

No. 26-1821

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Kerry Wachter, Danielle Ciampino,
Plaintiffs-Appellants,
Sarah Rouse, Issac Kuo,
Plaintiffs,

v.

Letitia James, in her official capacity as Attorney General for the State of New York, Betty A. Rosa, in her official capacity as Chancellor of the New York State Board of Regents, Lester W. Young, Jr., in his official capacity as Chancellor of the New York State Board of Regents, Judith Chin, in her official capacity as Vice Chancellor of the New York State Board of Regents, Roger Tilles, in their official capacity as a member of the New York State Board of Regents, Christine D. Cea, in their official capacity as a member of the New York State Board of Regents, Wade S. Norwood, in their official capacity as a member of the New York State Board of Regents, Susan W. Mittler, in their official capacity as a member of the New York State Board of Regents, Frances G. Wills, in their official capacity as a member of the New York State Board of Regents, Aramina Vega Ferrer, in their official capacity as a member of the New York State Board of Regents, Shino Tanikawa, in their official capacity as a member of the New York State Board of Regents, Roger P. Catania, in their official capacity as a member of the New York State Board of Regents, Adrian I. Hale, in their official capacity as a member of the New York State Board of Regents, Hasoni Pratts, in their official capacity as a member of the New York State Board of Regents, Patrick Mannion, in their official capacity as a member of the New York State Board of Regents, Seema Rivera, in their official capacity as a member of the New York State Board of Regents, Brian Krist, in their official capacity as a member of the New York State Board of Regents, Keith Wiley, in their official capacity as a member of the New York State Board of Regents, Felicia Thomas-Williams, in their official capacity as a member of the New York State Board of Regents,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Northern District of New York,
No. 25-cv-1718 (AMN/CBF)

**BRIEF FOR THE BUCKEYE INSTITUTE, MANHATTAN INSTITUTE, THE
DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES, INC., THE
CENTER FOR AMERICAN LIBERTY, AND KATE DELLICARPINI AS AMICI
CURIAE SUPPORTING APPELLANTS & REVERSAL**

David C. Tryon
Counsel of Record
Alex M. Certo
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

*Counsel for The Buckeye Institute,
Defense of Freedom Institute for
Policy Studies, Inc., and Kate
DelliCarpini*

Josh Dixon
Courtney Corbello
CENTER FOR AMERICAN LIBERTY
2145 14th Avenue, Suite 8
Vero Beach, FL 32960
(703) 687-6212
jdixon@libertycenter.org
ccorbello@libertycenter.org

*Counsel for Center for
American Liberty*

Ilya Shapiro
Trevor Burrus
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-700
ishapiro@manhattan.
institute

*Counsel for Manhattan
Institute*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29(a)(4)(A) and 26.1 of the Federal Rules of Appellate Procedure, organization amici The Buckeye Institute, Manhattan Institute, The Defense of Freedom Institute for Policy Studies, Inc., and the Center for American Liberty state that they have no parent corporation and issue no stock, thus no publicly held corporation owns more than ten percent of amici's stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF THE ARGUMENT.....	5
ARGUMENT.....	6
I. Officially issued guidance is often designed to effectuate change.....	6
II. Official guidance that chills speech is suspect	12
III. Official guidance that threatens enforcement, even if veiled, can constitute a credible threat of enforcement	15
CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

<i>Arnett v. Kennedy</i> , 416 U.S. 134 (1974)	24
<i>Biden v. Knight First Amendment Inst. at Columbia Univ.</i> , 141 S. Ct. 1220 (2021)	14
<i>Cayuga Nation v. Tanner</i> , 824 F.3d 321 (2d Cir. 2016)	16, 17
<i>Diamond Alternative Energy, LLC v. Env’t Prot. Agency</i> , 606 U.S. 100 (2025)	18
<i>Entick v. Carrington</i> , 19 Howell’s State Trials 1029 (1765)	13
<i>Hammerhead Enters., Inc. v. Brezenoff</i> , 707 F.2d 33 (2d Cir. 1983)	14, 17
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	18
<i>McKay v. Federspiel</i> , 823 F.3d 862 (6th Cir. 2016)	19
<i>Nat’l Rifle Ass’n of Am. v. Vullo</i> , 49 F.4th 700 (2d Cir. 2022)	15
<i>Nat’l Rifle Ass’n of Am. v. Vullo</i> , 602 U.S. 175 (2024)	15
<i>Rattner v. Netburn</i> , 930 F.2d 204 (2d Cir. 1991)	17
<i>Red Lion Broad. Co. v. FCC</i> , 395 U.S. 367 (1969)	13
<i>Susan B. Anthony List v. Driehaus</i> , 573 U.S. 149 (2014)	15

<i>Tinker v. Des Moines Indep. Cmty. Sch. Dist.</i> , 393 U.S. 503 (1969)	13
<i>Tweed-New Haven Airport Auth. v. Tong</i> , 930 F.3d 65 (2d Cir. 2019).....	16, 17
<i>Vitagliano v. Cnty. of Westchester</i> , 71 F.4th 130 (2d Cir. 2023)	16, 17, 18
<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943)	14
Statutes	
N.Y. Educ. Law § 306(1)	21
Other Authorities	
Benjamin Minhao Chen, <i>Do Linguistic Canons Matter?</i> , 58 Conn. L. Rev. 153 (2025).....	22
Christopher J. Walker, <i>Administrative Law Without Courts</i> , 65 UCLA L. Rev. 1620 (2018).....	7, 8, 9
<i>Decision No. 18,683</i> , State Educ. Dep’t, Office of Counsel (Feb. 17, 2026), https://www.counsel.nysed.gov/Decisions/volume65/d18683	23, 24
Elizabeth Bartholet et al., <i>Rethink Harvard’s Sexual Harassment Policy</i> , Bos. Globe (Oct. 15, 2014), https://tinyurl.com/2hamf6mh	8
Evelyn Douek & Genevieve Lakier, <i>Title VI as a Jawbone</i> , Knight First Amend. Inst. at Columbia Univ. (Sep. 26, 2024), https://perma.cc/E6CS-LC9S	9
<i>Formal Opinions of Counsel</i> , N.Y. State Educ. Dep’t, Office of Counsel, https://www.counsel.nysed.gov/opinions (last visited Sep. 17, 2026)	20, 21
Frederick Lane, <i>American Privacy: The 400-Year History of Our Most Contested Right</i> (Beacon Press 2009).....	13

<i>Guidance</i> , N.Y. State Educ. Dep’t, Office of Counsel, https://tinyurl.com/search-guidance (last visited Sep. 18, 2026)	20
<i>Heath Guidance and Resources</i> , N.Y. State Educ. Dep’t, https://www.nysed.gov/standards-instruction/health-guidance-resources (last visited Sep. 18, 2026)	22
Jonathan Turley, <i>The Indispensable Right: Free Speech in the Age of Rage</i> (2024)	12
Madison Ray, <i>Stopping a Washington Shortcut</i> , Nat’l Rev. Capital Matters (Apr. 27, 2026), https://tinyurl.com/stopping-a-washington-shortcut	9, 10
Memorandum for Heads of Civil Litig. Components, U.S. Attorneys, from Rachel Brand, Assoc. Attorney Gen., U.S. Dep’t of Justice, <i>Re: Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases</i> (Jan. 25, 2018), https://www.justice.gov/file/1028756/download	7
<i>Miscellaneous Guidance</i> , N.Y. State Educ. Dep’t, Office of Counsel, https://www.counsel.nysed.gov/miscellaneous (last visited Sep. 17, 2026)	20, 21
Nicholas R. Parrillo & Lee Liberman Otis, <i>Understanding and Addressing Controversies About Agency Guidance</i> , Regulatory Rev. (Mar. 5, 2018), https://tinyurl.com/parrillo-otis-agency-guidance	11
Nicholas R. Parrillo, Admin. Conference of the U.S., <i>Federal Agency Guidance: An Institutional Perspective</i> (2017)	10, 11
Philip Hamburger, <i>Courting Censorship</i> , 4 J. Free Speech L. 195 (2023)	15, 16

INTEREST OF AMICI CURIAE¹

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Manhattan Institute (MI) is a nonprofit policy research foundation whose mission is to develop and disseminate ideas that foster individual responsibility and agency. Drawing on research, reporting, and analysis, MI works to improve the quality of life, overcome cultural divides, promote educational excellence, and expand economic freedom.

¹ Appellants consent to the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2). Appellee “does not oppose.” Further, no counsel for any party has authored this brief in whole or in part and no person other than the amici has made any monetary contribution to this brief’s preparation or submission.

MI has a particular interest in defending speech protections because its scholars have been targets of speech-suppression efforts.

Amicus The Defense of Freedom Institute for Policy Studies, Inc. (“DFI”) is a nonprofit, nonpartisan 501(c)(3) institute dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker, and to protecting the civil and constitutional rights of Americans at school and in the workplace. Founded in 2021 by former senior leaders of the U.S. Department of Education who are experts in education law and policy and related constitutional and civil rights matters, DFI places a particular focus on protecting the First Amendment rights of individuals like the Appellees from dangers presented by government actors, like those presented in this case by the Appellants.

The Center for American Liberty (“CAL”) is a 501(c)(3) nonprofit law firm dedicated to protecting free speech and civil liberties. CAL represents litigants nationwide in cases involving the First Amendment, religious liberty, and parental rights, and regularly files amicus briefs in the Supreme Court and federal courts of appeals on important constitutional questions. CAL has a particular interest in ensuring

meaningful judicial review when government officials threaten enforcement against protected speech. This case implicates that interest because the decision below raises the threshold for pre-enforcement review of government action burdening speech. CAL joins in this brief so the Court receives additional perspective on the principles governing pre-enforcement standing and the credible-threat inquiry in the First Amendment context.

Kate DelliCarpini is an elected school board member for whom this case is not simply a legal dispute about a guidance document, but a question of what it means to serve on a school board. DelliCarpini believes that discussions at public board meetings must be open and honest, including on difficult and sometimes controversial subjects—such as those raised by Appellants—without disclosing confidential information or identifying individual students. In DelliCarpini’s view, an elected board member who cannot address such issues for fear that the State will deem the discussion improper can no longer fully perform the role for which the member was elected: to listen, ask questions, express concerns, and engage in difficult conversations.

DelliCarpini has experienced this dynamic firsthand through an

interaction with the New York State Attorney General's Office regarding her district's student enrollment practices, in which the Attorney General's Office communicated its legal position and requested changes to registration procedures. To DelliCarpini, that experience illustrates why local school boards must be able to carefully consider state directives and exercise independent governance judgment rather than defer automatically to every demand from a state agency. DelliCarpini's interest accordingly extends beyond the free-speech issue in this case to the principles of local control and autonomy of elected officials.

This case interests amici because, without the ability to challenge official guidance that stifles speech, the First Amendment rights that amici work to protect would be rendered meaningless.

SUMMARY OF THE ARGUMENT

Context is everything. An attorney advising a client about the law is one thing. A public official explaining the same law to the same person gives a very different impression. The attorney is trying to keep his client out of trouble, but the official is quite likely issuing a threat.

A public official's guidance is often issued to cause the parties the official regulates to conform their actions to the official's views. And oftentimes, by conforming their actions, regulated parties' speech is chilled. But a plaintiff's speech need not actually be chilled for standing to challenge the guidance. Where an official uses "guidance" as a display of force to coerce regulated parties to conform or face enforcement, there is a credible threat sufficient for pre-enforcement standing.

So it is here. The Guidance Letter, *see generally* JA-41, was not just issued by the New York Department of Education and posted on the website; it was issued by and printed on the joint letterhead of New York Attorney General Letitia James and the Commissioner of Education of the State of New York. Letitia James, as New York's Attorney General, is known for strong opinions on the law and for strong enforcement of the law against those with whom she disagrees. The Guidance Letter was

aimed at school board members and resembles an Orwellian edict from the Ministry of Truth—it directs the independently elected school board members on what they can and cannot say, or allow to be said, in their own public meetings.

Moreover, the Guidance Letter was targeted specifically against those who, like Appellants, had been reported to have violated the Guidance Letter’s allowable speech code: “Unfortunately, some board members have made, and encouraged, comments” that violate the directives in the guidance. JA-42. The Court can turn a blind eye to the government’s intimidation efforts, or it can recognize the issuance of the Guidance Letter for what it really was—a threat to silence anyone who violated the “Ministry’s” directive.

ARGUMENT

I. Officially issued guidance is often designed to effectuate change.

Although guidance documents often have legitimate purposes, there is no doubt that they can be—and have been—used to coerce regulated parties to act in certain ways. The use of federal guidance documents to effectuate change became so bad at one point that the Justice Department had to issue guidance on guidance.

Motivated by concerns that agency guidance is used to create binding rules, [the Associate Attorney General] directed the Justice Department to “not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch” and to “not use its enforcement authority to effectively convert agency guidance documents into binding rules.”

Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. Rev. 1620, 1625 (2018) (quoting Memorandum for Heads of Civil Litig. Components, U.S. Attorneys, from Rachel Brand, Assoc. Attorney Gen., U.S. Dep’t of Justice, *Re: Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases* 1, 2 (Jan. 25, 2018), <https://www.justice.gov/file/1028756/download>). As Professor Christopher Walker noted, whether agency guidance is legally binding, “regulated parties often have strong incentives to comply due to significant risks of agency enforcement.” *Id.* at 1626.

Consider one example from the federal Department of Education. “In 2011, the Department of Education’s Office of Civil Rights issued a ‘Dear Colleague Letter’ on how universities should handle claims of sexual harassment and assault on campus under Title IX.” *Id.* (citation omitted). According to Professor Walker, “[t]his Dear Colleague Letter is quintessential agency guidance: It lacks the force of law, and on its face

it purports only to provide guidance for regulated parties.” *Id.* Nevertheless, in response to that Dear Colleague Letter, Harvard University implemented new Title IX policies conforming to the Department of Education’s guidance. And in response to Harvard’s reactive implementation of those new policies, twenty-eight Harvard law professors proclaimed in a Boston Globe Op-ed that “the procedures mandated by the Dear Colleague Letter . . . ‘lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.’” *Id.* (quoting Elizabeth Bartholet et al., *Rethink Harvard’s Sexual Harassment Policy*, Bos. Globe (Oct. 15, 2014), <https://tinyurl.com/2hamf6mh>).

So, “[c]onsidering that this agency guidance is not legally binding and legal experts at Harvard concluded that the agency’s position is problematic, why did Harvard and the rest of higher education comply?” *Id.* Professor Walker says the answer is simple: The Department of Education “threatened to eliminate all federal funding for universities and colleges that did not comply. And it made that threat even more

credible by investigating universities to ensure compliance.” *Id.* at 1626–27.

More recently, scholars have raised concerns that the Department of Education is attempting to silence political speech at college protests through its guidance on Title VI. *See* Evelyn Douek & Genevieve Lakier, *Title VI as a Jawbone*, Knight First Amend. Inst. at Columbia Univ. (Sep. 26, 2024), <https://perma.cc/E6CS-LC9S>.

In another federal example, the EPA “issued guidance describing how states should evaluate environmental and demographic impacts in permitting decisions.” Madison Ray, *Stopping a Washington Shortcut*, Nat’l Rev. Capital Matters (Apr. 27, 2026), <https://tinyurl.com/stopping-a-washington-shortcut>. The EPA’s guidance letter “tacitly but clearly made receipt of EPA grants conditional on states’ compliance with a set of administrative mandates for adopting federally prescribed grievance procedures and collecting and disclosing the race and ethnicity of permit applicants.” *Id.* The EPA apparently made good on its threats:

The EPA’s implied directives subsequently appeared in civil rights investigation letters and compliance reviews. In one instance, the EPA opened a discrimination investigation against the Tennessee Department of Environment and Conservation regarding permits it issued for a pipeline project. The investigation was eventually dismissed, but its

real purpose — to bully other state environmental agencies into compliance — was accomplished. What’s more, the EPA specifically cited its guidance in its investigation closure letter, signaling to Tennessee and other states a new standard they need to follow, even though the “standard” was legally no more than a suggestion without underlying statutory authority.

Id.

“According to new research by the Center for Practical Federalism, guidance weaponization against states was evident in enforcement actions and legal proceedings in areas such as election laws, climate initiatives, and gender identity policies.” *Id.* All the foregoing guidance documents affected other governmental entities (as well as, in some cases, private parties), which is a cautionary note for all governments subject to another regulatory body.

As Yale Law Professor Nicholas Parillo has observed, “[b]ecause guidance suggests what the agency considers to be lawful (or unlawful), or announces what conduct the agency will (or will not) enforce against, a regulated party can greatly reduce the risk associated with enforcement by following guidance.” Nicholas R. Parrillo, Admin. Conference of the U.S., *Federal Agency Guidance: An Institutional Perspective* 64 (2017). Professor Parillo found that some regulated parties will conduct a cost-

benefit analysis when deciding whether to ignore agency guidance that may result in enforcement. *Id.* For example, in the private sector, one drug manufacturer executive whom Professor Parillo interviewed explained that

in deciding whether to follow FDA’s enforcement-related guidance, her company will do a risk calculation. They consider, on the one hand, the benefit of guidance-noncompliant behavior to their business and to the public health, and, on the other hand, the level of legal justification they feel under the legislative rule or statute (“are we prepared to take a warning letter and defend ourselves?”) and the “enforcement risk” (that is, the “probability” of enforcement “times” the “damage” to the business in the event of enforcement).

Id. at 63–64.

Regulated parties have long complained that that official guidance is “coercive in real life.” Nicholas R. Parrillo & Lee Liberman Otis, *Understanding and Addressing Controversies About Agency Guidance*, Regulatory Rev. (Mar. 5, 2018), <https://tinyurl.com/parrillo-otis-agency-guidance>. Through official guidance, agencies “can issue de facto regulations with little constraint simply by calling them ‘guidance.’” *Id.*

Given the current regulatory environment, it is a reasonable inference that government officials of all stripes and at all levels would understand that they ignore guidance “from above” at their own peril. The New York

Attorney General and Commissioner of Education made that quite clear when they stated, “[r]emoval of a board member is a drastic measure, but even an unsuccessful application for removal may pose a financial burden to schools and an unwelcome distraction from school boards’ important work.” JA-48 through JA-49.

II. Official guidance that chills speech is suspect.

“Free Speech is a human right. It is the free expression of thought that is the essence of being human. . . . It is the natural condition of humans to speak. . . . As such, it is not the creation of the Constitution, but rather embodied in that document.” Jonathan Turley, *The Indispensable Right: Free Speech in the Age of Rage* 23 (2024). Americans cherish the right to speak. They protect that right jealously, “not to achieve the potential of the democratic system, but the fulfillment of one’s own potential. Free speech remains one of humanity’s most essential impulses, and the Constitution captured that essentiality in the First Amendment.” *Id.* at 49–50.

Because free speech is an inherent human desire and a natural right, the Supreme Court has stated that “the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will

ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). Schools, too, are a marketplace for ideas. *Tinker* aptly affirmed that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Surely the same can be said of locally elected school board members and members of the public speaking at public school board meetings.

For centuries, government officials have attacked those who challenge the officials’ views, which in turn has chilled fundamental speech and association rights. *See, e.g., Entick v. Carrington*, 19 Howell’s State Trials 1029 (1765); Frederick Lane, *American Privacy: The 400-Year History of Our Most Contested Right* 8 (Beacon Press 2009) (recounting a Boston physician’s 1742 self-censorship because his letter may “fall into ill hands”). But, because political speech is the core of the First Amendment, “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to

confess by word or act their faith therein.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Of course, the government cannot engage in censorship by proxy by inducing, encouraging, or pressuring regulated parties to accomplish what it is constitutionally forbidden from accomplishing. “The government cannot accomplish through threats of adverse government action what the Constitution prohibits it from doing directly.” *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1226 (2021) (Thomas, J., concurring). The Guidance Letter threatens other government officials with enforcement, not only if they continue speaking, but also if they continue to allow others to speak. “Where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official’s request, a valid [First Amendment] claim can be stated.” *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983).

III. Official guidance that threatens enforcement, even if veiled, can constitute a credible threat of enforcement.

Actual chilling of speech and self-censorship are not required for standing. The purpose of pre-enforcement standing is to address situations in which an individual is threatened with the enforcement of a law. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). And to satisfy the pre-enforcement requirements, the plaintiff must intend to “engage in a course of conduct arguably affected with a constitutional interest”—such as continuing to speak. *See id.* at 159.

Determining whether guidance creates a credible threat of enforcement is not always easy. “[W]hen judges encounter these sorts of threats to freedom of speech—whether conveyed through guidance or lesser communications or mere coordination—they are puzzled as to whether anything legally significant has occurred.” Philip Hamburger, *Courting Censorship*, 4 J. Free Speech L. 195, 218 (2023) (citing *Nat’l Rifle Ass’n of Am. v. Vullo*, 49 F.4th 700, 707, 716 (2d Cir. 2022) (finding no coercion or threat in Vullo’s guidance on regulatory risk), *vacated and remanded*, 602 U.S. 175 (2024)). Knowing how to threaten within the legal landscape, officials can “sub-administratively suppress speech largely at their discretion.” *Id.* Officials often “add government pressure

only at the margins when cooperation is not enough. And because little of this subterranean regulation amounts to binding regulation, overt coercion, or final agency action, the executive can get away with censorship with little concern about judicial repercussions.” *Id.* But the courts need not allow such sly maneuvering.

Whether a threatened enforcement action is sufficiently credible necessarily depends on the circumstances surrounding the government’s asserted authority and its likelihood of exercising that authority. See *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130, 138–39 (2d Cir. 2023). This Court has noted that the credible-threat standard “sets a low threshold and is quite forgiving to plaintiffs seeking such pre-enforcement review, as courts are generally willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund.” *Id.* at 138 (quoting *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016)). “Where a statute specifically proscribes conduct, the law of standing does not place the burden on the plaintiff to show an intent by the government to enforce the law against it.” *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 71 (2d Cir. 2019) (cleaned up) (citation omitted). Rather, this Court will “presume[] such intent in

the absence of a disavowal by the government or another reason to conclude that no such intent existed.” *Id.* (cleaned up) (citation omitted).

Further, a veiled threat of enforcement through guidance is sufficient. This Court “previously found standing where there was no ‘express threat of prosecution specifically directed at the plaintiff,’” and has noted that other courts have “sustained pre-enforcement standing without a past enforcement action or an overt threat of prosecution directed at the plaintiff.” *Vitagliano*, 71 F.4th at 139–40 (quoting *Cayuga Nation*, 824 F.3d at 332 n.9).

In the present case, the record, taken in the light most favorable to [plaintiff], reveals statements by [the government official] that a reasonable factfinder could, in the words of *Hammerhead*, ‘interpret[] as intimating that some form of punishment or adverse regulatory action w[ould] follow’ if the *Gazette* continued to air [the plaintiff’s] views.

Rattner v. Netburn, 930 F.2d 204, 209 (2d Cir. 1991) (quoting *Hammerhead Enters., Inc.*, 707 F.2d at 39).

Even though neither *Hammerhead* nor *Rattner* addressed standing, they recognized the injury that triggers standing. And when, as here, “a plaintiff is the ‘object’ of a government regulation, there should ‘ordinarily’ be ‘little question’ that the regulation causes injury to the plaintiff and that invalidating the regulation would redress the plaintiff’s

injuries.” *Diamond Alternative Energy, LLC v. Env’t Prot. Agency*, 606 U.S. 100, 114 (2025) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). That this case involves guidance documents should make no difference.

In *Vitagliano*, this Court held that a plaintiff challenging Westchester County’s recently enacted “bubble zone” law—which prohibited demonstrators from knowingly approaching within eight feet of another person, without consent, while within 100 feet of a reproductive-health-care facility—faced a credible threat of enforcement even though the county had never threatened her with prosecution. *Vitagliano*, 71 F.4th at 133–34, 137–39. The Court explained that past enforcement or a stated threat of future prosecution is “relevant to assessing the credibility of an enforcement threat,” but neither “is necessary.” *Id.* at 139. Instead, courts presume an intent to enforce a law that proscribes the plaintiff’s intended conduct absent a governmental disavowal or some other reason to conclude that enforcement is unlikely. *Id.* at 138. That presumption was strengthened in *Vitagliano* because the county declined, when asked at oral argument, to represent that it would not enforce the challenged provision. *Id.* at 138–39.

Other circuits similarly evaluate a threatened enforcement action in light of its broader enforcement context. The Sixth Circuit, for example, considers whether there is a history of past enforcement against the plaintiff or others, whether officials have sent enforcement warnings concerning the plaintiff's specific conduct, whether the governing enforcement mechanism makes enforcement easier or more likely, and whether the government has refused to disavow enforcement against the plaintiff. *McKay v. Federspiel*, 823 F.3d 862, 868–69 (6th Cir. 2016).

Those considerations derive from cases in which concrete evidence of the government's willingness or ability to enforce transformed an asserted fear of enforcement into a credible threat. *Id.* at 869. Conversely, *McKay* explained that courts have declined to find a credible threat where those circumstances were absent, and the record was silent as to whether officials “threatened to punish or would have punished” the plaintiff for the proposed conduct. *Id.*

Context is important here. First, the Guidance Letter was not issued in a vacuum; it was issued in response to the observation that “some board members have made, and encouraged, comments during board meetings that demean and stigmatize LGBTQ+ students.” JA-42. The

Guidance Letter apparently also condemns “attacks” on certain school policies. *Id.* It is not a leap to infer that the Guidance Letter targeted school board members such as the Appellants, who claim to have expressed different views on the specified policies.

Second, it is difficult to find among the hundreds of the Department’s guidance documents more than a couple that are formatted as letters directed and sent to school boards. *Contrast Formal Opinions of Counsel*, N.Y. State Educ. Dep’t, Office of Counsel, <https://www.counsel.nysed.gov/opinions> (last visited Sep. 17, 2026) *with Miscellaneous Guidance*, N.Y. State Educ. Dep’t, Office of Counsel, <https://www.counsel.nysed.gov/miscellaneous> (last visited Sep. 17, 2026). *See also Guidance*, N.Y. State Educ. Dep’t, Office of Counsel, <https://tinyurl.com/search-guidance> (last visited Sep. 18, 2026) (listing 644 guidance documents). By directing the letters to the school boards and sending them directly to the school administration, the New York Attorney General and Commissioner of Education ensured that all school board members—including Appellants—were aware of the directives and the expectation that the board members would conform their conduct.

Third, very few guidance documents are issued jointly with the New York Attorney General—the state’s top law enforcement official, who is empowered to enforce the laws that the Guidance Letter interprets. *Contrast Formal Opinions of Counsel, supra* (listing formal opinions from the New York Department of Education’s Office of Legal Counsel) *with Miscellaneous Guidance, supra* (listing only four joint guidance documents). The Guidance Letter was also signed by the Commissioner of Education, who possesses statutory authority to remove a board member who willfully violates or neglects a duty imposed by laws pertaining to public schools or willfully disobeys a decision, order, rule, or regulation of the Regents or Commissioner. N.Y. Educ. Law § 306(1).

Fourth, it is rare that guidance letters threaten enforcement action for failure to follow the guidance. But this one does. The Guidance Letter explicitly states that board members who make or allow “inflammatory remarks about the legitimacy of students’ gender identity,” JA-43, may be “removed from office,” JA-44. The Letter further suggests that “purely ideological statements opposing students’ rights” may violate the “Dignity for All Students Act.” JA-45 through JA-46. The final two pages of the Guidance Letter contain thinly veiled threats of removal of those

who violate the Ministry’s speech directive. The Letter summarizes with this threat: The New York Department of Education and the New York Attorney General “*caution* board members to conduct their public meetings in a manner” consistent with the Guidance Letter. JA-49 (emphasis added).

Fifth, while some of the New York Department of Education’s guidance contains the disclaimer “[t]his document is not intended as a mandate and is to be used for guidance purposes only,” *see Heath Guidance and Resources*, N.Y. State Educ. Dep’t, <https://www.nysed.gov/standards-instruction/health-guidance-resources> (last visited Sep. 18, 2026), the Guidance Letter does not. The canon “*expressio unius est exclusio alterius*” is not only a legal doctrine, but it is also an intuitive logical deduction that even non-lawyers understand—even if they don’t know the Latin expression of the concept. See Benjamin Minhao Chen, *Do Linguistic Canons Matter?*, 58 Conn. L. Rev. 153, 156 (2025) (finding that an empirical study “evidence[d] that ejusdem generis and *expressio unius* can alter how everyday speakers of English construe ambiguous language”). In this case, it would appear that the Guidance Letter is not just advice; it is a “mandate.”

But there is more. The Letter concludes by encouraging “students and other community members” to file a complaint with the Office of the New York Attorney General, the New York Department of Education, or the New York Commission of Human Rights. The government is apparently asking the public to assist in enforcing the guidance in the Guidance Letter.

And the threat of others filing a complaint was not made in a vacuum. In *Application of Patterson for the removal of Isaiah Santiago*, Decision No. 18,683, State Educ. Dep’t, Office of Counsel (Feb. 17, 2026), <https://www.counsel.nysed.gov/Decisions/volume65/d18683>, a fellow board member sought removal of a Rochester school-board trustee based on his alleged use of a racial epithet. Commissioner Rosa initially determined that the petitioner had presented sufficient evidence for a reasonable factfinder to conclude that the trustee had engaged in a willful violation or neglect of duty under § 306 and ordered a hearing to determine whether he should be removed from office. *Id.* Although Commissioner Rosa ultimately denied removal after the trustee publicly apologized and the record developed further, the decision confirms that allegedly discriminatory speech occurring while a board member

conducts official business can trigger the Commissioner’s § 306 removal process. *Id.*

The Guidance Letter makes the Attorney General’s and the Commissioner’s interpretation of the law—and their contempt for school board members who oppose their interpretation—clear. And the Guidance Letter specifically attacks protected speech. The school board members are thus not without reason to fear enforcement for violating the interpretation of the law in the Guidance Letter.

CONCLUSION

Friendly advice is not a threat adequate for pre-enforcement standing. But the sword of a government directive, backed by a veiled threat of enforcement, is, no matter how carefully wielded or how decorative the sheath, still a sword. Indeed, “the value of a sword of Damocles is that it hangs—not that it drops.” *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

For the above reasons, this Court should reverse the decision below.

Respectfully submitted,

/s/ David C. Tryon

David C. Tryon
Counsel of Record
Alex M. Certo
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, Ohio 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

*Counsel for The Buckeye Institute,
Defense of Freedom Institute for
Policy Studies, Inc., and Kate
DelliCarpini*

Josh Dixon
Courtney Corbello
CENTER FOR AMERICAN LIBERTY
2145 14th Avenue, Suite 8
Vero Beach, FL 32960
(703) 687-6212
jdixon@libertycenter.org
ccorbello@libertycenter.org

*Counsel for Center for
American Liberty*

Ilya Shapiro
Trevor Burrus
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-700
ishapiro@manhattan.
institute

*Counsel for Manhattan
Institute*

September 25, 2026

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. Rule 29(a)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 4,503 words.

This document complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type-style requirements of Fed. R. App. R. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for the most current version of Office 365 in 14-point type, Century Schoolbook.

/s/ David C. Tryon
David C. Tryon
Attorney of record

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing amicus brief was served on all counsel of record via the Court's electronic filing system this 25th day of September 2026.

/s/ David C. Tryon
David C. Tryon
Attorney of record