E.g.*, *Freedman v. Maryland*, 380 U.S. 51, 57–58 (1965); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 65–67 (1989).

Notwithstanding these rulings, "[t]he recent history of Supreme Court First Amendment jurisprudence is a rogue's gallery of popular yet unconstitutional legislation." Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 52, 95 (2015). Fortunately, however, the Court has forestalled various attempts to dilute these formal protections. *See generally* Joel M. Gora, *Free Speech Still Matters*, 87 BROOKLYN L. REV. 195 (2021); Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J. L. & POL'Y 63, 64 (2016) ("the Roberts Supreme Court may well have been the most speech-protective Court in a generation, if not in our history"). For example, it rejected an attempt to expand the categories of unprotected speech as "startling and dangerous." *Stevens*, 559 U.S. at 470. And it has resisted efforts to "adjust the boundaries" of existing categories to give the government greater latitude to regulate speech. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011).

Most recently, the Court acknowledged the need to set precise limits for unprotected speech categories along with well-defined burdens of proof as a form of "strategic protection" for First Amendment rights, thus bolstering procedural safeguards. *Counterman v. Colorado*, 600 U.S. 66, 75–78 (2023). Such clarity is vital to avoid chilling expression "given the ordinary citizen's predictable tendency to steer 'wide of the unlawful zone.'" *Id.* (quoting *Speiser*, 357 U.S. at 527).

But as vital as these formal protections are, from the beginning this Court recognized that protecting First Amendment rights required it to evaluate the substance of government actions, not just the form those actions take. *Near*, 283 U.S. at 708. As this Court observed in *Bantam Books*, 372 U.S. at 67, "[w]e are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief."

B. Informal Censorship Schemes Circumvent Constitutional Limits.

One byproduct of strong First Amendment jurisprudence is that it creates powerful incentives for evasion, driving censorship efforts underground and off the books. As one response to this Court's rulings, "[f]ederal and state governments alike have found clever means to circumvent the restrictions that the First Amendment places upon their abilities to regulate speech because of its content, from funding to the use of putatively unrelated laws to a range of informal pressures." Bambauer, *supra* at 93–94.

Such workarounds ultimately led this Court to draw a line against informal censorship techniques in *Bantam Books*. At the same time this Court began to establish strong protections for literature in the mid-twentieth century, local governments immediately looked for ways to escape judicial scrutiny. In *Winters v. New York*, 333 U.S. 507, 508, 510 (1948), the Court struck down a state law prohibiting publications that contained, among other things, "pictures, or stories of deeds of bloodshed, lust or crime," holding "they are as much entitled to the protection of free speech as the best of literature." Not long thereafter, the Court struck down a Michigan law making it a crime to make available any book "tending to the corruption of the morals of youth," finding it "reduce[d] the adult population of Michigan to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

But the emergence of clear legal standards did little to blunt governmental desires to regulate what people could read. "Different communities used various measures, including having police or local prosecutors circulate blacklists as part of organized programs 'to drive certain publications from [the] community.' In some jurisdictions, officials obtained informal recommendations from interested organizations, while other communities established advisory committees or 'literature commissions' to identify suspect works." *See, e.g.*, Robert Corn-Revere, THE MIND OF THE CENSOR AND THE EYE OF THE BEHOLDER: THE FIRST AMENDMENT AND THE CENSOR'S DILEMMA 103 (Cambridge Univ. Press 2021).

Such was the case in Rhode Island, which established a Commission to Encourage Morality in Youth. The Commission lacked direct regulatory authority but could advise booksellers whether their wares "contain[ed] obscene, indecent or impure language, or manifestly tend[ed] to the corruption of the youth." *Bantam Books,* 372 U.S. at 59. Booksellers were free to ignore the "advice," but the Commission could recommend prosecution under state obscenity laws. And local police would pay follow-up visits to bookstores to see if they were selling any of the books on the Commission's list. *Id.* at 61–63.

Although the Court acknowledged no books had been "seized or banned by the State, and that no one has been prosecuted for their possession or sale," it nevertheless held Rhode Island's scheme was "a form of effective state regulation super-imposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary." *Id.* at 67, 69. The Commission lacked any enforcement authority and could only employ "informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" yet succeeded in its aim of suppressing publications it deemed "objectionable." *Id.* at 67. This, in turn, subjected "the distribution of publications to a system of prior administrative restraints[.]" *Id.* at 70.

Paradoxically, it is the *absence* of direct legal sanctions that makes informal censorship schemes a *worse* violation of the First Amendment. Because freedom of speech is vulnerable to "gravely damaging yet barely visible encroachments," this Court developed a body of law over the past century that has required the line between protected and unprotected

speech be "finely drawn" and subject to "the most rigorous procedural safeguards." *Id.* at 66.

But informal actions to suppress speech subvert the rule of law. Where the state acts using threats and intimidation, it may "obviat[e] the need to employ criminal sanctions," but it also "eliminate[s] the safeguards of the criminal process." *Id.* at 69–70. There are "no safeguards whatever against the suppression of nonobscene, and therefore, constitutionally protected, matter." *Id.* at 70. Such actions lack precise definitions of the speech to be restricted—or, in many cases, any definitions—which in the case of Rhode Island, left distributors "to speculate whether the Commission considers his publication obscene or simply harmful to juvenile morality." *Id.* at 71. And there was no provision "for judicial superintendence before notices issue or even for judicial review of the Commission's determinations of objectionableness." *Id.* Consequently, this Court found the "capacity for suppression of constitutionally protected publications" by informal pressures "is far in excess of that of the typical licensing scheme held constitutionally invalid[.]" *Id.*

And yet the situation is even worse than the *Bantam Books* Court may have realized. Unlike the Rhode Island Commission to Encourage Morality in Youth, which was created to exert *public* pressure on booksellers, in many cases the "[g]overnment frequently operates in private—behind closed doors, where countervailing forces and pressures are excluded." Bambauer, *supra*, at 103–04. That is the situation in *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023), which is also being considered this Term. *Cert.*

granted sub nom, *Murthy v. Missouri*, 144 S. Ct. 7 (2023). Such backstage management "is inherently less open than formal rulemaking through legislation, adjudication, or administrative procedure," and for that reason often evades judicial review. Bambauer, *supra*, at 97–98, 103–04.

Accordingly, it is vital for this Court to reaffirm the principles set forth in *Bantam Books* but also to clearly articulate standards for drawing "the distinction between attempts to convince and attempts to coerce." *Dart*, 807 F.3d at 230 (quoting *Okwedy,* 333 F.3d at 344. Doing so is needed not just to preserve the First Amendment, but to set clear boundaries for government officials. *Bantam Books*, 372 U.S. at 75 (Clark, J., concurring) ("The Court in condemning the Commission's practice owes Rhode Island the duty of articulating the standards which must be met[.]"). Until now, however, the Court has not taken the opportunity to shed more light in this area.

C. This Court Must Articulate Clear Strategic Protections Against Informal Censorship.

Direct protections for free speech mean little if this Court does not remain vigilant against end-runs around the First Amendment. It must affirm that "acts and practices . . . performed under color of state law" that "directly and designedly" silence or impair speech violate the First Amendment. *Bantam Books*, 372 U.S. at 68. It matters not if they come as "[t]hreats of prosecution or of license revocation, or listings or notifications of supposedly" unlawful speech—all are unconstitutional. *Id.* at 67 n.8.

1. While *Bantam Books* established the guiding principles, this Court has not elaborated on them since, *see* Part II.B., *supra*, leaving lower courts to add flesh to the bone.[27] The Second Circuit, for example, which has had the most opportunities in this area, *see supra* note 27; *see also infra*, held *Bantam Books* forbids "comments of a government official . . . reasonably interpreted" as "intimating [] some form of punishment or adverse regulatory action will follow the failure to accede the official's request." *Brezenoff*, 707 F.2d at 39. The Ninth Circuit added that it does not matter that an informal censorship target might have independently taken the action a state actor seeks, coercion arises "[s]imply by commanding a particular result." *Carlin Comm'cns*, 827 F.2d at 1295 (quotation marks omitted).

The Seventh Circuit further elaborated that any risk assessment of adverse government action must consider whether a communication is coercion, *even if* that action would come not from the specific official making a threat "but [from] other enforcement agencies that he urges" on. *Dart*, 807 F.3d at 235. It also held "such a threat is actionable . . . even if it turns out to be empty—the victim ignores it, and the threatener folds his tent." *Id.* at 231; *accord Warren*, 66 F.4th at 1210 ("We do not require an intermediary to admit that it bowed to government pressure . . . to state a First Amendment claim."). And it is now more

[27] *See, e.g.*, *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983); *Carlin Comm'cns, Inc. v. Mountain States Tel. & Tel.*, 827 F.2d 1291 (9th Cir. 1987); *Okwedy*, 333 F.3d at 339); *Zieper v. Metzinger*, 474 F.3d 60 (2d Cir. 2007); *Dart*, 807 F.3d at 229; *Vullo*, 49 F.4th at 700; *Kennedy v. Warren*, 66 F.4th 1199 (9th Cir. 2023); *Biden*, 83 F.4th at 350.

explicit that "an official does not need to say 'or else' if a threat is clear from the context." *Warren*, 66 F.4th at 1211-12 (citing *Dart*, 807 F.3d at 234).

Lower court decisions have also set forth indicia they use to identify unconstitutional informal censorship, including:

- whether state actors communicate primarily in their official capacity, *Rattner v. Netburn*, 930 F.2d 204, 205 (2d Cir. 1991); *Okwedy*, 333 F.3d at 341, 344; *Dart*, 807 F.3d at 231, 236;

- whether they invoke the target's "legal duty" or "obligations," cite specific laws to which it may be subject, or hint at the target's "potential susceptibility" to prosecution or "potential liability," *Dart*, 807 F.3d at 232, 236–37; *Okwedy*, 333 F.3d at 342–43;

- whether they imply the target will face economic or reputational harm, *id.*; *Dart*, 807 F.3d at 236; and

- whether the government actor makes or requires repeated or ongoing contact, demands a contact point for future interaction, or suggests no foreseeable endpoint to the pressure, *Zieper*, 474 F.3d at 67; *Dart*, 807 F.3d at 232, 236.

2. Drawing on these cases' common threads, this Court should adopt a more structured test to identify informal censorship to reinforce *Bantam Books*' command that "freedoms of expression must be ringed about with adequate bulwarks." 372 U.S. at 66. *Amici* submit that that standard should be the four-factor

test the Second Circuit misapplied in this case, App.25, as also adopted by the Ninth and Fifth Circuits with input from the lessons in *Dart*. *See Missouri v. Biden*, 83 F.4th at 378, 380–86; *Warren*, 66 F.4th at 1207, 1210–11; *but see also id.* at 1209 (distinguishing *Dart* from case at bar). The Court should, specifically, embrace the test as articulated in another case before it this Term, *Murthy v. Missouri*, No. 23-411 (on review of *Biden*, 83 F.4th at 380).

The test has much to commend it. It "starts with the premise that a government message is coercive . . . if it can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow [] failure to accede to the official's request," and employs four non-exclusive factors, none of which is independently dispositive, "namely (1) the speaker's word choice and tone; (2) whether the speech was perceived as a threat; (3) the existence of regulatory authority; and . . . (4) whether the speech refers to adverse consequences." *Biden*, 83 F.4th at 378 (quoting *Vullo*, 49 F.4th at 715) (internal quotation marks omitted).

The Fifth Circuit elaborated on the test with guidance on the various factors, which this Court should likewise adopt. That includes the insight that, in determining whether a state actor's speech is perceivable as a threat backed by regulatory authority, "the sum" of it "is more than just power." *Id.* Because, while "lack of power is certainly relevant" and "influences how [to] read" an official's message, the "lack of direct authority is not entirely dispositive." *Id.* at 379 (quoting *Warren*, 66 F.4th at 1209–10) (internal quotation marks omitted). Rather, the power of a government actor engaged in informal

censorship "need not be clearly defined or readily apparent, so long as it can be reasonably said that there is *some* tangible power lurking in the background." *Id.* (emphasis in original). Put bluntly, is the government actor in a position to make noncompliance hurt?

It is also "not required that the recipient bow to government pressure . . . if there is some indication the message was understood as a threat." *Id.* at 380 (quoting *Warren*, 66 F.4th at 1210–11). And as to adverse consequences, the court reinforces that an "official does not need to say 'or else,'" but merely "some message—even if unspoken—that can be reasonably construed as intimating a threat." *Id.* at 380–81 (quoting *Warren*, 66 F.3d at 1211–12) (internal quotation marks omitted).

3. Upon adopting the four-factor test and the associated guidance from lower courts, the Court should apply it to reverse the decision below. For although the test derives primarily from Second Circuit jurisprudence under *Bantam Books*, *see* App.25, the panel erred in its application here.[28]

The court acknowledged Vullo's regulatory authority over the insurers with whom she communicated, App.29, that the "'context' here was an investigation," App.31, and that she was "carrying out her regulatory responsibilities." App.32–33. And it assumed "some may have perceived [her industry-

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[28] Unlike the Fifth and Ninth Circuits, the Second Circuit has never factored *Dart* into its analyses under *Bantam Books*, and in fact has never cited *Dart* at all—including in its most recently issued decision on review. This may help explain its misapplication of the test.

directed] remarks as threatening." App.29.[29] Yet it somehow concluded she "did not coerce Lloyd's (or the other entities in question) into severing ties with the NRA," and that the consent decrees simply "explained the violations of the law," and "explicitly permitted . . . business with the NRA, assuming . . . programs did not violate New York law," App.32.[30] So, while at least half of the four factors favored the NRA, and the court admitted parts of the analysis "present a close[] call," App.31, it barred NRA from even surviving the pleading stage. App.33–34. That outcome ignores this Court's admonition that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007). Dismissing the First Amendment claim on such mixed grounds fails to keep "[t]he 'starch' in our constitutional standards," *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004), that proper application of any test evolved from *Bantam Books*

[29] The court treated the guidance letters separately from Vullo's other activity, App.26–34, but it's unclear why. The letters went out "while the investigation" of NRA-endorsed insurance programs "was underway," App.7, 9, to all Department-regulated insurance entities, App.9-10, presumably including those who later entered the consent decrees. App.11. Separating those efforts disregards binding precedent that state actors should "make sure that the totality of their actions do not convey a threat." *Zieper*, 474 F.3d at 70–71.

[30] And even that seems inaccurate. While the consent decrees allowed the companies to serve NRA as an insured, they forbid not just underwriting programs that violate state law, but also "***any*** *agreement or program with the NRA* . . . in in ***any*** affinity-type insurance program involving ***any*** *line of insurance* coverage." App.11 n.8 (emphases added).

should yield. It is also at odds with the need noted at the outset for "strategic protection" against informal censorship.

To ensure that arguably coercive efforts by state actors do not unduly chill protected speech, courts must give the benefit of the doubt not to government officials, but to the speakers to whom they direct their potentially censorious remarks. As the panel failed to do so here, this Court must reverse the decision below.

CONCLUSION

It has been 60 years since the Court articulated the principles limiting informal censorship in *Bantam Books*. Yet government actors at all levels have only grown more creative in their efforts to evade First Amendment strictures, suggesting "[a]dministrative fiat is as dangerous today as it was then"—if not more so. *Bantam Books*, 372 U.S. at 74 (Douglas, J., concurring). To protect the rule of law and to preserve this Court's strong First Amendment jurisprudence, it should take this opportunity to flesh out the standards limiting jawboning.

January 16, 2024

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