The Jawboning Cases End with a Bang Disguised by a Whimper

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Introduction

Jawboning is government "enforcement through informal channels, where the underlying authority is in doubt."[1] Jawboning debuted[2] at the Supreme Court in a pair of cases this Term, *National Rifle Association of America v. Vullo*[3] and *Murthy v. Missouri*.[4] Commentators had hoped that the Court would establish an analytical framework to evaluate when jawboning violates the First Amendment.[5] They were disappointed, although not

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[1] *See* Derek E. Bambauer, *Against Jawboning*, 100 Minn. L. Rev. 51, 61 (2015) (defining jawboning related to speech, especially online).

[2] The issue debuted this Term in at least its modern form, involving indirect pressure by government officials on internet entities such as social media platforms. All sides seemed to agree that *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), also constituted indirect governmental pressure through devolution of state authority to a putatively private commission that pushed booksellers to stop selling certain content.

[3] 602 U.S. 175 (2024) ("*Vullo*").

[4] 144 S. Ct. 1972 (2024) ("*Murthy*").

[5] *See, e.g.*, Mayze Teitler, *Doctrinal Disarray*, Knight First Amend. Inst. at Colum. Univ. (Mar. 15, 2024), https://knightcolumbia.org/blog/doctrinal-disarray (noting the "justices [faced] a fractious landscape of proposed legal tests and allegedly unconstitutional communications to navigate").

necessarily surprised.[6] The Court disposed of *Vullo* on procedural grounds, holding that the Second Circuit had failed to credit the well-pleaded allegations in the complaint of the National Rifle Association of America (NRA).[7] And the Court interred *Murthy* by finding that none of the plaintiffs had standing to bring suit.[8] The opinions did not set out a methodology for evaluating future jawboning cases, and Justice Neil Gorsuch wrote a concurrence in *Vullo*[9] suggesting that the Court would be unwise to do so—the courts will evidently know jawboning when they see it.[10] Hence, the outcomes seemed unsatisfying to everyone but the NRA, which will get the chance to prove its allegations in court.

However, upon closer inspection, there is far more bang than whimper in *Vullo* and *Murthy*. The cases offer examples of what a successful jawboning claim looks like and what an unsuccessful claim lacks. Thus, jawboning as a species of First Amendment violation is alive and well. Moreover, as Justice Samuel Alito noted in his *Murthy* dissent,[11] one can discern the outline of a methodology for such claims in *Vullo* despite Justice Gorsuch's warning. Ironically, this methodology resembles the multifactor tests previously applied by lower courts of appeals.[12] Lastly, the Court's standing analysis in *Murthy* is, in fact, an assessment of the merits of the plaintiffs' claims: Whether an alleged jawboning victim has standing is inextricably linked to the substantive First Amendment analysis. For once, at least, standing doctrine is not simply a "get out of jail free" card when a court wants to avoid a hard problem. It instead requires diving into whether and how the plaintiffs have suffered a cognizable injury to their freedom of expression.

[6] *See* Michael Macagnone, *Supreme Court to Weigh Government Role in Online Misinformation*, Roll Call (Mar. 14, 2024), https://rollcall.com/2024/03/14/supreme-court-to-weigh-government-role-in-online-misinformation/; Derek Bambauer (@dbambauer), X (Mar. 15, 2024, 9:41 AM), https://x.com/dbambauer/status/1768633536645320717 (stating "I hope they reach the merits [in *Murthy*], rather than dumping it on standing grounds").

[7] *Vullo*, 602 U.S. at 194–95.

[8] *Murthy*, 144 S. Ct. at 1981.

[9] *Vullo*, 602 U.S. at 200 (Gorsuch, J., concurring).

[10] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[11] *See Murthy*, 144 S. Ct. at 2010 (Alito, J., dissenting).

[12] *See Vullo*, 602 U.S. at 189–91 (listing examples of tests).

This article has three components. First, it briefly describes the opinions in *Vullo* and *Murthy*. Second, it assesses the guidance that the cases provide about jawboning for future plaintiffs, scholars, and courts. Lastly, it argues for a more explicit test for jawboning violations. The proposed test has three factors: the threat made by a government actor, the authority that the government actor possesses to justify this threat, and the power at the actor's disposal to implement that threat. This three-part test would both guide courts in determining when jawboning occurs and focus attention on the most problematic instances of the phenomenon.

I. The Opinions

The Court issued the opinion in *Vullo* first; it was unanimous, with Justice Sonia Sotomayor writing for the Court. The opinion in *Murthy* came out on the final day of the Term. Justice Amy Coney Barrett's majority opinion commanded six votes, with Justices Clarence Thomas and Gorsuch joining a sharp dissent by Justice Alito.

A. National Rifle Association of America v. Vullo

The NRA is a prominent gun rights advocacy organization that offers various benefits to members, including access to affinity insurance programs.[13] One such insurance program, Carry Guard, compensated policyholders for costs incurred from licensed firearm use—including for murder. Unsurprisingly, that coverage violates (at least) New York State law. A complaint from a gun advocacy group in fall 2017 led to an enforcement action brought by the New York Department of Financial Services (DFS). DFS oversees insurance firms operating in New York and was then headed by superintendent (and named defendant) Maria Vullo. DFS found both that the coverage was unlawful and that the NRA promoted Carry Guard without the required license. Other NRA affinity insurance programs had similar flaws. The firms offering and administering Carry Guard suspended the program in late 2017.

In February 2018, a former student of Marjory Stoneman Douglas High School in Parkland, Florida, attacked students and staff at the

[13] This summary of *Vullo*'s facts is taken from the majority opinion; critically, the opinion draws upon the well-pleaded allegations in the NRA's complaint and treats them as true given the procedural posture of the case. *See Vullo*, 602 U.S. at 181–86.

school with a semiautomatic weapon, killing 17 people and wounding 17 others. In the wake of the murders, which caused a wave of public anger at the NRA, Vullo met with one of the insurance firms to explain that it was in violation of certain aspects of New York's insurance laws. She explained that DFS would be willing to forgo enforcement if the firm stopped providing insurance to gun groups—and the NRA in particular. The firm agreed to have its subsidiaries stop underwriting gun-related insurance, and to reduce business with the NRA, in exchange for regulatory forbearance.

Two months later, Vullo issued guidance letters to DFS-regulated firms about risk management related to the NRA and similar organizations. The letters encouraged regulated entities to consider whether they faced any reputational or other risks from dealings with such firms. She was also quoted in a press release issued by New York's governor urging insurance companies and banks to cease doing business with the NRA and similar organizations. Shortly thereafter, two of the firms involved in Carry Guard entered into consent decrees with DFS. The firms admitted liability and agreed not to provide NRA-endorsed programs, but they retained the ability to sell corporate insurance to the Association. They also paid multimillion-dollar fines. A third Carry Guard firm entered into a similar consent decree in December 2018. The NRA sued Vullo (among others), alleging that Vullo violated the First Amendment by coercing entities regulated by DFS to cease doing business with the organization. The federal district court denied Vullo's motion to dismiss, but the Second Circuit reversed.

Justice Sotomayor's opinion focused immediately on the core issue in the case: Were Vullo's actions and statements protected as persuasive government speech, or barred as impermissible coercion? The opinion quickly reviewed the most relevant precedent, *Bantam Books, Inc. v. Sullivan*.[14] In *Bantam Books*, the state of Rhode Island had set up a commission to review books and magazines offered by distributors. The commission advised these outlets if any such offerings were, in the body's judgment, either obscene or unsuitable for consumption by anyone under age 18. While the commission had no formal enforcement powers, its advisory letters inevitably reminded

[14] *Vullo*, 602 U.S. at 188–90 (summarizing Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)).

distributors that it could make recommendations to the attorney general for prosecution. In addition, recipients of commission notices were usually visited by law enforcement, who would inquire what actions the distributor had taken based on the notice. In its opinion, the Supreme Court found that Rhode Island had crafted an unlawful system of prior administrative restraint, without sufficient constitutional safeguards, even though enforcement authority was at one remove from the commission itself. As Justice Sotomayor's majority opinion in *Vullo* concluded, *Bantam Books* "stands for the principle that a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf."[15]

In a jawboning case, the core claim is that the government suppressed speech indirectly via pressure on a third party. As the Court explained, the ultimate inquiry is thus whether the plaintiff has "plausibly allege[d] 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."[16] On its own, that formulation restates the core question without offering much assistance in answering it. However, the Court moved on to offer some lodestars in the analysis. First, it considered Vullo's authority, since "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."[17] Vullo and DFS had directly regulated the insurance firms involved in Carry Guard and similar programs. Next, the Court assessed the content of Vullo's communications with these regulated entities. Based on the NRA's well-pleaded allegations, Vullo had offered to overlook a set of technical infractions that are evidently common in the industry, so long as the targeted firms cut ties with the NRA. Then, the majority opinion evaluated how these firms reacted: with alacrity, in the direction Vullo indicated. Overall, the NRA's complaint, "assessed as a whole, plausibly alleges that Vullo threatened to wield her power against those refusing to aid her campaign to punish the NRA's gun-promotion advocacy."[18]

[15] *Id.* at 190.

[16] *Id.* at 191.

[17] *Id.* at 191–92.

[18] *Id.* at 194.

In the Court's view, the Second Circuit went astray by "taking the allegations in isolation and failing to draw reasonable inferences in the NRA's favor."[19] Neither the illegal nature of Carry Guard and similar programs, nor Vullo's move to target nonexpressive conduct for enforcement, insulated her actions from First Amendment scrutiny. The Court was attentive to the insidious nature of jawboning that targets intermediaries. After all, intermediaries have fewer incentives to defend speech that is not their own, and they may be subject to multiple regulators, any of whom could leverage that oversight to suppress speech. Based on the NRA's well-pleaded allegations, the Supreme Court reversed the Second Circuit, holding that the NRA's allegations, if true, would make out a First Amendment violation.[20]

B. Murthy v. Missouri

Unlike the straightforward lineup in *Vullo*—one plaintiff, one defendant, one issue—*Murthy* involved a hodgepodge of actors and allegations. The plaintiffs included five individuals and two states, Missouri and Louisiana. They sued a panoply of federal agencies and officials, including the Federal Bureau of Investigation (FBI), Centers for Disease Control and Prevention (CDC), and the Surgeon General, among others. The intermediaries involved in the case comprised most of the major social media platforms, including Facebook, X (formerly Twitter), and YouTube. According to the plaintiffs, the Biden administration, writ large, had pressured these platforms to censor speech, particularly related to the COVID-19 pandemic and to election-related misinformation. A Louisiana federal district court agreed. It granted a wide-ranging injunction barring communication between the administration and platforms and extending even to entities that were not parties to the lawsuit. The Fifth Circuit largely affirmed the injunction, although it trimmed back its scope somewhat. In determining whether content moderation by the

[19] *Id.*

[20] Justice Ketanji Brown Jackson wrote a brief concurrence highlighting the necessity of distinguishing between coercion and First Amendment violations—the existence of the former does not automatically prove the latter, in her view. *See id.* at 201 (Jackson, J., concurring). She distinguished between indirect censorship and retaliation, arguing that the second theory of jawboning was the better fit with the facts in *Vullo*. *See id.* at 202–03.

platforms counted as state action, the Fifth Circuit held that "a private party's conduct may be state action if the government coerced or significantly encouraged it."[21] The resulting injunction, though, covered platforms beyond the ones used by the plaintiffs, and was not limited by topic.[22]

The complexities in the case also included the different approaches and methods that the platforms themselves deployed to implement their various content moderation policies. It is often difficult to distinguish between voluntary, private initiatives and coerced ones. And it becomes far more challenging with the range of actors and time in play in *Murthy*.[23]

The majority opinion cut straight to standing (an approach harshly criticized by Justice Alito's dissent). Justice Barrett recounted the familiar elements of standing—concrete and particularized injury that is actual or imminent; traceability to the complained-of conduct; and redressability—in a way that emphasized the challenges faced by the *Murthy* plaintiffs. First, since the states and individuals sought forward-looking injunctive relief, they needed to show "that the third-party platforms 'will likely react in predictable ways' to the defendants' conduct."[24] Second, they had to show a "real and immediate threat of repeated injury."[25] In short, the plaintiffs needed to demonstrate that the platforms were likely to censor them as a result of governmental pressure. And, to support a preliminary injunction, the plaintiffs needed to make a "clear showing" that they were likely to establish each element of standing—based not on allegations, but on the factual evidence obtained during discovery.[26] This framing played up the difficult task that confronted the plaintiffs.

The majority's standing analysis was unsparing. While past instances of harm could serve as evidence of a likelihood of similar

[21] Missouri v. Biden, 83 F.4th 350, 380 (5th Cir. 2023) (internal citation omitted).

[22] *See Murthy*, 144 S. Ct. at 1985.

[23] It didn't help that both the district court and the Fifth Circuit relied on made-up facts in their decisions; Justice Barrett devoted a long footnote to explicating some of these findings that "unfortunately appear to be clearly erroneous." *Id.* at 1988 n.4; *see* Derek Bambauer, *Be Careful What You Ask For*, Knight First Amend. Inst. at Colum. Univ. (Oct. 30, 2023), https://knightcolumbia.org/blog/be-careful-what-you-ask-for.

[24] *Murthy*, 144 S. Ct. at 1986 (internal citation omitted).

[25] *Id.* (internal citation omitted).

[26] *Id.* (internal citation omitted).

future injury, the "lack of specific causation findings with respect to any discrete instance of content moderation" meant that the plaintiffs would "essentially have to build [their] case from scratch" and demonstrate that they had new cause to fear government-driven censorship of their particular speech.[27] Even the factual flights of fancy in the district court and Fifth Circuit opinions did not offer any direct links between government pressure and platform decisionmaking. The Court expressly rejected the Fifth Circuit's highly general approach to standing, which "attribute[ed] *every* platform decision at least in part to the" government based upon broad views of how the administration and the platforms interacted.[28] The core problem for showing traceability is that the social media platforms had begun limiting or removing COVID-19 and election misinformation well before the Biden administration came to office, and certainly before the alleged jawboning occurred. Moreover, the complexity of the case (multiple plaintiffs, defendants, platforms, topics, and alleged injuries) made showing causation all the more difficult.

The Court made short work of the States' standing claims and those of four of the individual plaintiffs (three doctors and a citizen journalist). It gave greater credence to claims by Jill Hines, an activist who published and promoted materials skeptical of COVID-19 vaccine and mask mandates. However, even her claims were too tenuous to confer standing. The evidence showed that Facebook had acted to deplatform one of her groups before the White House had made any relevant requests. Nor could she adduce proof that the Biden administration sought to suppress those who reposted content (as opposed to creating it initially). And it was not clear that any of her posted material actually ran contrary to requests from the CDC about COVID-19 misinformation.

Finally, none of the plaintiffs made a sufficient showing that they were likely to suffer future harm from jawboning. In particular, the Biden administration had dramatically scaled back its interactions with and pressure on social media platforms over COVID-19 as the pandemic gradually waned in severity by 2022. And redressability posed a challenge: Even if the social media services originally adopted or enforced content curation policies under governmental

[27] *Id.* at 1987.

[28] *Id.* at 1988 (emphasis in original).

duress, the waning of that pressure left the platforms free to maintain or abandon those practices with little fear of repercussion. Thus, an injunction against jawboning by the administration would have scant capacity to prevent future harm to the plaintiffs.

The majority opinion closed with a nod to the complexities of the case and the concomitant problems for proving standing: The burden rests on the plaintiffs, and the Court was not willing to trawl through the voluminous record in a search for connections that the plaintiffs had failed to establish.

Justice Alito's dissent exceeds the majority opinion in length and heat. It characterized *Murthy* as "one of the most important free speech cases to reach this Court in years."[29] Unlike the majority, the dissent cited *Vullo* to reinforce the principle that "government officials may not coerce private entities to suppress speech."[30] Like the majority, the dissent narrowed the field of actors and claims to focus on pressures by the White House and the CDC toward Facebook about content posted by Hines. In the dissent's view, the factual record is clear: The administration "continuously harried and implicitly threatened Facebook with potentially crippling consequences" if it did not comply with demands regarding COVID-19 content.[31] The dissent argued that Hines was "indisputably injured, and due to the officials' continuing efforts, she was threatened with more of the same."[32] The dissent attacked the majority's unwillingness to grapple with the merits of Hines's First Amendment claims. Although that criticism is not entirely accurate, it raised a cogent worry about the distinction between the two jawboning cases: "Officials who read today's decision together with *Vullo* will get the message. If a coercive campaign is carried out with enough sophistication, it may get by."[33]

Justice Alito also convincingly reinforced the concerns about jawboning intermediaries that the Court described in *Vullo*. Such intermediaries may be uniquely susceptible to government pressures (especially from the executive branch) because they depend on the statutory protections of 47 U.S.C. § 230 (popularly known as

[29] *Id.* at 1997 (Alito, J., dissenting).

[30] *Id.* at 1998. The majority opinion did not reference *Vullo* at all.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 1999.

"Section 230"). They are also vulnerable because they are potential targets for antitrust scrutiny and because they rely on American intervention to counteract aggressive European Union (EU) regulators.

The dissent spent nearly 10 pages recounting the oft-dramatic interactions between Biden administration officials and Facebook, perhaps culminating in President Biden's extravagant claim that the social media service was "killing people."[34] Next, the dissent turned to standing and argued for a different standard for traceability. In the dissent's view, it sufficed for Hines to "show that one predictable effect of the officials' action was that Facebook would modify its censorship policies in a way that affected her."[35] The dissent also contended that "it is reasonable to infer . . . that the efforts of the federal officials affected at least some of Facebook's decisions to censor Hines."[36] And, Justice Alito also took issue with the claim that jawboning had diminished by the summer of 2022, since the effects of that jawboning likely lingered and threats can carry force even if not expressly renewed. Finally, the dissent contended that redressability is effectively the mirror image of causation, and thus an injunction was likely to have at least some effect in reducing the future risk of harm to Hines.

After taking the majority to task on standing, Justice Alito's dissent turned to the merits of Hines's First Amendment claim. Here, the dissent articulated three guideposts that it discerned from *Vullo* for distinguishing "permissible persuasion [from] unconstitutional coercion."[37] These three factors are "(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."[38] The dissent emphasized the power of the President to influence all three of the intermediary weak points identified earlier—for example, by seeking legislative alteration of Section 230, by undertaking antitrust enforcement

[34] *Id.* at 2000. The majority opinion disagreed with Justice Alito's characterization of the facts. *See id.* at 1991–92 nn. 7 & 8; 1995 n.10 (majority opinion).

[35] *Id.* at 2006 (Alito, J., dissenting). The majority opinion also disagreed on traceability. *See id.* at 1992 (majority opinion).

[36] *Id.* at 2008 (Alito, J., dissenting).

[37] *Id.* at 2010.

[38] *Id.*

against Facebook, and by negotiating a deal with EU regulators over platforms' transfers of personal data to non-EU jurisdictions (such as the United States).[39] For the dissent, all three analytical factors plainly pointed toward coercion, not persuasion:

> In sum, the officials wielded potent authority. Their communications with Facebook were virtual demands. And Facebook's quavering responses to those demands show that it felt a strong need to yield.[40]

II. The Guidance

At first glance, the opinions in *Murthy* and *Vullo* are a letdown: The former disposes of the case on standing grounds, and the latter remands the case based on civil procedure issues. On the surface, then, the cases make no new First Amendment law. Neither opinion engages with, or even mentions, the other social media and free speech case from this Term, *Lindke v. Freed*.[41] That case addressed how to distinguish when government officials who use social media speak in their personal capacity versus their official capacity.[42] This omission is strange, because *Lindke* grappled directly with the state action doctrine—which is vitally important to jawboning—and because that case established a clear two-part test while simultaneously acknowledging the complexities inherent in analyzing social media cases.[43] *Murthy* and *Vullo* feel like a disappointment and a missed opportunity.

However, the jawboning opinions offer much more when read carefully.

First, and perhaps most important, jawboning remains alive and well as a species of First Amendment violation or claim. *Bantam Books* has always been a bit of an outlier: an oddly constructed oversight

[39] *Id.* at 2010–11.

[40] *Id.* at 2015.

[41] 601 U.S. 187 (2024).

[42] *See generally id.*

[43] The *Lindke* test has two parts for determining whether a government official's speech constitutes state action; each prong of the test must be met (in sequential order) for there to be a potential First Amendment violation. *See id.* at 198 (holding that "such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media").

scheme in the midst of one of many moral panics about the materials to which minors had access. Two technological shifts have since made the power and risks of jawboning much more potent.[44] The first, of course, was the rise of digitized information, sophisticated discovery mechanisms such as recommendation algorithms, and ubiquitous high-speed connectivity—in short, the modern internet. The second was the debut of popular intermediaries, such as social media platforms, that feature principally (if not almost exclusively) user-generated content rather than material created by the intermediaries themselves. The first trend led many internet consumers to depend on the medium for news, entertainment, and so forth. Control over that medium meant control over consumers' information environment. The second development reduced the incentives of these new intermediaries to defend access to any particular piece of content—after all, any particular topic or story would have only a vanishingly small effect on that platform's revenue stream. These two developments made jawboning, especially of internet intermediaries, both more effective and more attractive for regulators as an approach to control content.

Second, the cases provide exemplars for a successful and unsuccessful jawboning suit. The Court's analysis of *Vullo*, for example, paints a fairly straightforward case of improper regulatory pressure. Infractions by entities regulated by the New York Department of Financial Services were common (although one wonders how many violations involved murder insurance). And the DFS superintendent offered to overlook, or at least treat leniently, misconduct by firms that were willing to sever ties with an organization whose speech she disliked: the NRA.[45] Again, these facts are drawn from the NRA's complaint, and the organization will have to adduce proof in subsequent proceedings below. On this account, though, the threat is clear. If the insurance firms did not cooperate, DFS could have launched investigations that were likely to find malfeasance—indeed, all three firms settled with an admission of guilt. This demonstrates the considerable power that DFS wielded. And, while DFS possesses legitimate authority over some forms of communication

[44] *See* Bambauer, *supra* note 1, at 102–05.

[45] *See* Nat'l Rifle Ass'n v. Vullo, 602 U.S. 175, 194–95 (2024). Interestingly, the Fifth Circuit opinion in *Missouri v. Biden* viewed the facts in *Vullo* as "complex and sprawling." Missouri v. Biden, 83 F.4th 350, 378 (5th Cir. 2023).

by insurance entities (for example, over the accuracy of their representations to customers), it has no legitimate remit to dictate which business partners firms should choose based on their views on social issues such as gun control.[46]

Murthy, by contrast, is at best a weak jawboning claim. The facts are frankly a mess. The record is tens of thousands of pages long; some of the facts were outright fictions invented by the district court; and some of the defendants (such as the Surgeon General) lacked any authority or power over the social media platforms. Moreover, the platforms themselves were willing, often eager, to curate controversial content such as COVID-19 and election misinformation. While the platforms consulted various administration agencies and officials for guidance, they did not always follow that advice—as the frustration of Biden administration officials makes plain. Finally, the plaintiffs simply could not show causal links between administration pressure and moderation or removal of their content. As the dissent argued, this could perhaps be due to a subtle, coordinated campaign of pressure undertaken by the Biden administration. But in the midst of the chaos of a deadly pandemic and foreign interference in American elections, the simpler and more likely answer is that federal officials were working haphazardly and under pressure to try to limit the spread of information they viewed as dangerous.[47] To be sure, there seems little question that the administration would have liked to jawbone platforms into removing some of this content. But it is not clear that the platforms were unwilling participants, nor is it clear that the plaintiffs in the case suffered any harm from the government's efforts.

Third, the dissenting opinion in *Murthy* offers far more than a list of purported errors or a catalog of grievances. Justice Alito has discerned at least the outlines of the elements of the test for determining when jawboning is permissible speech and when it is impermissible coercion.[48] The Alito dissent may prove more influential than most dissents precisely because it undertakes the hard work of explaining what the majorities in the two cases seem to be doing.

[46] *See Vullo*, 602 U.S. at 176.

[47] This view had excellent empirical support in the case of COVID-19 falsehoods.

[48] *See Murthy*, 144 S. Ct. at 2010 (Alito, J., dissenting). Why the Court was unwilling to set out more precise parameters for jawboning claims in either *Vullo*—a unanimous opinion—or *Murthy* is a mystery, and a frustrating one.

And the dissent sounds a valuable note of warning: Jawboning is least likely to violate the First Amendment when it is subtle and indirect,[49] which are precisely the characteristics that make jawboning so hard to cabin in the first place. The *Vullo* scenario may turn out to be the exception rather than the rule. Government actors with more time and guile than Ms. Vullo may be able to craft jawboning schemes that are sufficiently covert and complex to evade liability, but sufficiently threatening to coerce their targets to comply. Here, too, the lack of a clear test for jawboning liability makes defending against such schemes difficult. Trial courts will have to reason from basic, core First Amendment principles to distinguish coercion from persuasion, without much in the way of guidance from the Supreme Court to assist them in that difficult task.

Fourth, not all members of the Court are in line behind Justice Alito's methodology for jawboning—or any methodology, for that matter. Justice Gorsuch's concurrence in *Vullo* explicitly rejects any of the existing tests utilized by the courts of appeals. Indeed, his concurrence strongly suggests that no such test can even be elucidated. In Gorsuch's view, the question is ultimately whether a suit has "plausibly allege[d] 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."[50] That summary is fine descriptively, but it provides zero guidance on how lower courts ought to approach that question. And that is unsatisfying, because unbridled discretion undercuts uniformity and invites ends-driven reasoning. Gorsuch's concurrence also suggests that even if the other eight members of the Court were to come to consensus on a jawboning methodology, Justice Gorsuch would continue to hold out.

Finally, the *Vullo* decision reinforces that state governments are just as capable of jawboning as the federal one—and indeed may have greater power to do so effectively.[51] Federal government actions tend to draw more attention from media, plaintiffs, and commentators. But in many ways, state and local governments have greater

[49] *See id.* at 1999.

[50] *Vullo*, 602 U.S. at 200 (Gorsuch, J., concurring).

[51] *See, e.g.*, Bambauer, *supra* note 1, at 53–57 (describing role of state attorneys general in pressure on Google).

daily sway over the lives of most citizens. *Vullo* shows that the Court is attentive to this dynamic, and the set of cases it cites are principally ones from lower levels of government.

III. A Better Test: Threats, Authorization, Power

A better methodology for jawboning considers three variables: threats, authorization, and power.

A. Threats

The existence of a threat from a governmental actor that involves speech is the triggering condition for jawboning analysis.[52] Jawboning is in play if there is a plausible threat, whether direct or indirect, explicit or implicit, latent or implemented. If there is a plausible threat, then a court should move on to the next steps in the analysis. But if there is no threat, then the communication is permissible government speech, not coercion. If the Surgeon General gives a speech noting false COVID-19 information on a social media platform and saying it ought to be removed, that's simply performing the job of being Surgeon General. Like private entities, the government is free to speak and to advocate for policy positions. Moral suasion differs from compulsion, and room for the former is required both by current First Amendment doctrine and the practical realities of governance. Governments are free to complain about what private entities say and how they act; indeed, it's difficult to conceive of how state officials could advocate for policy without so doing. Legitimate government speech may embarrass its target or cause citizens to change how they interact with that entity, but it does not suggest or imply that the state will deploy its regulatory authority to compel such a change.

Whether the state has issued a threat is not always easy to determine. Several courts of appeals use the reaction of the targeted entity

[52] Threats that have nothing to do with speech don't implicate the First Amendment. If the government threatens to initiate a Federal Trade Commission investigation of Google unless the firm switches to green energy, that might be a legally impermissible threat for other reasons, but it would not be a First Amendment issue. And threats emanating from direct regimes of prior restraint generate standard First Amendment claims. *See, e.g.*, Packingham v. North Carolina, 582 U.S. 98 (2017) (overturning ban on use of social media sites by registered sex offenders).

as one guidepost,[53] and the *Vullo* opinion does so as well (although without identifying this as part of the formal analysis).[54] However, the target's subjective reaction is a poor indicator of whether jawboning has occurred; an objective analysis is preferable. A weak target—or, perhaps more charitably, one that is highly risk averse—will overreact to even mild government pressure, including government speech. A strong target, with nerves of steel, won't cave even under obvious regulatory threats. Both extremes illustrate the problem with a subjective test: It will generate too many false positive and false negative results. Society should expect the subjects of speech to endure at least some criticism before they rush into court to bring suit—indeed, that is the lesson of defamation doctrine, among other examples. On the other side of the coin, targets of regulatory threats who successfully steel themselves against pressure should not be barred from redress. Instead of a subjective test based on how the *actual* target reacted, an objective test that looks at how a *reasonable* target would react could offer useful guidance on what constitutes governmental disapprobation versus governmental threats.

B. Authorization and Power

Once the recipient establishes that a threat was made, courts should assess two factors together: whether the actor making the threat is authorized to regulate the speech at issue in some fashion, and how much power the actor has to carry the threatened consequences into effect. Not all threats have equal force to compel. Courts should scrutinize most closely instances in which the government actor has little or no authorization to regulate but has considerable power to inflict harm for failure to follow its commands. This combination of factors makes government least legitimate and most menacing. Conversely, when a government entity has clear authorization over the speech and target at issue, and little capacity to make good on threats, courts should allow the state more leeway.

As ever, the hard cases are in the middle. In some of these cases, the threat may come from a government actor with clear authorization and significant power—for example, the Federal Communications

[53] *See Vullo*, 602 U.S. at 189 (citing case from the Second Circuit); *see also id.* at 190 (citing cases from the Third, Fifth, Seventh, and Ninth Circuits).

[54] *See Murthy*, 144 S. Ct. at 2010 (Alito, J., dissenting).

Commission (FCC) in the context of broadcast television regulation. In others, the threat may come from a government actor with questionable authorization but little clout—for example, the small-town clerk who threatens to travel across state lines and arrest a social media CEO. In the first type of middle case, as with the FCC, it is difficult to distinguish between legitimate enforcement and illegitimate pressure.[55] In the second type of middle case, it is hard to see how the government actor could carry out the threat. This new methodology does not have straightforward implications for those two combinations of authorization and power; the outcomes are likely to be context specific. Nonetheless, the model helpfully concentrates attention on the worst and most consequential instances of jawboning.

1. Authorization

The second variable pertains to authorization: Is the governmental entity authorized to engage in the conduct that it uses as a threat? The greater the authorization, the less likely that a threat will be jawboning. For example, American legal doctrines make it deliberately difficult to challenge a prosecutor's broad discretion to bring or withhold charges. By contrast, the Federal Trade Commission (FTC) may only declare a particular business practice unlawfully unfair if that practice meets a searching three-part test defined by statute.[56] FTC threats to investigate or bring charges are cabined by that limited authorization, and courts should thus be more willing to treat threats that *aren't* clearly authorized as jawboning. In some instances, courts will still need to play a counter-majoritarian role as a check on the political branches; otherwise, statutes might effectively insulate government entities from jawboning liability by conferring broad discretion upon them. However, unfettered regulators will inevitably generate political opposition. Courts assessing authorization should therefore begin with a presumption of deference to an agency's remit. Employing authorization in the analysis can helpfully constrain jawboning, along with governmental interference with speech more broadly, by pushing the state toward formal

[55] For example, the FCC's ability to impose sanctions on broadcasters for fleeting expletives and indecent images remains uncertain. *See* Lyle Denniston, *"Wardrobe Malfunction" Case Finally Ends*, SCOTUSBLOG (June 29, 2012, 11:51 AM), https://www.scotusblog.com/2012/06/wardrobe-malfunction-case-finally-ends/.

[56] 15 U.S.C. § 45(n).

speech-regulating mechanisms.[57] Such mechanisms are more transparent and more subject to state challenge than informal pressures that occur behind closed doors.

2. Power

The third variable in the new methodology is power. As explained above, there are many reasons that a governmental threat might be effective, from a long-shot risk of destruction to the sure risk of being metaphorically nibbled to death by ducks. "Bet the company" decisions are always sobering for executives. But the risk of death by a thousand cuts is also serious; the many Lilliputians managed to tie down Gulliver despite their tiny stature.[58]

This power analysis should have two components: the consequences of the threat that a government actor can plausibly make (outcome) and the likelihood that the actor can bring about that outcome (probability). Unlike the *Lindke* analysis—where the two steps are sequential and an insufficient level of either vitiates a claim of state action—outcome and probability interact and are always in play. Low-probability consequences may be a powerful threat if the potential outcome is severe—for example, the risk that Congress might pass legislation that would force the sale of a popular internet platform such as TikTok. And even a seemingly minimal outcome, such as receiving a stream of civil investigative demands, may be enough to push speakers and platforms into grudging compliance. That result is more likely when the government actor is virtually certain to be able to inflict that penalty, especially in an ongoing fashion.[59] Probability should also measure the constraints, practical and legal, that operate to limit the power of jawboning. Prosecutors often have largely unfettered discretion to open criminal investigations and bring charges. Modern legislators, on the other hand, typically must persuade a significant number of colleagues to pass legislation, even if they have the support of their President or governor. The more steps, or intervening entities, that lie between the actor who makes the threat and its instantiation, the less probable that outcome and thus the less likely that the pressure is jawboning.

[57] *See* Derek E. Bambauer, *Orwell's Armchair*, 79 U. Chi. L. Rev. 863, 868 (2012).

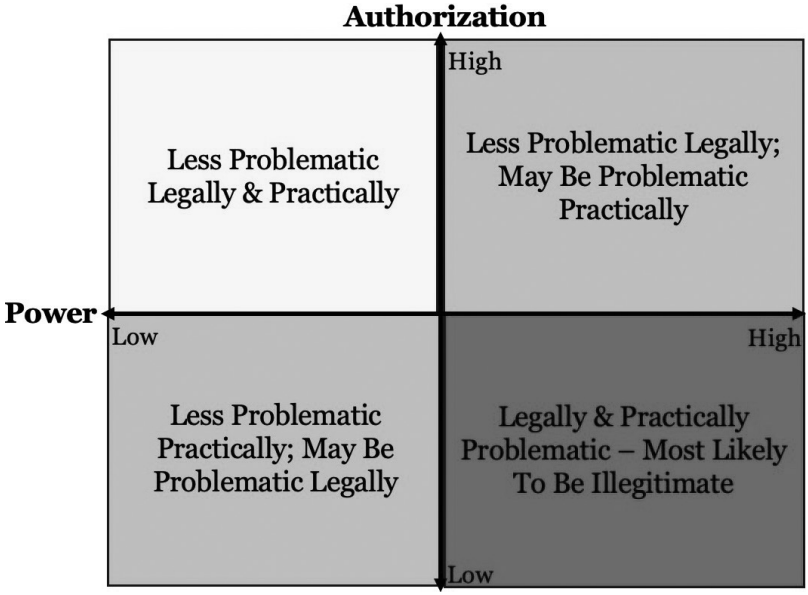
[58] Jonathan Swift, Gulliver's Travels (1726).

[59] *See* Bambauer, *supra* note 1, at 54.

In diagram form, the proposed methodology looks like Figure 1:

Figure 1

Jawboning Variables



This methodology helps considerably in winnowing down jawboning cases. When a governmental entity is operating within its authorized remit (high authorization) but has relatively low capacity to inflict significant consequences (low power), courts should be less willing to impose jawboning liability. In parallel, we do not need to be as concerned about such threats. But this isn't an exemption: Courts should still treat jawboning claims seriously, if only because punishing a threatening regulator from time to time discourages the others.

By contrast, when a government actor is operating outside its authorization but has real power to inflict harm for disobedience, courts should be most alert to potential jawboning and most willing to find that threats violate the First Amendment.

As already mentioned, the intermediate zones pose the most difficulty: when a government actor has both scant authorization to act and little power, or has real power and genuine authorization. The

former is less likely to generate controversy or litigation because private entities probably will not fear or heed threats from a renegade but ineffectual regulator. The latter is less likely to prompt challenges because the regulator's facial authority is strong. The latter, however, is the combination where the courts' counter-majoritarian role may be most important, since the political branches may have turned loose a "Mechanical Hound" that transgresses constitutional limits.[60]

Like all models, this one for jawboning simplifies the analysis needed, but hopefully it simplifies in useful fashion. It usefully concentrates attention on the most problematic instances of the phenomenon. But it leaves open a few questions that deserve attention.

First, both the Louisiana district court and the Fifth Circuit bought the argument that some "suggestions" are inherently coercive when made by government officials. For example, the FBI possesses wide-ranging investigative powers and has close ties to the Department of Justice. For this reason, both courts believed that the FBI automatically engages in jawboning when it makes suggestions about content moderation to platforms.[61] In their estimation, it didn't matter that the FBI never threatened or attempted to impose any consequences for failing to follow its advice. But this view is too categorical; a more sensible analysis would place the interactions between the FBI and platforms outside jawboning altogether, because jawboning requires a threat. The FBI never made one—probably because the agency is aware of its power and reputation and hence admirably cautious about pressure.

Still, the concept of an inherent threat shouldn't be rejected out of hand. Consider Darth Vader: No one is actually honored by his presence; he is there to realign activity with governmental wishes.[62] He is there, in short, to put things back on schedule. American government has no immediate analog (fortunately), but Senator Joe McCarthy came close in the 1950s.

Second, regulation by raised eyebrow is a real concern. The Motion Picture Association (formerly the Motion Picture Association of America) adopted its putatively voluntary system of movie ratings

[60] *See* Ray Bradbury, Fahrenheit 451 54–55 (Simon & Schuster 2003) (1953).

[61] *See, e.g.*, Missouri v. Biden, 83 F.4th 350, 388–89 (5th Cir. 2023).

[62] *See* Return of the Jedi, at 03:56 (Twentieth Century Fox 1983).

and content moderation—effectively enforced by a triopoly of movie theater chains at present—to preempt state and local censorship laws that interfered with motion picture distribution.[63] The major movie studios opted to conform to prevailing political preferences rather than to challenge them. However, they did so against the backdrop of a legal system that imposed significant costs and legal risks on everyone involved in distributing a film. Put differently, a presidential whisper is louder than anyone else's shout. It's not clear that courts can or should take account of voluntary, perhaps craven, decisions to go along to get along. If they do not, however, the concern is that risk-averse entities may be pressured outside the bounds of jawboning liability, to the detriment of free expression. The informal blacklisting that occurred in many industries during the McCarthy-era witch hunts for supposed Communists is one example. And it was also part of the dynamic in *Bantam Books v. Sullivan*, which combined outsourcing of government power with public enforcement of private arrangements, thereby resulting in the worst of all possible worlds. Both hard and soft censorship cast long shadows.[64]

Third, the subject matter involved in alleged jawboning likely matters and probably should. Some of the purported coercion in *Murthy* involved the Biden administration attempting to combat dangerous, and in some instances deadly, misinformation about the COVID-19 pandemic, which to date has killed over a million Americans. These efforts occurred against the backdrop of widespread false information about the illness and measures to combat it—false information that had been endorsed in many instances by former President Donald Trump and his administration. Pressure about speech related to COVID-19 seems similar to pressures about speech related to national security matters. In that context, the government formally operates under the same First Amendment standards as in all other contexts, but informally it enjoys more relaxed judicial scrutiny. The Constitution is not a suicide pact, and some deference seems due when the government articulates a reasonable, grounded threat to the polity that is separate from the speech at issue itself

[63] *See* E. Judson Jennings, *Show & Tell on the Internet? Will Jane & George Set the Standard? FCC Censorship and Converging Technologies*, 17 Seton Hall J. Sports & Ent. L. 1, 13 (2007).

[64] *See* Bambauer, *supra* note 57.

(not bogus threats like Communist propaganda in the mail).[65] With that said, courts ought to ask the government to bring receipts. The federal government often invokes national security to justify regulation of speech, and its track record of accuracy and candor is quite poor.[66] National security should not be a high card in the jawboning analysis.

In the opposite direction, courts ought to be more skeptical about jawboning that seeks to affect democratic processes such as elections. This is essentially a second-order authorization problem. If jawboning can increase the ease with which the government can obtain authorization for regulatory regimes, then authorization will be less useful as a guidepost. Put differently, courts ought to be alert to the risk that jawboning may entrench a set of political actors. This is why the allegations about White House pressures on social media platforms to remove information about the controversy over Hunter Biden's laptop are so worrisome.

Lastly, the jawboning discourse to date has focused almost exclusively on executive branch actors. This is too narrow. Congress has significant power to engage in jawboning. In fact, the House Judiciary Committee in the current session of Congress has essentially provided an ongoing exemplar of the problem. Committees can subpoena documents, compel witnesses to testify, threaten anyone who challenges their authority with contempt or referral to the Department of Justice, and generally impose regulatory costs on speakers and speech with which they disagree. The courts have typically been reluctant to interfere with Congress as a coequal branch, and they normally reject attempts to quash subpoenas via mechanisms such

[65] *See* Lamont v. Postmaster General, 381 U.S. 301 (1965).

[66] *See* Geoffrey R. Stone, *Free Speech and National Security*, 84 Ind. L.J. 939, 939 (2009) ("In the national security setting, however, the United States has a long and checkered history of allowing fear to trump constitutional values."); N.Y. Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring) ("[National] 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."). The current attempt to force a sale of TikTok, on pain of banning the app, is an excellent example. *See* Brief of First Amendment Law Professors as *Amici Curiae* in Support of Petitioners 20–25, TikTok Inc. v. Garland, No. 24-1113 (D.C. Cir. June 27, 2024), https://storage.courtlistener.com/recap/gov.uscourts.cadc.40861/gov.uscourts.cadc.40861.2062101.0.pdf. (The author is a signatory and co-author of the brief).

as the political question doctrine. But that deference ought to be more limited. The judicial branch has slowly recognized the ways in which the executive branch can interfere with First Amendment rights through misuse of putatively unrelated formal mechanisms and through informal ones. Courts should similarly be more active in reviewing challenges to congressional pressures on speech. And scholars and courts alike should be attentive to jawboning at state and local levels, which attracts less attention but which may be more potent given its concentrated focus. Jawboning, in short, should be a doctrine that constrains governmental pressures on speech at all levels and across all branches. By analyzing threats, authorization, and power, courts can identify the most problematic instances of such pressure and separate protected speech from improper intimidation.

Conclusion

For the first time, jawboning in its modern incarnation came to the Supreme Court this Term. At first blush, the results may seem disappointing: One case failed for lack of standing, and the second was remanded because the Second Circuit neglected to follow the proper approach to evaluating a motion for summary judgment. Those outcomes may please scholars of civil procedure and federal courts, but First Amendment observers can be forgiven for feeling pangs of disappointment.

However, when read closely, the cases end with a bang, not a whimper. Jawboning remains an important constraint upon government attempts to block speech—indeed, the doctrine has been revitalized. *Vullo*, in particular, demonstrates that the Court is attentive to indirect pressures at all levels of government. As bookends, the *Murthy* and *Vullo* decisions show what a viable jawboning claim does, and does not, need to include. While the Justices were not able to agree on a methodology for evaluating jawboning claims (and Justice Gorsuch disagreed even with the attempt to do so), Justice Alito's dissent in *Murthy* reveals the nascent outlines of such an approach. And that dissent contains an important cautionary tale: The courts must be alert to attempts to circumvent any framework they do establish.

This article makes an initial attempt at setting out an analytical method for weighing jawboning claims. The method is admittedly

incomplete because the question of "how much government pressure is too much?" resists easy formulation. But it draws upon threads in *Murthy* and *Vullo* and concentrates judicial attention on the most problematic instances of this phenomenon. These two decisions are sure to launch a thousand suits—or, at least, a significant number of them—and their importance in the skein of First Amendment precedent will only grow with time.