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 FIRST AMENDMENT SCHOLARS AS AMICI CURIAE SUPPORTING RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases—continued:

Constitution and statutes:

Miscellaneous:

Page

Miscellaneous—continued:

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INTEREST OF AMICI CURIAE

Amici curiae are constitutional law scholars who write and teach about the First Amendment.[1] Amici curiae believe that, in the decision below, the court of appeals applied well-established pleading standards to strike the correct balance between two core First Amendment interests: the right of private individuals to speak and the need for government to express its understanding of the popular will. Amici curiae thus have an interest in ensuring

[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than amici curiae or its counsel made such a monetary contribution.

that First Amendment law is not distorted through inappropriate applications of settled pleading standards.

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SUMMARY OF ARGUMENT

This case presents the question whether petitioner has plausibly alleged that respondent, a former government official conducting investigations and enforcement actions concerning bona fide violations of New York law, coerced private entities to stop doing business with petitioner in violation of the First Amendment. The answer to that question is no. Despite the weighty First Amendment

interests on both sides of the aisle, this case rises and falls on a straightforward application of settled pleading standards. A claim of First Amendment retaliation by government officials is not pleaded through conclusory and threadbare accusations—especially when the alleged threats amount to legitimate government speech made in the context of investigations and enforcement actions into concededly unlawful conduct, and when the government speech is plainly within the scope of a government official's regulatory authority.

A. Although petitioner invokes a violation of the First Amendment principle announced in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), petitioner's complaint does not allege *facts* sufficient to meet well-established pleading standards. Those standards are clear. In *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), this Court held that "bare assertion[s]" cannot "state a claim to relief that is plausible on its face," especially when an "obvious alternative explanation" exists. *Id.* at 556, 567, 570. And in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), this Court reaffirmed that "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" cannot suffice—particularly where the defendant is a government official accused of violating the Constitution. *Id.* at 678.

The obvious and lawful alternative explanation of petitioner's accusations is that respondent—while acting within the scope of her authority and investigating bona fide violations of the law—engaged in legitimate government speech to express the views of the state administration she represented on salient political issues. To allow petitioner's complaint to go forward on the basis of barebone allegations would undermine legitimate law enforcement efforts, including the exercise of prosecutorial discretion. It would also be inconsistent with the presumption of regularity and the doctrine of qualified immunity,

which are both meant to shield government officials from disruptive discovery into the performance of their official duties absent plausible factual allegations of illegality.

B. The pleading standards announced by this Court in *Iqbal* and *Twombly* mediate the tension between the free speech of private individuals and the need for government to advance policies responsive to the popular will and to prosecute crimes. In its complaint, petitioner alleges that respondent sent letters to regulated entities in the wake of the Parkland school shooting, and that these letters discussed reputational risks facing financial institutions. Petitioner claims that a press release outlining proposed gun-safety measures threatened regulatory action against those who failed to sever ties with petitioner. And petitioner states that respondent made unconstitutional threats during a private meeting with an insurance company. But these are just naked accusations. In its complaint, petitioner fails to allege facts that might sustain the plausibility of its bare conclusions. On their face, the statements challenged by petitioner are merely ordinary examples of legitimate government speech on important and pressing issues, made against the backdrop of ordinary law enforcement actions. In the absence of further allegations of fact, respondent's statements do not plausibly amount to unconstitutional coercion.

What separates amici curiae from those First Amendment scholars who support petitioner is a focus on the *facts* alleged by petitioner. To hold that petitioner has pleaded claims of unconstitutional retaliation would authorize any individual who is the object of lawful and meritorious investigations and enforcement actions to sandbag government investigators with a First Amendment lawsuit. It would not only contradict the salutary policies of *Iqbal* and *Twombly*, but it would also paralyze government speech and action.

ARGUMENT

THREADBARE ACCUSATIONS DO NOT TURN GOVERNMENT SPEECH INTO UNCONSTITUTIONAL THREATS

Amici curiae agree with those First Amendment scholars who argue that, "[n]o matter who the speakers are, the government cannot use the threat of legal sanctions to silence them." First Amend. Scholars Br. 5. Yet, though private citizens must be able to express their views, so too must public officials. "To govern, government has to say something." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 468 (2009) (quoting *Johanns* v. *Livestock Marketing Association*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting)). The government cannot (or will not) speak if it is encumbered by lawsuits built merely on threadbare and conclusory allegations, especially when the government is investigating, deterring, and prosecuting illegal conduct.

It is for this reason that amici curiae diverge from the excellent First Amendment scholars who, without focusing on the pleading standards, support petitioner. In light of its unadorned and implausible accusations, petitioner's case bears no true resemblance to *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). If a mere reference to the reputational risks that regulated entities ought to avoid were to amount to unconstitutional coercion, every critical statement by government officials could be deemed coercive at the pleading stage.

This Court has already instructed lower courts how to accommodate the need to protect private speech against government threats with the need to facilitate government speech. In the context of concededly meritorious government investigations and enforcement actions targeted at bona fide violations of the law, unadorned conclusions are not sufficient to state a plausible claim. That is this Court's explicit holding in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), which is consistent with *Bell Atlantic Corp.* v.

Twombly, 550 U.S. 544 (2007). When policing the line between individual freedom of speech and government speech, these cases teach that a plaintiff must allege facts that, if proven true, would sustain a plausible claim that government speech constitutes an unlawful threat. Petitioner's complaint does not meet that bar.

A. *Twombly* And *Iqbal* Set A High Bar For Allegations That Government Speech Amounts To Coercion In The Context Of Concededly Meritorious Investigations And Enforcement Actions

Courts are routinely required to separate the factual allegations of a complaint from its conclusions. Whereas the former are generally accepted as true at the pleading stage, the latter are not. Once conclusions are filtered out, a court must undertake a context-specific inquiry to determine whether a complaint sets forth plausible legal claims. And this Court has made clear that the mandated context-specific inquiry must be a rigorous one in cases, such as petitioner's, that involve government defendants. Otherwise plaintiffs could overcome the presumption of regularity, deter the exercise of prosecutorial discretion, and subvert the principles behind the doctrine of qualified immunity through barebone allegations of unconstitutional threats—all the while chilling government speech.

1. This Court's decisions have been clear that an adequate pleading must contain more than damning allegations of unlawful conduct. A complaint must instead allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007); see *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). If a complaint does nothing more than recite the elements of a cause of action—or if, when taken in context, its allegations support nothing more than the bare possibility of misconduct—then the underlying claim is not plausibly alleged. See *Iqbal*, 556 U.S. at 681-682;

Twombly, 550 U.S. at 566-568. In this case, therefore, petitioner's allegations that respondent's speech amounts to unconstitutional coercion must be evaluated for plausibility in the concrete context in which the challenged statements were uttered.

a. *Twombly* and *Iqbal* make clear that conclusory allegations of wrongful conduct do not state a claim upon which relief can be granted. Instead, a plaintiff must allege sufficient facts to justify a plausible allegation of wrongdoing—especially where the defendant is a governmental entity.

Plaintiffs in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), sued exchange carriers that had allegedly blocked competitive entry into local telephone and Internet services. *Id.* at 550. According to plaintiffs, the carriers engaged in illegal "parallel business conduct"—collectively overcharging, providing inferior network connections, and sabotaging other competitors—and agreed to refrain from competing with each other in violation of the Sherman Act. See *id.* at 550-552. To support that claim, plaintiffs relied on inferences rooted in two facts: that the carriers each made identical decisions, and that the carriers each failed to meaningfully pursue "attractive business opportunities in contiguous markets where they possessed substantial competitive advantages." *Id.* at 551 (quotations marks, citations, and alterations omitted).

According to the Court, these allegations did not state an antitrust claim. The allegations of parallel conduct fell short because "resisting competition is routine market conduct, and * * * there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway"—"the natural, unilateral reaction of each [carrier] intent on keeping its regional dominance." 550 U.S. at 566. Similarly, "bare assertion[s]" of conspiracy failed to rule out the "obvious alternative explanation"

that the "former [g]overnment-sanctioned monopolists were sitting tight, expecting their neighbors to do the same." *Id.* at 556, 567-568. Having failed to plead "enough facts to state a claim to relief that is plausible on its face," the plaintiffs could not "nudge[] their claims across the line from conceivable to plausible." *Id.* at 570.

That conclusion is in accord with the explicit rationale of *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). In the wake of the September 11, 2001, terrorist attacks, a Muslim Pakistani man was arrested and detained. *Id.* at 666. After pleading guilty to criminal charges, serving a term of imprisonment, and being deported to Pakistan, he filed a lawsuit in federal court claiming that dozens of federal officials, including the United States Attorney General and the Director of the Federal Bureau of Investigation, unconstitutionally targeted thousands of Arab Muslim men and held them in harsh conditions without any legitimate penological interest—all on the basis of race, religion, and national origin. *Id.* at 668-669. This Court held that the allegations were nothing more than an "unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 678. The Court offered two reasons for its conclusion.

First, the Court explained that many of the allegations in the complaint were nothing more than "bare assertions, much like the pleading of conspiracy in *Twombly*." 556 U.S. at 681. The problem was not that the allegations were "extravagantly fanciful" and thus "disentitle[d] * * * to the presumption of truth." *Ibid.* The problem, instead, was that the allegations—that high-ranking government officials spearheaded a racist, illegitimate enforcement scheme—"amount[ed] to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim." *Ibid.* (citation and internal quotations omitted). It was their "conclusory" nature that made those allegations "not entitled to be assumed true." *Ibid.*

Second, the Court reasoned that even the complaint's non-conclusory allegations failed to state a claim upon which relief could be granted. That was because, although "[t]aken as true," the allegations may be "consistent" with plaintiff's theory, they "do not plausibly establish" an unconstitutional purpose in light of "more likely explanations." 556 U.S. at 681. Between an "obvious alternative explanation" for the arrests and the alleged "purposeful, invidious discrimination," the Court held that it was "not a plausible conclusion" to infer that the arrests reflected anything other than a nondiscriminatory intent to detain noncitizens "illegally present in the United States" and with "potential connections to those who committed terrorists attacks." *Id.* at 682 (citation omitted).

b. The Court's decisions in *Twombly* and *Iqbal* depend heavily on the context of the allegations they consider. They hold that the plausibility of a complaint's allegations must be evaluated in light of their context. The same is true in this case, where petitioner claims that respondent violated the First Amendment by coercing insurance companies into cutting ties with petitioner on the basis of petitioner's advocacy. Pet. App. 188-190. The statements allegedly made by respondent did not come out of the blue. They were made in the course of her efforts to prevent concededly illegal conduct and to fulfill the legitimate obligations of her legislative mandate.

In September 2017, pursuant to a referral by the New York County District Attorney's Office stemming from a third-party complaint, the New York State Department of Financial Services (DFS) began investigating an insurance product known as Carry Guard, which petitioner had "aggressively promoted" as part of an "affinity insurance program." Pet. App. 6. "Affinity insurance programs are insurance programs endorsed by a membership organization for use by its members." *Id.* at 97 n.1; see *id.* at 204-

205. But petitioner was not a licensed insurance provider, so DFS's investigation focused on two companies, Chubb and Lockton, that underwrote and administered Carry Guard and other affinity policies. *Id.* at 6. That investigation revealed that a third entity, the insurance marketplace Lloyd's of London and its related syndicates, underwrote similar policies for petitioner. *Id.* at 7. It is undisputed that those investigations fell within DFS's authority under New York law. See Pet. Br. 6-8; Resp. Br. 5-7.

While DFS's investigation was ongoing, a gunman murdered 17 students and staff members at Marjory Stoneman Douglas High School in Parkland, Florida. Pet. App. 7. In response to the intense public backlash against petitioner and other gun-promotion advocacy organizations, "major American business institutions spoke out against gun violence, and some companies publicly severed ties with gun promotion organizations like [petitioner]." *Id.* at 7-8. Petitioner alleges that some of those entities severed ties with petitioner not based on disagreement with petitioner's advocacy or out of concerns about public criticism, but instead because "DFS communicated to banks and insurers with known or suspected ties to [petitioner] that they would face regulatory action if they failed to terminate their relationships." *Id.* at 208.

The investigation resulted in various consent decrees. DFS determined that, even though petitioner "did not possess an insurance license" as required by New York law to market and solicit affinity policies, petitioner nevertheless illegally "engaged in aggressive marketing of and solicitation for the Carry Guard [p]rogram" as well as "at least 11 additional insurance programs." Pet. App. 257-258; see also *id.* at 104-105 & n.4, 283. Petitioner later entered into a consent decree finding that its conduct violated the law. See N.Y. State Department of Financial Services, Consent Order, *In the Matter of The National*

Rifle Association of America, Case No. 2020-0003-C (Nov. 13, 2020) <tinyurl.com/NRA-Consent-Order>. DFS also determined that Carry Guard itself 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." Pet. App. 6. Accordingly, in a series of consent decrees, the three insurance underwriters admitted to numerous violations associated with Carry Guard and certain other programs endorsed by petitioner. *Id.* at 11, 252-295.

The question presented in this case is whether respondent's alleged speech, concededly expressed pursuant to her authority as the Superintendent of DFS and in the context of her legitimate investigations and enforcement actions, could plausibly give rise to an actionable claim of unconstitutional coercion.

2. While the *Twombly-Iqbal* rule shields all defendants from the expense and effort of fending off groundless claims, it especially protects government officials so that they can be free to focus on their important public duties, including the need to speak about salient and controversial issues. Plaintiffs are not permitted to ignore the presumption of regularity and bend government agencies to their will by distorting the First Amendment into a shield against the legitimate exercise of prosecutorial discretion.

a. This case brings into sharp relief the importance of enforcing the pleading standards set forth under this Court's precedents. If accepted, petitioner's position would deter the government from speaking on pressing and important issues. *Twombly* and *Iqbal*, however, stand for the proposition that federal courts require more than threadbare and conclusory allegations before they will become instruments for distracting officials from their duties, inhibiting discretionary governmental actions, and chilling government speech.

Public officials are elected to pursue policy positions. See *Penthouse International, LTD* v. *Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991), cert. denied, 503 U.S. 950 (1992). Often those positions involve strenuous criticism of groups and entities who have publicly stated their views. *Id.* at 1016. Far from some duty of impartiality, "[i]t is 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); see *Walker* v. *Texas Division, Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207-208 (2015).

Respondent in this case was undoubtedly "entitled to say what [she] wishes, and to select the views [she] wants to express," without fear that a party will conjure a First Amendment violation out of that expression. *Summum*, 555 U.S. at 467-468 (quotation marks and citation omitted). Yet that is exactly what petitioner asks the Court to do here: forbid speech by a government official relating to important political issues merely because those issues or their proponents fall within the official's regulatory purview. Petitioner brazenly seeks to bully respondent into silence while it is being investigated for conceded violations of New York law. Blessing these efforts would neuter government.

Government threats against private speech should not be tolerated. But equally intolerable would be allowing naked allegations to immunize unlawful conduct or derail investigations and enforcement actions against conceded violations of the law. It is especially important in this context strictly to enforce the holdings of *Twombly* and *Iqbal*. Otherwise this Court would authorize entities under investigation to corner government officials into a Hobson's choice by the simple filing of a lawsuit: remain silent or abandon enforcement.

b. Additionally, *Twombly* and *Iqbal* ensure that violators of the law who also happen to express views with which government officials publicly disagree are not permitted to use the threat of disruptive discovery to thwart legitimate investigations or enforcement actions based on nothing more than government disapproval.

The *Twombly-Iqbal* rule is "especially important in suits where [g]overnment-official defendants are entitled to assert the defense of qualified immunity," because government officials "must be neither deterred nor detracted from the vigorous performance of their duties" by "disruptive discovery." *Iqbal*, 556 U.S. at 685, 686 (citation omitted). Both qualified immunity and the *Twombly-Iqbal* rule "balance[] two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009). Other immunity doctrines seek to preserve this same balance. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 744-745 (1982).

Permitting plaintiffs to seek disruptive discovery from government officials for speech expressed within the purview of their regulatory authority, or during the course of enforcement actions and investigations into concededly unlawful conduct, can often be at odds with other well-established doctrines. Authorizing discovery based on conclusory and vague allegations would cripple the essential prerogatives of prosecutorial discretion. See *Bond* v. *United States*, 572 U.S. 844, 864-865 (2014); *Kalina* v. *Fletcher*, 522 U.S. 118, 125 (1997). And it would undermine the presumption of regularity, under which "courts presume that [government officials] have properly discharged their official duties" in the absence of more plausible factual allegations to the contrary. *United States* v.

Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926); see *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1721 (2019).

It would set a dangerous standard to permit those who concededly violate the law to recast meritless claims of selective prosecution as claims of First Amendment retaliation through government speech. Cryptocurrency exchanges could claim that "guidance alerting institutions to the risks of concentrating their deposits in cryptocurrency after a bank collapsed" amounts to coercion against pro-cryptocurrency speech. Resp. Br. 51. Companies violating "know your customer" regulations could deter legitimate investigations by recasting them as retaliation over their enthusiasm for doing business with China. Draft-card burners could derail criminal proceedings by invoking government disapproval of anti-war speech. Cf. *O'Brien* v. *United States*, 376 F.2d 538, 541 (1st Cir. 1967), vacated, 391 U.S. 367 (1968). And petitioner's executives could argue that fraud charges were brought against them because of their gun-promotion advocacy.[2]

In short, allegations of improper behavior by moneyed plaintiffs seeking to fend off the exercise of prosecutorial discretion should not be permitted to thwart the ability of government officials to carry out their duties when there is a "more likely" or "obvious" explanation for the challenged governmental speech than unconstitutional coercion. See *Iqbal*, 556 U.S. at 681, 682.

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[2] See Jake Offenhartz, *Former NRA Chief Wayne LaPierre Misspent Gun Rights Group's Money and Owes More Than $4M, Jury Finds*, Associated Press (Feb. 23, 2024) <tinyurl.com/LaPierre-Verdict>.

B. Petitioner's Allegations, Taken In Context, Do Not Plausibly Plead That Respondent's Speech Threatened Protected Private Speech

Petitioner's allegations describe public statements following the Parkland massacre. They also describe private meetings and enforcement decisions stemming from DFS's findings that Carry Guard and other affinity policies violated the law and that petitioner lacked the requisite license to market affinity products. Petitioner claims that respondent violated the First Amendment by coercing regulated entities into cutting ties with petitioner on the basis of petitioner's advocacy. Pet. App. 188-190.

None of petitioner's claims pass muster under *Twombly* and *Iqbal*. To the contrary, respondent simply and legitimately performed the statutory duties demanded of her by state law. See N.Y. Fin. Servs. L. §§ 301(C)(4), 302(a). And the court of appeals below correctly held that the industry letters, the public statements, and the alleged private meeting are "clear examples of permissible government speech." Pet. App. 28.[3]

1. Industry Letters. Shortly after the Parkland school shooting, respondent sent letters to DFS-regulated entities addressing the implications of gun violence for financial institutions. See Pet. App. 101-103. The complaint alleges that the letters constitute "threats * * * of adverse action if institutions failed to support [DFS's] efforts to stifle [petitioner's] speech and to retaliate against [petitioner] based on its viewpoint." *Id.* at 212. But the

[3] Because amici curiae focus on allegations that government speech amounted to an unconstitutional threat, they do not discuss petitioner's argument that the terms of the consent decrees themselves were coercive. See Pet. Br. 40-41. In any event, as the United States argued in its amicus brief in support of neither party (Br. 34), petitioner has not challenged on appeal the district court's holding that the consent decrees are entitled to absolute immunity.

complaint contains no factual allegations that might plausibly transform ordinary guidance documents into unconstitutional threats.

Petitioner objects that the letters referred to the "devastation caused by gun violence," and that they described such devastation "tragic," "regrettabl[e]," and "a public safety and health issue that should no longer be tolerated by the public." Pet. App. 247. Petitioner balks at the letters' suggestion that financial institutions heed "the voices of the passionate, courageous, and articulate young people" pushing for gun-safety measures. *Id.* at 29, 211. And petitioner deems it actionable that respondent—who is responsible for ensuring that entities under DFS's purview comply with the law—urged regulated entities to "continue evaluating and managing" reputational risks. *Id.* at 28. Other than mechanically reciting the elements of a cause of action, however, petitioner does not point to a single concrete fact suggesting that coercion occurred.

That is especially fatal in the face of an "obvious alternative explanation." *Twombly*, 550 U.S. at 566-568. As petitioner put it, "[i]n the wake of the [Parkland] shooting, [petitioner] faced intensified criticism for its pro-gun rights advocacy from many corners." Pet. 7. Indeed, it is a matter of public record that large companies experienced serious social pressure to cut ties with petitioner after the Parkland massacre.[4] For financial institutions with a mandate to maintain stability, the prospect of severe consumer condemnation from their dealings with pe-

[4] See Amy B. Wang, *Bank of America to Stop Lending to Some Gun Manufacturers in Wake of Parkland Massacre*, Washington Post (Apr. 11, 2018) <tinyurl.com/BoA-Manufacturers>; Nathan Bomey, *NRA Fallout: See the List of Companies that Cut Discounts for NRA Members after Parkland, Florida School Shooting*, USA Today (Feb. 26, 2018) <tinyurl.com/NRA-List>.

titioner and similar organizations, including gun manufacturers, is real. See Pet. App. 10. These reputational risks are intimately connected to financial stability. Against that backdrop, advising regulated entities to consider these risks does not constitute a threat of an investigation or regulatory action.

More fundamentally, respondent was entitled to encourage companies to heed the voices of those calling for gun control. See *Summum*, 555 U.S. at 470; *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966). Within constitutional limits, gun control is a policy for which state government officials are entitled to advocate. As the Solicitor General notes, respondent was "'permitted to communicate in a non-threatening manner with the entities [DFS] oversee[s] without creating a constitutional violation, and there is nothing inherently suspect about a regulator's seeking to persuade the entities she regulates." U.S. Br. 26 (quoting *O'Handley* v. *Weber*, 62 F.4th 1145, 1163 (9th Cir. 2023)).

Respondent also acted well within her duties by urging regulated entities to consider the effects of their association with gun-rights organizations given the national outcry over petitioner's efforts to stifle gun safety. As the Solicitor General points out, respondent's statements were far less strident than those made by presidents of the United States. See U.S. Br. 14. Petitioner's dislike of comments made by a state regulator is insufficient to transform those comments into unconstitutional threats. Any other conclusion would muzzle state officials in the ordinary discharge of their statutory duties.

2. Public Statements. In conjunction with letters to DFS-regulated entities, Governor Cuomo issued a press release outlining New York State's endorsement of gun-safety measures. See Pet. App. 99-101. Once again, petitioner attempts to cast that press release as threatening

insurance companies with "costly investigations, increased regulatory scrutiny[,] and penalties" if they did not "discontinue[ ] * * * their arrangements with [petitioner]." Pet. App. 27. But in the absence of concrete factual allegations, petitioner's naked accusations do not magically transform a perfectly ordinary press release into an unconstitutional threat.

Notably, petitioner's complaint is missing any concrete allegations. Nothing in the press release referred to regulatory scrutiny. Nothing in the press release ordered or directed any entity to take any action, let alone invoke any law that any entity could theoretically be violating. What the press release *did* do, however, is to quote respondent as stating that corporations can bring about "positive social change * * * to minimize the chance that [society] will witness more of these senseless tragedies"; encouraging companies to "take prompt actions to manage these risks and promote public health and safety"; and "urg[ing] all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with [petitioner]." Pet. App. 28.

These statements constitute normal public advocacy well within the bounds of ordinary government speech. It is the role of government officials to express and to lead public opinion. See *Summum*, 555 U.S. at 467-468. And there is nothing threatening in emphasizing the importance of corporate social responsibility. The obvious reading of the press release is that it refers to the "risks" of "senseless" gun violence—or, at worst, the "risks" of social disapproval by New Yorkers advocating to expand gun control. As much as petitioner would like to blame respondent for the national backlash against its advocacy efforts, the "obvious alternative explanation" is that the backlash had nothing to do with unconstitutional threats

and everything to do with widespread public horror at the toll of mass shootings and gun violence. See *Iqbal*, 556 U.S. at 681-682; *Twombly*, 550 U.S. at 566-568.

3. Private Meeting. The final unconstitutional "threat" claimed by petitioner is that, during a private meeting between respondent and Lloyd's in February of 2018, respondent allegedly "discussed an array of technical regulatory infractions plaguing the affinity-insurance marketplace" and "made clear" that Lloyd's "could avoid liability for infractions relating to other, similarly situated insurance policies, so long as it aided DFS's campaign against gun groups" by "scal[ing] back its NRA-related business." Pet. App. 199, 223. Closely examined, these allegations are no less conclusory, threadbare, or implausible than other aspects of petitioner's complaint.

Petitioner has come to court "armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 679. Indeed, petitioner fails to allege what respondent actually said to make her message "clear"; what "technical regulatory infractions" respondent supposedly implied; what those "similarly situated insurance policies" might have been; or how any alleged offer made by respondent broke with standard governmental negotiating procedures. Pet. App. 199, 223.

The context of respondent's alleged remarks also makes especially clear that petitioner's complaint fails the plausibility test of *Twombly* and *Iqbal*.

First, any alleged meeting between respondent and Lloyd's occurred months *after* DFS, acting upon the District Attorney's referral, had opened its investigation into petitioner's unlawful insurance products. The timing supports the legitimacy and reasonableness of the meeting, given that the investigation had revealed an array of serious insurance violations commonly enforced by respondent—not mere "technical regulatory infractions." Pet.

App. 199. For that reason, this case is nothing like *Gonzalez* v. *Trevino*, cert. granted, No. 22-1025 (Oct. 13, 2023). There, after a months-long investigation into a retiree who had organized a petition to remove the city manager, local law enforcement unlawfully arrested the retiree pursuant to an obscure criminal provision that had never before been used to charge someone for mishandling a government petition. By contrast, DFS routinely investigates violations similar to those at issue in this case through consent decrees. See N.Y. State Department of Financial Services, Consent Order, *In the Matter of American Life Insurance Co., Delaware American Life Insurance Company, and MetLife, Inc.*, No. 2020-0003-C (Mar. 31, 2014) <tinyurl.com/MetLife-Consent-Order>.

Second, petitioner has never suggested that Lloyd's had any arrangements with petitioner other than its unlawful affinity policies—and *all* of these affinity policies were administered by Lockton, which (unlike Lloyd's) was licensed to sell insurance in New York. See Pet. App. 225, 232, 234, 298-299, 302. Because Lockton announced that it would discontinue any relationship with petitioner *before* the alleged meeting between respondent and Lloyd's took place, there was no lawful relationship between Lloyd's and petitioner that respondent might have (or could have) been threatening to sever or undercut. See Resp. Br. 11 (citing N.Y. Ins. L. §§ 1102, 2105); see also *id.* at 19-20, 34.

In short, petitioner makes the threadbare accusation that respondent was engaged in unlawful regulatory bullying—that she was seeking to smother speech. But, as in *Iqbal*, there is an "obvious alternative explanation": respondent met and interacted with Lloyd's as part of an active and legitimate investigation that concerned concededly illegal insurance policies. There was no unconstitu-

tional threat here; there was only an ordinary effort to investigate illegal conduct and enforce the law. Petitioner's allegation does not constitute "a plausible conclusion." *Iqbal*, 556 U.S. at 682.

* * * * *

Amici curiae are First Amendment scholars who deeply believe that public speakers ought to be protected from governmental coercion. Petitioner has every right to advocate for its cause in the public space. What separates amici curiae from those First Amendment scholars who support petitioner is a focus on the facts alleged in petitioner's complaint.

These facts make all the difference. To support its claims of coercion in violation of the First Amendment, petitioner has offered only barebone allegations. Petitioner's accusations may catch headlines, but they do not satisfy the *Twombly-Iqbal* plausibility standard. That is why this case bears no true resemblance to *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963).

To disregard the glaring deficiencies in petitioner's complaint would seriously risk chilling legitimate government speech. It would authorize any individual, subject to lawful and meritorious investigations and enforcement actions, to sandbag government investigators with a First Amendment lawsuit whose discovery demands would undercut essential government functions. That is not the purpose or meaning of the First Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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