No. 22-842

IN THE

Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

MARIA T. VULLO, both individually and
in her former official capacity

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF *AMICUS CURIAE* OF JAMES P. CORCORAN, FORMER NEW YORK SUPERINTENDENT OF INSURANCE IN SUPPORT OF PETITIONER

BRETT A. SHUMATE
JONATHAN V. GOULD
CHARLES E.T. ROBERTS
Counsel of Record
RILEY W. WALTERS
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
cetroberts@jonesday.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. Insurance and Financial Services Regulators Wield Immense Power and Exercise Vast Discretion over Regulated Entities Under Highly Complex Regimes 3

B. Insurance and Financial Services Regulators Act with the Awareness that the Entities They Regulate Are Highly Sensitive to Regulatory Guidance and Influence 8

C. The Actions Alleged Here Crossed the Line Between Encouragement and Coercion 14

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 14

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963) 17

Belth v. N.Y. State Dep't of Ins.,
733 N.Y.S.2d 833 (N.Y. Sup. Ct. 2001).................. 4

Brantley v. Mun. Credit Union,
No. 19 Civ. 10994 (KPF), 2021 WL
981334 (S.D.N.Y. Mar. 16, 2021)........................... 7

City of New York v. Britestarr Homes, Inc.,
570 N.Y.S.2d 882 (N.Y. Sup. Ct. 1991).................. 4

Excess Line Ass'n of New York v. Waldorf & Assocs.,
965 N.Y.S.2d 831 (N.Y. Sup. Ct. 2013).................. 5

Indep. Ins. Agents and Brokers of New York, Inc. v. N.Y. State Dep't of Fin. Servs.,
200 N.E.3d 537 (N.Y. 2022) 5

Matter of Med. Soc'y of N.Y. v. Serio,
800 N.E.2d 728 (N.Y. 2003) 5

Matter of Thorndike,
127 N.Y.S.3d 213 (N.Y. App. Div. 2020)................ 4

N.Y. State Land Title Assoc., Inc. v. N.Y. State Dep't of Fin. Servs.,
92 N.Y.S.3d 49 (N.Y. App. Div. 2019)................ 4, 5

STATUTES

N.Y. Banking Law § 24 7

N.Y. Banking Law § 28 7

N.Y. Banking Law § 29 7

N.Y. Banking Law § 606 7

N.Y. Fin. Serv. Law § 102 4

N.Y. Fin. Serv. Law § 201 .... 3, 6, 7

N.Y. Fin. Serv. Law § 301 6

N.Y. Ins. Law § 109 6

N.Y. Ins. Law § 309 6

N.Y. Ins. Law § 1102 5

N.Y. Ins. Law §§ 2101–2140.. 6

OTHER AUTHORITIES

ACUS, Recommendation 2017-5, *Agency Guidance Through Policy Statements* (Dec. 14, 2017) 10, 11

Michael Asimow, Gabriel Bocksang Hola, Marie Cirotteau, Yoav Dotan, & Thomas Perroud, *Between the Agency and the Court: Ex Ante Review of Regulations*, 68 Am. J. Comp. L. 332 (2020)....................... 12, 13

Lukas Böffel, *The Influence of Artificial Intelligence and Emerging Technologies on the Regulation of Insurance Companies in the U.S.: An Exemplary Analysis of California's Rate Making Law*, 20 Berkeley Bus. L.J. 254 (2023) 4

The Department of Justice's "Operation Choke Point": Hearing before the Subcomm. on Oversight & Investigation of the H. Comm. on Fin. Servs., 113th Cong. 13 (2014) 9

Jay M. Feinman, *The Regulation of Insurance Claim Practices*, 5 U.C. Irvine L. Rev. 1319 (2015) 4

Julie Andersen Hill, *Regulating Bank Reputation Risk*, 54 Ga. L. Rev. 523 (2020) 10, 13, 14, 16

Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. Pitt. L. Rev. 405 (1996) 10, 15

George A. Mocsary, *Administrative Browbeating and Insurance Markets*, 68 Vill. L. Rev. 579 (2023) 4

Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries,* 36 Yale J. on Reg. 165 (2019) 8, 10–14, 16

Press Release, *California Insurance Commissioner Asks Insurance Industry to Divest from Coal*, California Department of Insurance (Jan. 27, 2016) 9

Press Release, *Setting a New Standard: Commissioner Lara Launches Inaugural Insurance Diversity Index*, California Department of Insurance (Oct. 12, 2023) 9

Promoting the Rule of Law Through Improved Agency Guidance Documents, 84 Fed. Reg. 55,235 (Oct. 15, 2019) 11

Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, 84 Fed. Reg. 55,239 (Oct. 15, 2019) 11

Role of Supervisory Guidance, 86 Fed. Reg. 9,253 (Feb. 12, 2021) 11

Chuck Ross, *Audio Tapes Reveal How Federal Regulators Shut Down Gun Store Owner's Bank Accounts*, Daily Caller (January 14, 2015) 9

Thomas L. Holzman, *Unsafe or Unsound Practices: Is the Current Judicial Interpretation of the Term Unsafe or Unsound?*, 19 Ann. Rev. Banking L. 425 (2000) 13

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae was appointed by Governor Mario Cuomo to serve as the New York Superintendent of Insurance, heading the agency with primary responsibility for regulating New York's insurance industry from 1983 to 1990—before those responsibilities were later transferred to the Department of Financial Services. He has also served as Executive Chairman and Chief Executive Officer of several major insurance companies, and as a partner in the insurance practices of two major international law firms. In those roles, *amicus* has been closely involved in regulatory enforcement actions like those at issue in this case, including actions involving sensitive regulated industries and politically disfavored entities, from both inside and outside government.

Amicus submits this brief because the decision below provides regulators with free reign to coerce entities they regulate into de-insuring or de-banking groups that a regulator or their boss (such as a governor) disfavors for whatever reason. Although *amicus* does not personally support the National Rifle Association's advocacy, he believes—like the American Civil Liberties Union now representing the NRA—that the threat to free speech at issue here could equally harm groups aligned with his own political views if left unchecked. In light of the Second Circuit's conclusion that the extraordinary actions

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

alleged here cannot plausibly be viewed as anything other than "legitimate enforcement action," *amicus* writes to respectfully disagree.[2]

SUMMARY OF ARGUMENT

The extraordinary pressure that New York's top insurance and financial services regulator allegedly put on regulated firms to cut ties with the National Rifle Association was inappropriate and inconsistent with the normal course of that regulator's duties. Simply put, according to the Second Amended Complaint, the Superintendent used her vast and discretionary powers to impair the financial viability of an entity she and her governor politically disfavored. Those allegations are more than plausible in context and should have survived a motion to dismiss.

The crucial context that the court below failed to adequately appreciate is the regulatory environment in which the Superintendent and firms subject to her regulation operate. Not only does the Superintendent wield immense power, but she does so with immense discretion over whether, when, and how to deploy that power to maximal effect. Equip that immense discretionary power with a highly complex web of rules to police and the unsurprising result is that firms treat their regulator's "encouragements" as edicts.

In that context, the alleged conduct here—if true—not just plausibly but *likely* coerced firms into economically blacklisting the regulator's political

---

[2] The positions taken in this brief are those of the *amicus* in his personal capacity and should not be attributed to any institution with which the *amicus* is or has been affiliated.

target. Given her alleged methods, this was no mere attempt by the Superintendent to advise the entities she regulates on compliance matters—which would have been an entirely legitimate undertaking. This was instead an effort by a regulator to cut off a politically disfavored group's access to basic financial services—services that are essential in today's world. And so far that effort has succeeded. If permitted to continue without accountability, this practice of depriving persons and entities of vital coverages based on politics will grow in frequency and intensity, threatening the stability of both the American economy and democracy.

ARGUMENT

A. Insurance and Financial Services Regulators Wield Immense Power and Exercise Vast Discretion over Regulated Entities Under Highly Complex Regimes.

Insurance and financial services are among the most highly regulated industries in the modern economy. In New York, supervisory and enforcement authority over these industries is consolidated in a single agency, the Department of Financial Services ("DFS"). DFS, in turn, is headed by a single appointee of the Governor, the Superintendent, who enjoys substantial power and discretion to "supervise the business of, and the persons providing, financial products and services, including any persons subject to the provisions of the insurance law and the banking law." N.Y. Fin. Serv. Law § 201(a). This power and discretion necessarily affects the behavior of insurance and other financial services firms.

1. "[I]nsurance may be the most highly regulated industry in the United States." Jay M. Feinman, *The Regulation of Insurance Claim Practices*, 5 U.C. Irvine L. Rev. 1319, 1340 (2015). Unlike other financial services industries, however, insurance "is subject to nearly plenary state regulation." George A. Mocsary, *Administrative Browbeating and Insurance Markets*, 68 Vill. L. Rev. 579, 587 (2023) (explaining that the federal McCarran-Ferguson Act of 1945 gives states primary regulatory authority over insurance). Because federal law effectively "opens the field for 50 more or less different regulatory schemes," it can be "difficult for insurance companies to comply with regulations." Lukas Böffel, *The Influence of Artificial Intelligence and Emerging Technologies on the Regulation of Insurance Companies in the U.S.: An Exemplary Analysis of California's Rate Making Law*, 20 Berkeley Bus. L.J. 254, 259, 262 (2023).

New York, in particular, subjects its insurance industry to intense regulation. *See, e.g.*, *Matter of Thorndike*, 127 N.Y.S.3d 213, 217 (N.Y. App. Div. 2020) (recognizing the "highly regulated nature" of the insurance industry); *Belth v. N.Y. State Dep't of Ins.*, 733 N.Y.S.2d 833, 834 (N.Y. Sup. Ct. 2001) ("The insurance industry is highly regulated."); *City of New York v. Britestarr Homes, Inc.*, 570 N.Y.S.2d 882, 886 (N.Y. Sup. Ct. 1991) ("highly regulated insurance industry").

DFS is the agency charged with "the enforcement of the [State's] insurance . . . laws." N.Y. Fin. Serv. Law § 102. And the responsibility for carrying out that mandate rests with a single individual: the Superintendent of DFS. *See N.Y. State Land Title Assoc., Inc. v. N.Y. State Dep't of Fin. Servs.*, 92

N.Y.S.3d 49, 54 (N.Y. App. Div. 2019) ("Responsibility for administering the Insurance Law rests with the Superintendent of DFS, who has broad power to interpret, clarify, and implement the legislative policy." (quotations omitted)). Indeed, the Superintendent of DFS is the "sole regulator" of insurance in the State and holds "broad regulatory powers over the sale of insurance policies," as well as "broad disciplinary powers." *Excess Line Ass'n of New York v. Waldorf & Assocs.*, 965 N.Y.S.2d 831, 840–41 (N.Y. Sup. Ct. 2013). State courts, moreover, are highly deferential to the Superintendent: Unless contrary to the "clear wording" of a statute, the Superintendent's interpretation and implementation of legislative policy "will be upheld in deference to her special competence and expertise with respect to the insurance industry." *N.Y. State Land Title Assoc.*, 92 N.Y.S.3d at 54 (quoting *Matter of Med. Soc'y of N.Y. v. Serio*, 800 N.E.2d 728, 733 (N.Y. 2003)); *see also Indep. Ins. Agents and Brokers of New York, Inc. v. N.Y. State Dep't of Fin. Servs.*, 200 N.E.3d 537, 549 (N.Y. 2022) (observing that this expertise is "necessary to flesh out details of the broadly stated legislative policies" (quotations omitted)).

The Superintendent thus acts with significant regulatory authority and discretion. For example, no entity may enter the insurance business in New York unless it obtains a license from the Superintendent. N.Y. Ins. Law § 1102(a), (d). The Superintendent, moreover, has broad discretion to grant, renew, or deny such a license: "The superintendent may refuse to issue or renew any such license if in h[er] judgment such refusal will best promote the interests of the people of this state." *Id.* § 1102(d). Once licensed,

insurance companies are then subject to continuing examination "as often as [the Superintendent] deems it expedient for the protection of the interests of the people of th[e] state." *Id.* § 309(a). The Superintendent also controls, at her discretion, the approval of insurance rates, policy forms, and affiliate activities. *Id.* §§ 2101–2140 (affiliate activities), 2303 (rates), 3202 (policy forms). And as the facts of this case demonstrate, the Superintendent even polices the highly subjective and nebulous category of "reputational risk."

Companies operating in this complex regulatory environment thus depend on maintaining the Superintendent's good will. Otherwise, a disfavored company may experience a higher degree of regulatory oversight.

Moreover, the superintendent has enforcement discretion when dealing with a company that violated insurance law or regulations. She may choose to initiate a civil enforcement action or criminal investigation, or even refer the matter to the state attorney general. *See, e.g.*, N.Y. Fin. Serv. Law §§ 201, 301; N.Y. Ins. Law § 109(d). Violations may also carry large fines, as the facts of this case again demonstrate. N.Y. Ins. Law § 109(c). Or the Superintendent may use her discretion to prioritize other matters.

In short, federal law grants near plenary authority to states to regulate the insurance industry, and New York in turn grants near plenary authority over such regulation to the Superintendent of DFS. Given the scope of that authority, insurance companies naturally give the Superintendent great deference.

2. The financial services industry more broadly is likewise subject to intense and intricate regulation. In New York, the Superintendent of DFS enjoys significant authority and discretion over the regulation of financial services. She is empowered, for example, to take any action she "believes necessary to," among other goals: "ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services"; "protect users of financial products and services from financially impaired or insolvent providers of such services"; or "educate and protect users of financial products and services and ensure that users are provided with timely and understandable information to make responsible decisions about financial products and services." N.Y. Fin. Serv. Law § 201(b).

In executing these powers, the Superintendent can "investigate and examine all records of banking institutions at any time." *Brantley v. Mun. Credit Union*, No. 19 Civ. 10994 (KPF), 2021 WL 981334, at *2 (S.D.N.Y. Mar. 16, 2021). If a bank wishes to change location or open a branch, it must obtain approval from the Superintendent, N.Y. Banking Law §§ 28, 29; and she may altogether reject a request to form a bank in New York if she believes the bank would not promote the "public convenience and advantage," *id.* § 24. The Superintendent may also, "in h[er] discretion, forthwith take possession of the business and property of any banking organization" if she finds that the organization "[h]as violated any law; [i]s conducting its business in an unauthorized or unsafe manner; [i]s in an unsound or unsafe condition to transact its business; [or c]annot with safety and expediency continue business[.]" *Id.* § 606(1)(a)–(d).

Financial services firms in New York thus operate under the auspices of a formidable regulator with sweeping power over the survival of their businesses. And they do so in an environment where "it is practically impossible . . . to comply with all legislative rules all the time." Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 Yale J. On Reg. 165, 194 (2019). So, like insurance companies, other financial services firms have a strong incentive to remain in the Superintendent's good graces.

B. Insurance and Financial Services Regulators Act with the Awareness that the Entities They Regulate Are Highly Sensitive to Regulatory Guidance and Influence.

Given the interplay between the broad power of regulators and the complexity of the regulatory regimes, insurance and financial services firms often feel pressure to comply with nominally non-binding guidance. That guidance should only be used to aid the industry in understanding ambiguous statutory standards, changing enforcement priorities, or other legitimate regulatory aims. But practically speaking, it carries significant weight for firms. Regulators understand this dynamic. That is why they frequently seize the opportunity to achieve through informal guidance what likely cannot be achieved through more formal actions like legislation.

In recent years, the California Insurance Commissioner has issued press releases calling on insurance companies to further partisan political ends. In one, the Commissioner strongly encouraged

insurance companies to embrace "diversity, equity, and inclusion." Press Release, *Setting a New Standard: Commissioner Lara Launches Inaugural Insurance Diversity Index*, California Department of Insurance (Oct. 12, 2023), https://perma.cc/B6UN-4QJY. In another, the Commissioner called on companies to divest from the coal industry because such investments are, in his view, too risky. Press Release, *California Insurance Commissioner Asks Insurance Industry to Divest from Coal*, California Department of Insurance (Jan. 27, 2016), https://perma.cc/K3RQ-VWGH.

Banks, too, have faced informal but impactful regulatory pressure. *See, e.g.*, *The Department of Justice's "Operation Choke Point": Hearing before the Subcomm. on Oversight & Investigation of the H. Comm. on Fin. Servs.*, 113th Cong. 13 at 29–30 (2014), https://perma.cc/JF5D-XFZG (transcript of Rep. Andy Barr reading correspondence from a landowner whose bank, citing regulatory pressure over reputational risk, was closing an account because the landowner leased property to a surface coal mine); Chuck Ross, *Audio Tapes Reveal How Federal Regulators Shut Down Gun Store Owner's Bank Accounts*, Daily Caller (January 14, 2015), https://perma.cc/A3SZ-KP9Y (detailing how the National Credit Union Administration forced a credit union to close a firearms dealer's account).

In New York, practically speaking, regulators know that companies regard any suggestion or guidance by the Superintendent as a directive. So when the Superintendent allegedly pressures insurance companies and banks to drop a politically disfavored

group, she does so knowing full well that these tactics can be effective.

1. Regulators are well-aware of the "coercive power of guidance." Julie Andersen Hill, *Regulating Bank Reputation Risk*, 54 Ga. L. Rev. 523, 580 (2020). In fact, the secret has been out for some time. *See, e.g.*, *id.* at 582 (noting that "reputation risk guidance serves as an informal enforcement measure"); Parrillo, *supra*, at 174 ("Regulated parties often face overwhelming practical pressure to follow what a guidance document 'suggests.'); Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. Pitt. L. Rev. 405, 420–21 (1996) (observing that "regulatory agencies can probably be equally effective through threats of prosecution, even raised eyebrows," as they can be through formal regulation).

Indeed, during *amicus*'s seven-year tenure as Superintendent of Insurance, he never issued guidance without first undergoing a rigorous internal process that involved the Insurance Department's general counsel. The reason for this effort was simple: *Amicus* knew that insurance companies were likely to regard nominally non-binding guidance as compulsory. He knew that any suggestion or "guidance" that he gave would likely be regarded as a directive.

Along these lines, the Administrative Conference of the United States ("ACUS") has recommended that regulators take steps to ensure clarity about the legal effect of guidance precisely because "modern regulatory schemes often have structural features that tend to lead regulated parties to follow the policy

statement's approach even if in theory they might be legally free to choose a different course." ACUS, Recommendation 2017-5, *Agency Guidance Through Policy Statements* (Dec. 14, 2017), https://perma.cc/CG6Y-ND72. Prior federal administrations have also sought to curb improper guidance. *See, e.g.*, *Promoting the Rule of Law Through Improved Agency Guidance Documents*, 84 Fed. Reg. 55,235 (Oct. 15, 2019), https://perma.cc/T2Y7-9TG5; *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, 84 Fed. Reg. 55,239 (Oct. 15, 2019), https://perma.cc/Q38Z-YHDA; *Role of Supervisory Guidance*, 86 Fed. Reg. 9,253 (February 12, 2021), https://perma.cc/S758-X5GX.

Professor Nicholas Parrillo has explained why parties would comply with agency guidance absent a legal obligation to do so. Based in part on candid admissions by former regulators themselves, he observes that the ability of regulators to impose their will through guidance and other informal measures "can be predicted on the basis of certain organizational and legal factors that are present in some regulatory schemes but not others." Parrillo, *supra*, at 174.

For example, regulatory regimes that include pre-approval requirements—such as a requirement that regulated parties obtain a license from an agency to operate—create strong incentives to follow that agency's guidance. *Id.* at 184. So too do regimes in which regulated parties have a strong interest in "maintaining a good relationship with the agency." *Id.* at 191. Such relationships are especially important "when a regulated party is monitored by an agency

continuously and must interact with it repeatedly under a regulatory scheme" where perfect compliance is hard to achieve. *Id.* In these cases, a party that has "buil[t] up goodwill and mutual trust with the agency or its officials" by following guidance may receive the benefit of the doubt when it falls out of compliance in some other way. *Id.* at 192. And, of course, parties have a strong incentive to follow agency guidance when the regulator has the power to "make life miserable" for those who do not comply. *Id.* at 195. Or even end a particular business altogether.

These features are present in New York's regulatory scheme for insurance. *See supra* Part A.1. Simply put, insurers must appreciate the risk that they will eventually engage in conduct that is arguably noncompliant with relevant law, and if that happens, they would benefit from having a reputation with the Superintendent as a good-faith actor. Parrillo, *supra*, at 191 (stressing importance of "maintaining a good relationship with" regulators in the context of complicated regulatory schemes because "the regulated party will inevitably engage in some conduct that is arguably noncompliant with the relevant statutes or legislative rules").

This same dynamic makes "many parties . . . reluctant to institute litigation against government agencies because of a fear of reprisal." Michael Asimow, Gabriel Bocksang Hola, Marie Cirotteau, Yoav Dotan, & Thomas Perroud, *Between the Agency and the Court: Ex Ante Review of Regulations*, 68 Am. J. Comp. L. 332, 359 (2020) (noting lack of effective judicial review over agency action in this area). That is because "[r]egulated parties often believe it is vital to maintain an agency's trust and confidence in order

to diminish the risk of close regulatory scrutiny and to receive the benefit of the doubt when the agency discovers noncompliant conduct." *Id.* What is more, "[t]his concern seems magnified at state or local levels, where the regulators and regulatees are in particularly close and constant contact." *Id.* This reality underscores the need for this Court to provide clarity while it has the opportunity.

2. It is likewise common knowledge that the financial services industry more broadly is particularly sensitive to regulatory guidance. For example, banks lean heavily on guidance for understanding the capacious "safety and soundness" standard, which is the basis for a significant amount of bank supervision. *See* Thomas L. Holzman, *Unsafe or Unsound Practices: Is the Current Judicial Interpretation of the Term Unsafe or Unsound?*, 19 Ann. Rev. Banking L. 425, 425 (2000) (noting that the term "exerts a powerful influence over the fate of financial institutions"). And "banks are a prime example of regulated parties who are invested in good relationships with agencies and thus are sensitive to guidance." Parrillo, *supra*, at 192. That is because banks, like insurance companies, have "intense and ongoing interactions with their regulators." Hill, *supra*, at 580 (quotations omitted). Accordingly, "a bank's relationship to its regulators [i]s fundamental to its business and [i]s like that of a child to its parents, right down to the point that parents can often get their children to change behavior by informal means." Parillo, *supra*, at 195.

Regulators themselves have recognized this dynamic. As a former Federal Reserve official put it, "nothing else matters" if a bank loses the trust of its

regulators, so a "bank should follow [guidance] or have a compelling reason for not doing so." *Id.* at 194. Former Consumer Financial Protection Bureau ("CFPB") officials have echoed this view. According to one former CFPB regulator, banks should comply with CFPB guidance "to avoid any activity that would invite agency scrutiny" and to "avoid the costs of undergoing an additional examination, or worse, the costs of undergoing an investigation." *Id.*

Moreover, "banks operate in a regulatory system where perfect compliance is unattainable." Hill, *supra*, at 581. So a consistent effort to comply with non-binding guidance may cause regulators to overlook some true infractions—or at the very least chalk them up as good-faith mistakes. Parrillo, *supra*, at 191.

C. The Actions Alleged Here Crossed the Line Between Encouragement and Coercion.

The conduct alleged in the Second Amended Complaint must be viewed in light of these structural features and practical realities. As the Second Circuit acknowledged, this broader "context" is crucial. Pet. App. 31. So too is "common sense." *Id.* 20–21 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 663–64 (2009)). But the opinion below falls short on both scores.

In context, the alleged conduct more than plausibly crossed the line between encouragement and coercion. Indeed, in *amicus*'s professional experience and opinion, the alleged conduct fell outside the ordinary course for a regulator and bore no significant connection to the Superintendent's official responsibilities. Simply put, the alleged conduct *likely* coerced firms to blacklist a politically disfavored entity

from essential financial services. And if courts allow this dangerous precedent to stand, it will be hard to get the genie back in the bottle. What New York does to the NRA today, another state may do to Planned Parenthood tomorrow. And on the same purported grounds: the need to manage "reputational risk."

Finally, allowing discovery will not interfere with the legitimate regulation of the insurance and financial services markets. On the contrary, if regulators can impose their (or their political boss's) political beliefs by depriving disfavored persons and entities of insurance—thereby crippling their financial viability—then insurance and financial markets will suffer significant and chronic disruption. So too will our democracy.

1. As explained, given certain structural features of the industry, insurers are strongly incentivized to heed regulators' perceived wishes—even when they are not legally compelled to do so. If they do not, then all of a sudden a politically motivated regulator might hold up much-needed regulatory approvals; order a market-conduct exam; or turn minor technical violations into enforcement priorities. In this context, the line between encouragement and coercion is very fine, for insurers have a strong incentive to follow even the most anodyne agency guidance. As others have put it, "even raised eyebrows" from a regulator can be enough to ensure compliance. Mashaw, *supra*, at 420–21.

And the allegations here involve far more than raised eyebrows. Insurers were allegedly warned that doing business with a certain politically disfavored group posed "reputational risk"—an inherently vague

concept that has scant basis in legitimate risk management and that empowers regulators to lock unpopular groups out of markets. *See* Pet. App. 248. Some insurers that formerly served the disfavored entity allegedly were forced to sign broad consent orders that carried multi-million dollar penalties. *See id.* at 225, 305–07. And press releases, regulatory guidance, and contemporaneous investigations and penalties were allegedly used to pressure companies to cut ties. *Id.* at 244, 246, 305–07. In particular, the guidance's admonition to take "prompt actions" likely would be interpreted as a directive by firms. *Id.* at 248, 251. So too would the warnings of "reputational risk," which clearly implied that failure to cut ties with the disfavored group might violate an insurer's fiscal obligations. *Id.* Historically, insurers have not regarded a customer's political views as a "risk" to be managed. Now, if the conduct alleged here becomes the norm, they may have to.

2. For similar reasons, the alleged conduct was plausibly coercive against financial services firms. As explained above, banks feel intense pressure to comply with agency guidance. *See supra* Part B.2.; Parrillo, *supra*, at 191–95 (documenting results of interviews with bank regulators and attorneys). This "coercive power of guidance" allows regulators to wield their broad and discretionary authorities effectually, Hill, *supra*, at 583, whether for good or for ill.

And the Superintendent wielded just as much authority over financial services firms as she did over insurers. So these actors also had the strongest incentives to comply with her wishes, especially when couched in the manner alleged here (*e.g.*, as "reputational risk"). In this context, the alleged

conduct more than plausibly crossed the line separating encouragement from coercion.

3. In sum, the Superintendent of DFS allegedly used a variety of tools at her disposal—up to and including legal sanction—to pressure insurance and financial services companies operating in New York to sever ties with a group she and her governor disfavors politically. If the allegations here are true (as courts must presume them to be at this stage), then the Superintendent employed tactics she believed would force obedience—and she got it.

To be sure, there are bound to be close cases where some legitimate forms of encouragement or persuasion can feel unduly coercive. But this is not one of them. In *amicus*'s experience, the alleged conduct is far removed from how a regulator legitimately gives "fair legal advice" on "legal rights and liabilities," which is the chief purpose of guidance. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 72 (1963). Instead, the conduct bears the hallmarks of an orchestrated effort to use regulatory power to punish a disfavored group. Take, for example, the consent decrees that prohibit certain insurers from *ever* offering affinity insurance programs with the disfavored group again—even if such coverage would be perfectly lawful. Pet. App. 225. That ban serves no legitimate regulatory purpose. Just the opposite—it harms insurers, it harms the disfavored group, and it harms individual consumers by depriving them of access to essential insurance coverages.

4. Finally, permitting discovery into the allegations here will not interfere with legitimate regulation. The alleged conduct fell far outside the ordinary course for

the Superintendent of DFS—and for a regulator more generally. This Court should not hesitate to hold that the alleged conduct plausibly constituted coercion. Such a conclusion is necessary to avoid crippling instability in insurance and financial markets. In a world where the changing tides of political power or the ebb and flow of a single official's favor can bring about sea changes in who key industries can and cannot do business with, no one's boat is safe.

Although politicized attempts by regulators to "de-insure" or "de-bank" disfavored groups are becoming more and more common, they represent an extreme departure from a regulator's official responsibilities and a threat to both our economy and our democracy. Firms, markets, and the public all depend on the freedom to speak without fear of government retaliation. They trust that regulators will not use their vast power and discretion to punish political foes. The allegations here support, at the very least, a plausible inference that the Superintendent of DFS violated that trust.

CONCLUSION

The judgment below should be reversed.

January 16, 2023 Respectfully submitted,

BRETT A. SHUMATE
JONATHAN V. GOULD
CHARLES E.T. ROBERTS
Counsel of Record
RILEY W. WALTERS
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
cetroberts@jonesday.com

Counsel for Amicus Curiae