No. 22-842

IN THE

Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

MARIA T. VULLO,

Respondent.

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

BRIEF OF FINANCIAL REGULATION AND ADMINISTRATIVE LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

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Amici are scholars of banking, insurance, and administrative law, and banking governance, and are concerned that a decision in favor of Petitioner would stifle the ability of financial and other regulatory agencies to issue important guidance, which has been a core function of regulatory supervision for centuries.[2]

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2. Amici join in their individual capacities; institutional affiliations are provided for purposes of identification only.

SUMMARY OF THE ARGUMENT

Petitioner asks this Court to grant it special status by ruling that it cannot be the subject of unfavorable regulatory guidance by virtue of its political speech. Such a ruling would severely curtail regulators' ability to ensure that supervised entities are operating in a safe and sound manner.

On April 19, 2018, Respondent, who was at the time the Superintendent of New York's Department of Financial Services ("DFS"), issued two nearly identical industry guidance letters ("Guidance Letters"): one addressed to banks and one to insurers.[3] The letters cited the February 14, 2018 mass school shooting in Parkland, Florida, and the growing public sentiment disfavoring Petitioner following Petitioner's statements about the shooting; they encouraged recipient entities to evaluate any business relationships with Petitioner in light of reputation risk and their commitments to public safety and health. Separately, in October 2017, DFS began investigating an insurance product called Carry Guard, offered as an affinity program in New York State by Petitioner via several insurance providers. That investigation determined that Carry Guard violated insurance laws in New York and resulted in consent orders (and significant fines) for

3. Guidance, New York State Department of Financial Services, *Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations* (April 19, 2018), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20180419_guidance_risk_mgmt_nra_NRA_similar_gun_promotion_orgs_banking_industry; https://www.dfs.ny.gov/industry_guidance/industry_letters/il20180419_guidance_risk_mgmt_nra_NRA_similar_gun_promotion_orgs_insurance_industry.

Petitioner, Chubb, Lockton, and Lloyd's in 2018. See Brief of Respondent Maria T. Vullo, *NRA of Am. v. Vullo*, 144 S. Ct. 375 (2023), at 13-14. The Guidance Letters were not related to that investigation or to Petitioner's unlawful insurance products.

Although Petitioner has characterized it as a First Amendment matter, this case is fundamentally about financial regulation and the extent to which regulators may ensure that the banks and insurers they oversee are safe and sound. Accepting Petitioner's argument – that Respondent violated Petitioner's First Amendment rights when she issued industry guidance about financial risks – would mean that regulators across industry sectors may not be free to raise concerns about identified risks to the entities they supervise. This could have profoundly negative consequences for businesses and consumers alike.

Regulatory guidance is an important facet of financial services supervision, particularly at the state level. Petitioner claims that, by issuing the Guidance Letters, Respondent, "motivated by her avowed antipathy toward the NRA's political views … invoked her unparalleled authority over the trillion-dollar New York financial services industry to coerce banks and insurance companies to blacklist the NRA, offering a blend of threats and inducements expressly designed to penalize the NRA for its political advocacy." Brief of Petitioner National Rifle Association of America, *NRA of Am. v. Vullo*, 144 S. Ct. 375 (2023), at 16. In fact, Respondent exercised her supervisory authority in an entirely appropriate way, advising on a growing risk of harm to financial services firms in New York.

The Guidance Letters contain neither threats nor inducements. Their purpose was a perfectly permissible and commonplace exercise of supervisory authority: to alert banks and insurers to possible financial harms. As the Second Circuit observed, in the wake of the Parkland shooting, and prior to the Guidance Letters, "many government officials and major American business institutions spoke out against gun violence, and some companies publicly severed ties with gun promotion organizations like the NRA." *NRA of Am.* v. *Vullo*, 49 F.4th 700, 708 (2d Cir. 2022). This widespread negative public sentiment created tangible risks for financial institutions that maintained relationships with these organizations; as more companies publicly distanced themselves from Petitioner and similar organizations, the risk profile of investing in, or insuring, these organizations grew.

The fact that some DFS-regulated entities did terminate relationships with Petitioner following the Parkland shooting – both before and after the issuance of the Guidance Letters – only underscores the validity of the concerns. As the Second Circuit observed, "general backlash against gun promotion groups and businesses that associated with them was intense after the Parkland shooting. … Such a backlash could (and likely does) directly affect the New York financial markets; as research shows, a business's response to social issues can directly affect its financial stability in this age of enhanced corporate social responsibility." *NRA of Am. v. Vullo,* 49 F.4th at 717.

That the risks involved were "reputational" in nature does not make the Guidance Letters any less appropriate. Reputation risk is a well-recognized facet of a business's risk management program, and the harms to the financial health of a company that flow from reputation risk are

very real. For example, when it became known that Wells Fargo was providing financing for the controversial Dakota Access Pipeline Project, City Councils in Seattle, Washington and Davis, California (both places where there was widespread negative public sentiment about the pipeline) severed their ties with the bank, pulling over $3 billion in annual cash flow.[4] Public perception about a financial institution's social responsibility, specifically its relationships with organizations and projects that are viewed as harmful to communities, is a significant aspect of its risk profile, and it was entirely appropriate for Respondent to flag these risks for the entities she supervised.

ARGUMENT

I. Regulators Must be Able to Warn Financial Institutions of Financial Risks Before They Materialize.

The financial services sector has been subject to federal regulation in some form or another since before the Civil War, and to state regulation from decades earlier.[5] The activities in which banks and insurers engage are inherently risky, and the harms to the public when those

4. See Bill Chappell, *2 Cities to Pull More Than $3 Billion From Wells Fargo Over Dakota Access Pipeline*, NPR (February 8, 2017, 2:18 PM ET), https://www.npr.org/sections/thetwo-way/2017/02/08/514133514/two-cities-vote-to-pull-more-than-3-billion-from-wells-fargo-over-dakota-pipelin. See also Julie Anderson Hill, *Regulating Bank Reputation Risk*, 54 Ga. L. Rev. 523 (2020).

5. See, *e.g., Koen Inghelbrecht et al., Model-Free Implied Dependence and the Cross-Section of Returns*, (June 1, 2023). Available at SSRN: https://ssrn.com/abstract=4235236

risks are realized can be devastating. When a bank fails, its customers do not simply need to find new service providers, as they might in other industries; customers can sustain devastating economic losses when they cannot recover their deposits, sending ripple effects throughout the economy. Similarly, if an insurer is unable to pay claims, policyholders have no realistic market alternative – they cannot purchase another insurance policy covering claims or losses that have already occurred.

Thanks to the dual banking system in the United States, a key feature of our vibrant and dynamic national economy, states play a vital role in regulating financial services and guarding against these adverse outcomes. All 50 states have banking regulators who oversee state-chartered banks, which represent almost three-quarters of all banks in the United States. These regulators are tasked not only with ensuring their chartered entities are operating in a sound manner, but also with protecting the financial well-being of local communities.[6]

States play a particularly crucial role in regulating the insurance industry, thanks to minimal federal oversight outside of health insurance. State insurance departments are responsible for the solvency of a $1.4 trillion industry.[7]

6. Conference of State Bank Supervisors, *State Financial Regulation 101* (July 1, 2023) https://www.csbs.org/state-financial-regulation-101.

7. The OCC, FDIC, and NCUA are not responsible for regulating the prudential or market conduct activities of insurers. The Dodd-Frank Act authorized the Federal Reserve Board to oversee a limited segment of the insurance industry – entities deemed "systemically important," and insurance holding companies that own a federally insured depository institution. No insurer is currently classified as systemically important.

All 50 states have established guaranty funds that insurance companies pay into, to ensure claims can be paid if an insurer becomes insolvent. And every state mandates that insurers provide various coverages, such as uninsured motorist coverage and specific provisions covering property loss, notice and cancellation requirements, and limitations on exclusions. Insurance companies are required to participate in any number of insurance programs in the state to achieve state-determined goals of access and affordability. These include residual markets in personal lines, automobile and workers' compensation, wind and storm pools, as well as numerous federal and state mandates in health insurance.

In addition to enabling regulators to identify unique risks in their jurisdictions, state regulation over banking and insurance fosters an environment in which we benefit from laboratories of regulatory theory, as states test different, sometimes conflicting, methods and approaches.

A. Banks and insurance companies are inherently risky and will harm depositors, insureds, and the financial system if they fail.

Banking and insurance are inherently dangerous businesses. When the value of an asset falls, there is an ensuing risk that a firm won't be able to meet its liabilities. For banks, the process of maturity transformation makes long-duration loans from shorter-duration debt, which exposes them to the possibility of bank runs. For example, banks permit depositors to withdraw their funds at any time but simultaneously lend that money to borrowers with thirty-year terms. Similarly, insurers pledge to pay claims whenever they arise, but invest premiums in both short-duration and long-duration financial instruments

(primarily life insurers). Even where the duration of assets and liabilities is aligned, a sudden drop in the value of a firm's assets creates significant risk, because there will be insufficient value to match its liabilities.

Financial services are therefore inherently unstable when regulated improperly. In banking, the risk is a collective-action problem: banks will not have sufficient assets on hand to meet all withdrawal requests if a substantial number of depositors try to withdraw funds at the same time, while depositors may suddenly demand redemptions if they lose confidence in their institutions.[8] Firms may take losses if they must liquidate assets that have decreased in value, or before maturity, in attempts to meet redemption requests.[9] Those losses will be borne unevenly; those who withdraw first will receive their full deposits whereas those who withdraw last will receive a fraction, or nothing at all. This inevitably creates a rush to withdraw, and an advantage for depositors who withdraw at the earliest sign of potential losses. Rumors of trouble become self-fulfilling prophecies, even at otherwise healthy institutions.

While insurers are also affected by maturity risk, the primary concern when an insurer fails is its ability to pay claims. At its core, insurance is money for a promise, and aside from health insurance, the insurer's promise to pay a covered claim typically comes after the premium was

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8. See David Zaring, *The Corporatist Foundations of Financial Regulation*, 108 Iowa L. Rev. (March 15, 2023) ("The unpleasant aspect of finance lies in the fact that banking is a dangerous business with consequences distributed well beyond the investors and managers of a bank that fails.").

9. See 12 U.S.C. § 1824 and § 1790e.

paid and often after the one-year policy period. For life insurers, much or all of the premium is paid many years or decades before the policyholder dies, which only then triggers the insurer's promise.

These risks are often systemic. The failure of one player may cause contagion, a phenomenon whereby healthy institutions fail because the public cannot distinguish solvent and insolvent institutions, causing a domino effect across the broader financial system. When several institutions are impacted at the same time, federal deposit insurance funds and state insurance guarantee funds may be depleted, putting taxpayer dollars at risk. Continued high assessments can cause insurers to decrease the amount of insurance they are underwriting in a particular state, thereby lowering their assessments but also reducing competition and access to that line of insurance in the state.

These are not mere hypotheticals. In the early 2000s, a unit of the insurance giant American International Group, Inc. (AIG) increased the volume of its credit default swaps (CDS) business, ultimately developing a portfolio worth $533 billion by 2007.[10] CDS functioned like insurance, as AIG's counterparties paid the firm premiums in exchange for AIG's pledge to cover future losses. However, AIG failed to appreciate the true risks of these products and did not put aside sufficient capital reserves for the total coverage it was selling. As a result, it was unable to comply with its CDS obligations when asset valuations began dropping in 2007, helping cause the Great Financial Crisis.[11]

10. Report of the Financial Crisis Inquiry Commission at 141 (2011).

11. *Id.* at 140.

AIG "was so interconnected with [the larger financial system] through counterparty credit relationships on [CDS] and other activities …. that its potential failure created systemic risk."[12] Fearing "cascading losses and collapses throughout the financial system," the federal government ultimately "concluded AIG was too big to fail and committed more than $180 billion to its rescue."[13] Following AIG's collapse, the Financial Crisis Inquiry Commission (FCIC), a commission appointed by Congress to investigate the causes of the 2008 financial crisis, concluded that the reduction of oversight by federal and state regulators made AIG's failure possible. Specifically, the FCIC observed that "because of the deregulation of OTC derivatives, state insurance supervisors were barred from regulating AIG's sale of credit default swaps even though they were similar in effect to insurance contracts."[14]

In 1991, California-based Executive Life Insurance Company faced insolvency. The state's insurance commissioner sought buyers for its assets, including risky bonds and insurance policies. A group of French companies won the bid, despite laws prohibiting foreign government ownership of California insurers, and secretly took control by providing false information to the California Department of Insurance and the Federal Research Bank of New York. The California Department of Insurance eventually uncovered the scheme, sparking a protracted legal battle. The collapse was attributed to the

12. *Id.* at 352.

13. *Id.*

14. *Id.*

"laxity of state regulators, particularly in California."[15] More than a decade later, "many of its policyholders, some of them elderly and disabled, [were] struggling to get by on monthly annuity payments that are 30% to 50% less than what they had been promised by the once highly rated insurer."[16]

In 2023, the United States witnessed the largest bank failure since the 2008 financial crisis when Silicon Valley Bank (SVB) experienced a bank run and became insolvent within the span of two days. SVB's customers were overwhelmingly businesses in the tech sector, and, when interest rates rose, those businesses, many of which were heavily leveraged, found that they needed to access their deposits. For its part, SVB had over-invested in long-term bonds, and lost money when it had to liquidate them quickly to meet demands. All of this fueled the perception that the bank was not financially sound, causing customers to withdraw nearly $50 million in deposits in a single day.

In addition to overseeing compliance with the law and bringing enforcement actions, financial services regulators often issue guidance to advise and warn on various types of risk. The ability to issue such guidance is particularly crucial at the state level, where regulatory agencies may have unique insights into local trends, developments, and events that might create specific financial risk to their

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15. Kathy M. Kristof, *Behind Executive Life's Fall : Regulators Are Taking the Heat for Letting the Insurer's Problems Go On, Entrapping Thousands of Its Policyholders*, L.A. TIMES, Sept. 1, 1991.

16. Lisa Girion, *'Little People Floundering' From Executive Life Losses*, L.A. TIMES, Apr. 28, 2002.

communities. Some examples of topics on which state financial regulatory bodies have issued industry guidance include: wildfires,[17] floods,[18] the COVID-19 pandemic,[19]

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17. Release: *Federal and State Financial Regulatory Agencies Issue Statement on Supervisory Practices Regarding Financial Institutions Affected by Hawaii Wildfires Board of Governors of the Federal Research System*, State of Hawaii Department of Commerce and Consumer Affairs (Aug. 17, 2023), https://cca.hawaii.gov/blog/release-federal-and-state-financial-regulatory-agencies-issue-statement-on-supervisory-practices-regarding-financial-institutions-affected-by-hawaii-wildfires-board-of-governors-of-the-federal-reserv/.

18. State of California Department of Financial Protection & Innovation, *Guidance to Financial Institutions, Mortgage Lenders and Servicers Regarding Borrowers Affected by Severe Winter Storms, Flooding and Landslides*, https://dfpi.ca.gov/2024/02/08/guidance-to-financial-institutions/ (last visited February 20, 2024).

19. State of Alabama State Banking Department, *Statement on Financial Institutions Working With Customers Affected by the Coronavirus and Regulatory Assistance*, (March 16, 2020) https://banking.alabama.gov/wp-content/uploads/2023/06/Superintendent_Mike_Hill_Statement_on_Working_with_Bank_Customers3162020.pdf.

the cannabis industry,[20] teleworking,[21] and unlicensed motor vehicle sales.[22]

At the federal level, guidance is encouraged as a best practice for regulatory agencies by the Administrative Conference of the United States.[23] And the Conference of State Bank Supervisors notes that state financial regulators are specifically responsible for, among

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20. Guidance, Colorado Department of Regulatory Agencies, (November 25, 2019) https://drive.google.com/file/d/1b6dvYgjZDcKRn_PwH4RJOG2T5LvlLm6b/view?usp=sharing

21. New Mexico Regulation and Licensing Department Financial Institutions Division, *Guidance on Telework/Remote Work from Non-Licensed Locations* (November 23, 2020), https://api.realfile.rtsclients.com/PublicFiles/1ee897135beb4b1c82715d36398de4c5/e4d9dea6-0cba-4c1d-8bb7-40cbcde8861d/FID%20Guidance%20on%20Telework%20Remote%20Work%20from%20Non-Licensed%20Locations.pdf.

22. Massachusetts Division of Banks Registry of Motor Vehicles, *Unlicensed Motor Vehicle Sales Finance Companies* (October 25, 2016), https://www.mass.gov/industry-letter/unlicensed-motor-vehicle-sales-finance-companies-0.

23. See Administrative Conference of the United States, *Guidance in the Rulemaking Process* (June 10, 2014), https://www.acus.gov/recommendation/guidance-rulemaking-process. See also Susan Webb Yackee, *Guidance on Regulatory Guidance: What the Government Needs to Know and Do to Engage the Public*, IBM Center for the Business of Government (2021), https://www.businessofgovernment.org/report/guidance-regulatory-guidance (explaining that "[f]ederal agencies routinely issue guidance documents to announce policy statements and to clarify the meaning of existing statutes and regulations") (last visited February 20, 2024).

other things, ensuring the financial well-being of their communities.[24] Supervisory guidance has long been recognized as a key tool for executing that mission, and New York's Financial Services Law explicitly grants the DFS Superintendent the authority to issue guidance involving financial products and services.[25] DFS has issued industry guidance on stablecoins, Russia's invasion of Ukraine, cybersecurity vulnerabilities, electronic signatures, whistleblowing programs, and a host of other areas where it has identified potential risks to the entities it supervises.[26]

B. The nature of banking and insurance necessitates regulators' frequent communication of risks to firms.

Unlike in many other industries, the regulation of financial institutions is focused on preventing harm, and not simply penalizing institutions for failing to follow statutory or regulatory commandments. Given the harm that will befall customers and the public if banks and insurers fail, "[i]t is imperative that [regulators] ensure the safety and soundness of individual financial institutions and the banking system as a whole *before* they fail, rather than attempt to address the consequences of collapse *after*."[27] Indeed, in enacting the Banking Act of

24. See *Financial Regulation 101*, supra note 6.

25. NY Financial Services Law 302(a).

26. New York State Department of Financial Services, Industry Letters, (June 8, 2022) https://www.dfs.ny.gov/industry_guidance/industry_letters.

27. Todd Phillips, *In Support of Supervisory Guidance*, 3 Corp. & Bus. L.J. 344, 357 (2022).

1933, which helped stabilize the banking system after the Crisis of 1929, Congress recognized that the banking system will only work if "people believe that their money is safe when in a bank."[28]

Regulators accordingly engage in continuous and ongoing "monitoring, inspecting, and examining" of banks and insurers to promote their stability.[29] Under this process, known as supervision, regulators "concern themselves with all manner of [an institution's] affairs" and encourage (but do not require) adjustments to institutions' operations so that overly risky activities that could put their continued operation in jeopardy are flagged before problems start. *In re Subpoena Served Upon Comptroller*, 967 F.2d 630, 633-34 (D.C. Cir. 1992).

Supervision occurs through "an iterative process of comment by the regulators and response" by institutions, *id.* at 633, making the issuance of "supervisory guidance and various informal means of communication . . . central to the supervisory relationship."[30] Regulators issue supervisory guidance in order to "draw [institutions'] attention to observed trends in a banking activity that raise safety and soundness concerns and indicate ways in

28. H.R. Rep. No. 73-150, at 6 (1933) (quoting statement of Dr. Thomas Nixon Carver).

29. Board of Governors of the Federal Reserve, *Supervising and Regulating Financial Institutions and Activities*, https://www.federalreserve.gov/aboutthefed/files/pf_5.pdf

30. Daniel K. Tarullo, *Bank Supervision and Administrative Law*, 2022 Colum. Bus. L. Rev. 279, 285 (2022).

which potential risks might be avoided."[31] Guidance alerts institutions to "examples of practices that mitigate risks, or that [regulators] generally consider to be consistent with safety-and-soundness standards or other applicable laws and regulations, including those designed to protect consumers."[32] Supervisory guidance may be provided to individual institutions based on risks identified during examinations or on an industry-wide basis.

This Court has long recognized that supervision is key to ensuring financial institutions are safe and sound and able to meet their obligations, noting that supervision "'may be one of the most successful (systems of economic regulation),'" and the reason for "the virtual disappearance of bank failures from the American economic scene." *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 330 (1963), quoting 1 Davis, Administrative Law (1958) § 4.04. Although it is true that supervisors may err—warning institutions of risks that fail to appear or failing to warn about risks that end up felling the largest banks or insurers—the banking and insurance systems are worse-off when regulators simply enforce the law and no more.

C. Financial services regulators should warn supervised entities when market players pose heightened risks.

There are instances in which particular industries pose greater risks to financial institutions than they

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31. *Tarullo*, supra note 31 at 304.

32. Board of Governors of the Federal Reserve System, *Role of Supervisory Guidance*, 86 Fed. Reg. 18173 (Feb. 3, 2021).

do to the general public. In those cases, it is important that regulators are able to help institutions identify and address those risks, even if those industries may be able to claim animus or portray themselves as disfavored.

Take, for example, guidance the federal banking regulators issued alerting institutions to risks posed by firms engaged in the crypto-asset industry.[33] The guidance came shortly after Silvergate Bank "experienced significant deposit outflows that led to a liquidity crisis" in late 2022 as its largest depositors—largely crypto-asset firms—withdrew deposits *en masse,* ultimately causing the bank to wind down its operations.[34] Among other things, the guidance warned banks of "[c]ontagion risk within the crypto-asset sector resulting from interconnections among certain crypto-asset participants" and noted that particular depositors who issue crypto-assets known as stablecoins faced "run risk, creating potential deposit outflows for banking organizations that hold stablecoin

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33. See Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Joint Statement on Crypto-Asset Risks to Banking Organizations (Jan. 3, 2023), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20230103a1.pdf.

34. Office of the Inspector General, Review of the Supervision of Silvergate Bank, 2023-SR-B-014R (Sept. 27, 2023), https://oig.federalreserve.gov/reports/board-review-silvergate-summary-sep2023.pdf. *See also* Steven Church, Silvergate Plans to Wind Down Bank Operations and Liquidate, Bloomberg (Mar. 8, 2023), https://www.bloomberg.com/news/articles/2023-03-08/silvergate-plans-to-wind-down-bank-operations-and-liquidate?sref=S5RPfkRP.

reserves."[35] The guidance made clear, though, that banks "are neither prohibited nor discouraged from providing banking services to customers of any specific class or type, as permitted by law or regulation."[36]

Mere months after the guidance, Signature Bank also failed—its "significant client concentration of [crypto-asset] companies put it in a precarious position" from which it could not recover when contagion hit the banking sector in early March 2023.[37] DFS appointed the FDIC receiver when it closed Signature Bank; the FDIC estimated a resulting $2.5 billion loss to the agency's Deposit Insurance Fund.[38]

Similarly, many state insurance commissioners and the Federal Insurance Office (FIO) have begun alerting insurers to the risks associated with their coverage of and investments in companies engaged in fossil fuel extraction. Climate change may "impair insurers' investments in real estate or in securities of businesses vulnerable to climate-related disasters" or those ill-prepared for "the ongoing [public policy and consumer] efforts to shift to a carbon neutral or net-zero economy by mid-century."[39]

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35. *Id.*

36. *Id.*

37. Federal Deposit Insurance Corporation, *FDIC's Supervision of Signature Bank*, (April 28, 2023) https://www.fdic.gov/news/press-releases/2023/pr23033a.pdf

38. *Id.* at 2.

39. Federal Insurance Office, U.S. Department of the Treasury, *Insurance Supervision and Regulation of Climate-Related Risks* (June 2023), https://home.treasury.gov/system/

Connecticut's insurance commissioner, for example, issued guidance asking "insurers to take a proportionate approach to managing climate risks" stemming from, *inter alia*, their "business lines" and "investment strategies."[40] DFS also issued guidance encouraging insurers "to analyze their climate risks on both the underwriting and investment sides of their balance sheets," including "investment exposure to [industries] that have high transition or physical risks."[41] The FIO encouraged state insurance regulators to "develop and adopt … expectations for insurers to incorporate climate-related risks into their annual financial planning."[42] Although oil and gas producers could claim that insurance regulators

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files/136/FIO-June-2023-Insurance-Supervision-and-Regulation-of-Climate-Related-Risks.pdf; This is also a significant regulatory concern internationally, *see* International Association of Insurance Supervisors, *Issues Paper on the Implementation of the Recommendations of the Task Force on Climate-related Financial Disclosures* (February 2020), https://www.iaisweb.org/uploads/2022/01/200227-Issues-Paper-on-the-Implementation-of-the-TCFD-Recommendations.pdf (stating that "all insurance businesses will be directly or indirectly affected over the long-term" by climate change).

40. State of Connecticut Insurance Department, *Guidance for Connecticut Domestic Insurers on Managing the Financial Risks for Climate Change*, Bulletin No. FS-44 (Sept. 15, 2022), https://portal.ct.gov/-/media/CID/1_Bulletins/Bulletin-FS-44.pdf.

41. New York State Department of Financial Services, *Guidance for New York Domestic Insurers on Managing the Financial Risks from Climate Change* (November 15, 2021) https://www.dfs.ny.gov/system/files/documents/2021/11/dfs-insurance-climate-guidance-2021_1.pdf.

42. See *Insurance Supervision and Regulation of Climate-Related Risks*, supra note 39.

issue these documents to target their industry for its advocacy against particular legislation or regulation, the guidance merely highlights financial risks posed to insurers and encourages (but does not compel) them to address those risks.

In an attempt to cast Respondent's guidance as an improper attack on a "disfavored industry," Petitioner's amici analogize this to "Operation Chokepoint," the FDIC and DOJ initiative aimed at curtailing fraud and money laundering by encouraging financial institutions to evaluate relationships with high-risk entities that were facilitating illegal activity, like payment processors and payday lenders. See Brief of Financial and Business Law Scholars, *NRA of Am. v. Vullo*, 144 S. Ct. 375 (2023), at 19. While this initiative has "taken on symbolic and mythic proportions in partisan discourse about regulation generally and regulation of the financial sector specifically,"[43] it was in reality a fairly transparent, rational response to the growing threat posed by internet-abled financial crime. It resulted in the successful identification and prosecution of several significant online schemes facilitated by these players, and the forfeiture of their proceeds.[44] It was "not at all surprising, … much less inappropriate, that regulators began to discourage banks from having financial entanglements with payday lenders" and other high-risk entities in this environment.[45]

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43. Dru Stevenson, *Operation Choke Point: Myths and Realty*, 75 Adm. Law. Rev. 2 (2023), at 318, https://administrativelawreview.org/wp-content/uploads/sites/2/2023/07/ALR-75.2_Stevenson.pdf

44. *Id.* at 327-328.

45. *Id.*

Operation Chokepoint is also markedly distinguishable from what Respondent did here. Where Operation Chokepoint was a robust, multi-agency enforcement effort that also included a "moral suasion" element,[46] the Guidance Letters were a single communication by one state regulator, warning of a risk that was purely reputational in nature, and could not give rise to any enforcement action.

D. Regulated institutions benefit from receiving guidance.

Unlike rules, regulations, or enforcement actions, guidance issued by regulators is non-binding, and institutions are not legally compelled to address all – or any – risks that regulators flag. And, while financial institutions generally respect and pay attention to non-binding industry letters from their regulators, it is also true that "banks will often question, sometimes resist, and occasionally outright ignore supervisory guidance."[47] The same goes for insurers.

The ability to issue non-binding guidance is particularly important in our fast-changing economic environment, where risks may emerge and create gaps in the regulatory oversight regime. As Professor Daniel Tarullo notes, one of the key functions of a financial sector regulator "is to identify bank innovations or shifts in activities carrying risks that were not contemplated in the drafting of existing regulatory rules," and an important tool for

46. *Id.* at 325.

47. Daniel K. Tarullo, *Bank Supervision and Administrative Law,* 2022 Colum. Bus. L. Rev. 279 (2022), at 300.

mitigating these risks is the issuance of guidance by the regulator.[48] Guidance, in some situations, also offers a more efficient and less costly means of managing risks when compared to, for example, rulemaking, enforcement actions, or increased capital requirements.[49]

In 2021, the federal banking regulators issued nearly identical final rules codifying their Interagency Statement Clarifying the Role of Supervisory Guidance.[50] The rules noted that the issuance of guidance is discretionary and is not a prerequisite to a regulator's exercise of its statutory and regulatory authorities. In other words, statutes and legislative rules, not statements of policy, set legal requirements. In connection with these rules, the Board of Governors of the Federal Reserve noted that "supervised institutions at times request supervisory guidance and . . . guidance is important to provide clarity to these institutions, as well as supervisory staff, in a transparent way that helps to ensure consistency in the supervisory approach."[51]

Beyond financial and insurance regulation, direct-to-consumer guidance also plays an important role helping to encourage beneficial consumer behavior and discourage behavior that poses a risk to health or safety through

48. *Id.*

49. *Id.*

50. Federal Register, *Role of Supervisory Guidance* (April 8, 2021), Colum. Bus. L. Rev. https://www.federalregister.gov/documents/2021/04/08/2021-07146/role-of-supervisory-guidance#citation-2-p18173.

51. *Id.*

informational guidance, cautions, and warnings.[52] Even automobile recall notices constitute a form of regulatory guidance.[53]

In a recent study consisting of 135 interviews of professionals (in industry, agencies, and policy and other groups) to learn how agencies and the public use regulatory guidance, Professor Nicholas Parrillo found that:

> [M]uch and perhaps most guidance is issued because regulated parties seek and demand it. … Compared with purely case-by-case adjudication or enforcement, guidance makes frontline agency decisionmakers more decisive and fast in their decisions, saving time and resources for the agency and the regulated public. It also makes agency decisionmaking more predictable, comprehensible, and uniform, shielding regulated parties against unequal treatment, unnecessary costs, and unnecessary risk. Compared with legislative rulemaking, guidance is better for dealing with conditions of uncertainty and for making agency policy comprehensible to regulated parties who lack counsel. Further—and interviewees cited this

52. Food and Drug Administration, *Ultrasound Imaging*, https://www.fda.gov/radiation-emitting-products/medical-imaging/ultrasound-imaging (last modified on Jan. 12, 2024).

53. United States Department of Transportation, National Highway Traffic Safety Administration, *Consumer Alert: Don't Buy or Use Steering Wheel Decorative Emblem Decals* (Nov. 6. 2023), https://www.nhtsa.gov/press-releases/consumer-alert-steering-wheel-decorative-emblem-decals.

> factor several times more than any other—the provision of guidance takes less time and resources than legislative rulemaking.[54]

II. Accepting Petitioner's Argument Would Eliminate Agencies' Ability to Provide Guidance on a Wide Array of Risks.

Petitioner uses the First Amendment as a vehicle to launch a collateral attack on the ability of regulators to issue statements related to the safety and soundness of the entities they supervise. Accepting Petitioner's position would mean that regulators across industries will be hamstrung in their ability to issue important risk management guidance.

A. "Reputation risk" is economic risk and an important subject of regulatory guidance.

Reputation risk is a vitally significant business and regulatory concern. For example, in a 2014 global survey on reputation risk, Deloitte found that "87% of the executives surveyed rate reputation risk as more important or much more important than the other strategic risks their companies are facing."[55] At its core, reputation risk is "a type of aggregate financial risk, and it is appropriate

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54. Nicolas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective, Administrative Conference of the United States*, Yale Law School, p. 35 (October 12, 2017), parrillo-agency-guidance-final-report.pdf.

55. Deloitte, *2014 Global Survey On Reputation Risk* (October 2024), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Governance-Risk-Compliance/gx_grc_Reputation@Risk%20survey%20report_FINAL.pdf.

for financial institutions to consider it. … [While] many businesses posing reputational risk are legal, … as the Bible says, not everything that is lawful is beneficial."[56] Advising on reputation risk is therefore particularly important where a regulator identifies conduct that, while not unlawful, nevertheless creates risk for the industry. Indeed, the ability to offer guidance related to reputation risk is critical in part because these risks cannot, on their own, be the basis for enforcement actions.

Federal financial regulators recognize reputation risk.[57] The NAIC created an "Own Risk and Solvency Assessment" (ORSA) Model Act in 2015, which has been adopted by most states (including New York). ORSA requires insurers to evaluate their own risk profiles and risk management structures; insurers must include reputation risk within this review. Business relationships with third parties who are themselves particularly controversial are listed as one source of reputation risk.[58]

Petitioner concedes that reputation risk guidance is within the mandate of the DFS Superintendent.

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56. Dru Stevenson, supra note 51, at 358.

57. Board of Governors of the Federal Reserve System, *Supervisory Policy and Guidance Topics*, https://www.federalreserve.gov/supervisionreg/topics/legal_risk.htm; Office of the Comptroller of the Currency, *Large Bank Supervision*, pp. 32-33 (June 2018), https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/large-bank-supervision/pub-ch-large-bank-supervision.pdf.

58. National Association of Insurance Commissioners, *Branded Risks, NAIC Insurance Summit 2016*, https://www.naic.org/insurance_summit/documents/insurance_summit_160517_financial_orsa_branded _risks.pdf.

Petitioner's Brief at 4. Petitioner also cites several DFS actions related to reputation risk that were, in its view, permissible: the imposition of a fine on Deutsche Bank for doing business with Jeffrey Epstein; the action against Goldman Sachs for using funds to bribe the President of Malaysia; and guidance about the reputation risks around Wells Fargo after its scheme to open fraudulent customer accounts came to light. Petitioner's Brief at 44.

But, Petitioner claims, this case is different because the risk identified in the Guidance Letters was, in Petitioner's view, related to a political position rather than unlawful conduct. This misses the point; the risk to financial firms was extant, as the Second Circuit noted, based on recent events and overwhelming public sentiment. The Guidance Letters specifically highlighted growing public concern over gun violence and the "social backlash" against "organizations that promote guns that lead to senseless violence."[59]

In an attempt to support its misguided argument, Petitioner conflates the Guidance Letters with DFS's investigation and eventual enforcement actions related to Petitioner's unlawful insurance product Carry Guard See Petitioner's Brief at 45. They are in fact completely distinct. The enforcement actions (and resulting consent orders) flowed from specific violations of long-standing New York insurance law.

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59. Guidance, New York State Department of Financial Services, *Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations* (April 19, 2018), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20180419_guidance_risk_mgmt_nra_NRA_similar_gun_promotion_orgs_banking_industry.

The Guidance Letters, in contrast, were motivated by the reactions of the public and the business community following a devastating mass school shooting. They did not reference Carry Guard, or any potential or ongoing investigation or action. Indeed, while the reputation risk identified in the Guidance Letters was potentially harmful, a firm's decision to carry that risk would not have been illegal. Petitioner's attempt to paint the Guidance Letters as coercive because of an unrelated (and perfectly lawful) investigation is unavailing.

Importantly, it was Petitioner, and not Respondent, who created the reputation risk that ultimately materialized in the form of boycotts and financial harms. In the year leading up to the issuance of the Guidance Letters, there were several high-profile mass shootings, and Petitioner's reaction to each further inflamed public opinion. For example:

- On October 1, 2017, a mass shooting in Las Vegas killed 58 and left over 800 injured. NRA Executive Vice President Wayne LaPierre responded by blaming Hollywood, video games, federal law enforcement, and former President Barack Obama for mass shootings like this.[60]

- On February 14, 2018, a mass shooting at Marjory Stoneman Douglas High School in Parkland Florida killed 17 and left 17 injured. The NRA responded by asserting that "The elites don't care not one whit

60. See Jason Silverstein, *NRA's Wayne LaPierre spreads blame for Las Vegas shooting but won't back any gun control bills*, New York Daily News (October 8, 2017), https://www.nydailynews.com/news/politics/nra-wayne-lapierre-spreads-blame-las-vegas-shooting-article-1.3549482.

about America's school system and school children. Their goal is to eliminate the Second Amendment and our firearm freedom so they can eradicate all individual freedoms." Mr. LaPierre advocated for arming teachers, hardening the schools, and repeated a common refrain that "to stop a bad guy with a gun, it takes a good guy with a gun."[61]

- On May 18, 2018, a mass shooting at Santa Fe high school in Texas killed 10 and left 13 wounded. Oliver North, then-incoming president of the NRA, blamed popular culture, movies, television, Ritalin, and other factors as promoting the climate of violence enabling these mass shootings and echoed the NRA's statement that better security and arming teachers is the most appropriate solution.[62]

These statements, which Petitioner was unquestionably free to make, provoked anger and dismay among listeners, and many business partners offering services to NRA members ended their affiliations with Petitioner.[63]

61. *U.S. gun lobby slams anti-gun 'elites' after Florida school massacre*, Reuters (February 22, 2018), https://www.reuters.com/.

62. See Joseph Weber, *New NRA Leader Oliver North on School Shootings: 'Disease isn't the Second Amendment,'* Fox News Sunday (May 20, 2018), https://www.foxnews.com/transcript/oliver-north-on-nras-response-to-texas-school-shooting-sen-lindsey-graham-on-status-of-trump-kim-summit.

63. See Jacey Fortin, *A List of the Companies Cutting Ties With the N.R.A.*, New York Times, (February 24, 2018), https://www.nytimes.com/2018/02/24/business/nra-companies-boycott.html; Brad Tuttle, *All the Companies Cutting Ties with the NRA After Deadly Florida School Shooting*, Money (March 1, 2018),

In this climate of public outrage, Respondent's Guidance Letters were a well-reasoned and appropriate way to warn of the risks of doing business with Petitioner. As noted above, businesses were ending their relationships with Petitioner long before the Guidance Letters were issued.

By asking this Court to find a First Amendment violation where Respondent alerted her supervisees to these concerns, Petitioner seeks special status to be free from the adverse effects of its own conduct, under the guise of protected speech.

B. Respondent's Guidance Related to Reputation Risk was an Important Exercise of Supervisory Authority, and was not a First Amendment Violation.

Although Petitioner attempts to characterize Respondent's speech in the Guidance Letters as the type of "thinly veiled threats to institute criminal proceedings against [the recipient] if they do not come around" that this Court found violated the First Amendment in *Bantam Books*, (Petitioner's Brief at 27, citing *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 68 (1963)), it is in fact markedly different.

In *Bantam Books*, the Rhode Island Commission to Encourage Morality in Youth, a government entity, was alerting booksellers that they were potentially engaging in illegal activities by selling books it had deemed

available athttp://money.com/money/5172471/nra-enterprise-first-national-bank-of-omaha-boycott-protests/.

objectionable; the Commission's notices to sellers included copies of referrals to the local sheriff, and thanked the sellers in advance for their "cooperation." *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 62. This Court found that these statements, which alluded to potential criminal enforcement but did not involve any judicial body, were prior restraints on the booksellers' speech and violative of the First Amendment. *Id.* at 70. In stark contrast, regulatory guidance in the financial services space is commonplace, and recipients of the Guidance Letters would not plausibly have interpreted them as threatening, particularly given the language used.

Petitioner's amici also seek to align Petitioner's position with the nonprofit advocacy organization the NAACP in *NAACP v. Button*, 371 U.S. 415 (1963) and *Alabama ex rel. Patterson*, 357 U.S. 449 (1958).[64] In those cases, the Court protected the NAACP, on First Amendment grounds, from the arbitrary enforcement of specific statutes or rules, finding no substantial regulatory interest served by the enforcement of the rules.[65] The comparison to the instant case is inapposite; the Guidance Letters were nonbinding, and disregarding them could not serve as the basis to find a violation of the law. Moreover, the regulatory interest that motivated the Guidance Letters is apparent on their face.

Nor does *Cohen* v. *California*, 403 U.S. 15 (1971), on which Petitioner also relies, offer support. In that case, this Court found that the arrest and conviction of

64. Amicus Brief of the Second Amendment Foundation, *NRA of Am. v. Vullo*, 144 S. Ct. 375 (2023) at 8-10.

65. *Id.*

a California citizen for wearing a jacket that contained a politically provocative obscenity was a First Amendment violation, noting that the government cannot restrict speech based on fears that it might inspire "a hypothetical coterie of the violent and lawless" to respond. *Id* at 1787.

There was nothing hypothetical about the harms about which Respondent was cautioning here. Moreover, Respondent was not placing any restrictions whatsoever on Petitioner's speech, nor was she imposing penalties based on Petitioner's advocacy. She was identifying a risk that had already materialized, and was anticipated to grow. The fact that the risk was "reputational," and related to Petitioner's increasing unpopularity,[66] does not make the guidance improper.

Respondent noted the importance of social responsibility to a company's economic well-being, writing that "a review of performance reports of many firms to their stakeholders demonstrates how their performance is based on both their strategic business vision as well as on a commitment to society as a whole."[67] She then went on to highlight that DFS covered entities are "in the business of managing risks, including their own reputational risks, by making risk management decisions on a regular

66. In 2019, a Gallup poll found support for Petitioner to be at an all-time low in this country, with mass shootings, internal corruption, and financial woes being cited as contributing factors. See Jeffrey M. Jones, *Americans' Views of NRA Become Less Positive*, Gallup.com (September 13, 2019), https://news.gallup.com/poll/266804/americans-views-nra-become-less-positive.aspx.

67. *Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations*, supra note 59.

basis regarding if and how they will do business with certain sectors or entities." Against that backdrop, DFS encouraged "its chartered and licensed 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, as well as continued assessment of compliance with their own codes of social responsibility."

This is precisely the type of guidance that financial regulators must be permitted to offer. Public perception is a powerful market force, and when a regulator identifies a sudden trend or shift regarding an entity's reputation in the community, it is entirely appropriate that they alert regulated entities to that development. The Guidance Letters were a discrete response to legal and cultural changes reshaping the business climate related to Petitioner.[68]

Although Petitioner faults the Guidance Letters for all of the adverse consequences it suffered when financial institutions backed away from it, the fact is that the groundswell of negative sentiment towards Petitioner began well before the Guidance Letters were issued,

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68. The regulatory guidance followed episodes of gun violence that led to popular outcries and legislative reform initiatives nation-wide. See *Vullo*, 49 F.4th at 711. Litigation over corruption also led companies to withdraw from business relationships. See Danny Hakim, *At the N.R.A., a Cash Machine Sputtering*, NY TIMES (March 14, 2019), https://www.nytimes.com/2019/05/14/us/nra-finances-executives-board-members.html. Even without similar regulatory guidance in states other than New York, businesses and financial institutions were revaluating their relationships with Petitioner.

immediately after the Parkland shooting. As the Second Circuit noted, the two primary consequences about which Petitioner complains – the call from Lockton terminating its relationship with Petitioner, and the refusal of Petitioner's corporate insurer to negotiate a new contract, and the ensuing difficulty finding coverage – occurred prior to the issuance of the Guidance Letters. See *Vullo*, 49 F.4th at 716. Indeed, the fact that Petitioner was having trouble executing its business plan and obtaining insurance coverage is evidence that the risks warned of in the Guidance Letters were being realized before the letters were written.

C. Courts are not well-positioned to adjudicate when reputation risk advice is proper.

Petitioner's argument, which attempts to cast an attack on regulatory supervision as a First Amendment fight, illustrates the difficulty with courts adjudicating whether a particular form of guidance was appropriate or not. For example, on July 13, 2022, DFS issued an industry letter to all federal student loan servicers urging them to promote the Public Service Loan Forgiveness Program by, *inter alia*, posting information about the program on their websites and sending proactive communications to borrowers.[69] On December 22, 2021, DFS issued a letter to all chartered banks encouraging them to waive transaction fees associated with the receipt of restitution payments to Holocaust survivors and their heirs, stating

69. Guidance, New York State Department of Financial Services, *Best Practices for Promoting Public Service Loan Forgiveness* (July 13, 2022), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20220713_pslf.

that the "fee waivers will serve to reflect the willingness of New York regulated financial institutions to contribute to the well-being of our citizens."[70] Theoretically, recipients of these letters could have complained to the courts that DFS was "jawboning" for a political purpose, as Petitioner and its amici have done here. DFS would undoubtedly say that the guidance was meant to promote economic well-being in New York, and not driven by any political beliefs.

As noted above, DFS and other banking regulators have issued guidance related to the risks associated with the cryptocurrency industry.[71] In the insurance industry, guidance around climate change-related risks has become more common.[72] Again, critics could claim that these are

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70. Guidance, New York State Department of Financial Services, *Fee Waiver for Holocaust Reparation Payments* (December 22, 2021), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20211222_fee_waiver_holocaust_reparation_payments.

71. Guidance, New York State Department of Financial Services, *Proposed Updates to Guidance Regarding Listing of Virtual Currencies* (Sept. 18, 2023), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20230918_guidance_vc_listing; New York State Department of Financial Services, *Guidance Regarding Listing of Virtual Currencies* (Nov. 15, 2023), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20231115_listing_virtual_currencies.

72. Guidance, New York State Department of Financial Services, *Guidance for New York States Regulated Banking and Mortgage Organizations Relating to Management of Material Financial and Operational Risks from Climate Change* (December 2023), https://www.dfs.ny.gov/system/files/documents/2023/12/dfs_climate_change_guidance_banking_mortgage_orgs_202312.pdf; Industry Letter, New York Department of Financial

instances of regulators advancing a political viewpoint through industry guidance. But courts are not well-equipped to determine whether a regulator's guidance is motivated by political belief or genuine concern for the well-being of their regulated entities. See, *e.g.*, *DOC* v. *New York*, 139 S. Ct. 2551, 2573 (2019) (holding that "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons").

So long as the agency can point to a reasonable basis for issuing the guidance, and the guidance is not coercive, the regulator should be permitted to issue it.

CONCLUSION

Petitioner effectively asks this Court to grant it immunity from any government action or speech that may adversely impact it, on the grounds that Petitioner is engaged in political advocacy. This is entirely out of step with legal precedent, and a decision in Petitioner's favor would risk upending centuries of administrative and regulatory law allowing financial regulators to issue guidance to supervised entities for the benefit of consumers, the public, and regulated entities themselves.

Services, *Industry Letter: CRA Consideration for Activities that Contribute to Climate Mitigation and Adaptation* (February 9, 2021), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20210209_cra_consideration.

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