No. 22-842

In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,
PETITIONER

v.

MARIA T. VULLO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

Petitioner alleges that respondent, the former Superintendent of the New York State Department of Financial Services, sought to suppress petitioner's speech by threatening to take unrelated enforcement actions against insurance companies and financial institutions if they did not end their business relationships with petitioner.

The question presented is whether those allegations state a plausible First Amendment claim.

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INTEREST OF THE UNITED STATES

This case presents the question whether petitioner has plausibly alleged that a government official violated the First Amendment by coercing private entities to stop doing business with petitioner in order to stifle its political advocacy. Although the two cases arise from very different facts, the legal principles that govern here are similar to those that govern in *Murthy* v. *Missouri*, cert. granted, No. 23-411 (Oct. 20, 2023), which involves claims against federal officials. More broadly, the United States has a substantial interest in the interpretation and application of the legal principles that distinguish between proper governmental efforts to inform, persuade, or exhort and improper attempts to suppress protected speech.

STATEMENT

A. Factual Background

Petitioner, the National Rifle Association (NRA), is a nonprofit corporation that "advocate[s] for its views on the Second Amendment" and other issues related to firearms. Pet. App. 194; see *id.* at 190. Petitioner alleges that respondent, the former Superintendent of the New York State Department of Financial Services (DFS), violated the First Amendment by coercing insurance companies and financial institutions to terminate their business relationships with petitioner in an effort to suppress petitioner's advocacy. *Id.* at 188-190.

1. DFS has broad authority to regulate financial services in New York, including by taking civil enforcement actions. Pet. App. 201-202. In September 2017, DFS became aware of an insurance product known as Carry Guard that petitioner had "aggressively promoted" as part of an "affinity insurance program." *Id.* at 6. "Affinity insurance programs are insurance programs endorsed by a membership organization for use by its members" and can include life, health, property, and casualty insurance. *Id.* at 97 n.1; see *id.* at 204-205. DFS determined that Carry Guard violated New York law because it "insured New York residents for intentional, reckless, and criminally negligent acts with a firearm that injured or killed another person." *Id.* at 6.

DFS commenced an investigation focusing on two companies, Chubb and Lockton, that underwrote and administered Carry Guard and other NRA affinity policies. Pet. App. 6. That investigation revealed that a third entity, the insurance marketplace Lloyd's of London and its related syndicates (collectively, Lloyd's), underwrote similar NRA-endorsed policies. *Id.* at 7.

On February 14, 2018, while DFS's investigation was ongoing, a gunman killed 17 students and staff at Marjory Stoneman Douglas High School in Parkland, Florida. Pet. App. 7. The shooting sparked an intense public backlash against petitioner and other gun-advocacy organizations. *Id.* at 7-8. In response, a number of "major American business institutions spoke out against gun violence, and some companies publicly severed ties with gun promotion organizations like [petitioner]." *Id.* at 8. Those companies included certain DFS-regulated banks and insurers. *Id.* at 12-13.

2. Petitioner alleges that some of those entities severed ties with petitioner not based on disagreement with petitioner's advocacy or concerns about public criticism, but instead because "DFS communicated to banks and insurers with known or suspected ties to the NRA that they would face regulatory action if they failed to terminate their relationships." Pet. App. 208. Petitioner's allegations describe private meetings, public statements, and enforcement decisions.

First, petitioner alleges that DFS privately threatened insurers with enforcement action if they continued doing business with petitioner. Most specifically, petitioner alleges that on or about February 27, 2017—roughly two weeks after the Parkland shooting—respondent met with senior executives of Lloyd's. Pet. App. 8 & n.6. At the meetings, respondent allegedly "presented [her] views on gun control and [her] desire to leverage [her] powers to combat the availability of firearms, including specifically by weakening the NRA." *Id.* at 221. She also allegedly "discussed an array of technical regulatory infractions plaguing the affinity-insurance marketplace" in which Lloyd's participated. *Id.* at 199. But she allegedly "made it clear

* * * that DFS was less interested in pursuing the infractions of which she spoke, so long as Lloyd's ceased providing insurance to gun groups, especially the NRA." *Id.* at 199-200. A few months later, on May 9, Lloyd's announced that "it had directed its underwriters to terminate all insurance related to the NRA and not to provide any insurance to the NRA in the future." *Id.* at 224.

Petitioner separately alleges that around the same time, Lockton's chairman called petitioner to say that although "Lockton privately wished to continue doing business with the NRA, * * * Lockton would need to 'drop' the NRA * * * for fear of 'losing [its] license' to do business in New York." Pet. App. 209. Lockton then announced that it would stop providing brokerage services for NRA-endorsed insurance programs. *Id.* at 13.

Second, petitioner's complaint describes two guidance letters and related public statements issued on April 19, 2018. The two nearly identical letters—one sent to insurance companies and the other to financial institutions—are entitled "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations." Pet. App. 9; see *id.* at 246-251. The letters stated that they were being issued "in the wake of several recent horrific shootings, including in Parkland." *Id.* at 246, 249. They emphasized that "the social backlash against the [NRA] and similar organizations that promote guns * * * can no longer be ignored" and that "society, as a whole, has a responsibility to act." *Id.* at 246-247, 249-250. And they approvingly cited "[t]he recent actions of a number of financial institutions that severed their ties with the NRA" as "an example of" businesses' "fulfilling their corporate social responsibility." *Id.* at 247, 250. Then, in the final paragraph, the

letters "encourage[d]" regulated entities "to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations"; "to review any relationships they have with the NRA or similar gun promotion organizations"; and "to take prompt actions to manag[e] these risks and promote public health and safety." *Id.* at 248, 251.

The same day, then-Governor Andrew Cuomo announced in a press release that he had "direct[ed] [DFS] to urge insurers and bankers statewide to determine whether any relationship they may have with the NRA or similar organizations sends the wrong message to their clients and their communities." Pet. App. 243-244. The press release included a statement by respondent "urg[ing] all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA, and to take prompt actions to manage these risks and promote public safety." *Id.* at 244. And Governor Cuomo followed up with a tweet stating: "The NRA is an extremist organization. I urge companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public." *Id.* at 213.

Petitioner alleges that the April 2018 letters and accompanying statements did "not merely express" respondent's "own political opinions," but rather "invoke[d] the 'risk management' obligations of recipients." Pet. App. 211-212. Petitioner further alleges that "DFS directives regarding 'risk management' must be taken seriously by financial institutions" because "risk-management deficiencies" can result in sizeable fines. *Id.* at 202. And petitioner alleges that, when

"[r]ead in the context of the preceding months' private communications," the April 2018 statements "were threats that deliberately invoked DFS's 'risk management' authority to warn of adverse action" if regulated entities continued doing business with petitioner. *Id.* at 212.

Third, petitioner focuses on consent decrees that DFS secured based on insurance-law violations associated with Carry Guard and certain other NRA-endorsed programs. Pet. App. 11, 252-295. DFS announced that it had entered into consent decrees with Lockton and Chubb in May 2018. *Id.* at 11. Lloyd's then entered into its own consent decree with DFS in December 2018. *Id.* at 296-320. In the consent decrees, all three insurance companies admitted that they had provided some unlawful NRA-endorsed insurance programs and agreed to no longer provide any NRA-endorsed insurance programs, including lawful ones, to New York residents. *Id.* at 270, 289, 306. The companies also agreed to pay fines of $7 million (Lockton), $1.3 million (Chubb), and $5 million (Lloyd's). *Id.* at 11 n.8.

B. Proceedings Below

1. Petitioner sued Governor Cuomo, DFS, and respondent in the United States District Court for the Northern District of New York. Pet. App. 187. As relevant here, the operative complaint asserts that respondent "established a 'system of informal censorship' designed to suppress the NRA's speech," in violation of the First Amendment. *Id.* at 231 (quoting *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 71 (1963)).[1]

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[1] Petitioner's complaint contains two First Amendment claims, one based on a theory of censorship and one based on a theory of retaliation. Pet. App. 230-236. Because the two claims rest on the

The district court denied respondent's motions to dismiss petitioner's First Amendment claims. Pet. App. 67-74, 111-129. The court concluded that petitioner had plausibly alleged "that the combination of Defendants' actions, including [respondent's] statements in the Guidance Letters and Cuomo Press Release as well as the purported 'backroom exhortations' [to Lloyd's], could be interpreted as a veiled threat to regulated industries to disassociate with the NRA or risk DFS enforcement action." *Id.* at 72. And the court further reasoned that petitioner had made "sufficient allegations plausibly supporting the conclusion that [respondent's] actions were taken in an effort to suppress the NRA's gun promotion advocacy." *Id.* at 128.

The district court also rejected respondent's argument that she was entitled to qualified immunity. The court concluded that "a question of material fact exists as to whether" respondent "threatened Lloyd's with DFS enforcement if the entity did not disassociate with the NRA" and that such a threat would violate clearly established law. Pet. App. 73.[2]

2. The court of appeals reversed. Pet. App. 1-38. The court rejected petitioner's First Amendment claims because it determined that petitioner had "fail[ed] to plausibly allege that [respondent] engaged in unconstitutional threatening or coercive conduct." *Id.* at 27. In analyzing that issue, the court considered four factors:

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same factual allegations and legal arguments, the parties and the lower courts have analyzed them together. *Id.* at 113. We follow the same approach in this brief.

[2] The district court dismissed all other claims in the case except petitioner's First Amendment claim against Governor Cuomo in his individual capacity; Governor Cuomo did not appeal the denial of his motion to dismiss that claim. See Pet. App. 93, 183-184.

(1) respondent's "word choice and tone"; (2) whether respondent had "regulatory authority"; (3) "whether [her] speech was perceived as a threat"; and (4) "whether [her] speech refer[red] to adverse consequences." *Id.* at 25. Applying those factors, the court found that respondent's "words in the Guidance Letters and Press Release * * * [could not] reasonably be construed as being unconstitutionally threatening or coercive" because they "were written in an even-handed, nonthreatening tone and employed words intended to persuade rather than intimidate." *Id.* at 27, 29.

The court of appeals acknowledged that respondent's alleged "statements at the Lloyd's meetings present a closer call." Pet. App. 31. But the court reasoned that "[t]o the extent [respondent] offered Lloyd's leniency in the course of negotiating a resolution of the apparent insurance law violations, context shows that she was merely carrying out her regulatory responsibilities." *Id.* at 32. The court thus concluded that "the Complaint fails to plausibly allege that [respondent] unconstitutionally threatened or coerced Lloyd's or the other entities to stifle the NRA's speech." *Id.* at 33-34.

Finally, the court of appeals held that "even assuming [petitioner] sufficiently pleaded" a First Amendment violation, respondent "is nonetheless entitled to qualified immunity because the law was not clearly established and any First Amendment violation would not have been apparent to a reasonable official at the time." Pet. App. 34.

3. This Court granted certiorari limited to the question whether petitioner's complaint plausibly alleges a First Amendment violation. 144 S. Ct. 375; see Pet. i-ii.

SUMMARY OF ARGUMENT

The allegations in petitioner's operative complaint, taken as true, state a plausible claim that respondent violated the First Amendment by coercing regulated entities to terminate their business relationships with petitioner in an effort to suppress petitioner's advocacy. The Court should, however, reject some of petitioner's broader arguments, which would threaten to condemn legitimate government activity if applied in other, more typical circumstances.

A. The government has wide latitude to speak for itself, including by forcefully criticizing viewpoints with which it disagrees and encouraging citizens to disassociate from groups expressing those viewpoints. But the government may not punish or suppress such viewpoints; nor may it coerce others into inflicting the punishment or suppression for it. In *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), for example, this Court held that a state commission violated publishers' First Amendment rights by threatening to refer distributors for prosecution unless they pulled some of the publishers' books from the shelves. *Id.* at 67-68.

B. Petitioner has plausibly alleged that at meetings in February 2018, respondent coerced Lloyd's to end its business relationship with petitioner in an effort to financially harm petitioner because of her disagreement with petitioner's advocacy. At the meetings, respondent allegedly expressed a desire to leverage her authority to financially weaken petitioner based on her disagreement with petitioner's views, identified technical regulatory infractions that Lloyd's might have committed, and then stated that she would be willing to overlook those infractions if Lloyd's stopped doing business

with petitioner. If true, those allegations would establish that respondent violated the First Amendment.

In holding otherwise, the court of appeals applied a multifactor test for identifying improper coercion. But the court erred by unmooring the factors from the question they are meant to answer: Whether the official's challenged conduct, viewed objectively and in context, conveys a threat of adverse government action. Indeed, the court ignored what it elsewhere called the most important factor: Whether respondent referred to adverse consequences. That is precisely what respondent is alleged to have done by communicating that she would pursue enforcement action against Lloyd's based on an array of additional technical infractions unless Lloyd's stopped doing business with petitioner.

C. Because petitioner's allegations about the February 2018 Lloyd's meetings provide a straightforward basis for rejecting the court of appeals' holding that no coercion occurred, this Court need not address petitioner's other allegations. And the Court should not address those other allegations because they raise more difficult questions in a highly unusual factual context. If the Court does consider petitioner's other allegations, it should hold that the April 2018 guidance letters and accompanying public statements provide some additional support for petitioner's First Amendment claim, but that many of petitioner's broader arguments lack merit.

1. Viewed in isolation, the first four paragraphs of the guidance letters present no First Amendment concerns; they simply attempt to convince, not coerce, private parties to cut ties with petitioner because of petitioner's firearms advocacy. Petitioner's reliance on the fact that the guidance letters were official documents

sent to regulated entities is misplaced. Government officials are entitled to speak in their governmental capacities to criticize protected speech and to encourage regulated entities to act accordingly, so long as they do not threaten adverse government action.

2. When viewed in context, however, the final paragraph of the guidance letters provides additional support for petitioner's First Amendment claim. That paragraph invokes "risk management" and "reputational risk," which are established terms in the world of financial regulation and which can be the basis for regulatory or enforcement actions. Yet that paragraph did not provide general guidance about those obligations; nor did it simply remind the entities to manage their reputational risks. Instead, the letters and accompanying statements contained a specific instruction about how the entities should comply with their obligations: refuse to do business with petitioner. That instruction was bolstered by petitioner's statements in the earlier Lloyd's meetings. And by urging entities to review only their relationships with petitioner and "similar gun promotion organizations," Pet. App. 247-248, the letters plausibly targeted petitioner because of its viewpoints.

3. Finally, petitioner's reliance on respondent's enforcement actions against Lloyd's, Lockton, and Chubb, and the terms of the resulting consent decrees, is misplaced. Although those actions are consistent with petitioner's theory of the case, they are also consistent with legitimate enforcement efforts because they were based on bona fide violations of New York law. Moreover, the district court held that those actions are entitled to absolute prosecutorial immunity and petitioner has not challenged that holding here. Accordingly, although the enforcement actions and consent decrees

might provide context for evaluating petitioner's allegations about the Lloyd's meetings and guidance letters, they cannot themselves be a basis for liability.

ARGUMENT

PETITIONER'S COMPLAINT PLAUSIBLY ALLEGES A FIRST AMENDMENT VIOLATION, BUT SOME OF ITS BROADER ARGUMENTS WOULD IMPROPERLY CONDEMN LEGITIMATE GOVERNMENT ACTIVITY

Under this Court's longstanding precedent, government officials violate the First Amendment if they use threats of adverse government action to coerce private parties to suppress protected speech. Assuming the truth of petitioner's allegations, that is what happened here: Petitioner alleges that respondent met with executives from Lloyd's, described her opposition to petitioner's political advocacy, and threatened to take unrelated enforcement actions against Lloyd's unless it stopped doing business with petitioner. Respondent has denied those allegations, and they may be false. But if they are true, they describe a classic First Amendment violation like the one the Court found in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). The court of appeals thus erred in rejecting petitioner's claims at the motion-to-dismiss stage.

Because petitioner's allegations about respondent's meetings with Lloyd's provide a sufficient basis for rejecting the court of appeals' holding and vacating its decision, this Court need not address petitioner's additional allegations. Those allegations raise harder questions because they involve a substantial amount of government speech and conduct that would ordinarily pose no First Amendment problem, and also because this case involves unusual facts. In addition, some of petitioner's arguments seek to extend the relevant First

Amendment principles too far and would risk condemning legitimate government speech and regulation if applied in other circumstances. But if the Court addresses those additional allegations, it should hold that—when viewed as a whole and in the context of petitioner's other allegations—petitioner's allegations about respondent's public statements provide further support for its claim that respondent sought to suppress its political advocacy using threats of regulatory action.

A. Government Officials Have Wide Latitude To Express Their Own Views, But They Violate The First Amendment If They Coerce Private Parties To Suppress Protected Speech

1. As this Court has long recognized, "the government can speak for itself." *Board of Regents* v. *Southworth*, 529 U.S. 217, 229 (2000). When it does, "the Free Speech Clause has no application." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 467 (2009). The government "'is entitled to say what it wishes' and to select the views that it wants to express" free from "'First Amendment scrutiny.'" *Id.* at 467-468 (citations omitted). Indeed, it is often "the very business of government to favor and disfavor points of view." *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment). "The Constitution * * * relies first and foremost on the ballot box," not the First Amendment, "to check the government when it speaks." *Shurtleff* v. *City of Boston*, 596 U.S. 243, 252 (2022).

One familiar consequence of those fundamental principles is that public officials are free to "vigorously criticize a publication" or speaker "for any reason they wish," including disagreement with the speaker's views. *Penthouse International, Ltd.* v. *Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991), cert. denied, 503 U.S. 950 (1992).

Throughout our Nation's history, government officials have often "criticized" "corporations and other institutions" for "speech protected by the First Amendment." *Id.* at 1016; see Gov't Br. at 23-25, *Murthy* v. *Missouri*, cert. granted, No. 23-411 (Oct. 20, 2023) (collecting examples).

That longstanding practice includes criticism intended to persuade citizens to disassociate from or decline to support particular advocacy groups or viewpoints. President Reagan emphasized that "[t]he politics of racial hatred and religious bigotry practiced by the [Ku Klux] Klan and others have no place in this country," urging "Democrats and Republicans alike [to] be resolute in disassociating ourselves from any group or individual whose political philosophy consists only of racial or religious intolerance."[3] President Clinton denounced labor unions for using "roughshod, muscle-bound tactics" in opposing passage of a trade agreement, arguing that lawmakers and citizens should reject the unions' message.[4] And President Biden has "call[ed] on all Americans to reject the lie" of white supremacism and "condemn[ed] those who spread the lie for power, political gain, and for profit."[5]

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[3] Ronald Reagan Presidential Library & Museum, *Letter to the Chairman of the Commission on Civil Rights Concerning the President's Views on the Ku Klux Klan* (Apr. 30, 1984), perma.cc/2BV5-D28H.

[4] Susan Baer, *Clinton pounds unions' tactics against NAFTA*, The Baltimore Sun, Nov. 8, 1993, at 1A.

[5] The White House, *Remarks by President Biden and First Lady Biden Honoring the Lives Lost in Buffalo, New York, and Calling on All Americans to Condemn White Supremacy* (May 17, 2022), perma.cc/MLH3-9UH2.

2. Of course, the government may not punish people for disagreeing with it or use its authority to suppress disfavored views. See *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573 (2002). When officials invoke their power to regulate or enforce rather than to speak on behalf of the government, their actions trigger First Amendment scrutiny. As a general matter, government regulations or enforcement actions that "target speech based on its communicative content" are "presumptively unconstitutional." *National Institute of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2371 (2018) (citation omitted) (*NIFLA*). And the government may not circumvent that limitation by coercing a nominally private party to do the suppression for it.

This case turns on the critical distinction between permissible "attempts to convince" and impermissible "attempts to coerce." *O'Handley* v. *Weber*, 62 F.4th 1145, 1158 (9th Cir. 2023), petition for cert. pending, No. 22-1199 (filed June 8, 2023). "The First Amendment does not interfere with [governmental] communication so long as the intermediary is free to disagree with the government and to make its own independent judgment about whether to comply with the government's request." *Ibid.* But government officials may violate the First Amendment if they "threaten adverse consequences if the intermediary refuses to comply." *Ibid.*

This Court's decision in *Bantam Books* illustrates that distinction. There, a state commission was charged with "investigat[ing] and recommend[ing] the prosecution" of violations of a law prohibiting "obscene, indecent or impure" content in books and other publications. 372 U.S. at 59-60 (citation omitted). The commission in turn identified certain publications as "'objectionable'" in notices to distributors and retailers; asked for "'co-

operation in removing the listed and other objectionable publications'"; emphasized the commission's "duty to recommend to the Attorney General prosecution of purveyors of obscenity"; assured that "'[c]ooperative action will eliminate the necessity of our recommending prosecution'"; and had a police officer conduct follow-up visits to assess compliance. *Id.* at 62-63 & n.5. The Court held that the commission had violated the First Amendment by "threat[ening to] invok[e] legal sanctions and other means of coercion" in order to "achieve the suppression of publications deemed 'objectionable.'" *Id.* at 67. The Court rejected the commission's argument that it had "simply exhort[ed] booksellers," explaining that those booksellers' "compliance with the Commission's directives was not voluntary" given the "thinly veiled threats to institute criminal proceedings against them." *Id.* at 66, 68.[6]

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[6] This Court's state-action precedents reflect the same distinction between persuasion and compulsion. See, *e.g.*, *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). Under those precedents, a finding that the government compelled a private party to suppress speech may mean that the private party's conduct is deemed to be state action. See *Manhattan Community Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1928 (2019). In *Murthy*, the plaintiffs have framed their claim in terms of the state-action doctrine; here, petitioner has relied directly on the First Amendment. The same fundamental principle, however, governs in both cases: The government may not use threats or inducements to compel private parties to suppress speech, but the government does not violate the First Amendment or transform private conduct into state action if it merely engages in speech of its own—including speech intended to inform, criticize, or otherwise influence private speech. See Gov't Br. at 25-29, *Murthy*, *supra* (No. 23-411).

B. Petitioner's Allegations About Respondent's February 2018 Meetings State A Plausible First Amendment Claim

To state a First Amendment claim under the foregoing principles, petitioner must plausibly allege that respondent sought to "coerc[e]" private parties, by threats or inducements, into disassociating from petitioner in order "to achieve the suppression" of petitioner's speech. *Bantam Books*, 372 U.S. at 67. In particular, petitioner must allege that, when viewed as a whole and in context, respondent's statements would have been "reasonably understood," *id.* at 68, as a threat that adverse government action would follow a failure to comply.

The parties and the court of appeals appear to agree on that basic standard, which is also the standard applied by other courts. See Pet. Br. 16-17; Br. in Opp. 28; Pet. App. 24; see also *O'Handley*, 62 F.4th at 1158 (collecting cases). It is likewise common ground that, in considering whether petitioner has met that standard, the Court must "assume the[] veracity" of the complaint's "well-pleaded factual allegations" and "reasonable inference[s]" therefrom, and "then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678-679 (2009).

Here, petitioner alleges that respondent sought to suppress its speech by threatening Lloyd's with unrelated enforcement action unless it ended its business relationship with petitioner. If those allegations are true, they are sufficient to establish a First Amendment violation.

1. Petitioner alleges that when respondent met with Lloyd's in February 2018, she raised "an array of technical regulatory infractions" that Lloyd's allegedly com-

mitted in its affinity-insurance products, but offered not to "pursu[e] th[os]e infractions * * * so long as Lloyd's ceased providing insurance to gun groups, especially [petitioner]." Pet. App. 199-200. Petitioner also alleges that respondent explained her intention to "focus" her affinity-insurance enforcement efforts "solely on those syndicates which served [petitioner], and ignore other syndicates" that did not serve petitioner or other gun groups. *Id.* at 223. And petitioner alleges that in response, Lloyd's agreed to "scale back" its business with petitioner. *Ibid.*

If true, those allegations would establish that respondent "coerc[ed]" Lloyd's to take a particular action "to achieve the suppression of" petitioner's speech. *Bantam Books*, 372 U.S. at 67. Specifically, respondent invoked "the threat" of "legal sanctions"—an enforcement action based on unrelated regulatory infractions—to "coerc[e]" Lloyd's into ceasing its business with petitioner. *Ibid.* Because respondent thus allegedly conveyed that her decision to exercise regulatory authority in the future would turn on whether Lloyd's acceded to her demands, a company in the position of Lloyd's would have "reasonably understood" respondent's statements as "threats." *Id.* at 68.[7]

Petitioner has also plausibly alleged that respondent did not make those threats in a neutral effort to enforce the law that only incidentally burdened petitioner's

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[7] Viewed from the opposite direction, respondent allegedly offered Lloyd's an inducement—in the form of leniency for regulatory infractions—to cease its business with petitioner. Such inducements are equivalent to coercive threats: The Constitution does not distinguish between "comply or I'll prosecute" and "comply and I'll look the other way." Cf. Gov't Br. at 27, *Murthy*, *supra* (No. 23-411).

speech, but instead sought to suppress petitioner's speech "based on its communicative content." *NIFLA*, 138 S. Ct. at 2371 (citation omitted). Petitioner alleges that respondent emphasized her "views on gun control" and offered to exchange enforcement leniency for actions by Lloyd's that would "aid[] DFS's campaign against gun groups." Pet. App. 221, 223. The alleged agreement between respondent and Lloyd's required Lloyd's to "scale back its NRA-related business" generally, *id.* at 223—not to cease underwriting only unlawful insurance programs like Carry Guard. And petitioner alleges that respondent was "aware of pervasive, colorable regulatory infirmities affecting numerous affinity-insurance programs," but "explained to Lloyd's in closed-door meetings[] [that] the Cuomo administration sought to focus on 'gun programmes' and gun advocacy groups." *Id.* at 200, 219. Taken as true, those allegations state a plausible claim that respondent sought to coerce Lloyd's into terminating its business with advocacy groups whose messages she disfavored.

Although the relevant inquiry is objective, not subjective, the alleged response by Lloyd's provides some further support for the conclusion that a reasonable person would have understood respondent's alleged statements as threats. Cf. *Bantam Books*, 372 U.S. at 63 (noting bookseller's "reaction on receipt of a notice"). Soon after respondent allegedly met with Lloyd's, the Lloyd's Board of Directors allegedly concluded that respondent "had transformed the 'gun issue' into a compliance matter." Cert. Reply Br. 5 (citing Sealed Pet. App. 29). Lloyd's then "publicly announced that it had directed its underwriters to terminate all insurance related to the NRA and not to provide any insurance to the NRA in the future." Pet. App. 224. That reinforces

the conclusion that petitioner has plausibly alleged that respondent's statements in the February 2018 meetings are reasonably understood as a threat that Lloyd's would need to sever its ties with petitioner in order to avoid regulatory "compliance" issues.[8]

2. The court of appeals correctly recognized that "'[i]n determining whether a particular request to suppress speech is constitutional, what matters is the distinction between attempts to convince and attempts to coerce.'" Pet. App. 24-25 (citation omitted). But the court then attempted to draw that distinction by considering four non-dispositive factors: "(1) word choice and tone"; "(2) the existence of regulatory authority"; (3) "whether the speech was perceived as a threat"; "and, perhaps most importantly, (4) whether the speech refers to adverse consequences." *Id.* at 25. That is the same four-factor test the Fifth Circuit purported to apply in *Murthy*. See *Missouri* v. *Biden*, 83 F.4th 350, 378 (per curiam) (citing the Second Circuit's decision here), cert. granted *sub nom. Murthy* v. *Missouri*, 144 S. Ct. 7 (2023) (No. 23-411). As the government's brief in *Murthy* explains, those factors may be relevant in identifying coercive threats, but they can lead courts astray if they are applied in a manner that is unmoored from

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[8] Petitioner has also alleged that respondent privately threatened other "banks and insurers with known or suspected ties to the NRA that they would face regulatory action if they failed to terminate their relationships with the NRA." Pet. App. 208; see *id.* at 208-210. Those allegations are generally too conclusory to carry independent weight. See *Iqbal*, 556 U.S. at 678. But petitioner's specific allegations about a contemporaneous call from Lockton's chairman stating that the company "would need to 'drop' the NRA—entirely—for fear of 'losing our license' to do business in New York," Pet. App. 209 (brackets omitted), lend some additional plausibility to petitioner's allegations about the Lloyd's meetings.

the fundamental coercion inquiry. Gov't Br. at 36-43, *Murthy*, *supra* (No. 23-411). And as in *Murthy*, that is what happened here.

In holding that petitioner's allegations about the Lloyd's meetings failed to state a claim, the court of appeals ignored what it elsewhere called the "most important[]" factor—"whether the [government official's] speech refers to adverse consequences." Pet. App. 25. At the meeting, respondent allegedly *did* refer to adverse consequences—by indicating that she would pursue "technical regulatory infractions" unless Lloyd's "ceased providing insurance to gun groups, especially the NRA." *Id.* at 199-200.

In response to those allegations, the court of appeals emphasized that "[t]o the extent [respondent] offered Lloyd's leniency in the course of negotiating a resolution of the apparent insurance law violations, context shows that she was merely carrying out her regulatory responsibilities." Pet. App. 32. It is true that if respondent had simply offered to forgo enforcement based on one insurance-law violation in exchange for an agreement by Lloyd's to cease another violation, the offer would pose no First Amendment concerns. Rather, it would constitute a "legitimate" exercise of enforcement discretion in choosing how best to target unlawful conduct. *Id.* at 33.

As explained above, however, petitioner's complaint plausibly alleges that respondent made a different kind of offer that *does* pose First Amendment concerns. See pp. 17-20, *supra*. Specifically, respondent allegedly offered Lloyd's leniency for "regulatory infractions plaguing the affinity-insurance marketplace" if Lloyd's would "cease[] providing insurance" *of any kind* "to gun groups, especially [petitioner]." Pet. App. 199-200. The

alleged bargain was thus unrelated to—and swept more broadly than—respondent's investigation of unlawful insurance programs like Carry Guard. And even more importantly, petitioner has plausibly alleged that respondent insisted that Lloyd's terminate all of its dealings with petitioner based not on a neutral effort to enforce the insurance laws, but rather on respondent's disagreement with petitioner's advocacy.

3. Respondent, for her part, has not seriously argued that the First Amendment allows a public official to use threats of enforcement action or offers of leniency to coerce a regulated entity to stop doing business with a disfavored speaker. Instead, respondent has principally argued (Br. in Opp. 34) that petitioner's allegations about the Lloyd's meetings "are too vague to enable a court to assess them." But petitioner's complaint provides several details about those meetings: They occurred "on or about February 27, 2018"; the "participants included [respondent] herself, along with" two named executives of Lloyd's and an affiliate; and respondent offered leniency "for infractions relating to [certain affinity] insurance policies" if Lloyd's "cease[d] underwriting firearm-related policies" and "scale[d] back its NRA-related business." Pet. App. 221, 223. At the pleading stage, petitioner was not required to allege with "precision * * * what [respondent] actually said to make her message 'clear.'" *Id.* at 31.

4. Of course, if this case proceeds, it may well become clear that respondent in fact never made any coercive statements to Lloyd's. But in this procedural posture, the Court's task is to "assume the[] veracity" of the complaint's "well-pleaded factual allegations" and "reasonable inference[s]" therefrom, and "determine whether they plausibly give rise to an entitlement to re-

lief." *Iqbal*, 556 U.S. at 678-679. Applying that standard, petitioner's allegations about respondent's meetings with Lloyd's suffice to state to a plausible First Amendment claim.

C. If The Court Addresses Petitioner's Other Allegations, It Should Hold That The April 2018 Statements Provide Additional Support For Petitioner's Claim, But Should Reject Petitioner's Broader Arguments

Even without more, petitioner's allegations about the February 2018 meetings state a First Amendment claim. That conclusion answers the question presented and provides a sufficient basis for vacating the court of appeals' decision.

Given that straightforward path for resolving this case, the Court need not and should not address petitioner's arguments based on the other allegations in the complaint, which raise more difficult issues and involve unusual facts. To the extent the Court nonetheless considers those allegations, it should make clear that, viewed in isolation, much of what respondent said and did could qualify as permissible government speech and regulatory enforcement. And the Court should reject petitioner's contrary arguments, some of which would curtail legitimate government speech and deprive public officials of much-needed clarity about the line between what is permitted and what is forbidden. Ultimately, however, petitioner's allegations about the April 2018 statements—when viewed as a whole and in the context of petitioner's other allegations—provide additional support for petitioner's overarching First Amendment claim.

1. Many of respondent's April 2018 statements consisted of government speech that would raise no First Amendment concern if viewed in isolation

a. The first four paragraphs of respondent's April 2018 guidance letters, standing alone, raise no First Amendment concerns. Those paragraphs address "several recent horrific shootings" and the growing "social backlash against the [NRA], and similar organizations that promote guns that lead to senseless violence." Pet. App. 246. They note "precedent in the business world where firms have * * * fulfill[ed] their corporate social responsibility," including "[t]he recent actions of a number of financial institutions that severed their ties with the NRA after" the Parkland shooting. *Id.* at 247. And they emphasize that gun violence "is a public safety and health issue that should no longer be tolerated by the public." *Ibid.*

Similar to the government speech by Presidents Reagan, Clinton, and Biden discussed above, the first four paragraphs of respondent's guidance letters are an "attempt[] to convince" private parties to cut ties with petitioner, not an "attempt[] to coerce" them into doing so. *O'Handley*, 62 F.4th at 1158. Those paragraphs "criticize" petitioner for its pro-gun "speech" and "appeal[] to the public not" to support that speech by doing business with petitioner. *Penthouse International*, 939 F.2d at 1016. But they do not "threaten[]" private parties with "[any] sanction" for continuing to do business with the NRA. *Ibid.* The language thus leaves private parties "free to disagree with the government and to make [their] own independent judgment about whether to comply with the government's request." *O'Handley*, 62 F.4th at 1158. Accordingly, the first four paragraphs of the guidance letters, read in isolation, would indicate

that respondent was simply "speaking on [the government's] own behalf" in the marketplace of ideas—which she was permitted to do, even using strong rhetoric, without implicating the First Amendment. *Summum*, 555 U.S. at 470. Indeed, "a representative government requires that" government officials "be given the widest latitude to express their views on issues of policy." *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966).

b. Petitioner acknowledges (Br. 16) that government officials may "express their opinions without violating the First Amendment." But in challenging respondent's April 2018 statements, petitioner focuses on several elements that should carry little or no weight in the First Amendment analysis.

First, petitioner asserts that the guidance letters and accompanying statements were suspect because they were "issued by 'the New York State Department of Financial Services,' not 'Citizen Maria Vullo.'" Pet. Br. 33 (brackets and citation omitted). But the premise of the government speech doctrine is that "*the government* can speak for itself," *Board of Regents*, 529 U.S. at 229 (emphasis added)—not merely that government officials can speak in their personal capacities. The leaders of government agencies are entitled to take positions and advocate points of view on behalf of the government, not merely as citizens.

Second, petitioner emphasizes (Br. 32-33) that the guidance letters were issued to DFS-regulated entities pursuant to DFS's statutory authority to provide "guidance." N.Y. Fin. Servs. L. § 302(a). A speaker's authority over the recipients of a message may be relevant to the coercion inquiry because a threat is more (or less) likely to be coercive if the speaker actually has (or lacks) the authority to carry out a threat. But agencies are

"permitted to communicate in a non-threatening manner with the entities they oversee without creating a constitutional violation," and there is nothing inherently suspect about a regulator's seeking to persuade the entities she regulates. *O'Handley*, 62 F.4th at 1163. The critical question is whether the communications were threatening, not whether they were issued to regulated parties or pursuant to statutory authority.

Third, petitioner emphasizes (Br. 34) that "the Guidance Letters urged banks and financial institutions to cut all ties with the NRA and other groups because of their 'gun promotion' advocacy, not because of any legal infraction." But government officials are not required to limit their public advocacy to discouraging illegal conduct or addressing subjects within the scope of their regulatory authority. To the contrary, public officials "surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate." *Penthouse International*, 939 F.2d at 1015. There is thus nothing wrong with an official's criticizing protected speech or urging members of the public not to support it—just as Presidents and other leaders have long done. See p. 14, *supra*.

c. In short, had respondent limited her statements to the sorts of exhortations in the first four paragraphs of the guidance letters and the corresponding portions of the press release, those statements would have fallen squarely within the Nation's long tradition of public officials speaking on matters of public concern. Such efforts to inform, persuade, or criticize—even when strongly worded—do not themselves pose any First Amendment issue.

2. Petitioner has plausibly alleged that other language in the April 2018 statements, read in context, provides additional support for its First Amendment claim

a. Respondent did not, however, limit her April 2018 statements to the sorts of exhortations and advocacy discussed above. Instead, the final paragraph of the guidance letters "encourages * * * [regulated entities] to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations." Pet. App. 248. And it further "encourages regulated institutions to review any relationships they have with the NRA or similar gun promotion organizations, and to take prompt actions to manag[e] these risks and promote public health and safety." *Ibid.*

"Risk management" and "reputational risk" are established terms in the world of financial regulation. In the federal system, multiple agencies regulate financial institutions' management of risk as part of their broader responsibility to ensure the financial soundness of banks and other regulated entities. For example, as the Office of Comptroller of the Currency (OCC) has explained, "risk is the potential that events will have an adverse effect on a bank's current or projected financial condition," and the OCC's system of "[r]isk-based supervision focuses on evaluating risk, identifying existing and emerging problems, and ensuring that bank management takes corrective action before problems compromise the bank's safety and soundness."[9] One form of recognized risk is reputational risk, defined as

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[9] OCC, *Comptroller's Handbook, Examination Process, Bank Supervision Process* 24 (Sept. 2019) (*OCC Handbook*), perma.cc/7HJD-Q8FC.

"the risk to current or projected financial condition and resilience arising from negative public opinion," which "may impair a bank's competitiveness by affecting its ability to establish new relationships or services or continue servicing existing relationships."[10] When federal agencies "identify excessive risks" at a financial institution, they can use "supervisory recommendations," "informal agreements," or "formal enforcement actions" to "reduce risks and address deficiencies."[11]

DFS also has authority to regulate financial institutions' management of risk. New York law empowers the DFS Superintendent to "take such actions as [she] believes necessary" to "ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services." N.Y. Fin. Servs. L. § 201(b)(2). Petitioner alleges that DFS has exercised that power to issue "directives regarding 'risk management,'" and that those directives "must be taken seriously by financial institutions" because "risk-management deficiencies can result in fines of hundreds of millions of dollars." Pet. App. 202; see Pet. Br. 3-4. Those allegations plausibly establish that the final paragraph of the guidance letters was not merely an exercise in persuasion, but instead "invok[ed] the legal obligations of [regulated] institutions." *Backpage.com, LLC* v. *Dart*, 807 F.3d 229, 236 (7th Cir. 2015), cert. denied, 580 U.S. 816 (2016).

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[10] *OCC Handbook* 28; see Board of Governors of the Federal Reserve System, *Legal/Reputational Risk* (Oct. 3, 2023), perma.cc/JUJ9-YTK3 (similar).

[11] Federal Deposit Insurance Corporation (FDIC), *Risk Management Manual of Examination Policies*, § 15.1 (Nov. 9, 2023), perma.cc/BP26-PAY4.

b. Of course, the fact that the guidance letters can reasonably be read to invoke regulated entities' legal obligations does not itself violate the First Amendment. Federal and state agencies routinely provide guidance to regulated entities on how to comply with the law. So long as the underlying law is consistent with the First Amendment and the guidance does not threaten enforcement action based on protected speech, such guidance poses no First Amendment problem. And that remains true even if particular applications of a content-neutral regulation impose "incidental" burdens on expression. *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (*FAIR*). Accordingly, respondent would not have violated the First Amendment had she merely issued general guidance reminding regulated entities of their obligation to manage reputational risks—even if that guidance might have prompted some regulated entities to reassess their relationships with petitioner.[12]

Here, however, respondent did not offer guidance about risk-management obligations in general, but instead specifically tied those obligations to a request that entities sever their business relationships with petitioner—suggesting that a failure to take that spe-

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[12] Although the federal banking agencies consider reputational risks to financial institutions under their supervision, they do not require the termination of customer relationships "based solely on reputation risk." FDIC, *Statement of the Federal Deposit Insurance Corporation* 3 (May 22, 2019), perma.cc/93S6-QKHS. And the Federal Reserve Board, FDIC, and OCC recently stated that "[b]anking organizations are neither prohibited nor discouraged from providing banking services to customers of any specific class or type, as permitted by law or regulation." *Joint Statement on Crypto-Asset Risks to Banking Organizations* (Jan. 3, 2023), perma.cc/QAZ2-QJJA.

cific action would violate those obligations. Indeed, the contemporaneous press release expressly "urge[d] all" regulated entities "to join the companies that have already discontinued their arrangements with the NRA, and to take prompt actions to manage the[ir] risks." Pet. App. 244. In contrast to guidance documents that generally explain how regulated entities may conform their conduct to the law, or even remind regulated entities simply to *manage* reputational risks (without suggesting or demanding any particular course of action), the guidance letters here were accompanied by a specific instruction about how entities should "deal[]" with "the NRA": refuse to do business with it. *Id.* at 248.

Critically, moreover, petitioner has plausibly alleged that the April 2018 statements "'target[ed] [petitioner's] speech based on its communicative content.'" *NIFLA*, 138 S. Ct. at 2371 (citation omitted). The letters encouraged regulated entities to "review any relationships they have with the NRA or similar *gun promotion* organizations." Pet. App. 247-248 (emphasis added). And Governor Cuomo's follow-on tweet tied entities' reputational risks to his assertion that the NRA is "an extremist organization." *Id.* at 213.

Petitioner's allegations about the earlier Lloyd's meetings reinforce that understanding of the letters. As explained above, petitioner has plausibly alleged that, at those meetings, respondent did not simply offer Lloyd's leniency to induce its compliance with insurance law; instead, she offered Lloyd's leniency to induce it to stop doing any business—including lawful business—with petitioner. See pp. 17-20 *supra*. In turn, the ensuing guidance letters can plausibly be viewed as an ex-

tension of respondent's earlier alleged efforts to coerce private actors into suppressing petitioner's speech.[13]

c. The court of appeals correctly observed that respondents' statements "favor[ing] gun control over gun promotion" and seeking "to convince DFS-regulated entities to sever business relationships with gun promotion groups" were "permissible government speech." Pet. App. 28. But the court failed to consider the guidance letters' references to regulated entities' risk-management obligations in the context of other public and private statements expressing hostility towards any entity doing business with petitioner. See pp. 29-30, *supra*.

Respondent emphasizes (Br. in Opp. 31) that the guidance letters do not "cite[] *any* law or regulation." But respondent also acknowledges (*ibid.*) that "risk-management obligations * * * are well recognized in the financial industry." Thus, by encouraging entities to "take prompt action" to "manag[e] their risks" by ceasing "their dealings with the NRA," Pet. App. 248, the letters conveyed respondent's view that such action was *part* of the entities' "well recognized" "obligations," Br. in Opp. 31.

d. Petitioner, for its part, correctly argues that, when viewed in context, the April 2018 statements lend further support to its First Amendment claim, which

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[13] In response to allegations that he and respondent had used threats of regulatory enforcement to suppress petitioner's speech, Governor Cuomo tweeted: "The regulations NY put in place are working. We're forcing the NRA into financial jeopardy." J.A. 21. Although that tweet is not referenced in petitioner's operative complaint, it would tend to support the inference that the guidance letters and contemporaneous public statements were an extension of respondent's earlier alleged efforts to coerce private actors into suppressing petitioner's speech.

must be assessed by judging the allegations in the complaint "as a whole." Pet. Br. 40 (capitalization and emphasis omitted). But again, some of petitioner's arguments seek to extend the relevant First Amendment principles too far.

First, petitioner emphasizes (Br. 35-38) that many DFS-regulated insurers and banks either cut ties with petitioner or declined to do business with petitioner in the wake of respondent's challenged conduct. To the extent petitioner has offered nonconclusory allegations tying those decisions to respondent's alleged coercion—as it has done with Lloyd's and Lockton—those allegations support its claim. But petitioner's general allegations that other regulated entities refused to do business with it carry little weight because those decisions have an "obvious alternative explanation" for the alleged parallel conduct, *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 567 (2007)—the contemporaneous public reaction to the Parkland shooting, which led many entities not regulated by respondent to cut ties with petitioner. Pet. App. 7-8.

Second, petitioner challenges (Br. 42-45) the court of appeals' conclusion that reputational risks posed by regulated entities' dealings with petitioner are a proper subject of regulation. Petitioner asserts (*ibid.*) that the court's conclusion effectively allows a "heckler's veto" because it rests on the public's reaction to petitioner's speech. The decisions on which petitioner relies stand for the uncontroversial proposition that the government cannot target speech for regulation based on its "content" and that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992). Here, petitioner has plausibly alleged that respondent

singled out regulated entities' relationships with petitioner precisely because of the content of petitioner's speech. See pp. 19, 21-22, *supra*.

But the same analysis would not apply to even-handed enforcement of content-neutral risk-management requirements, even if particular applications of those requirements might impose "incidental" burdens on speech. *FAIR*, 547 U.S. at 62. For example, financial regulators may properly remind banks of their obligation to identify and manage reputational risks associated with providing services to their business partners even if those risks might include the financial fallout from public opposition to a particular partner's speech. Here, however, petitioner has plausibly alleged that respondent was not engaged in neutral enforcement of risk-management obligations, but instead acted based on her own disagreement with petitioner's views.

e. As with respondent's meetings with Lloyd's, further factual development may refute petitioner's allegations that the guidance letters were coercive. For example, perhaps DFS frequently issued guidance letters with language encouraging entities to take specific actions, but never followed up with any consequences, such that the letters here would not have been reasonably understood to suggest any realistic threat of enforcement. Perhaps petitioner will be unable to substantiate some of its related allegations. Or perhaps other facts will emerge that will cast the guidance letters in a different light. But for purposes of resolving respondent's motion to dismiss, the question is whether petitioner's allegations, taken as a whole, allege "enough facts" to "nudge[] [its] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. And when viewed in context, petitioner's allega-

tions about the April 2018 statements provide further support for its claim that respondent sought to suppress petitioner's speech using threats of enforcement action.

3. Petitioner's allegations about the consent decrees may provide context for its other allegations, but cannot themselves be a basis for liability

Finally, petitioner relies on respondent's enforcement actions against insurers that dealt with petitioner and the terms of the resulting consent decrees. See, *e.g.*, Pet. Br. 34-35, 37. Although those enforcement actions are consistent with petitioner's theory of the case, they also are consistent with respondent's legitimate regulatory enforcement efforts because they appear to have been based on bona fide violations of New York law. Cf. *Twombly*, 550 U.S. at 567 (an "obvious alternative explanation" can defeat plausibility). Moreover, the district court held that those enforcement actions were entitled to absolute prosecutorial immunity, and petitioner has not challenged that holding here. See Pet. App. 49-67. Accordingly, although this Court may consider the enforcement actions and consent decrees as relevant context for respondent's non-immune statements—as both parties and the courts below have done—those immunized acts should not themselves be a basis for liability.

CONCLUSION

The judgment of the court of appeals should be vacated.[14]

Respectfully submitted.

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[14] Petitioner seeks (Br. 47) reversal of the court of appeals' decision rather than vacatur. But the decision below also rested on the court's alternative holding that respondent is entitled to qualified immunity, Pet. App. 34, which this Court has not granted certiorari to review. Accordingly, if the Court agrees that petitioner's complaint states a First Amendment claim, it should vacate the court of appeals' decision and remand to allow the lower court to reconsider the qualified-immunity question in light of this Court's opinion.