IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LORI CHAVEZ-DEREMER, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, Plaintiff-Counterclaim Defendant, v. SUFFOLK ADMINISTRATIVE SERVICES, LLC; PROVIDENCE INSURANCE CO., I.I.; ALEXANDER RENFRO; WILLIAM BRYAN; ARJAN ZIEGER, Defendants-Counterclaim Plaintiffs.	Civil Action No. 3:24-CV-01512 (CVR)

REPLY IN SUPPORT OF SECRETARY'S
MOTION TO DISMISS DEFENDANTS' FIRST AMENDED COUNTERCLAIM
FOR DECLARATORY AND INJUNCTIVE RELIEF

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Plaintiff Lori Chavez-DeRemer, Secretary of Labor ("Secretary") respectfully submits this Reply in support of her Motion to Dismiss Defendants' First Amended Counterclaim for Declaratory and Injunctive Relief (ECF No. 60). Defendants' Opposition to the Department's Motion fails to offer any explanation for the gaps in their Amended Counterclaim. Instead, it rehashes the same muddled claim that the Department initiated an investigation and ultimately filed the instant lawsuit to retaliate against Defendants for their business relationships with DMP and LPMS, who were allegedly engaged in protected First Amendment activity.

Defendants' Opposition brief completely fails to connect this claim to a legitimate legal framework. Assuming Defendants' allegations are true—though many are undermined by confidential settlement negotiations Defendants themselves filed as exhibits to their Amended Counterclaim—Defendants still fail to allege that they engaged in protected First Amendment activity, or that the Department initiated its investigation of Defendants to suppress viewpoints advocated by either Defendants or by DMP and LPMS. Further, Defendants have failed to show that the instant enforcement action is a final agency action reviewable under the Administrative Procedure Act. For these reasons, the Court should grant the Secretary's Motion to Dismiss Defendants' First Amended Counterclaim (ECF No. 60).

ARGUMENT

I. Defendants Have Not Pled a First Amendment Claim Under the Framework in *National Rifle Association v. Vullo*

Defendants' Opposition to the Department's Motion to Dismiss argues that the Department is improperly using its "power to punish or suppress rights protected by the First Amendment," in violation of the Supreme Court's recent decision in *National Rifle Association of America v. Vullo*. ECF No. 71 at 1 (citing 602 U.S. 175 (2024)). However, Defendants fail to state a First Amendment claim under *Vullo*'s framework.

Plaintiffs in *Vullo* challenged enforcement activity and public statements by New York's Department of Financial Services ("DFS"). *Vullo*, 602 U.S. at 188–81. DFS's superintendent, Maria Vullo, allegedly reached a deal with a major insurance company in which it "would instruct its syndicates to cease underwriting firearm-related policies" and would reduce its business with the National Rifle Association ("NRA"), a gun-rights advocacy organization. *Id.* at 183. In exchange for these actions, DFS promised to "focus its . . . enforcement action solely on those syndicates which served the NRA, and ignore other syndicates writing similar policies." *Id*.

Vullo also published official letters encouraging "DFS-regulated entities to . . . evaluat[e] and manag[e] their risks . . . that may arise from their dealings with the NRA or similar gun promotion organizations" and issued a press release urging New York's banks and insurance companies to "discontinue[] their arrangements with the NRA." *Vullo*, 602 U.S. at 183–84. Evaluating these alleged facts, the Supreme Court found that the plaintiff "plausibly allege[d] conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff's speech" and that plaintiff therefore stated "a claim that the government violated the First Amendment through coercion of a third party . . . ." *Id.* at 191. In other words, plaintiff plausibly alleged that "Vullo coerced DFS-regulated entities to cut their ties with the NRA in order to stifle the NRA's gun-promotion advocacy and advance her views on gun control." *Id.* at 197.

This case is factually distinct from *Vullo* in many respects. First, neither DMP nor LPMS is an advocacy organization. DMP's "primary business purpose . . . is the production, capture, segregation, aggregation, anonymization, organization, and sale to third parties of electronic data generated by its partners." ECF No. 52 (Am. Countercl.) ¶ 45. And LPMS "is a general partner

for DMP and other similar limited liability partnerships which rely upon the participation of limited partners to contribute their electronic data for aggregation and sale." *Id.* ¶ 51.

Further, seeking an advisory opinion about ERISA coverage from the government agency tasked with enforcing ERISA is not protected speech. And even if it was, Defendants do not allege that the Department has engaged in retaliatory conduct against DMP and LPMS because of the legal position they asked the Department to adopt. Defendants argue instead that the Department is "punishing" Defendants for their role as service providers to DMP and other similar plans (a business function that does not involve protected speech) because DMP and LPMS sought an Advisory Opinion and filed suit against the Department—but not because of the *content* of either the Advisory Opinion request or the lawsuit.[1] *See* Am. Countercl. ¶¶ 1–4. And

[1] Defendants' counterclaims also imply that they were "punished" when, in the course of settlement negotiations, the Department allegedly increased the monetary and nonmonetary components of its settlement demand only because DMP and LPMS declined to withdraw their Advisory Opinion Request and dismiss the *Data Marketing* case. *See* Am. Countercl. at ¶¶ 154–55. This is undermined by the sampling of confidential settlement communications that Defendants filed as exhibits to their counterclaim.

Global settlement negotiations began in this case in 2024, after a year and a half of negotiations between just the Department and Defendants in this case. *See, e.g.*, Am. Countercl. Ex. R, ECF No. 52-18 (February 2024 e-mail broaching the subject of a global settlement discussion). In July 2022, the Department sent Defendants a letter outlining the claims in the instant lawsuit. *See* Am. Countercl. Ex. O, ECF No. 52-15. And in June 2023, the Department sent a demand letter estimating that SAS and PIC would be liable to disgorge *at least* $60.3 million in damages if they were found liable in litigation; the letter offered to settle the Department's claims for $40 million in addition to a civil penalty and injunctive relief (including removal of each of the Defendants from their roles as fiduciaries). *See* Am. Countercl. Ex. P at 2–3, ECF No. 52-16. In short, the Department outlined its claims and made a settlement demand consistent with the relief sought in this suit long before the parties explored the possibility of a global settlement.

Further, it is clear from the confidential settlement communications that these negotiations were nuanced and cannot be boiled down to Defendants' oversimplified version of events that the Department "conditioned a reasonable settlement of the Anjo Investigation . . . upon the withdrawal by DMP and LPMS of the AO Request, and the dismissal by DMP and LPMS of the Texas suit." *Compare* ECF No. 71 at 2 *with* Am. Countercl. Ex. S, ECF No. 52-19 (multi-page letter outlining Department's global settlement proposal).

unlike *Vullo*, Defendants do not point to any public or private statements by the Department threatening to initiate or refrain from initiating legal action against Defendants or other entities simply because they seek advisory opinions from the Department or file lawsuits against the Department.

Moreover, the government officials in *Vullo* allegedly sought "to 'expand their regulatory jurisdiction to suppress the speech of organizations that they have no direct control over.'" *Vullo*, 602 U.S. at 197–98 (quoting Brief for First Amendment Scholars as *Amici Curiae* Supporting Petitioner at 8). But here, Defendants do not allege that the Department acted outside of its regulatory jurisdiction. Indeed, the Department is indisputably acting within the bounds of its authority when making determinations about ERISA coverage and issuing requested advisory opinions.

Applying *Vullo*'s framework, Defendants have failed to state a First Amendment claim. Indeed, it appears that Defendants' counterclaims seek what *Vullo* expressly prohibits: a "right to absolute immunity from [government] investigation," or a "right to disregard [state or federal] laws." *Vullo*, 602 U.S. at 198 (quoting *NAACP v. State of Ala.*, 357 U.S. 449, 463 (1958) (alterations in *Vullo*)).

II. Defendants Otherwise Fail to State a First Amendment Claim

Defendants have not stated a First Amendment claim under *any* legal framework. They have not shown they have standing to bring First Amendment claims and they have not plead the three elements necessary to make a *prima facie* case of First Amendment retaliation in the First Circuit. In particular, Defendants have not alleged that they "engaged in an activity protected by the First Amendment." *Staples v. Gerry*, 923 F.3d 7, 15 (1st Cir. 2019). But they also fail to

allege that the government "took an adverse action against [them]" and further fail to demonstrate a "causal link between the protected activity and the adverse action." *Id.*

A. Defendants Fail to Demonstrate Standing

Defendants rely on a single case from the Central District of California, *NRA v. City of Los Angeles*, to argue they have standing "to sue for violation of their First Amendment rights of association" with DMP and LPMS. ECF No. 71 at 5 (citing 441 F. Supp. 3d 915 (C.D. Cal. 2019)). This case is inapplicable.

City of Los Angeles addresses the constitutionality of a city ordinance requiring business owners to disclose contracts with and sponsorship of the NRA when seeking business opportunities with the City of Los Angeles, to prevent public funds from "undermin[ing] the City's efforts to legislate and promote gun safety." *City of Los Angeles*, 441 F. Supp. 3d at 932 (internal quotations omitted). One of the plaintiffs, "Doe," was a contractor who supported the NRA and desired "'to continue bidding for and obtaining' City contracts." *Id.* at 925. Doe brought suit, in conjunction with the NRA, alleging a violation of his own First Amendment rights. *Id.* at 925–26. The court found that Doe stated a First Amendment claim because he "undisputedly engaged in the protected First Amendment activity of pro-firearm speech," through his involvement with the NRA (*id.* at 941–42), and because the record supports the "contention that the purpose of the Ordinance is to deter association with the NRA." *Id.* at 938. Though Defendants cite *City of Los Angeles* to argue they have standing, the case does not address the question of standing.

Unlike the plaintiffs in *City of Los Angeles*, Defendants do not allege that they are part of a group or association that expresses a viewpoint on any topic. And while Defendants argue that DMP and LPMS have engaged in First Amendment activity, it is well-settled that "[a] party

ordinarily has no standing to assert the First Amendment rights of third parties." *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 49 (1st Cir. 2005). Here, where Defendants do not allege their own First Amendment rights are being violated, and where they otherwise fail to explain why they have standing, they do not have standing to pursue First Amendment counterclaims.[2]

B. Defendants Do Not Make a Prima Facie Case of First Amendment Retaliation

1. Defendants Do Not Argue Their Conduct is Protected By the First Amendment

"It is the duty of the party seeking to engage in allegedly expressive conduct to demonstrate that the First Amendment applies to that conduct." *Wine & Spirits*, 418 F.3d at 49. Defendants have failed to meet this burden: it is impossible to discern the nature of their First Amendment claim from their Counterclaim.

Defendants appear to argue that their association with DMP and LPMS is constitutionally protected conduct. *See* ECF No. 71 at 5–7. But freedom of association is a legal concept with a specific definition: "a right to associate for the purpose of engaging in those activities protected

[2] Defendants incorrectly allege that the Department is "judicially estopped" from making arguments about standing, because the Department's Opposition to DMP and LPMS's Motion to Intervene argued "that DMP's and LPMS's asserted interests are adequately represented by the Defendants." ECF No. 71 at 8 n.18. They do not offer further explanation. At least "two conditions must be satisfied before judicial estoppel can attach. . . . [f]irst, the estopping position and the estopped position must be directly inconsistent . . .[s]econd, the responsible party must have succeeded in persuading a court to accept its prior position." *Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004). Defendants do not address these factors and could not argue that they are satisfied. First, the Department's earlier brief argues that the proposed First Amendment claims were not "related to the subject matter of the Secretary's Complaint" and therefore did not assess whether any associated interests were adequately represented. ECF No. 62 at 11–12. Second, this Court's order on the Motion to Intervene did not find that Defendants have standing to assert First Amendment claims on behalf of DMP and LPMS. Therefore, DMP and LPMS have failed to demonstrate that judicial estoppel should attach.

by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). The First Amendment's protections for freedom of association do not protect the right of one business to do business with another.

The cases Defendants cite to argue that they are engaged in protected associational activity address the constitutionality of disclosure requirements; in each of those cases, the protected associational conduct was uncontested, and the decisions are completely inapplicable. *See, e.g.*, *City of Los Angeles*, 441 F. Supp. 3d at 929 (evaluating constitutionality of city ordinance requiring disclosure of association with NRA); *Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015) (evaluating constitutionality of state's non-profit registration requirement, which required the disclosure of the names and contributions of "significant donors"); *Am. for Prosp. Found. v. Becerra*, 903 F.3d 1000 (9th Cir. 2018), *rev'd sub nom*. *Am. for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021) (similar).

Defendants do not allege that they engage in advocacy efforts along with DMP and LPMS. And DMP and LPMS do not "engage[] in extensive political advocacy" but simply promote a business purpose. *City of Los Angeles*, 441 F. Supp. 3d at 925. In fact, Defendants' Amended Counterclaim explains that DMP requested an advisory opinion from the Department not in furtherance of an ideology, but because "the fifty separate state insurance regulatory agencies could pose significant and indefinite burdens on DMP through investigations and rulings of their own." Am. Countercl. ¶ 82. This is not political advocacy subject to First Amendment protection. "The First Amendment's core concern is with the free transmission of a message or idea from speaker to listener, not with the speaker's ability to turn a profit . . .". *Wine & Spirits*, 418 F.3d at 48.

2. Defendants Fail to Plead the Second or Third Elements of a Retaliation Claim

Defendants argue that the Department filed the instant lawsuit because DMP and LPMS "refused to withdraw the AO Request or dismiss the Texas suit." ECF No. 71 at 12. But this statement merely repeats Defendants' conclusory argument that the government took adverse action against them. *O'Brien v. Welty*, the case Defendants cite to argue that the government took an adverse action against them because of their First Amendment activity, actually pinpoints the holes in their counterclaim. 818 F.3d 920 (9th Cir. 2016). Plaintiff in *O'Brien* was a politically active university student who supported "constitutional conservati[sm]." *Id.* at 924. He alleged he was subject to harassment from school officials as a result of his political activities. *Id.* at 933–35. He was subject to disciplinary action after a campus incident and alleged his disciplinary hearing was unfair and that additional sanctions (including a sanction effectively prohibiting him from filling leadership roles within his political advocacy group for the duration of his university career) were imposed as a result of his political activity. *Id.* at 934. The Ninth Circuit found that plaintiff sufficiently alleged that his "protected activity was a substantial or motivating factor" that caused the university to "conduct[] disciplinary proceedings and impos[e] sanctions." *Id.* at 935 (quoting *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006)). Defendants' Counterclaim is completely devoid of analogous facts to support their contention that the Department's "[o]therwise lawful" investigation and enforcement action was nonetheless an unlawful adverse action. Defendants do not – and cannot – allege facts demonstrating that the Department initiated its investigation, conducted its investigation unfairly, or imposed unreasonable sanctions because Defendants were engaged in protected First Amendment conduct.

Moreover, Defendants renew their conclusory allegations that "temporal proximity" between their supposedly protected speech and the Department's enforcement action demonstrates a causal link between the two. But Defendants do not engage with the fact that this causal link dissolves because their underlying allegations are implausible, as the Secretary's motion explains.[3] *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). For these reasons, Defendants' First Amendment retaliation claim should be dismissed.

II. Defendants Fail to State an APA Claim

Defendants either misunderstand or purposely misrepresent the holding of *Alpine Securities Corporation v. SEC*. No. 2:18-cv-00504-CW-CMR, 2024 WL 4681816, at *12 (D. Utah Nov. 5, 2024). In *Alpine*, the court considered whether an SEC enforcement action was final agency action subject to review under the Administrative Procedure Act ("APA"), using the two-prong test set forth in *Bennett v. Spear*: (1) whether the action marks the "consummation of the agency's decisionmaking process," and (2) whether the action either determines "rights or obligations" or from which "legal consequences will flow." 520 U.S. 154, 177–78 (1997) (internal quotation omitted). *Id.* While the *Alpine* court noted that filing an enforcement action in

[3] Defendants object to the Department's explanation of the motivations for opening its investigation, because that information is not alleged in the Counterclaim. *See* ECF No. 71 at 3. It appears this is an objection to a quote from the Department's answer in a separate lawsuit, which states that "the SAS/PIC Investigation was initiated 'after receiving several participant complaints and state referrals involving [SAS and PIC] and entities associated with [them] . . .'" ECF No. 60-1 at 17 n.6 (quoting *Suffolk Admin. Servs. v. U.S. Dep't of Labor*, No. 3:21-cv-1031-DRD (D.P.R.), ECF No. 24 ¶ 72). A court is permitted to take "judicial notice of the fact that another proceeding took place, or of certain other undisputable aspects of those proceedings." *Diaz-Morales v. Rubio-Paredes*, 170 F. Supp. 3d 276, 281 n.2 (D.P.R. 2016) (quoting *MVM Inc. v. Rodriguez*, 568 F. Supp. 2d 158, 164 (D.P.R. 2008)). Defendants reference the *Suffolk* case in their counterclaim. *See* Am. Countercl. ¶ 106. And this Court may reasonably take judicial notice of the fact that in 2021 – long before much of the allegedly retaliatory conduct took place – the Department publicly stated reasons for opening the investigation that led to the instant lawsuit. This further undermines the plausibility of Defendants' allegations and claims.

federal court "arguably" satisfied the first *Bennett* prong, it concluded that the enforcement action failed the second *Bennett* prong because it did not "determine any rights or obligations" of the defendants and did not "impose any legal consequences that are cognizable for purposes of the APA." 2024 WL 4681816, at *12. The court held that the enforcement action was not final agency action subject to review and dismissed the case for lack of standing. *Id.* at *13. The conclusion here is the same—the Secretary's enforcement action does not determine any rights or obligations of Defendants, nor does it impose any legal consequences for purposes of APA review; thus, the lawsuit is not reviewable under the APA.

Defendants' reliance on *AT&T v. EEOC*, 270 F.3d 973 (D.C. Cir. 2001) fares no better. While the *AT&T* court muses that while "there clearly would be final agency action if the [agency] filed a lawsuit against AT&T," this would not be reviewable "as final agency action under the APA." *Id.* at 975. Instead, the company should "simply defend itself against the suit." *Id.* As the *Alpine* court pointed out, *AT&T* suggests an agency's enforcement action is *not* reviewable under the APA, and the proper response to an enforcement action is to *defend that action*, not to file a separate lawsuit (or bring a counterclaim) challenging the enforcement action under the APA. In sum, neither *Alpine* nor *AT&T* hold that an agency enforcement action is reviewable under the APA; thus, Defendants' APA claim should be dismissed.

CONCLUSION

For the reasons above, the Secretary respectfully requests that the Court grant her Motion to Dismiss Defendants' First Amended Counterclaim for Declaratory and Injunctive Relief (ECF No. 60).

Dated: December 15, 2025

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CERTIFICATE OF SERVICE

I hereby certify that I filed the Reply in Support of Secretary's Motion to Dismiss Defendants' First Amended Counterclaim for Declaratory and Injunctive Relief on the docket via CM/ECF. Notice of this filing will be sent to all counsel of record through the Court's Electronic Case Filing System.

/s/ *Sarah D. Holz*
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