No. 26-1264

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

A WOMAN'S CONCERN, INC., d/b/a YOUR OPTIONS MEDICAL CENTERS,

Plaintiff-Appellant,

v.

MAURA HEALEY, GOVERNOR OF MASSACHUSETTS, sued in her individual and official capacities; ROBERT GOLDSTEIN, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH, sued in his individual and official capacities; REPRODUCTIVE EQUITY NOW FOUNDATION, INC.; REBECCA HART HOLDER, EXECUTIVE DIRECTOR OF REPRODUCTIVE EQUITY NOW FOUNDATION, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Massachusetts (No. 1:24-cv-12131-LTS)

REPLY BRIEF OF PLAINTIFF-APPELLANT

SAMUEL J. WHITING
[redacted]
MASSACHUSETTS LIBERTY LEGAL CENTER
[redacted]

OLIVIA F. SUMMERS
[redacted]
JORDAN A. SEKULOW
[redacted]
STUART J. ROTH
[redacted]
ANDREW J. EKONOMOU
[redacted]
CHRISTINA A. COMPAGNONE
[redacted]
NATHAN J. MOELKER
[redacted]
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

Counsel for Plaintiff-Appellant

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INTRODUCTION

Following the U.S. Supreme Court decisions in *Vullo*, *First Choice*, and *Chiles,* it is abundantly clear that the First Amendment positively prohibits what the Commonwealth has done. *Vullo* confirms that government speech becomes unconstitutional when officials use government power to pressure private parties to suppress disfavored expression. *First Choice* confirms that a faith-based pregnancy center need not wait for enforcement before challenging official pressure that chills its First Amendment activity. And *Chiles* confirms that the Commonwealth cannot evade the First Amendment by relabeling protected professional speech as medical "practice" or "standard of care." Those principles decide this case. The Commonwealth launched a targeted campaign against a defined class of religious pro-life medical providers, labeled them a public health crisis and deceptive advertisers, partnered with and funded REN to identify and stigmatize specific centers including YOM, solicited complaints through official channels, and issued licensing Guidance warning that abortion pill reversal ("APR")-related conduct could subject licensed professionals to discipline.

The Commonwealth's own brief confirms the campaign's target, admitting that the "only reasonable inference" is that the Guidance was directed at anti-abortion centers. Commonwealth Br. at 41. And the threat is ongoing: the Guidance remains in place, the Commonwealth continues to defend its authority to discipline licensed professionals who exercise their constitutional right to speak about APR-related information or services, and YOM continues to face the practical consequences of a campaign designed to chill its speech and religious exercise. At the Rule 12(b)(6) stage, those allegations had to be assessed together and credited in YOM's favor. The district court did the opposite, and its dismissal should be reversed.

SUMMARY OF THE ARGUMENT

The district court's judgment should be reversed for two reasons. First, the Amended Complaint plausibly alleges that the Commonwealth did far more than express its own views. Read as a whole, the Complaint alleges a coordinated campaign that targeted religious pro-life pregnancy centers, used enforcement-laden accusations and licensing guidance to place those centers and their physicians "on notice," solicited complaints through official channels, and produced concrete chilling effects on YOM's speech, religious exercise, and medical operations. Appellees' responses repeat the district court's error by separating each component of that campaign from the others. But *Vullo*, *Bantam Books*, *First Choice*, and *Chiles* require the opposite approach: the Court must consider word choice, regulatory authority, context, purpose, and effect *together*, and must draw reasonable inferences in YOM's favor.

Second, the Complaint plausibly alleges that REN and Holder acted under color of state law. Massachusetts did not merely fund or listen to a private advocate; it publicly described REN as its trusted partner, collaborated with REN in creating and implementing the campaign, promoted REN-created resources through official channels, relied on REN complaints to accelerate official guidance, and used REN's platform to disseminate name-identifying content the Commonwealth would not place on its own website. Those allegations support joint action, a close nexus, significant encouragement, and unlawful circumvention of constitutional limits. Taken together, the Amended Complaint states viable Free Speech, Free Exercise, Equal Protection, and state-action claims, and the dismissal should be reversed.

ARGUMENT

I. The Amended Complaint, Read Comprehensively, Plausibly Alleges the Violation of YOM's Constitutional Rights Through a Campaign Designed to Chill Religious Speech.

A. The Commonwealth's Brief Confirms, Rather Than Cures, the District Court's Methodological Error.

The Commonwealth's Brief organizes its defense by document and by actor: the public education campaign is discussed as government speech, Commonwealth Br. at 19–24, the Commissioner's and Governor's individual statements are analyzed as isolated instances of "expressive conduct," Commonwealth Br. at 22–24, the Guidance is treated as a distinct, purportedly generally applicable communication, Commonwealth Br. at 33–43, and the Department's and Board's investigatory activity is walled off as "regulatory communications" analyzed independently of everything else, Commonwealth Br. at 44–46. In other words, the Commonwealth attempts to separate out the different acts at issue in this case and treat them separately, rather than considering them together as a cohesive unit.

The Commonwealth repeats the very error corrected by the Supreme Court in *Vullo*. The Second Circuit in *Vullo* "conclude[d] that Vullo's alleged actions constituted permissible government speech and legitimate law enforcement, and not unconstitutional coercion" by "taking the allegations in isolation and failing to draw reasonable inferences in the NRA's favor." *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 186, 194 (2024). The Supreme Court reversed unanimously, explaining that Vullo's private meeting with an insurance executive, her subsequent guidance letters to the industry, and her accompanying press release had to be read "against the backdrop of" one another—not sealed into separate analytical boxes. *Id.* at 195.

The Commonwealth treats *Vullo*'s individual factual findings, for example, the "sanctions-backed threat" delivered in a private meeting, *id.* at 195, as though that specific fact pattern is the floor for a viable coercion claim, rather than one illustration of coercion assessed holistically. *See* Commonwealth Br. at 25–28. But *Bantam Books* itself involved no such private "deal": it involved coordinated notices, an implicit referral threat, and follow-up police visits—nothing resembling *Vullo*'s back-room negotiation—and the Supreme Court still found coercion. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 62–63, 67–68 (1963).

In *Vullo*, the Supreme Court did not require the NRA to identify one standalone document that, read in isolation, contained the entire threat. It considered the regulator's word choice, authority, context, and consequences together. 602 U.S. at 191. YOM asks for the same analysis here. When a public-health regulator brands a disfavored class of religious pro-life medical providers as deceptive and dangerous, issues contemporaneous licensing Guidance warning of discipline for APR-related conduct, solicits complaints through official channels, and then points to those same complaints as the reason to accelerate the Guidance, a medical provider could reasonably understand the message as coercive. That is exactly the inference the district court was required to draw in deciding Defendants' motions to dismiss.

B. The Amended Complaint States a Free Speech Coercion Claim That the Response Briefs Do Not Refute.

1. The label "government speech" does not immunize the government's campaign.

The Commonwealth's Brief leans heavily on the proposition that "[a] government official can share her views freely . . . and she can do so forcefully in her hopes of persuading others to follow her lead." Commonwealth Br. at 20 (quoting *Vullo*, 602 U.S. at 188). YOM has never disputed that proposition, and its Opening Brief said so expressly. Opening Br. at 27. But the Commonwealth's Brief quotes only half of the governing standard. The very passage it relies on continues:

a government official may criticize and persuade, but "cannot . . . use the power of the State to punish or suppress disfavored expression." *Vullo*, 602 U.S. at 188. That is the half of *Vullo* the Commonwealth's Brief never confronts, and it is the half on which YOM's claim rests. YOM challenges a campaign that expressly disfavors religious Pregnancy Resource Centers ("PRCs") with terms of legal wrongdoing, a licensing-authority Guidance publicly posted that threatens their speech, a complaint-solicitation infrastructure funneling grievances to the very agency that controls YOM's license, and a two-year investigation traceable to the Commonwealth's own campaign partner. *Bantam Books* involved government "speech"—a list of objectionable titles—that did not receive government-speech immunity once it was coupled with a referral threat and police follow-up. 372 U.S. at 62–63, 67–68. The same combination defeats government-speech immunity here.

The Commonwealth's central move is definitional: it labels the Public Education Campaign and statements by the Commissioner and Governor as "government speech" under *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and treats that label as dispositive. But *Summum* and its progeny answer a different question than the one presented here. Those cases ask whether the government itself can speak on public property or through public programs without being forced to also carry private messages with which it disagrees. *Summum*, 555 U.S. at 467–68. Those cases do not hold that once government conduct is characterized as "speech," it is thereby immunized from the coercion analysis the Supreme Court applies under *Bantam Books* and *Vullo*.

Indeed, *Vullo* forecloses the Commonwealth's framing. The conduct the Supreme Court held stated a First Amendment claim in *Vullo* consisted almost entirely of speech: guidance letters on agency letterhead, a joint press release, and public statements urging regulated companies to sever ties with the NRA. 602 U.S. at 183–84. The Court did not ask whether that conduct was "government speech" and stop there; it asked whether the communications, read in context, could reasonably be understood to threaten adverse regulatory consequences to punish or suppress the plaintiff's viewpoint. *Id.* at 191. *Vullo* held that such communications can *simultaneously* be government speech and actionable coercion.

The communications at issue here bear the hallmarks *Vullo* identified as relevant to coercion, not mere criticism. The Commissioner did not state a viewpoint in the abstract; he called PRCs a public health crisis and issued formal guidance, on Department letterhead, to every entity his agency licenses, warning of discipline for "conduct which places into question their competence to practice," App.126–27, in the same document and press cycle that criticized "these centers" as engaged in "deceptive tactics." App.123. Layered atop a public campaign directing the public to "file a complaint against an anti-abortion center," App.133–34, and an internal record describing the purpose of the guidance as putting such centers "on notice," this is far different from a mayor denouncing topless bars in the abstract, *Connell v. Signoracci*, 153 F.3d 74 (2d Cir. 1998), or a Commonwealth agency issuing a generic consumer advisory. It is a regulator combining criticism with a simultaneous reminder of its own disciplinary authority over the listener—the exact combination *Vullo* held could plausibly convey a threat. 602 U.S. at 195 (emphasizing that the guidance letters must be "viewed in the context" of the private meeting disclosing the regulator's enforcement leverage).

The Commonwealth never squarely explains why its guidance, disciplinary warnings, and public campaign differ meaningfully from the guidance letter, press release, and private meeting at issue in *Vullo*. Instead, it simply labels its conduct "government speech." Whether the Commissioner's guidance and the public statements of the Governor and Commissioner were persuasion or threat is a classic question that turns on context, motive, and effect—the kind of question *Vullo* itself allowed a plaintiff to develop through discovery by reversing a Rule 12(b)(6) dismissal.

The Commonwealth did not merely say that it disagreed with PRCs or preferred abortion providers. It repeatedly branded PRCs as "deceptive," "dangerous," and a "public health threat"—terms that carry regulatory and legal consequences when spoken by officials who supervise medical licensing and public health. When the Commonwealth's chief health officer publicly labels a disfavored class of licensed medical providers a "public health threat," while simultaneously issuing licensing guidance, soliciting complaints, and pursuing investigations, reasonable observers understand the message as more than persuasion. They understand it as a warning backed by Commonwealth power. By accusing PRCs of deception, fraud-like misconduct, and public-health danger, the Commonwealth did not simply join a public debate. It used enforcement-laden language to stigmatize and threaten YOM's protected speech and to signal that regulated actors, such as doctors, would face consequences for continuing to associate with PRCs.

The Commonwealth's reliance on *O'Handley v. Weber*, 62 F.4th 1145, 1158 (9th Cir. 2023), for the proposition that citizens remain "free to disagree" with government messaging, Commonwealth Br. at 32, 33, is inapposite for the same reason. *O'Handley* involved a government communications office flagging content to a social-media platform with no licensing authority whatsoever over the plaintiff. 62 F.4th at 1158–59. Commissioner Goldstein is not a commentator; he is the official who controls whether YOM's clinics may lawfully operate. The "free to disagree" principle has no purchase when the speaker doing the criticizing holds the licensing authority.

None of Appellees' cited cases justifies their conduct. *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (9th Cir. 2005), is a good example. There, no *Bantam Books* argument was made or addressed: California criticized tobacco companies through a public anti-smoking campaign, but the companies "concede[d]" that "the message produced by the government's advertisements create[d] no First Amendment problem apart from its method of funding[,]" a claim very different from the *Vullo* claim at issue here. *Id.* at 911.

The other cases the Commonwealth cites fare no better. In *Gini*, the Ninth Circuit held only that allegedly defamatory statements by police officials, standing alone, did not establish a First Amendment violation because "injury to reputation *alone* is not sufficient to state" a constitutional claim. *Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1045 (9th Cir. 1994) (emphasis added). YOM does not allege reputational injury alone. It alleges that Commonwealth officials used defamatory, enforcement-laden accusations as part of a coordinated campaign that included licensing guidance, complaint solicitation, regulatory investigations, and threats of professional discipline. That is the coercive use of Commonwealth power—not mere defamation—and *Gini* says nothing about whether such a campaign violates *Bantam Books* or *Vullo*.

Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 102 (1st Cir. 2002), and *Pendleton v. City of Haverhill*, 156 F.3d 57, 62–63 (1st Cir. 1998), are to the same effect. Both stand for the unremarkable proposition that defamation, even by a government actor, does not by itself transgress constitutional rights. But neither case meaningfully addressed *Bantam Books*, involved licensing-backed threats, complaint solicitation, regulatory investigations, or a campaign plausibly designed to chill protected speech.

2. The Commonwealth's diffuseness and attribution arguments do not immunize a coordinated campaign that named YOM specifically.

The Commonwealth argues that several of the harshest statements YOM's Opening Brief cites were made by Defendant Holder or by REN rather than by a Commonwealth Appellee. Commonwealth Br. at 23 n.10. This does not defeat YOM's claim for two independent reasons. First, as discussed below, the Amended Complaint alleges that REN and Holder acted as willful participants in a joint campaign with DPH and the Governor's office. Statements made by a coordinated campaign partner, operating pursuant to a formal Commonwealth contract and using Commonwealth funding, are properly attributed to the coordinated effort for purposes of assessing word choice and tone under *Vullo*. Second, and independently, the Commonwealth Appellees' own direct statements—"public health threat," "deceptive and dangerous tactics," and the Guidance's own characterization of PRC-affiliated medical practices as inconsistent with accepted care, App.28–30, 32, 101—amply supply sufficient enforcement-laden language on their own, without reliance on any statement by Holder or REN, to satisfy the first *Vullo* factor. For the Commonwealth's Health Commissioner to call something a public health crisis is no light thing; it is using the full force of government to target disfavored speech.

The Commonwealth separately argues that no case supports treating broad, category-wide criticism of an entire class of disfavored speakers—rather than individualized criticism of YOM specifically—as coercive. Commonwealth Br. at 30–32. But *Bantam Books* itself targeted a category of disfavored publications, not a single publisher, and the Supreme Court found coercion nonetheless. *Bantam Books* does not require that a plaintiff be named to be targeted; it requires only that the plaintiff be identifiable as a member of a defined class the government singled out for adverse treatment. 372 U.S. at 62–63 (notices identified *titles*, not distributors, yet the distributor who carried those titles was the party coerced).

Category-wide targeting does not dilute a coercion claim; where, as here, the Plaintiff is a member of the targeted category, is named directly in campaign-linked materials, App.35–36, 42, and is licensed by the very government issuing the condemnation, sweeping the whole category into the threat makes the message more comprehensive, not less coercive. Here, the Amended Complaint alleges that the guidance memorandum's own internal file name identified it as directed at anti-abortion centers, App.29; that the Department's internal communications described the document's purpose as putting such centers "on notice"; and that of the roughly thirty anti-abortion centers operating in Massachusetts, only four—a group necessarily including YOM—are subject to DPH licensure and therefore capable of being disciplined under the guidance at all. App.122. A guidance document that can functionally reach only four addressees, internally labeled as a target, is not "diffuse." It is closer to *Bantam Books*'s targeted list than to an undifferentiated public announcement, and certainly closer than any case the Commonwealth cites for the proposition that generalized criticism forecloses a claim.

Second, and more directly still, the Amended Complaint alleges that the Commonwealth did not merely criticize anti-abortion centers as an undifferentiated class—it funded and pointed the public to a resource that names YOM specifically. DPH's official "Avoid Anti-Abortion Centers" webpage, part of the same public education campaign the Commonwealth defends as generic government speech, links directly to materials published by REN that identify YOM by name and urge the public to avoid it. App.33–36. This is not incidental: the Commonwealth provided REN with substantial public funding—$250,000 for its legal hotline and a further portion of the $1 million public education campaign—and formalized REN as what the Commonwealth's own campaign materials call its "trusted partner." App.33–35, 38–39, 432. One individual specifically noted that certain content identifying individual PRCs by name and logo had to remain on REN's website rather than the Commonwealth's own, because doing so was "not something we can do on mass.gov." App.55.

That allegation alone defeats the Commonwealth's claim that its campaign was merely "diffuse and general." The Commonwealth cannot launch, fund, and hyperlink to a private "trusted partner's" name-and-shame directory of specific centers—while candidly acknowledging internally that it could not publish the same specific, name-identifying content on its own official channels—and then tell this Court that its campaign was too generalized to have identified any particular plaintiff. The Commonwealth funds the speaker, brands the speaker as its partner, links to the speaker's list from its own official webpage, and internally acknowledges using that speaker's website as the outlet for content it could not place under its own name.

Third, the Commonwealth's own description of its evidentiary theory undercuts its "diffuse and general" argument. The Commonwealth repeatedly emphasizes that the guidance and campaign were prompted by specific complaints about specific anti-abortion centers—REN's October 2023 and December 2023 letters concerning YOM's mobile unit and Clearway Clinic. Commonwealth Br. at 5–10. The Commonwealth cannot simultaneously argue that its guidance was a targeted regulatory response to complaints about identifiable anti-abortion centers *and* that the same guidance was too generalized to plausibly threaten any particular center, including one of the very centers whose alleged conduct prompted the letters that led to the guidance in the first place. YOM is not a bystander swept up in an undifferentiated public announcement; on the Commonwealth's own telling, YOM's mobile unit is among the specific alleged conduct that occasioned the guidance and campaign it now insists was aimed at no one in particular.

Fourth, the Commonwealth never once engages with *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003), on which YOM's principal brief squarely relies. Opening Br. at 28, 31–32. In *Okwedy*, the Second Circuit sustained a coercion claim against a borough president who pressured a billboard company to remove a religious advertisement, even though the official held no regulatory authority: his ability to inflict collateral harm through the general levers of government office was enough. 333 F.3d at 344. The Commonwealth's silence on *Okwedy* is telling: it does not argue it is wrongly decided, distinguishable, or inapplicable; it simply does not mention it. That omission matters because *Okwedy* forecloses the "diffuse and general" defense the Commonwealth advances here. If an official with *no* licensing or regulatory power over the plaintiff can plausibly coerce it merely by threatening to bring the machinery of government to bear, then Commissioner Goldstein—who holds direct authority over YOM's medical license, the operational predicate for everything YOM does—plainly can.

3. The Commonwealth's attempt to isolate the physician's departure ignores the Amended Complaint's cumulative, non-conclusory allegations of harm.

The Commonwealth devotes substantial attention to Plaintiff's allegation that Defendants' campaign of intimidation has directly contributed to the decision of one of YOM's doctors to stop practicing for YOM. Plaintiff clearly alleges, as a factual matter, that one of Plaintiff's doctors quit because of the Commonwealth's actions; specifically, "As a direct, immediate, and foreseeable result of Defendants' threats, one of Plaintiff YOM's doctors quit providing services for YOM." App.66. YOM specifically alleged that the physician departed because of the Commonwealth's action.

The Commonwealth complains that the date of the departure is not alleged in the Amended Complaint. But the Complaint alleges a departing physician, reduced clientele, an ongoing Board investigation, continuing stigma, and chilled religious counseling. App.20, 27, 60, 66. The physician allegation is also plausible: YOM alleged that after the Guidance warned licensed professionals that APR-related conduct could be deemed inconsistent with accepted practice and subject to discipline, one of its doctors stopped serving YOM as a direct result. Temporal proximity between a specific, license-backed threat directed at conduct YOM's physicians perform and that physician's subsequent departure is precisely the kind of factual content that separates a plausible inference from a merely conceivable one. The inclusion of a precise date is not necessary.

The Commonwealth's argument depends on isolating the campaign from the Guidance. The Amended Complaint does not allege that the physician left merely because the Governor or Commissioner criticized PRCs at a press conference. It alleges that, as part of the challenged campaign, the Commissioner issued formal Guidance to licensed medical professionals warning that APR and other pro-life-related conduct "could be found to be practicing inconsistently with accepted practice and subject to discipline." App.30, 48. For a physician whose ability to serve YOM depends on maintaining a Massachusetts license, that is not abstract public criticism. It is a license-backed warning from the official responsible for public health regulation. And because YOM can provide medical services only through licensed professionals, threatening the physician's license for pro-life speech was a direct and foreseeable means of pressuring YOM itself. The Commonwealth therefore misses the point when it says there was no threat "to" the unnamed physician. The threat was the Guidance: continue participating in the disfavored PRC-related practice the Commonwealth had just condemned, and risk discipline.

Vullo did not require the regulator to say, "stop doing business with the NRA or else." It held that coercion may be inferred from word choice, regulatory authority, context, and resulting conduct. 602 U.S. at 191. Here, the word choice was disciplinary; the official had licensing authority; the warning was issued in the middle of a campaign branding PRCs deceptive and dangerous; and a physician allegedly stopped serving YOM as a direct result.

4. The Commissioner's Guidance was a targeted threat, not a neutral reminder.

The Commonwealth characterizes the Guidance as a document "sent to 'every licensed physician, physician assistant, nurse, pharmacist, pharmacy, hospital, and clinic in Massachusetts,'" Commonwealth Br. at 15–16 (quoting App.2), and argues that the district court correctly discounted the internal "on notice" description and the publicly posted file name as either internal or immaterial. Commonwealth Br. at 40–41 (citing Add.29–30, 49). This argument does not survive scrutiny on either point.

First, the file name—"Guidance on Anti-abortion center and standard of care reminder guidance – 1.3.2024"—was not a secret. The Amended Complaint alleges it was publicly linked and visible on the DPH website. App.29. A document broadly distributed under a title naming its target, issued the same day as a press release naming "anti-abortion centers," App.29–31, is not analogous to the address-neutral guidance letters in *Kennedy v. Warren*, 66 F.4th 1199 (9th Cir. 2023), or *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151 (10th Cir. 2021), both of which the Commonwealth cites for the proposition that describing existing legal obligations is not coercive. Commonwealth Br. at 39. Those letters merely restated background law to a general audience. The Guidance here did something different: it announced, for the first time, that a currently lawful medical practice, i.e., providing information and views about medication-abortion reversal, "could be found to be practicing inconsistently with accepted practice and subject to discipline." App.30, 48. That statement is materially closer to the notices in *Bantam Books*, which likewise announced consequences for continuing to distribute specific, named titles. 372 U.S. at 62–63.

The Commonwealth now effectively concedes the targeting point. It admits that the press release accompanying the Guidance was issued "based on [DPH's] concern about the operation of anti-abortion centers," that it referred to licensed providers "including these centers," and that "[t]he only reasonable inference" is that the Guidance was "targeting" anti-abortion centers. Commonwealth Br. at 41. That concession defeats the Commonwealth's effort to characterize the Guidance as a neutral, generally applicable reminder divorced from viewpoint or target. The only thing the Commonwealth denies is unconstitutional purpose: it says the Guidance targeted anti-abortion centers "not to suppress their speech," but to ensure legal compliance. *Id.* That is a merits defense, not a pleading-stage ground for dismissal.

YOM alleges detailed facts showing that the same Guidance was issued amid a campaign branding PRCs as deceptive and dangerous, relied on enforcement-laden terms, threatened license discipline for pro-life-related conduct, and followed complaints by the Commonwealth's paid campaign partner. At the motion to dismiss stage, those allegations plausibly support the competing inference that the admitted targeting was viewpoint-based and coercive. The Commonwealth cannot have it both ways. It cannot insist the Guidance was too neutral and diffuse to threaten anyone, while also telling this Court that the "only reasonable inference" is that the Guidance targeted anti-abortion centers. Once the Commonwealth concedes the target, the remaining question is why that target was selected and how the Guidance would reasonably be understood by regulated professionals. Under *Vullo*, those questions require context, not dismissal. 602 U.S. at 191.

The Commonwealth's explanation makes the targeting worse, not better. According to the Commonwealth, one alleged incident at one center justified a statewide campaign and disciplinary Guidance aimed at "anti-abortion centers" as a class. Commonwealth Br. at 40–41. But the First Amendment does not allow the government to bootstrap an allegation against one speaker into a license-backed warning against an entire disfavored viewpoint. If the concern were truly neutral enforcement of ultrasound, paperwork, or scope-of-practice rules, the Guidance would have targeted those practices wherever they occurred. Instead, the Commonwealth targeted PRCs because they are anti-abortion.

The Commonwealth claims that "[t]he guidance includes only neutral descriptions of the laws and regulations governing the provision of health care in the Commonwealth. It says nothing about the viewpoints of particular providers." Commonwealth Br. at 34–35. Far from it. The Guidance examples confirm the opposite. They specifically single out pro-life views related to APR and use language that mirrors the Commonwealth's campaign against PRCs targeting *all* their pro-life speech and activities. It does not simply remind all licensees that they must comply with generally applicable standards of care. It identifies a contested subject—medication-abortion reversal—and warns that providers who "offer[] or provide[]" information or services related to that lawful practice "could be found to be practicing inconsistently with accepted practice and subject to discipline." App.48. Similarly, it identifies as an example of "false, deceptive, and misleading practice" communications suggesting that ultrasound results are being interpreted by a qualified provider when they are not. App.127. That example mirrors the allegations in REN's October 2023 complaint against YOM, and was incorporated into the January 3, 2024, Guidance while DPH's review remained ongoing.

The APR warning is viewpoint-specific because it burdens only one side of the debate: the side that tells women seeking abortion that reversal may be possible. The Guidance did not neutrally describe existing law; it threatened licensed professionals with discipline for communicating a disfavored pro-life message associated with PRCs, in the complete absence of any legal prohibition. Nor is the threat diluted because the Guidance was written in professional-regulation terms. That is what makes it coercive. A statement from the Commissioner that a licensee's APR-related conduct may be "inconsistent[] with accepted practice" and "subject to discipline" is a warning that the provider's license may be at risk. For YOM, whose medical services depend on licensed physicians and other licensed professionals, that license-backed warning predictably pressures those professionals to avoid YOM and its protected speech.

The Commonwealth insists that the Guidance "does not refer, directly or indirectly, to adverse consequences if [YOM] continues its anti-abortion speech, or suggest that [YOM] could avoid adverse regulatory action by stopping its anti-abortion speech." Commonwealth Br. at 35. The opposite is true. The Guidance identifies the pro-life message at issue—APR-related speech and services—and warns licensed professionals that participating in that message "could be found to be practicing inconsistently with accepted practice and subject to discipline." App.48. That is an adverse consequence. The message to YOM's physicians was unmistakable: continue associating with YOM's disfavored APR-related speech and risk losing your license.

The Commonwealth can insist that its view of APR is scientifically correct, but that does not change what the Guidance does: it uses licensing consequences to deter regulated professionals from participating in APR-related counseling and services associated with PRCs. The Commonwealth used that asserted judgment as the vehicle for threatening professionals who would otherwise associate with YOM's protected pro-life speech.

In *National Institute of Family & Life Advocates v. James*, 160 F.4th 360 (2d Cir. 2025), New York defended its stigmatization of APR by claiming it was allegedly unsupported and unsafe. The Second Circuit rejected the premise that New York could avoid First Amendment scrutiny simply by declaring one side of the APR debate medically wrong. Instead, it held that statements about APR's availability, safety, and efficacy were protected speech and that New York's asserted interest in preventing allegedly misleading medical claims did not eliminate the First Amendment problem. *Id.* at 365, 375.

Massachusetts makes the same move here. It labels APR "unproven" and "unsafe," then treats that label as sufficient reason to threaten license discipline against physicians and APRNs who communicate or act consistently with the contrary pro-life view. *James* forecloses that shortcut. The Supreme Court recently emphasized this very point: "A prevailing standard of care may reflect what most practitioners believe today, but it cannot mark the outer boundary of what they may say tomorrow. Far from a test of professional consensus, the First Amendment rests instead on a simple truth: '[T]he people lose whenever the government transforms prevailing opinion into enforced conformity.'" *Chiles v. Salazar*, 607 U.S. 627, 654–655 (2026) (citation omitted).

The Commonwealth attempts to distinguish *James* on the ground that YOM does not itself offer or provide APR, and therefore the Commissioner's guidance cannot plausibly be read as directed at YOM's speech. Commonwealth Br. at 37–38 & n.16. That distinction does not survive contact with the Guidance's own text and stated purpose, nor with how the Guidance would function in practice. It also cannot survive *James*, where, as the Commonwealth concedes, "[t]here was no evidence in that case that the plaintiff provided the treatment." Commonwealth Br. at 38 n.16. The Guidance does not merely regulate the clinical administration of APR. Its accompanying press release explicitly frames the Department's concern as extending to how anti-abortion centers "advertis[e]" and communicate about reproductive options, App.122–23, and the Amended Complaint alleges that YOM's own protected speech includes providing information about APR to patients considering abortion, App.22.

A licensed provider affiliated with, or providing informational counseling at, a center like YOM cannot cleanly separate "informing a patient about APR" from "offering or providing" it in the eyes of a regulator who has just publicly declared that APR is "unproven, unethical, and unsafe" and warned of discipline for "conduct which places into question their competence to practice." App.127. The practical effect of pairing a disciplinary warning about APR with a public campaign criticizing centers for "misinformation about abortion services," App.100–01, is to place a chilling thumb on the scale against any licensed provider's willingness to discuss APR with patients at all—precisely the speech-related harm *James* recognized.

James demonstrates that the Commonwealth's own theory—that "strong evidence" of APR's unsafety is a scientific fact rather than a contested viewpoint, App.127—is the same justification New York offered and lost on.[1] A licensing agency's assertion that a treatment is medically discredited does not transform disciplinary guidance threatening providers who discuss it into pure clinical regulation immune from First Amendment scrutiny; it is the very content-based judgment about a category of speech that *James* held could not be enforced against a provider's protected communications with patients.

Read together, the Guidance's own stated purpose, its pairing with a public campaign accusing anti-abortion centers of "misinformation," and the internal record describing its aim as putting such centers "on notice," plausibly allege that the Department's target was not merely clinical provision of a treatment, but the *speech* of centers—including YOM—that discuss it with patients.

Chiles makes clear that the First Amendment does not turn on the government's chosen label. The Commonwealth cannot transform speech into conduct simply by characterizing it as a "treatment," "therapeutic modality,"

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[1] The theory is also inconsistent with the Guidance, which cited only an advocacy stance, not any scientific research. App.48.

"practice," or "standard of care." *Chiles*, 607 U.S. at 644–45. "The First Amendment is no word game." *Id.* at 645. Under *James*, APR-related communications are protected speech. Under *Chiles*, the Commonwealth cannot evade that rule by relabeling those communications as medical practice.

Second, the Commonwealth argues, and the district court held, that the Department's internal email describing the purpose of its guidance as putting anti-abortion centers "on notice" cannot bear on the coercion analysis because it "could not be part of how the guidance was perceived" by its recipients. Commonwealth Br. at 41 (citing Add.30). That reasoning inverts *Vullo*'s objective test rather than applying it. *Vullo* asks whether a communication, "viewed in context," could reasonably be understood as conveying a threat. 602 U.S. at 191. Internal agency communications are classic, and frequently the *best*, evidence of *context*: they show what the agency actually meant to communicate, and thus what a reasonable recipient—attentive to the same complaint letters, the same regulatory backdrop, and the same public campaign the agency was contemporaneously planning—would reasonably infer from the document. Courts routinely rely on an official's contemporaneous internal characterization of a communication's purpose to inform whether that communication, externally, functioned as a threat rather than a neutral reminder. *See Vullo*, 602 U.S. at 183–84, 195 (crediting allegations about DFS's internal deliberations and Vullo's private statements of purpose as informing how her subsequent guidance letters and press release should be understood). If a wholly private meeting can corroborate the coercive character of later public communications in *Vullo*, an internal DPH email describing the very document at issue—a document that was itself public—can do no less work here.

Nothing in *Vullo* confines the "context" a court may consider to only those facts that were independently visible to the recipient at receipt. If that were the rule, plaintiffs could never plead coercion based on an agency's own documented intent, no matter how damning, so long as the agency kept its true purpose out of the four corners of the letter it sent. That cannot be the law, and it is certainly not what *Bantam Books* held when it looked past the Commission's polite phrasing to what the scheme of notices, backed by referrals to police, was designed to accomplish. 372 U.S. at 67–68. The district court's flat refusal to consider this allegation at all, rather than weighing it as one more piece of the aggregated context *Vullo* directs courts to examine, was error, and the Commonwealth's defense of that ruling here fares no better.

5. The Commonwealth's regulatory contacts with YOM must be assessed in the context the Commonwealth's own Brief concedes existed.

The Commonwealth describes DPH's licensing review, the February 2024 compliance letter, and the Board's investigatory subpoenas as routine, lawful, and disconnected from any viewpoint-based motive. Commonwealth Br. at 44–46.

YOM's theory has never depended on any one of these acts being *independently* unlawful. The theory is that their timing and origin—each traceable to a complaint filed by REN, the Commonwealth's own funded and formally contracted campaign partner, during the same window REN was co-authoring the public campaign's messaging, App.26, 40–44—plausibly supports an inference that otherwise lawful regulatory tools were deployed for a pretextual, viewpoint-suppressing purpose. *Vullo* confirms that this distinction matters: a regulator "can pursue violations of state . . . law," but cannot do so "in order to punish or suppress" protected expression. 602 U.S. at 196. The Commonwealth's own account confirms, rather than refutes, the predicate for that inference: it acknowledges the allegations that "based on REN's October 2023 letter, the Department reviewed [YOM's] advertising," Commonwealth Br. at 6, and that the Board's investigation proceeded based on the allegations in REN's complaint.

The Amended Complaint pleads still more. Internal DPH communications stated that the Commonwealth was "using the [two REN] complaints as a reason to put out this guidance now rather than March." App.52. REN itself emphasized the regulatory significance of its complaints, pointing to DPH's public Statement that, "[i]n the wake of recent complaints regarding several anti-abortion centers, DPH has initiated a review of its statutory and regulatory obligations." App.375. And REN did not ask only for review of a discrete mobile-unit issue; it urged investigation of "the Your Options Medical licensed clinics." App.95. Those facts plausibly allege that REN's complaints were not isolated citizen petitions, but campaign inputs used to justify official guidance, public messaging, DPH review, and Board scrutiny of YOM and its medical director.

Vullo does not require a plaintiff to plead a smoking-gun communication between every government actor before a coordinated-pressure theory may proceed. It requires courts to assess word choice, regulatory authority, context, and effect as a whole. 602 U.S. at 191. Here, the context includes REN's Commonwealth-funded partnership, its simultaneous role in campaign messaging, its complaints against YOM, DPH's express reliance on those complaints to accelerate the Guidance, and the Board investigation based on the same allegations. The Commonwealth may later attempt to prove that the Board acted wholly independently. But at the Rule 12(b)(6) stage, this Court must credit the plausible competing inference: that the subpoenas were part of the same campaign of regulatory pressure directed at YOM's protected pro-life speech.

The Commonwealth's reliance on the absence of a completed enforcement action asks this Court to impose a completed-enforcement requirement that the Supreme Court has categorically rejected at the pleading stage. *First Choice Women's Res. Ctrs., Inc. v. Davenport,* 146 S. Ct. 1114 (2026), holds that a faith-based pregnancy center suffers a present, cognizable First Amendment injury from governmental pressure that chills its protected activity, and that the injury exists not just when a demand is enforced, but when it is made. The Commonwealth does not mention *First Choice* at all, and its silence is telling: *First Choice* forecloses the enforcement-completion requirement on which the Commonwealth's argument depends.

C. The Amended Complaint States a Free Exercise Claim That the Commonwealth's Brief Mischaracterizes.

For similar reasons, the Free Exercise claim was sufficiently pleaded and should not have been dismissed. First, the Amended Complaint does not rest on the abstract proposition that the Commonwealth criticized PRCs. It alleges that the Commonwealth targeted a class of religious pro-life speakers, branded their life-affirming counseling deceptive and dangerous, threatened the licensed professionals necessary to carry out that counseling, and thereby chilled YOM's ability to provide religiously motivated counseling and medical support to women considering abortion. App.20–22, 31, 58–60, 64, 66, 71. That is a burden on religious exercise.

The question is whether the Commonwealth targeted or burdened religiously motivated conduct because of its religious and pro-life character. YOM alleged exactly that: DPH materials identified PRCs as commonly affiliated with religious organizations, internal campaign materials asked how to address the "religious aspects" of these centers, and the Commonwealth then launched a campaign and Guidance directed at that religiously identifiable class. App.28, 41.

YOM has alleged ample evidence of that hostility. The Commonwealth argues that DPH's January 2024 Statement that PRCs are commonly "affiliated with national advocacy or religious organizations that provide funding and support to advance an anti-abortion agenda" was "a statement of fact . . . not criticism." Commonwealth Br. at 51. Whether that statement was a neutral demographic observation or a hostile framing designed to associate PRCs' religious identity with deception is precisely the kind of factual and inferential question Rule 12(b)(6) commits to the plaintiff's favor at the pleading stage—not a characterization the Commonwealth may simply assert into the record.

Moreover, that statement does not stand alone. The Amended Complaint also alleges that internal campaign-planning materials expressly asked "[h]ow do we want to tackle/address religious aspects of these places," App.41—a document the Commonwealth acknowledges exists but characterizes only as evidence that the campaign ultimately avoided discussing PRCs' religious character in its final public materials. Commonwealth Br. at 50. That characterization again inverts the pleading standard: whether the document reflects careful avoidance of religious targeting, or a considered strategy for how to leverage PRCs' religious identity while maintaining plausible deniability, is a factual dispute, not a question this Court may resolve against YOM at the Rule 12(b)(6) stage.

Finally, the Commonwealth's Brief argues that YOM has not alleged any burden on religious conduct because "the only thing Defendants have told YOM it cannot do is violate medical laws." Commonwealth Br. at 52 (quoting Add.52–53). That framing ignores the Amended Complaint's core allegation: the campaign has chilled YOM's religiously motivated counseling and speech—the practice of sharing, consistent with YOM's sincerely held belief in the sanctity of life, information about alternatives to abortion. App.20–22, 31, 58–60, 64, 66, 71. That is religious exercise, not merely an operational inconvenience, and the Free Exercise Clause protects it no less than it protects religiously motivated prayer or ritual conduct. *See Kennedy v. Bremerton School District*, 597 U.S. 507, 525 (2022).

D. The Amended Complaint States an Equal Protection Claim That the Commonwealth's "Not Similarly Situated" Argument Cannot Defeat at the Pleading Stage.

The Commonwealth argues that abortion clinics are not proper comparators to PRCs. Commonwealth Br. at 52–54. The Commonwealth's "not similarly situated" argument defines the comparator at the wrong level of generality. YOM does not allege that abortion clinics and PRCs are identical in every service they provide. It alleges that YOM and licensed abortion clinics are similarly situated in the relevant respects: both provide pregnancy-related medical services, both communicate with patients about reproductive-health decisions, both are subject to DPH oversight, and both may generate complaints or inspection issues implicating patient safety and regulatory compliance. The Commonwealth says abortion clinics provide abortion, abortion referrals, and contraception while PRCs do not. Commonwealth Br. at 53. But that distinction describes the parties' opposing viewpoint—it does not explain why serious, documented deficiencies at abortion clinics received ordinary regulatory treatment, while alleged concerns about PRCs triggered a statewide public campaign, complaint-solicitation apparatus, and "on notice" Guidance.

If anything, the Commonwealth's asserted distinction proves YOM's point. The reason the Commonwealth says PRCs are different is that they do not provide or refer for abortion. But treating pro-life centers differently because they decline to facilitate abortion is viewpoint-based discrimination, not a neutral comparator distinction. Equal Protection does not allow the government to define away similarly situated comparators by relying on the very ideological difference alleged to have motivated the discrimination. At the pleading stage, YOM plausibly alleged that licensed PRCs and licensed abortion clinics are comparable for purposes of DPH oversight, yet were treated dramatically differently when regulatory concerns arose.

Nor does the Commonwealth dispute the specific disparate-treatment facts YOM's Opening Brief describes: that DPH received at least eight complaints against, and documented multiple failed inspections of, abortion clinics between 2022 and 2024, including critical violations involving non-sterile surgical equipment, biohazardous material stored with food, and unchecked patient vitals before anesthesia—all without any comparable public campaign, complaint-solicitation webpage, or "on notice" Guidance directed at those facilities. App.50. The Commonwealth does not contest these facts; it argues only that they are legally irrelevant because abortion clinics are the wrong comparator altogether. Commonwealth Br. at 52–54. That argument fails for the reason explained above, and once it fails, the Commonwealth offers no alternative defense of the differential treatment YOM has pleaded.

II. REN and Holder's Actions, Taken as a Whole, Demonstrate State Action as Massachusetts's Trusted Partner.

REN and Holder were not mere private advocates. The Amended Complaint alleges that Massachusetts called REN its "trusted partner," App.432, funded its anti-PRC work, incorporated REN into campaign planning and messaging, promoted REN resources through official channels, relied on REN complaints to support the Guidance, and used REN's website to disseminate name-identifying content the Commonwealth would not place on Mass.gov. Those allegations plausibly support joint action, close nexus, significant encouragement, and use of a private intermediary to accomplish official objectives.

REN's response repeatedly attempts to disaggregate conduct that the Amended Complaint plausibly alleges was part of a single coordinated effort. According to REN, its advocacy, its complaints against YOM, and the

Commonwealth's public campaign were all separate activities undertaken by distinct actors pursuing independent objectives. But the plausible allegations of the Amended Complaint support a very different inference. The same Commonwealth officials and REN representatives advanced the same accusations through multiple channels over an extended period. REN publicly accused YOM and similar PRCs of engaging in deceptive practices and endangering patients, filed complaints urging investigations, publicized those complaints, and then collaborated with DPH on a statewide campaign built around the same allegations. App.93–99, 100–02. Taken together, those facts support the inference that these actions were interconnected components of one effort directed at the same disfavored speakers, not isolated events that must be viewed in artificial separation.

A. The Defendants Engaged in Joint Action.

REN attempts to reduce the state action inquiry to a single question: whether it possessed independent regulatory authority over YOM. That is not the law. Section 1983 reaches private parties who are willful participants in joint activity with the State. REN became a joint participant in the Commonwealth's campaign targeting pregnancy-resource centers through coordinated action, shared objectives, and substantial involvement in the challenged conduct. REN was intimately involved in the campaign's development while simultaneously advancing the same narrative through complaints, public statements, hotline services, and advocacy materials aimed at PRCs. App.93–102. It was not merely commenting from the sidelines but actively participating in the effort that produced the challenged campaign.

Under the joint action theory, private actors become state actors when they are "willful participant[s] in joint activity with the State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). The key inquiry is whether the private party and Commonwealth officials were joint participants in the challenged action. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). Private parties act under color of state law when the state "so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in [the challenged activity]." *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 5 (1st Cir. 2005) (quoting *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999)).

State action by private parties has been found when the executive or judicial arm of state government provided assistance in perpetrating unconstitutional conduct. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (state action found where private party resorted to state courts to enforce discriminatory private deed restrictions); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (state action found based on the symbiotic relationship between restaurant and publicly run parking facility leasing property to the restaurant). The principle running through these cases is that a private actor cannot avoid constitutional scrutiny when the State lends its authority, machinery, endorsement, or practical assistance to the challenged conduct. That principle applies here: REN's role was not confined to independent advocacy but was intertwined with the Commonwealth's campaign, complaint channels, official messaging, funding, and public referral mechanisms in a way that made REN a willful participant in state action.

There is explicit joint participation between the Commonwealth Defendants and the REN Defendants. The public education campaign is explicitly described as "created by the [DPH] in collaboration with the Reproductive Equity Now Foundation[.]" App.101. REN and Holder's brief contradicts the record at a crucial point: REN's effort to portray the Abortion Legal Hotline as a wholly private undertaking. REN's Brief asserts that the Hotline was "managed and operated by REN, not by or in coordination with the [Commonwealth]." REN Br. at 35. But the Commonwealth's own campaign materials say the opposite, describing the Hotline as "a free and confidential resource, created by the Reproductive Equity Now Foundation, the Massachusetts Attorney General's Office, the Women's Bar Foundation, and the ACLU of Massachusetts." App.102. The same campaign materials directed members of the public to utilize that Hotline. *Id.* Thus, while REN now characterizes the Hotline as an entirely private initiative, the Commonwealth publicly represented it as a resource created in conjunction with a Commonwealth law-enforcement office and incorporated it into the Commonwealth's broader campaign against PRCs. The Commonwealth thus directed the public to a complaint-and-information mechanism that REN and Commonwealth officials jointly created, further confirming that REN was part of the campaign's official apparatus.

REN's Response repeatedly treats REN's Hotline as an entirely separate private activity. The Commonwealth did not.[2] Its campaign launch materials presented the Hotline, complaint mechanisms, agency guidance, and the public-education campaign as interconnected responses to the perceived problem of anti-abortion centers. App.101–02. REN cannot simultaneously rely on its collaborative role in creating the campaign while insisting that the campaign's core referral mechanisms, including the Hotline prominently promoted by the campaign, must be viewed in isolation.

One qualifies as a state actor when one acts in a close, intertwined, and joint partnership with the State. YOM has pleaded extensive facts demonstrating joint action between REN and Holder and Massachusetts officials. REN participated extensively in planning and implementing the campaign, including regular coordination meetings with DPH and MORE Advertising. REN provided input on strategy, messaging, and materials that carried equal weight to input from DPH employees. App.40–44, 53–57. REN officials were included on media-plan approval

[2] Its legal filings aside, REN boasts about its joint action in "partnership" and "collaboration" with Massachusetts. REPRODUCTIVE EQUITY NOW, *Hotline* https://reproequitynow.org/hotline (last visited Sept. 22, 2026).

emails alongside DPH employees, and their suggestions received the same level of approval authority. App.46.

REN's brief describes REN as merely an "independent consultant" providing outside input while the Commonwealth retained ultimate decision-making authority. REN Br. at 3. But the Commonwealth publicly described the relationship in materially different terms. In announcing the campaign, DPH stated that the campaign "was created by [DPH] in collaboration with the Reproductive Equity Now Foundation." App.101. Holder likewise stated that REN had "been honored to work with the Massachusetts Department of Public Health on the creation" of the campaign. *Id.* These public admissions support a far stronger inference of joint participation than the passive consultant role REN now attempts to assume.

YOM does not rely on the word "partnership" as a talisman or out of context. It relies on detailed allegations of joint creation, shared implementation, Commonwealth funding, Commonwealth promotion of REN-created resources, REN leadership in campaign logistics and messaging, REN complaints used to time and justify official guidance, and Commonwealth reliance on REN materials in official communications. The Amended Complaint alleges that REN helped design the campaign, drafted public-facing materials for Commonwealth approval, coordinated the launch, supplied the complaint machinery the Commonwealth promoted, and provided the factual and rhetorical foundation for official action against PRCs. That is not merely calling a private group a "partner"; it is pleading the concrete facts showing that REN functioned as one.

B. Defendants Had a Close Nexus and Symbiotic Relationship.

Moreover, the actions of the REN Defendants qualify as state action under the nexus and symbiotic relationship tests. The inquiry under the nexus test is "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). This standard is met by showing that the State "has provided such significant encouragement, either overt or covert." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

REN and Commonwealth officials collaborated extensively on the campaign against PRCs. REN's response reframes YOM's allegations as though they depended upon proving that REN possessed formal final approval authority over campaign materials. They do not. The question is not whether the Commissioner ultimately retained sign-off authority, but whether REN plausibly participated as a joint actor in the creation, development, and implementation of the challenged campaign. And on that point, the record contains much more than the role of a detached outside consultant. REN's cited November 2023 email proves far less than REN suggests. App.292. At most, it shows that campaign concepts would ultimately be reviewed by the Commissioner's office before publication. *Id.* But every joint venture has a final decisionmaker. Evidence that DPH retained final sign-off authority does not negate the substantial evidence that REN helped create, shape, and develop the campaign itself, including DPH's own public admission that the campaign was created "in collaboration with" REN. App.101. The allegations show collaborative development of campaign content, frequent coordination with Commonwealth officials, and a shared effort to stigmatize and suppress pregnancy-resource centers. That is sufficient to plausibly allege action under color of state law.

REN's reliance on cases holding that government contractors are not automatically state actors misses the point. In some circumstances, a contract with the state can indeed demonstrate state action. *See, e.g.*, *West v. Atkins*, 487 U.S. 42 (1988) (holding that private physician under contract with a state to provide medical services to inmates was a state actor for purposes of Section 1983); *Lopez v. Dep't of Health Servs.*, 939 F.2d 881, 883 (9th Cir. 1991) (holding that a private physician under contract with a state to provide medical services qualifies as a state actor); *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700 (11th Cir. 1985) (holding that private organization supplying health services to prisoners is a state actor). YOM does not contend that every government contractor becomes a state actor. Nor does YOM rely solely on the existence of a contract or receipt of public funds. The Amended Complaint alleges that REN was deeply involved in designing, shaping, and executing a government campaign directed at a disfavored class of speakers.

Where a private organization works hand-in-hand with state officials to develop and implement the challenged government action, joint-action principles permit constitutional claims against both participants.

REN's Response now retreats to the claim that REN merely offered "input and suggestions." REN Br. at 33. But the Commonwealth did not tell the public that REN was merely an outside consultant providing occasional suggestions. It described, and still describes, REN as a "trusted partner" and publicly announced that the campaign was created "in collaboration with" REN. App.101. The Court should credit those contemporaneous descriptions over Appellees' effort to minimize the relationship after litigation commenced. The Commonwealth stated that the campaign was created "in collaboration with" REN, and Holder publicly celebrated REN's work with DPH in creating the campaign. App.101. Having publicly touted and platformed REN as a collaborative partner in the campaign's creation, Appellees cannot now recast REN as a mere bystander whose role was limited to offering occasional comments on materials prepared by others.

C. REN Was Used in Order to Circumvent Limitations on Government Action.

Most damning of all, the Amended Complaint alleges that REN was specifically utilized to circumvent constitutional limitations on government action.

The allegations of deliberate circumvention are compelling. A MORE Advertising employee explicitly stated that PRC logos should remain on REN's website because publishing them was "not something we can do on mass.gov." App.55. Commonwealth officials thus used REN to disseminate content and blacklists they could not constitutionally or politically place on official government channels.

Government cannot launder viewpoint discrimination through a nominally private organization it funds, directs, and co-authors materials with. In *Norwood v. Harrison*, 413 U.S. 455 (1973), the Supreme Court held that the State may not do indirectly what it is prohibited from doing directly: it cannot funnel resources or authority to a private organization to accomplish a constitutional violation that it could not carry out through its own apparatus. *Id.* at 465. Here, the Commonwealth's own documents supply direct evidence of precisely that strategy.

D. The DPH Complaint Is Properly a Basis for Liability.

REN and Holder try to use their DPH complaint as a shield to evade liability in this matter. This case is not limited to a complaint. The basis for REN and Holder's liability, the predicate of this case, lies elsewhere: they acted as the trusted partner of the Commonwealth, with Commonwealth funding and support, and in explicit partnership in this campaign as a joint action with Massachusetts officials.

REN and Holder overread a statement at the hearing below, where counsel for YOM emphasized this very point: that REN and Holder are "a State actor" for purposes of "the media campaign." App.563–64. The premise that REN and Holder seek to extract from this statement—that the DPH complaint is entirely irrelevant to that campaign—in no way follows, nor was it conceded by counsel.

YOM's theory has consistently been that REN and Holder acted as partners with the Commonwealth in a coordinated anti-PRC campaign—not that the complaint, standing alone, supplies the entire basis for liability. REN's complaint cannot be characterized as private petitioning because it was filed as part of REN's role as a Commonwealth partner in the campaign against PRCs. *See* App.37, 50, 52. REN's complaint was not the plea of a concerned citizen seeking government intervention—it was a strategic weapon deployed by the Commonwealth's "trusted partner" to provide cover for a predetermined campaign of regulatory harassment.

The Amended Complaint alleged that REN's DPH complaint was submitted to justify the launch of Defendants' campaign. REN and Holder respond that the campaign was initiated before the DPH complaint was filed. REN Br. at 37. That underscores the point. No complaints were filed against pro-life pregnancy centers *before* the campaign was initiated, or even after a public solicitation for complaints while the campaign was being created. Indeed, the only complaints filed were REN's—and those were filed with the Commonwealth while it and REN were in the middle of creating the campaign against PRCs. Internal DPH communications indicate that REN's complaints were used as *justification* for the timing of the regulatory Guidance and the launch of the public campaign. App.52. In their own words: "We were using the [two REN] complaints as a reason to put out this guidance now rather than March." *Id.* This statement appears in the very paragraph REN tries to suggest distanced DPH from REN. The campaign was a coordinated effort by Defendants, not an isolated incident.

REN's conduct at issue here is not merely its complaint to the Commonwealth; it is that at every step in the process of this campaign of threats and harassment, Defendants served as the Commonwealth's trusted partner and operative. REN's complaint serves as one component of this joint action. *See United Mine Workers v. Pennington*, 381 U.S. 657, 670 n.3 (1965); *see also Amphastar Pharms. Inc. v. Momenta Pharms., Inc.*, 850 F.3d 52 (1st Cir. 2017). Immunity does not mean inadmissibility: "offering the exhibit was to demonstrate the purpose and character of defendants' acts, a permissible use even if the letter was within the *Noerr* exception." *Lamb Enters. v. Toledo Blade Co.*, 461 F.2d 506, 516 (6th Cir. 1972).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court below.

Respectfully submitted,

/s/ *Olivia F. Summers*
OLIVIA F. SUMMERS
[redacted]
JORDAN A. SEKULOW
[redacted]
STUART J. ROTH
[redacted]
ANDREW J. EKONOMOU
[redacted]
CHRISTINA A. COMPAGNONE
[redacted]
NATHAN J. MOELKER
[redacted]
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

SAMUEL J. WHITING
[redacted]
MASSACHUSETTS LIBERTY LEGAL CENTER
[redacted]

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with this Court's September 8, 2026, order granting Plaintiff-Appellant leave to file a reply brief not exceeding 10,000 words because it contains 9,999 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface and type-size requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in proportionally spaced typeface using Microsoft Word, in 14-point size.

/s/ *Olivia F. Summers*
Olivia F. Summers [redacted]
American Center for Law & Justice
[redacted]

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on Sept. 23, 2026, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ *Olivia F. Summers*
Olivia F. Summers
American Center for Law & Justice
[redacted]

Counsel for Plaintiff-Appellant