No. 22-842

In The Supreme Court of the United States

The National Rifle Association of America,

Petitioner,

v.

Maria T. Vullo, both individually
and in her former official capacity,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF FORMER STATE COMMISSIONERS OF INSURANCE AND BANKING AS AMICI CURIAE SUPPORTING RESPONDENT

James M. Gross
FOLEY HOAG LLP
1301 Ave. of the Americas
New York, NY 10019
(212) 812-4000

Caroline Holliday
FOLEY HOAG LLP
Seaport West
155 Seaport Blvd.
Boston, MA 02210
(617) 832-1000

Beth C. Neitzel
Counsel of Record
FOLEY HOAG LLP
1717 K Street N.W.
Washington, D.C. 20006
(202) 223-1200
bneitzel@foleyhoag.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici are former commissioners and deputy commissioners of insurance and banks from across the United States. With more than five decades and 10 states of regulatory experience among them—including New York's Department of Financial Services ("DFS")—*Amici* are well positioned to opine on and place in proper context the regulatory actions at issue in this case.

Although *Amici* hold divergent views on the policy positions of the National Rifle Association ("NRA"), they agree on the following: (i) Regulators like themselves have an obligation to provide guidance to banks and insurers on managing risk, including reputational risk related to politically controversial matters; (ii) the guidance letters at issue here appropriately warned of real reputational risk and permissibly engaged in public advocacy; and (iii) any holding to the contrary would discourage regulators from issuing essential guidance on reputational and other risks and chill public officials' protected speech.

Amici are therefore united in their view that, whatever the decision in this case, the Court should not hold that the guidance letters at issue here violated the First Amendment.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel represent that they authored this brief in its entirety and no one else made a monetary contribution for it.

David Cotney worked in the Massachusetts Division of Banks for over 26 years, serving as the Commonwealth's Commissioner of Banks from 2010 to 2016. From 2013 to 2015, Mr. Cotney was also the Chairman of the State Liaison Committee of the Federal Financial Institutions Examination Council. He was appointed to serve as Chairman of the Board of Directors of the Conference of State Bank Supervisors in 2015.

Anne Melissa Dowling served as the Deputy Commissioner and, later, as the Acting Commissioner of the Connecticut Department of Insurance from 2011 to 2015. She subsequently served as the Director of the Illinois Department of Insurance from 2015 to 2017. Ms. Dowling is currently a Director at AXIS Capital, a Senior Advisor at Bain Capital, and a Member of the Board of Directors at Keystone Agency Partners and Prosperity Group Holdings.

John Finston, J.D. served as Deputy Commissioner and then General Counsel of the California Department of Insurance from 2012 to 2017. He later served as the New York Executive Deputy Superintendent of Insurance from 2022 to 2024. Mr. Finston was a member of the Board of Directors of the Federal Crop Insurance Corporation from 2013 to 2020 and is currently a Strategic Advisor at Finston Strategic Consulting, LLC.

John Franchini was the New Mexico Superintendent of Insurance from 2010 to 2019. He now owns his own consulting firm, John G. Franchini Consulting.

Dave Jones served as the California Commissioner of Insurance from 2011 to 2019. He currently leads Dave Jones Consulting and the Climate Risk Initiative at Berkeley Law School.

Teresa Miller was the Pennsylvania Insurance Commissioner from 2015 to 2017, before which she served as Administrator of the Oregon Insurance Division. Ms. Miller was appointed Pennsylvania Secretary of Human Services in 2017, serving in this capacity until 2021. She is currently a Principal at the MITRE Corporation.

Mike Rothman was the Minnesota Commissioner of Commerce from 2011 to 2017, overseeing the insurance industry and state banks, among other industries. In 2016, he served as President of the North American Securities Administrators Association. Mr. Rothman now owns Rothman Law & Consulting, where he specializes in legal matters and consulting services involving the highly regulated insurance, financial, and securities sectors.

Susan Voss served as Iowa's Commissioner of Insurance from 2005 to 2013. In 2011, she was elected to serve as the President of the National Association of Insurance Commissioners. Ms. Voss has also represented United States Insurance Regulators in meetings with the European Union and International Association of Insurance Supervisors, and in the United States-China Strategic Dialogues. She now owns Voss Consulting, LLC.

SUMMARY OF ARGUMENT

Amici take seriously the powers that regulators like themselves wield vis-a-vis the entities they oversee. They do not dispute that a regulator may violate the First Amendment if he threatens an intermediary with legal sanctions to silence the speech of a disfavored third party. But the guidance letters at issue in this case did nothing of the sort.

Those letters focused on a constant and critical concern for all financial regulators, banks, and insurance companies today: reputational risk. Widely regarded as one of the greatest threats to insurance companies and banking institutions, reputational risk must be managed proactively. And given the intense public backlash against gun-promotion organizations at the time the guidance letters were issued, business dealings with petitioner posed significant reputational risk—which meant financial risk for those institutions and their clients. Based on *Amici*'s considerable experience with such matters, Ms. Vullo thus acted appropriately in warning of these risks.

Ms. Vullo also acted *permissibly* when she engaged in public advocacy in the guidance letters. Under the First Amendment, public officials like Ms. Vullo have wide latitude to express their own views, so long as they do not cross the line into threats or coercion. Nothing in the guidance letters did so. Indeed, while insurance and banking institutions might very well have ceased (or refused to begin) doing business with petitioner, there are multiple lawful and "obvious alternative explanation[s]" for that result. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007).

A ruling in petitioner's favor holding that the guidance letters violated petitioner's First Amendment rights could have serious consequences for regulators and regulated industry. Such a holding would discourage regulators from warning the entities they oversee about reputational and other risks, impairing companies' ability to anticipate and manage those threats. As this case illustrates, the effect would be particularly acute in the context of reputational risk stemming from politically controversial issues and events. Not only would regulators be reluctant to advise the institutions they regulate; they would be loath to voice their position on matters of public concern—fearing accusations of coercion and lawsuits like this one.

ARGUMENT

A. Reputational Risk Is A Critical Consideration For Banks And Insurance Companies.

Petitioner and certain of its *amici* make much of the fact that the guidance letters issued by Ms. Vullo focused on "reputational risk." In today's marketplace, however, corporate value is inextricably linked to a company's reputation, such that a reputational hit often carries significant consequences for a company's stability and its shareholders. Indeed, reputational risk is now universally deemed a core component of risk-management strategy for all companies, and particularly for those operating in the insurance and banking industries.

1. Although the notion of reputational risk has long been understood, it was not until the mid- to late-1990s "that the concept became an object of studies"

and a focus of regulators. S. Gaultier-Gaillard & J. Louisot, *Risks to Reputation: A Global Approach*, The Geneva Papers, Vol. 31 at 427 (2006); *see also* J. Anderson Hill, *Regulating Bank Reputation Risk*, 54 Ga. Law Rev. 523, 543 (2019) (noting that reputational risk "lurked in the background" until the "mid-1990s with a shift toward risk-focused regulation" in the banking industry). This shift coincided with the development of risky financial products and major derivative losses, leading to the "evolution of the business of banking" more generally. Hill, *supra* at 544.

Faced with these developments, regulators of financial industries sought to implement "'risk-focused' supervisory approaches." *Id.* For the first time, regulators emphasized the importance of managing "reputational risk"—that is, "the potential that negative publicity regarding an institution's business practices, whether true or not, will cause a decline in the customer base, costly litigation, or revenue reductions." *Id.* at 546 (quoting Bd. of Governors of the Fed. Reserve Sys., SR 95-51, Rating the Adequacy of Risk Management Processes and Internal Controls at State Member Banks and Bank Holding Companies (Nov. 4, 1995)); *see also id.* at 544-46 (collecting similar pronouncements from other regulatory bodies).

This change in focus proved prescient. Reputation now accounts for a significant portion of *all* corporate value, whether the company operates in the financial sector, insurance industry, or another market. *See, e.g.*, R.G. Eccles, S.C. Newquist, and R. Schatz, *Reputation and Its Risks*, Harvard Business Review (Feb. 2007) (attributing "70% to 80% of

market value" in today's economy to "intangible assets such as brand equity, intellectual capital, and goodwill"); Gaultier-Gaillard and Louisot, *supra* at 425 n.1 (explaining that approximately 270 senior executives identified "reputational risk … as the most significant threat to business out of a choice of 13 categories of risk") (citing study from The Economist Intelligence Unit (2005)). According to a 2019 Report from AMO Strategic Advisors, in the first quarter of 2019, more than a third of the total capitalization of the companies on the world's 15 leading financial indices was "attributable to corporate reputations." *What Price Reputation?*, Corporate Reputation Value Drivers: A Global Report by AMO at 8 (2019).[2] Put differently, $16.77 trillion of those companies' collective $47.52 trillion total market capitalization derived from those companies' reputations. *Id.*

With financial stability and shareholder value so tied up in reputation, it is hardly surprising that reputational crises have massive repercussions for companies and their shareholders. A study of 300 reputational crises between 1980 and 2020 revealed that regardless of the company's response, the average impact on shareholder value is eight percentage points, "reflecting a total of [$]1.2 trillion in destroyed value." D. Pretty, *Respecting the Grey Swan: 40 Years of Reputation Crisis* 14 (2021).[3] Another study—this one involving 340 influential

---

[2] *Available at*: https://www.australasianir.com.au/common/Uploaded%20files/AIRA%20Documents/Member%20Update%20Documents/AMO_What_Price_Reputation_report_R2[2]%20(1).pdf.

[3] *Available at*: https://www.aon.com/getmedia/03965282-4d98-49c3-9e4c-97d4fbfb2c3e/Respecting-the-Grey-Swan.aspx.

events over 40 years—estimated that "companies that have fared poorly following a reputation crisis have lost a total of $2.8 trillion in shareholder value over the post-event year." Aon Corporation, *Reputation Risk Analytics*.[4]

The upshot of these findings is that a company's reputation matters—*a lot*—so risks to reputation must be "proactively manag[ed]." *See* Eccles et al., *supra*. Monitoring changes in public opinion is therefore a critical part of reputational risk management. Companies must seek to "identify political, demographic, and social trends that could affect" a company's reputation and work to mitigate those risks. *Id.*

2. These principles are key to the insurance industry and particularly critical following the 2008 global financial crisis.[5] In the wake of that crisis, insurance regulators adopted the U.S. Own Risk and Solvency Assessment (ORSA) framework, which has been part of the National Association of Insurance Commissioners (NAIC) Solvency Modernization Initiative since 2015. Press Release, NAIC Ctr. Ins. Pol'y Rsch., Own Risk and Solvency Assessment (ORSA) (Feb. 1, 2023) (describing this increased focused on risk management and reporting after the

---

[4] https://www.aon.com/en/capabilities/risk-management/reputation-risk-consulting?utm_source=linkedin&utm_medium=paid-post&utm_campaign=0_ri_esg_all_crs_global_r0&utm_content=reputation__read-article&utm_term=rep-risk-article-esg (last visited Feb. 26, 2024).

[5] Although reputational risk similarly impacts banking firms, *see supra* Part A.1, *Amici* focus here on insurance companies due to their central role in petitioner's allegations.

financial crisis).[6] Under the ORSA framework, insurance companies are required to develop and issue their own assessments of current and future risk, including reputational risk. These assessments assist regulators in gauging insurers' ability to withstand financial stress—a central component of which is exposure to reputational risk. E. Russo & S. Hall, *The ORSA Journey Has Begun*, NAIC Ctr. Ins. Pol'y Rsch. Newsletter (Mar. 2016) at 10 (describing the ORSA as an important tool for regulators to "carry out risk-focused surveillance").[7]

In fact, A.M. Best—the largest credit rating agency in the world specializing in the insurance industry—calls reputational risk "one of the biggest threats for insurance companies." M. Zboron, *Reputational Risk in the Context of A.M. Best's Rating Analysis*, The Geneva Papers Vol. 31 at 510 (2006). As A.M. Best explains, "the management of reputational risk is intrinsically linked to an insurer's overall risk assessment and risk control strategy." *Id.* As outlined above, after all, a hit to a company's reputation can substantially reduce its client or customer base—and in turn, the firm's profit margins. "[T]he insurance industry relies heavily on reputation for its transactions between professionals as well as with the non-professional insured." Gaultier-Gaillard & Louisot, *supra* at 441. But that is hardly the only consideration. An insurer's failure to properly

---

[6] *Available at*: https://content.naic.org/cipr-topics/own-risk-and-solvency-assessment-orsa.

[7] *Available at*: https://naic.soutronglobal.net/Portal/Public/en-GB/DownloadImageFile.ashx?objectId=7683&ownerType=0&ownerId=24276.

account for reputational risk, including from controversial issues, can also draw the ire of investors and shareholders.

Take, for instance, recent examples of insurance company shareholder votes forced by activist investors over environmental issues. In mid-2022, shareholders of Travelers Companies, Inc., Chubb Limited, and Berkshire Hathaway forced votes on proposals requiring each company to prepare reports "addressing if and how it intends to measure[] greenhouse gas emissions associated with its underwriting, insuring, and investment activities, in alignment with the Paris Agreement's 1.5°C goal requiring net-zero emissions by 2050." Press Release, As You Sow, Investors Send Greenhouse Gas Reduction Message to National Insurance Companies (June 1, 2022).[8] Those proposals stemmed in part from the significant financial exposure each insurer faced from its involvement in the oil and gas industries. *Id.* In each case, the proposals received significant shareholder support, garnering 47% of shareholder votes at Berkshire Hathaway, 55.8% at Travelers, and 72% at Chubb Limited. *Id.*

Shareholders have forced votes on other hot-button issues as well. In the wake of the protests stemming from the murder of George Floyd in 2020, an activist investor proposed that Travelers' shareholders vote on whether the company should reconsider its policies to "help ensure its insurance offerings reduce and do not increase the potential for

---

[8] *Available at*: https://www.asyousow.org/press-releases/2022/6/1/investors-greenhouse-gas-reduction-message-insurance-companies.

racist police brutality, nor associate [the Travelers] brand with police violations of civil rights and liberties." Letter from Arujuna Capital to Travelers Companies, Inc. Corporate Secretary (Dec. 1, 2021). When Travelers sought relief from the SEC on the ground that its business is not related to the issue of "racist police brutality," Letter from Travelers Companies, Inc. to U.S. Securities and Exchange Commission (Jan. 18, 2022), the SEC summarily rejected the request. The SEC, the agency wrote, was "unable to conclude that the Proposal is not [] significantly related to the Company's business." Letter from Rule 14a-8 Review Team, U.S. Securities and Exchange Commission to the Travelers Companies, Inc. (Apr. 1, 2022).[9]

The takeaway from these episodes is clear: Ignore reputational risk—including risk stemming from controversial issues—at your peril.

Amici were therefore surprised to see that, according to James P. Corcoran, former New York Superintendent of Insurance, "reputational risk" is merely a "vague concept that has scant basis in legitimate risk management." Brief for *Amicus Curiae* James P. Corcoran, Former New York Superintendent of Insurance, in Support of Petitioner 15-16 (hereafter, "Corcoran Br."). That is simply incorrect—although, admittedly, reputational risk was not such a salient issue during Superintendent Corcoran's tenure in the 1980s. As detailed above, however, since the end of his tenure in 1990,

---

[9] Each of the above-cited correspondence is available at: https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2022/arjunatravelers040122-14a8.pdf.

reputational fallout has become one of the greatest threats to all companies, and particularly those in the insurance and financial industries.

B. Non-Binding Guidance Letters Like Those Issued By Ms. Vullo Assist Insurance Companies In Managing Reputational Risk.

Because reputational risk is a critical concern for insurance markets and institutions, regulators charged with overseeing insurers—like Ms. Vullo and *Amici*—must also pay careful attention to reputational risks and help insurance entities manage them. *See, e.g.*, NAIC Own Risk and Solvency Assessment (ORSA) Guidance Manual 7-8 (2022) (recommending that insurers' risk self-assessments include "certain operational and reputational risks").[10] Providing guidance on reputational risk, in other words, is now an integral part of the job for any insurance or banking commissioner.

Yet former Superintendent Corcoran ignores this vital responsibility, suggesting that any such guidance is *per se* compulsory and coercive because regulated entities "treat their regulator's 'encouragements' as edicts." Corcoran Br. 2; *see also id.* at 9 ("regulators know that companies regard any suggestion or guidance by the Superintendent as a directive"), 10 (same). But agencies are plainly "permitted to communicate in a non-threatening manner with the entities they oversee." *O'Handley v. Weber*, 62 F.4th 1145, 1163 (9th Cir. 2023), petition

---

[10] *Available at*: https://content.naic.org/sites/default/files/publication-orsa-guidance-manual.pdf.

for cert. pending, No. 22-1199 (filed June 8, 2023). Were it otherwise, regulators could hardly do their jobs. And "there is nothing inherently suspect about a regulator's seeking to persuade the entities she regulates." Brief for the United States as Amicus Curiae Supporting Neither Party 25-26 (hereafter, "Gov't Br.").

Besides, in *Amici*'s experience, firms do *not* in fact regard the suggestions of regulators as edicts. During their tenures as commissioner (or deputy commissioner) of insurance or banking, each of the undersigned *Amici* offered recommendations and other guidance that many firms ignored (and sometimes publicly disputed). Particularly in light of this experience, *Amici* harbored no illusions that their agencies could achieve the effect of a legislative rule through non-binding guidance. *Cf.* C.R. Raso, Note, *Strategy or Sincere? Analyzing Agency Use of Guidance Documents*, 119 Yale L.J. 782, 787 (2010) ("Concern over agency abuse of guidance documents has [] been overstated in both the policy world and the administrative law literature.").

Petitioner's *amicus* is similarly off base in suggesting that the regulated entities at issue here are "reluctant to institute litigation against government agencies because of a fear of reprisal," Corcoran Br. 12 (internal quotation marks and citation omitted). *Amici* were all sued—and sued repeatedly—by entities they oversaw, in connection with their regulatory duties. So was former Superintendent Corcoran. *See, e.g.*, *Ins. Co. of Pa. v. Corcoran*, 850 F.2d 88 (2d Cir. 1988); *Am. Progressive Life & Health Ins. Co. of N.Y. v. Corcoran*, 715 F.2d 784 (2d Cir. 1983); *Avis Rent A Car System, Inc. v.*

Corcoran, 142 Misc. 2d 941 (N.Y. Cnty. Sup. Ct. 1989) (each involving challenge by regulated entity to regulatory action undertaken by State of New York's Insurance Department). And Ms. Vullo, too, faced multiple lawsuits from insurers challenging her regulatory actions. *See, e.g.*, *UnitedHealthcare of N.Y., Inc. v. Vullo*, 323 F. Supp. 3d 470 (S.D.N.Y. 2018), *rev'd sub nom. UnitedHealthcare of N.Y., Inc. v. Lacewell*, 967 F.3d 82 (2020); *Matter of Indep. Ins. Agents & Brokers of N.Y., Inc. v. New York State Dep't of Fin. Servs.*, 39 N.Y.3d 56 (2022).

In short, former Superintendent Corcoran's concerns about the so-called "compulsory" effect of non-binding guidance letters, Corcoran Br. 10, are misplaced. His views are premised on a regulatory system that does not exist today—if it ever did—in which regulated entities fear their regulators, obey all agency recommendations, and conform their practices and behaviors to their regulators' political preferences. In *Amici*'s experience, this depiction is far from accurate. Rather, insurance and banking firms are sophisticated entities that fully comprehend the difference between binding rules and non-binding guidance. And when those firms disagree with their regulators' views, they disregard agency guidance, publicly pushback against agency recommendations and proposed rulemaking, and/or file lawsuits to challenge agency action.

Based on *Amici*'s experience, in other words, banks and insurance companies well understand that guidance letters like those at issue here seek to advise regulated institutions about possible sources of reputational risk. Given the value of a company's

reputation in today's marketplace, such guidance is critical, commonplace, and wholly appropriate.

C. The Guidance Letters Appropriately Warned Of Reputational Risk And Permissibly Engaged In Public Advocacy.

For the reasons outlined above, *Amici* disagree with the notion (at Corcoran Br. 17) that Ms. Vullo acted improperly in issuing the guidance letters. As evidenced by the intense public backlash against gun-promotion organizations in the wake of the Parkland school shooting, App. 8, 246, 249, partnering with the NRA at this time indeed posed substantial reputational risk to insurance and banking firms—which meant financial risk for those institutions and their clients, *see supra* Part A. Ms. Vullo thus acted appropriately in warning of those risks, including by encouraging regulated institutions to reconsider their dealings with the NRA.

Of course, the question whether Ms. Vullo acted *appropriately* in issuing the guidance letters is largely beside the point. The question here is whether, in doing so, she violated the NRA's First Amendment rights. That is an easy call—she did not.

1. Under the First Amendment, "a government official has the right to speak for herself (and her agency) and to select the views she wishes to express." App. 23 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009)); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005)). Ms. Vullo—on behalf of DFS—was "entitled to say what [she] wish[ed] and to select the views that [she] want[ed] to express" in the guidance letters and related press release.

Summum, 555 U.S. at 467-68; *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment) (noting that it is "the very business of government to favor and disfavor points of view"). As the Solicitor General recognized in this case, "[t]hroughout our Nation's history, government officials have often criticized corporations and other institutions for speech protected by the First Amendment." Gov't Br. 14 (quotation marks omitted).

In her role as Superintendent of DFS, then, Ms. Vullo was not limited to "giv[ing] 'fair legal advice' on 'legal rights and liabilities,'" as petitioner's *amicus* would have it. Corcoran Br. 17 (explaining, in his view, how "a regulator legitimately [acts]"). She was entitled to levy "criticism intended to persuade citizens to disassociate from or decline to support particular advocacy groups or viewpoints." Gov't. Br. 14. The First Amendment pays no mind to such speech "so long as the [target of the speech] is free to disagree with the government and to make its own independent judgment about whether to comply with the government's request." *O'Handley*, 62 F.4th at 1158. That was certainly true of the guidance letters and press release here.

The guidance letters simply "*encourage[d]*" insurers and financial institutions to "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations, if any." App. 248, 251 (emphasis added). The letters also recognized the "recent horrific shootings," the growing "social backlash against the [NRA]," and the "senseless[ness]" of gun violence." App. 246. And they

noted that many "financial institutions [had recently] severed their ties with the NRA." App. 247. Finally, they again "*encourage[d]* regulated institutions to review any relationships they ha[d] with the NRA or similar gun promotion organizations," and urged them "to take prompt actions to manag[e] these risks and promote public health and safety." *Id.* (emphasis added).

None of these exhortations offends the First Amendment. *See Summum*, 555 U.S. at 467-70. Nor does the related press release, in which Ms. Vullo "urge[d]" regulated institutions "to join the companies that have already discontinued their arrangements with the NRA." App. 244. She was well within her rights to appeal to New York's insurance companies and banks in this way, and to advise them to "manage the[] risks" arising from continued relations with the NRA. *Id.* And New York's insurance companies and banks, for their part, were "free to disagree" and decline her "request." *O'Handley*, 62 F.4th at 1158; *see supra* pp. 12-14. In short, because "the guidance [letters] d[id] not threaten enforcement action based on protected speech, such guidance pose[d] no First Amendment problem." Gov't Br. 29.[11]

---

[11] To be sure, the government has argued that the guidance letters provide additional support for petitioner's First Amendment claim if "*viewed as an extension*" of Ms. Vullo's alleged closed-door meeting with Lloyd's in February 2018. Gov't Br. 30-31 (emphasis added); *see also id.* at 23 (same). But that argument makes little sense because the operative complaint asserts that only a handful of people were present at that meeting and thus aware of the bargain Ms. Vullo allegedly proposed. App. 221. Besides, given *Amici*'s knowledge of Ms. Vullo's character and close working relationships with her during her tenure as Superintendent of DFS, *Amici* strongly

2. Indeed, there were multiple reasons in this case—apart from the alleged government coercion—for New York's insurance and banking institutions to cease (or refuse to begin) doing business with petitioner. *See Twombly*, 550 U.S. at 567 ("obvious alternative explanation[s]" foreclose allegations of unlawful conduct).

First, in the wake of the horrific Parkland shooting, numerous "major American business institutions spoke out against gun violence, and some companies publicly severed ties with gun promotion organizations like [petitioner]," App. 8, including DFS-regulated insurance and banking institutions, App. 12-13. *See also* Gov't Br. 3, 24 (noting that the intense public backlash against gun-promotion organizations led many entities "to sever[] ties" with petitioner).

Second, petitioner had for some time been peddling affinity insurance programs that insured against "intentional criminal acts" with a firearm. App. 6. Not only were such products illegal, *id.*, but petitioner was promoting them without an insurance license, App. 6-7, another violation of New York law (and that of other states).[12] This is no mere

---

doubt the veracity of petitioner's allegations regarding this purported private meeting.

[12] *See* In the Matter of the National Rifle Association, Insurance Commissioner of the State of California, File No. OC201700492-AP, Order Adopting Stipulation (May 1, 2019), *available at* https://www.insurance.ca.gov/0400-news/0100-press-releases/2019/upload/nr035OrderAdoptingStipulation.pdf ("The NRA acknowledges that the Commissioner may have reasonably interpreted the [NRA's conduct] as constituting a solicitation to purchase the Carry Guard Policy…."); In the Matter of:

technicality. Insurance regulators are charged with policing unlicensed insurance products and sellers, and they have good reason to enforce against them. In recent years, regulators' investigations have revealed "numerous instances of insurance premium theft, embezzlement, and fraud by unlicensed sellers of insurance specifically targeting vulnerable populations." Press Release, Cal. Dept. Ins., Commissioner Lara Issues PSAs on Unlicensed Insurance Scams and Vehicle Warranties (Aug. 18, 2022).[13] Beyond outright fraud, unlicensed offerings often come with additional costs and fewer protections

---

Proceedings by the Commissioner of Banking and Insurance, State of New Jersey, to fine Lockton Affinity, LLC, Reference No. 9026721, Consent Order (Sept. 3, 2019) (recognizing that the affinity insurance program website maintained and hosted by the NRA and the emails sent by the NRA soliciting Carry Guard insurance in 2017 constitute solicitations of insurance by an entity not licensed as an insurance producer, in violation of New Jersey law).

[13] *Available at*: https://www.insurance.ca.gov/0400-news/0100-press-releases/2022/release063-2022.cfm. Many state regulators' warnings highlight the threats posed by unlicensed insurance sellers. *See, e.g.*, https://www.myfloridacfo.com/division/ica/fraudandscams (**Florida**); https://www.in.gov/idoi/consumer-services/consumer-alerts/consumer-alert-archives/beware-of-fraudulent-insurance/ (**Indiana**); https://agentsync.io/blog/industry-news/louisiana-insurance-commissioner-unlicensed-insurance-negotiations-pose-consumer-risk (**Louisiana**); https://www.mass.gov/info-details/identifying-and-reporting-insurance-fraud (**Massachusetts**); https://www.mid.ms.gov/consumers/fight-insurance-fraud.aspx (**Mississippi**); https://www.dfs.ny.gov/consumers/scams_schemes_frauds/insurance_fraud_avoid_becoming_a_victim (**New York**); https://www.attorneygeneral.gov/protect-yourself/insurance-fraud/types-of-insurance-fraud/ (**Pennsylvania**); https://www.opic.texas.gov/news/insurance-scams/ (**Texas**).

for consumers. *See Regulators Must Scrutinize Advice by Insurance Agents*, Investment News (June 8, 2019) ("Investors dealing with unlicensed individuals could find themselves in overly expensive investments with long lock-up periods.").[14] With many unlicensed insurance products also *unlawful* (as in this case, *see supra* n.11), regulators are right to take their dangers seriously.

By the time of the guidance letters, many in the industry knew of petitioner's illegal insurance exploits,[15] and Lloyd's, Lockton, and Chubb were under investigation by DFS for partnering with the NRA in this scheme, App. 6-7. Even leaving aside the public backlash against petitioner, then, petitioner's practice of unlawful insurance dealings meant significant reputational (and other regulatory) risk for petitioner's insurance partners—ample reason, in *Amici*'s experience, for Lloyd's, Lockton, and Chubb to sever ties, and for other regulated entities to eschew them.

Third, the guidance letters might indeed have *persuaded* regulated entities to "review [their] relationships … with the NRA or similar gun promotion organizations, and to take prompt actions

---

[14] *Available at*: https://www.investmentnews.com/industry-news/opinion/editorial/regulators-must-scrutinize-advice-by-insurance-agents-79876.

[15] *See, e.g.*, L. Scism, *New York Regulator Probes NRA-Branded Self- Defense Insurance,* Wall St. J. (Oct. 24, 2017), *available at:* https://www.wsj.com/articles/new-york-regulator-probes-nra-branded-self-defense-insurance-1508885768; *NRA's Carry Guard Comes Under Fire as "Murder Insurance,"* CBS News (Oct. 19, 2017), *available at:* https://www.cbsnews.com/news/nras-carry-guard-comes-under-fire-as-murder-insurance/.

to manag[e] these risks." App. 247; *see also* Gov't Br. 25-26 ("there is nothing inherently suspect about a regulator's seeking to persuade the entities she regulates"). In some instances, to be sure, this might have resulted in firms terminating (or declining to take on) business with petitioner. Thus, even if a recipient of the guidance cut ties with petitioner or refused to build them *because of* the guidance, that does not mean that the entity did so due to coercion or intimidation. *See Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 950 (1992) (rejecting the contention that "the very fact that the 7–Eleven chain discontinued sales of Penthouse proves that the Commission's actions abridged appellant's First Amendment rights"). A regulated institution could well have determined, on its own or due to the reputational risks highlighted in the guidance letters, that it could best manage financial risk by not partnering with petitioner. Particularly given the letters' tone and text, actions taken in response, if any, "w[ere] more likely explained by[] lawful" persuasion than unlawful coercion, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

Adhering to threshold pleading requirements, including that "obvious alternative explanations" defeat liability, *Twombly*, 550 U.S. at 567, is especially important here—i.e., when a controversial speaker claims that government advice or criticism violated its First Amendment rights.

When an entity like petitioner engages in controversial speech, associating with that entity may well pose real reputational and financial risk to its business partners. *See supra* Part A. That entity should not be permitted to defeat a motion to dismiss

and proceed to discovery based simply on an accusation that a critical government response was retaliation for the entity's disfavored message. A controversial speaker, after all, can easily cry retaliation. But government guidance (or criticism) is not coercive just because the speaker is the government. *See supra* pp. 12-14; *Penthouse Int'l*, 939 F.2d at 1016 ("If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized."). Nor is it coercive (and impermissible) just because it may be effective in persuading companies and citizens to disassociate from the controversial entity. *See* Gov't Br. 14.

Allowing such claims to proceed without careful consideration of plausibility pleading requirements would produce precisely the "counterproductive" result *Iqbal* sought to avoid, forcing government officials into unwarranted and "disruptive discovery." 556 U.S. at 685-86 (explaining why the plausibility standard is "especially important where Government-official defendants are entitled to assert the defense of qualified immunity"). In addition, as discussed below, allowing such claims to proceed could discourage public officials from carrying out essential regulatory responsibilities and broadly chill their own protected speech.

D. A Ruling For Petitioner Based On The Guidance Letters Would Hinder Regulators' Ability To Assist Firms In Managing Reputational Risk And Chill Public Officials' Protected Speech.

A ruling in petitioner's favor grounded in the guidance letters could have dangerous consequences. It could deter regulators from warning the entities they oversee about reputational and other risks, impairing banks' and insurance companies' ability to anticipate and manage those threats. It could also "curtail legitimate government speech and deprive public officials of much-needed clarity about the line between what is permitted and what is forbidden." Gov't Br. 23.

For reasons outlined above, reputational risk has become an important, if not paramount, focus for many firms, particularly in the insurance and banking sectors. *See supra* Part A. And because it must be managed proactively, monitoring and advising on reputational risk has likewise become an essential part of the job for those who regulate these firms. *See supra* Part B. But a decision from this Court condemning the guidance letters issued here would hinder this function, leaving regulators uncertain whether and exactly how they are permitted to take a position on the "political, demographic, and social trends that could affect" a company's reputation and financial health, *see* Eccles *et al.*, *supra*.

This is especially true when the issue or occurrence in question is politically or socially controversial, as this case well illustrates. Yet it is

precisely in these circumstances—that is, matters of controversy—that an issue is most likely to impact a company's reputation (and, in turn, financial solvency). *See* M. Zboron, *supra* at 31; *see also, e.g.*, *supra* pp. 10-11 (noting controversial issues of reputational risk that triggered forced shareholder votes); Office of the Comptroller of the Currency (OCC), Comptroller's Handbook: Oil and Gas Exploration and Production Lending 17 (Oct. 2018) (providing guidance on reputational risk stemming from dealings with oil and gas companies "found or perceived by the public to be negligent in preventing environmental damage, hazardous accidents, or weak fiduciary management").[16] A decision from this Court that discourages regulators from advising entities on how to navigate such hot-button issues could impair firms' abilities to anticipate and manage significant risks. It could even create a destabilizing information gap in the industry, because "[d]epartures from effective corporate and risk governance principles and practices … can affect [] entire … sector[s] and the broader economy." OCC, Comptroller's Handbook: Corporate and Risk Governance 4 (July 2019).[17]

Beyond this impact on regulators' and firms' risk-management responsibilities, a decision in this case holding that the guidance letters violated petitioner's First Amendment rights could chill

---

[16] *Available at:* https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/oil-gas-exploration-prod-lending/index-oil-gas-exploration-production-lending.html.

[17] *Available at*: https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/corporate-risk-governance/pub-ch-corporate-risk.pdf.

protected government speech. Unsure where the new line is drawn, public officials could hardly feel "free to speak out to criticize practices, [particularly] in a condemnatory fashion," *Penthouse Int'l*, 939 F.2d at 1015. Yet, so long as they do not suppress disfavored speech through threats or coercion, that is "surely" their right. *Id.*; *see also* Gov't Br. 14 (outlining this "longstanding practice" "throughout our Nation's history"). This Court should craft a decision that protects that right, whatever the outcome of this case.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

James M. Gross
FOLEY HOAG LLP
1301 Ave. of the Americas
New York, NY 10019
(212) 812-4000

Caroline Holliday
FOLEY HOAG LLP
Seaport West
155 Seaport Blvd.
Boston, MA 02210
(617) 832-1000

Beth C. Neitzel
Counsel of Record
FOLEY HOAG LLP
1717 K Street N.W.
Washington, D.C. 20006
(202) 223-1200
bneitzel@foleyhoag.com

Counsel for Amici Curiae

February 27, 2024