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 Petition For A Writ of Certiorari To The
United States Court of Appeals For The Second Circuit

BRIEF FOR FORMER EXECUTIVE OFFICERS OF THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

DANIEL S. ALTER, ESQ.
ABRAMS FENSTERMAN, LLP
Attorneys for Amici Curiae
81 Main Street, Suite 400
White Plains, New York 10601
(914) 607-7010
dalter@abramslaw.com

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IDENTITITES AND INTEREST OF *AMICI CURIAE*[1]

Amici are former executive officers of the New York State Department of Financial Services (DFS). They include **CELESTE KOELEVELD, ESQ**., former DFS General Counsel; **HEATHER MCARN**, **ESQ.**, former DFS Chief of Staff; **MATTHEW L. LEVINE, ESQ**., former DFS Executive Deputy Superintendent for Enforcement; **NANCY RUSKIN, ESQ**., former DFS Executive Deputy Superintendent for Financial Frauds & Consumer Protection; **JEAN T. WALSH, ESQ.**, former DFS Executive Deputy Superintendent for Banking; **TROY OECHSNER, ESQ.** former DFS Acting Executive Deputy and Deputy Superintendent for Insurance; **MEGAN PRENDERGAST MILLARD**, **ESQ.**, Former DFS Deputy Superintendent for Enforcement; **STEPHEN DOODY, ESQ.** former DFS Deputy Superintendent for Insurance, **JAMES REGALBUTO**, former DFS Deputy Superintendent for Insurance; **RUTH CORDNER**, former DFS Deputy Superintendent for Banking; **ROBERT DONOVAN**, former DFS Deputy Superintendent for Banking & Capital Markets; and **MARK SILVER, ESQ**., former DFS Special Assistant to the Superintendent.

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[1] Pursuant to Rule 37, *amici* affirm that no counsel for any party authored this brief in whole or in part and that no individuals other than amici or their counsel contributed money to fund the brief's preparation or submission.

Collectively, *amici* have served DFS and the people of New York State under multiple superintendents, supervising the work of the agency's insurance, banking, capital markets, consumer protection, investigations and enforcement, and legal divisions. They are experts in departmental operations across the agency's regulatory portfolio. And they are well-schooled in the dynamics of prudential supervision.

Uniquely important here, *amici* interacted regularly (if not daily) with numerous financial service providers licensed by DFS. They are intimately familiar with the subtle relationship between regulators and regulated entities and the constructive reciprocity often involved in their dealings. Because it is a collaborative effort, with important public and private financial interests always at play and sometimes in tension, the bond between DFS and its regulated entities must be flexible within legal boundaries. As a purely practical matter, the alternatives are simply not workable.

Petitioner National Rifle Association of America (Petitioner) has presented this Court with a stilted, two-dimensional view of the supervisory dynamic at play in this case. *Amici* are deeply concerned that the Court's adoption of that view could result in a First Amendment standard for "coercion" that would seriously and needlessly hamstring a regulator's ability to protect the safety and soundness of financial institutions. *Amici* therefore believe that their first-hand, real-world experience in overseeing DFS licensees will assist the Court in deciding this case.

SUMMARY OF ARGUMENT

Invoking this Court's decision in *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), Petitioner seeks to hold respondent, former DFS superintendent Maria Vullo (Superintendent), liable in damages for violating the group's First Amendment free speech rights. Petitioner alleges that the Superintendent tried to retaliate against the organization for its political advocacy by "dragooning the private financial entities she regulated to blacklist the NRA and other gun promotion groups." Petitioner's Brief (Pet. Br.) at 20. Pointing to: (1) two industry guidance letters by which the Superintendent urged New York State licensed insurance companies and banks to consider any business association with Petitioner; (2) consent orders that DFS entered against state-licensed, global insurance entities for having conducted indisputably *illegal* business with *Petitioner*; and (3) instances in which financial service providers licensed by DFS supposedly ended their business dealings with Petitioner for fear of governmental harassment, Petitioner argues that the Superintendent coerced New York licensees to "cut ties with the NRA or else." *Id*. at 18.

Or else, what? According to Petitioner, the Superintendent's actions carried the implicit threat of license revocation or multi-million-dollar fines for regulated entities that did not follow her lead on gun control. But from a purely practical perspective, the argument is ludicrous. Although financial regulators are generally invested with considerable authority and discretion, they are institutionally constrained from pressuring licensees to take politically or ideologically based actions intended to affect *non-industry* related interests. That observation is especially accurate when those licensees are multinational Goliaths in the insurance and banking sectors.

Petitioner offers this Court a test for determining whether a government speaker has crossed the line between permissible persuasion and unlawful coercion. Under its proposed standard, government officials exceed that boundary "when they engage in speech or conduct that a reasonable *recipient* would understand as threatening official retribution." Pet. Br. at 16 (emphasis added). *Amici* are deeply concerned, however, that Petitioner's suggested liability trigger is too loose. Not all recipients are alike, and an indiscriminating approach to regulated entities that fails to account for their relative industry positions and strengths could seriously disrupt the necessary (and rather ordinary) give and take in a supervisory relationship.

Doubtless, this case will have a significant impact on regulatory efficacy because an unnecessarily lax constitutional claim for coercion could significantly interfere with the legitimate missions of numerous government agencies. The overhanging threat of an implausible yet nonetheless viable cause of action can only deter appropriate supervision of financial service providers. To avoid unwarranted interference with regulatory oversight, while faithfully protecting free expression from governmental censorship, this Court must, once again, use "sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Under any effective standard crafted with those tools, the Second Circuit's decision below should be affirmed. Petitioner's allegations of coercive conduct are factually unsupported, and their legal arguments bottom on overt misrepresentations. Indeed, the extent to which Petitioner distorts the written record betrays the implausibility of Petitioner's narrative. Its attempt to use a universal and valid business concern to concoct a so-called heckler's veto, and thereby transform ordinary industry guidance letters into alleged regulatory ransom notes, is belied by the very documents upon which Petitioner relies. And once those allegations are properly stripped of their faux-factual veneer, Petitioner cannot "nudge" its censorship claim "across the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009) (cleaned up). It should fail as a matter of law.

ARGUMENT

I. Any First Amendment test for alleged informal regulatory coercion should account for practical considerations, such as the political and financial strength of a subject regulated entity.

Petitioner paints a cartoon image of the Superintendent as "the 'sheriff of Wall Street,' overseeing thousands of banks and companies with trillions of dollars at stake." Pet. Br. at, 3, 17. One can just imagine her with a ten-gallon hat, chaps, and *no* six shooters at her sides instilling fear and awe among the regulated town folk. In Petitioner's imagined world, "Vullo's power as Superintendent of DFS and the value of continuing to operate in good standing in the nation's financial capital . . . gave [her] outsized influence over the banks and insurers whom she urged to cut ties with the NRA." *Id.* Evidently, that dubious assumption provides the framework for Petitioner's entire censorship claim. "The more power an official has over those she addresses," Petitioner contends, "the more likely that message will be coercive." *Id.* at 28.

Although it tries to fall back on commonsense, the argument is somewhat naïve. As Justice Thomas has aptly observed,

> [a] particular official, to be sure, may wield power in such a way as to coerce unlawful [conduct] even in the absence of any explicit demand or threat. But it ignores reality to assert that *every* public official, in *every* context, automatically exerts coercive influence on others by virtue of his office.

Evans v. United States, 504 U.S. 255, 290 (1992) (Thomas, *J.*, dissenting (emphasis in original)). By way of illustration, Justice Thomas made a nuanced and critical point that certainly applies to power dynamics affecting regulatory relationships. "If the chairman of General Motors meets with a local court clerk," he wrote, "whatever implicit coercive pressures exist will surely not emanate from the clerk." *Id.*

Truth be told, a regulator's ability to leverage her authority coercively to achieve an illegitimate aim, *i.e.,* a goal that is beyond her statutory permit, is far more difficult than Petitioner supposes. *See* Pet. Br. at 38 (arguing "[r]egulated banks and insurance companies are highly attuned to the numerous ways that a regulator can make life difficult if they do not heed the official's will"). Admittedly, the superintendent would carry considerably more sway in meetings with insurance and banking executives than would a "local court clerk," but the fundamental lesson still applies. Regulatory pressure flows both ways.

As one legal scholar has argued, regulated entities, especially economically and politically powerful ones, manage supervisory intimidation through a policy of "mutually assured destruction" – much like the policy historically employed by global superpowers to deter nuclear warfare. *See* Brigham Daniels, *When Agencies Go Nuclear: A Game Theoretic Approach to the Biggest Sticks in an Agency's Arsenal*, 80 Geo. Wash. L. Rev. 442, 499 (2012). In that scenario, licensees facing devasting threats from regulatory agencies may be unable to respond with "mutual and identical threats," but they have their "own sort of recourse to retaliation." *Id.* The retribution unleashed on an agency by a threatened regulated entity has included hostile public relations campaigns, which use aggressive advertising and lobbying strategies to yield toxic political fall-out. *See id.* at 500-504. Aware of those potential consequences, regulators usually think twice before pressing the button – and properly so.[2]

[2] The idea of an inherently coercive interplay between regulators and the entities they supervise, which Petitioner adopts as the baseline behavioral dynamic, fails to account for the equally troubling concept of "regulatory capture." The notion of regulatory capture "refers to the tendency for regulators to take the mindset of an interest group either because of the influence of the interest group or political interference." Therese M. Vaughan, *The Economic Crisis and Lessons from (and for) U.S. Insurance Regulation*, Journal of Insurance Regulation (2009), at 7. Because Petitioner's one-dimensional model of regulatory relations ignores that counterforce, it is inadequate. A careful agency must continually navigate between perceived coercion and capture

All this is to say that a First Amendment claim for regulatory coercion, such as Petitioner's, must at least set forth practical and *audience*-specific facts to state an actionable violation. In other words, those allegations must provide a factual basis from which a court – "draw[ing] on its judicial experience and common sense" – can infer that a *particular* regulated entity reasonably felt threatened. *Iqbal*, 556 U.S. at 679. Contrary to Petitioner's argument, the legitimacy of a DFS superintendent's important and at times contentious work cannot be judged by reading "tea leaves." Pet. Br. at 31. That approach is a fail-safe recipe for abusive litigation and supervisory disfunction.

The more tailored analysis that *amici* suggest fits comfortably within our First Amendment tradition. It is "grounded in our long-standing recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office." *Connick v. Myers*, 461 U.S. 138, 154 (1983). And in keeping with those goals, the Court has instructed that legal standards governing speech must have "the flexibility necessary to allow government to respond to very serious practical

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by managing "a political process whereby political actors seek to allocate the powers of the state for their own benefit." Kenneth J. Meir, *The Politics of Insurance Regulation*, 58 Journal of Risk and Insurance 700, 700 (1991).

problems without sacrificing the free exchange of ideas the First Amendment is designed to protect." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996) (plurality).

Each day, the DFS superintendent must grapple with the rough and tumble of the New York financial markets. She supervises numerous muscular, mega-licensees in the financial services sector – such as Chubb, Lloyd's of London, AIG, MetLife, and Lockton – whose driving profit motive is antithetical to the reflexive regulatory capitulation that Petitioner ascribes to those firms. She also supervises more modest industry participants that are often less assertive than the larger firms. Those are practical distinctions with practical consequences that – within perfectly legal bounds – shape regulatory relationships.

Keeping such key differences in mind, a superintendent must have latitude to interact with each regulated entity, in context, "without fear that these differences will lead to liability." *Waters v. Churchill*, 511 U.S. 661, 677 (1994) (plurality). Her effectiveness as a law-abiding regulator depends on it. If, instead, a *third party* could too easily challenge administrative consent orders as unconstitutionally coercive because they supposedly target the *third party's* unrelated political views, no regulator could do her job.

A suitably pragmatic standard for this case is rooted in *Bantam Books*, itself. There, the Court concluded that notices issued by a state morals commission to a large book distributor warning against the latter's dissemination of claimed indecent materials (followed by police spot checks on the distributor's response) "was reasonably understood . . . by the *distributor*" to be a "thinly veiled threat[]" of criminal prosecution. 372 U.S. at 68 (emphasis added). Notably, the distributor was "sophisticated" and a "substantial business concern[]." *Id.* at 79 & n.3 (Harlan, *J.*, dissenting). And, thus, this Court's inquiry fundamentally turned on the distributor's relative susceptibility to the commission's not-so-subtle intimidation.

The facts in *Bantam Books* were clear and unequivocal. The commission's actions were plainly coercive, even to "sophisticated" and "substantial business concerns," *Bantam Books*, 372 U.S. at 79 & n.3 (Harlan, *J.*, dissenting), and the contemporaneous history wholly supports that conclusion, *see id.* at 67 n.8 (listing numerous cases nationwide involving "[t]hreats of prosecution or license revocation, or listings or notifications of supposedly obscene or objectionable publications or motion pictures, on the part of chiefs of police or prosecutors"). In the 1950s, "any depiction of sex in books, movies, or magazines was tightly constrained." Geoffrey R. Stone, *Sex and the First Amendment: The Long and Winding History of Obscenity Law*, 17 First Amend. L. Rev. 134, 143 (Fall 2019); *see also* Kendra Albert, *Imagine a Community: Obscenity's History and Moderating Speech Online*, 25 Yale J.L. & Tech. 59, 62 (Special

Issue 2023) ("In the 1950s, state level censorship varied wildly, with a film censored in Kansas for its inclusion of language like the word 'virgin.'"). Consequently, even seasoned publishers had every reason to take the commission's aggressive demands very seriously.

Today, global insurers and their brokers are not so skittish. In addition to having tremendous resources with which to push back against an overreaching regulator,[3] those companies are secure in knowing that, except in situations involving the most serious violations of law and/or substantial danger to public welfare, it would be wildly irresponsible for a DFS superintendent to revoke their New York business licenses. And even in those extreme circumstances, a superintendent can only

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[3] For example, in 2023, Lockton – one of the world's largest insurance brokers – reported more than $3B in revenue, *see* Lockton Companies, available at https://global.lockton.com/us/en/news-insights/private-owners hip-long-term startegy-drivesdouble-digit-growth-for-lockton, and insurer Chubb Ltd. reported more than $225B in assets and $57.5B in gross premiums. *See* Chubb Insurance, available at http:// about.chubb.com/#:~:text=Chubb%20has%2 0more%20%than %20%24225,A%2B%2B%20from%20A.M.%20Best. In 2022, Lloyds of London reported assets exceeding $50B and $59B in gross premiums, *see* Lloyd's of London 2022 Annual Report, available at https://www.lloyds.com/ about lloyds/investor-relations/financial-performance/ financi al-results/full-year-results-2022, and MetLife Inc. and American International Group, Inc. reported assets exceeding $600B and $500B, respectively, *see* Reinsurance News, available at https://www.reinsurancene.ws/worlds-largest-insurance-companies/.

revoke a license or impose large fines if a licensee has violated a specific law *and* has received a due process hearing. Moreover, prevailing industry conditions are reportedly such that "[t]he exit of one or even multiple national carriers with a large book of business [in New York] would be highly disruptive, and there is a serious question if business could be absorbed by other carriers in the market."[4] With that procedural and practical knowledge squarely in mind, any reasonable DFS licensee would have understood the Superintendent's claimed conduct here as far less troubling than the conclusion drawn by the distributor in *Bantam Books*.

II. Petitioner's allegations of supposedly coercive conduct by the Superintendent should not state a First Amendment claim for relief.

Relying on: (1) two industry guidance letters (one to DFS regulated insurance entities and the other to DFS regulated banking entities) that urged licensees to evaluate their business associations with Petitioner after the Marjorie Stone Douglas Highschool shootings in Parkland, Florida; (2)

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[4] Memorandum from Independent Insurance Agents & Brokers of America, Inc. of New York (a/k/a Big I New York) to Adrienne Harris, Superintendent, NYDFS (October 2, 2023), *New York's Impending Insurance Crisis*, available at: https;//biginy.org/newsfeed/SiteAssets/Big%201%20NY%20Memo%20to%20NYDFS_New%20York%27s%20Impending%20Insurance% 20Crisis_10.2.23.pdf.

statements that the Superintendent allegedly made to Lloyd's executives regarding her views on gun control and her antipathy for the "pro-gun" lobby; and (3) consent orders that DFS entered into with Lockton, Chubb, and Lloyd's in which those companies were fined for serious violations of New York insurance law, Petitioner mounted a First Amendment censorship-by-coercion attack against the Superintendent. *See* Pet. Br. at 32-35. But as the Second Circuit held, the Superintendent's alleged actions were not coercive to a reasonable, industry-leading insurance broker or underwriter. Pet. App. at 5. In reviewing that conclusion, this Court "must consider the complaint in its entirety, as well as other sources courts examine when ruling on Rule 12(b)(6) motions to dismiss, in particular documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Those informational sources clearly show that Petitioner's allegations of coercion are fatally implausible.

(a) The DFS industry guidance letters were not unlawfully coercive.

On April 19, 2017, in the wake of the Marjorie Stone Douglas Highschool massacre, the Superintendent issued guidance letters to DFS-regulated insurance and banking entities "encourage[ing] its [regulated entities] to continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations." Pet. App. 248, 251. The guidance letters further "encourage[d] regulated institutions to review any relationships they have with the NRA or similar gun promotion organizations, and take prompt actions to manag[e] these risks and promote public health and safety." *Id.* The Second Circuit correctly concluded that the agency's statements "cannot reasonably be construed as being threatening or coercive[,]" as they were "written in an even-handed, nonthreatening tone and employed words intended to persuade rather than intimidate." Pet. App. at 27, 29. They contained no prescriptive directives, no mention of legal obligations, and no suggestion of adverse consequences. They are nothing like the *in terrorem* notices involved in *Bantam Books*. *See* 372 U.S. at 62 n.5.

Equally important, and directly contrary to Petitioner's misleading suggestion, those guidance letters provide no legal basis for a DFS regulatory enforcement action against any licensee. *See* Pet. Br. at 30 (suggesting that licensee's disregard of guidance letter could result in "a range of punitive measures, including direct enforcement actions, the appointment of third-party monitors, millions of dollars in fines, and criminal referrals"). They do not even purport to embody an enforceable "rule" under New York State administrative law, much less qualify as one. *See Schwartfigure v. Hartnett*, 83 N.Y.2d 296, 301-02 (1994); *accord Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979) (discussing APA requirements for administrative action to have force and effect of law). Any sophisticated financial services provider knows that DFS guidance letters cannot give rise to enforcement actions.[5]

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[5] DFS guidance letters regularly and expressly state that agency enforcement action is predicated on distinct violations of statutes or regulations. Any industry warning to obey governing law "or else" is unambiguous. *See, e.g.,* Regulation of Association Health Plans, Ins. Cir. Let. No. 10 (2018), July 27, 2018 ("The AHP Rule does not preempt, in whole or in part, New York law or DFS's regulation of health insurance. DFS will continue to enforce State requirements vigorously and to the fullest extent of State law to protect the integrity of New York's health insurance markets and the consumer protections of New York law. DFS is prepared to undertake all additional enforcement actions necessary to protect New Yorkers from the AHP Rule."), available at https://www.dfs.ny.gov/industry_guidance/circular_letters /cl2018_10; Preauthorization for Substance Use Disorder Treatment, Ins. Cir. Let. 13 (2018), September 19, 2018 ("Additionally, the Department will monitor compliance with all SUD treatment coverage requirements, including during market conduct exams. The Department will take action against an issuer for any failure to adhere to all statutory and regulatory requirements for SUD treatment coverage."), available at https://www.dfs.ny.gov/industry_guidance /circular_letters/cl2018_13; Limited Benefits Health Insurance Policies or Contracts, Ins. Cir. Let. 14 (2018) ("The Department will continue to fully enforce State requirements vigorously to ensure that limited benefits health insurance policies or contracts are not offered within New York unless they comply with all statutory and regulatory requirements for comprehensive health insurance coverage. If an issuer has issued such a policy or contract in violation of New York law, the Department expects the issuer to provide coverage in accordance with New York law."), available at https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2018_14.

Petitioner tries to compensate for that inconvenient truth by making bald and wildly untrue assertions. Restating the Superintendent's reference to "reputational risk" over and over like some kind of sorcerer's incantation, Petitioner summons a "heckler's veto" out of thin air. Pet. Br. at 19. Petitioner then insists, repeatedly, that DFS-regulated "[f]irms are obligated to consider 'reputational risk,' and failure to do so adequately *can and has resulted in multi-million-dollar fines*." *Id.* at 18 (emphasis added); *see also id.* at 33 ("reference to 'reputational risk,' in particular, would not be lost on recipients, since failure to consider such risk can lead to multi-million-dollar fines"); 40 ("Guidance Letters' invocation of banks and insurers' legal obligation to consider 'reputational risk' *did* constitute a distinct threat, as failure to adequately manage reputational risk can lead to massive fines" (emphasis in original)). Based on that premise, Petitioner argues that, if tolerated, the agency's concern for "'reputational risk' would give government regulator's free reign to selectively target unpopular speech, effectively letting regulators invoke a heckler's veto over any viewpoint controversial enough to generate 'public backlash.'" *Id.* at 43.[6]

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[6] To be sure, 'reputational risk is neither an alien nor disabling concept to the insurance industry. It has become a quantifiable source of revenue. "Reputational risk insurance, a burgeoning field, does precisely that: insurers and companies agree on a price at which the insurer is willing to sell, and the

It is an interesting theory as told, but the argument is devoid of factual support. Indeed, it is entirely fabricated. Petitioner finds this supposed reputational boogie man lurking in only two DFS consent orders that fined only two banks. Both those consent orders were issued, however, over a year *after* the Superintendent left her position at DFS. Thus, neither one evidences her decried heavy-handedness.

Those consent orders also involved egregious violations of anti-money laundering rules – legal breaches that contributed to the success of multi-billion-dollar frauds and resulted in the banks providing critical services to international criminal enterprises. *See* Pet. Br. 3-4. They were expressly grounded in specific *statutory* and *regulatory* requirements, which give them teeth. As any DFS licensee would immediately take note, the Superintendent's guidance letters here were toothless because there are no specific statutory or regulatory rules regarding regulatory risk.

Nevertheless, Petitioner first describes a $150 million fine that DFS imposed on Deutsche Bank as a "penalty . . . for offering financial services to child trafficker Jeffrey Epstein, citing, *inter alia,* the bank's failure to consider the 'reputational risk'

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company is willing to buy, insurance against reputational harms." Claire A. Hill, *Marshalling Reputation to Minimize Problematic Business Conduct*, 99 B. U. L. Rev. 1193, 1210-11 (2019).

of such transactions." Pet. Br. at 3. But, in that "*inter alia,*" Petitioner strategically hides some very critical facts. For example, Petitioner says nothing about the extremely serious anti-money laundering violations that Deutsche Bank committed in dealing with high-risk Lebanese and Estonian banks. Both those dangerous banking relationships were included in the $150 million fine, but they were completely distinct from Deutsche Bank's Jeffrey Epstein debacle.[7] And regarding the bank's Epstein-related violations, the only mention of reputational risk in the consent order is in reference to the actions of *Deutsche Bank's* own reputational risk committee.[8]

DFS was unambiguous about the reason for taking regulatory action against Deutsche Bank. The consent order definitively explains that the bank's "fundamental failure was that, although [it] properly classified Mr. Epstein as high-risk, [it] failed to scrutinize the activity in his accounts for the kinds of activity that were obviously implicated by Mr. Epstein's past."[9] By failing to perform those

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[7] *See generally* Consent Order, *Deutsche Bank AG*, No. 20200706 (N.Y.S. Dep't of Fin. Servs. July 6, 2020), https://www.dfs.ny.gov/system/files/documents/2020/07/ea20200706_deutsche_bank_consent_order.pdf. (Deutsche Consent Order).

[8] Deutsche Bank Consent Order, ¶¶ 22-23, 29.

[9] Deutsche Bank Consent Order, ¶ 56.

legally required duties, Deutsche Bank did not detect the payments used for Epstein's ongoing child trafficking. DFS did *not* cite reputational risk to justify Deutsche Bank's fine.

Second, Petitioner similarly invokes a DFS consent order entered against Goldman Sachs, Group, Inc. in October 2020, which fined the bank $150 million "for, *among other things*, failing to consider reputational risk from bonds it offered to a Malaysian company that was paying large bribes to the then-President of Malaysia." Pet. Br. at 4 (emphasis added).[10] Facts don't hide any better in English than they do in Latin. Despite Petitioner's spin, DFS actually determined that Goldman Sachs had failed "to provide adequate due diligence and committee review services" for multi-billion-dollar transactions, thereby conducting business "in an unsafe and unsound manner."[11] The agency also found that the bank failed to report employee criminal misconduct.[12] DFS made crystal clear that, although those serious regulatory violations exposed Goldman Sachs "to undue financial and

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[10] Petitioner erroneously states that Goldman Sachs was fined $54.75 million. The amount of the fine was $150 million. *See* Consnet Order at ¶ 32, Goldman Sachs, No. 20201021 (N.Y.S. Dep't Fin. Servs. Oct. 21, 2020), https://www.dfs.ny.gov/system/files/documents /2020/10/ea20201021_goldman_sachs.pdf. (Goldman Sachs Consent Order).

[11] Goldman Sachs Consent Order, ¶ 30.

[12] Goldman Sachs Consent Order, ¶ 31.

reputational risk," reputational exposure was not the actionable harm.

There is no heckler to be found anywhere in either the Deutsche Bank or Goldman Sachs consent order. Petitioner thus failed plausibly to allege that reputational risk has ever served as a pretext for censorship or would be reasonably viewed as such by a DFS regulated entity.[13]

(b) The DFS consent orders do not support a plausible inference of unlawful coercion.

It is a fact that Petitioner, Lockton, Chubb, and Lloyd's all broke the law. Petitioner was conducting insurance business in New York without a license, the type of liability coverage that Petitioner marketed in conjunction with Lockton, Chubb, and Lloyd's was plainly illegal under New York law, and Lockton violated New York's rules for offering insurance coverage in the excess lines market. Each of those parties (including Petitioner) admitted their illegal conduct and voluntarily paid fines. *See* Pet. App. at 252-320; *see also National Rifle Association of America*, No. 2020-0003-C (N.Y.S. Dep't of Fin. Servs. Nov. 13, 2020) (NRA

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[13] Petitioner essentially concedes that point by changing tack at the end of its brief and ultimately acknowledging that the fines imposed on Deutsche Bank and Goldman Sachs by DFS stemmed directly from their serious violations of banking law. *See* Pet. Br. at 44.

Consent Order), https://www.dfs.ny.gov/system/files/documents/2020/11/ea2020118_co_nra_pdf.

Yet, Petitioner tries unpersuasively to use those same consent orders as evidence of third-party coercion. "Just two weeks after issuing the Guidance Letters," Petitioner argues, the Superintendent "rolled out punitive measures against two of the NRA's three principal affinity insurance providers, Lockton and Chubb[,]" and then Lloyd's consent order "followed shortly thereafter." Pet. Br. at 35. According to Petitioner, those "consent orders drove home [the Superintendent's] capacity to inflict regulatory pain on institutions that failed to heed her demands." *Id.* (footnote omitted).

That's an odd twist. Regulated entities generally see consent orders for what they are, *i.e.*, a negotiated admission of liability and calculation of penalty. Here, as in other cases, the DFS consent orders merely communicate the essence of deterrence – that the superintendent can "inflict regulatory pain on institutions" *that break the law*. "As between that obvious alternative explanation . . . and the purposeful, invidious" coercion that Petitioner asks this Court to infer, coercion "is not a plausible conclusion." *Iqbal*, 556 U.S. at 682 (cleaned up).[14]

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[14] As this Court has observed, simply because alleged conduct may be "consistent" with an unlawful scheme, the scheme nevertheless may be implausible when the actions

(c) Petitioner failed to allege that the conversations supposedly had between the Superintendent and Lloyd's executives plausibly caused Lloyd's to discontinue business with Petitioner.

Finally, Petitioner tries to round out its censorship claim by alleging that the Superintendent met with Lloyd's executives in February 2018 and supposedly "presented her views on gun control and her desire to leverage her powers to combat the availability of firearms, including specifically by weaking the NRA." Pet. Br. at 7 (cleaned up). Petitioner then makes a causal leap, insisting that those claimed conversations resulted in *Lloyd's* "cutting all ties with the NRA." *Id.* at 18. Neither the facts as alleged nor the law permit that implausible inference, however.

Something critical happened between the Superintendent's alleged conversations with Lloyd's in February 2018 and Lloyd's business disassociation with Petitioner on May 9, 2018 – *DFS entered a consent order against Lockton on May 2, 2018, requiring the broker to terminate its illegal insurance business with Petitioner*. *See* Pet. App. at 221, 224, 252, 269-72, Joint App. at 19. Because Lockton was selling illegal insurance products in New York in partnership with Lloyd's, Lockton's

are "more likely explained by[] lawful" behavior. *Iqbal*, 556 U.S. at 680.

business discontinuance with Petitioner necessarily terminated Lloyd's business with Petitioner. *See id.* at 271 ¶ 46 (requiring Lockton "to fully cooperate" with Lloyd's "to effect any cancellation" of the illegal insurance products underwritten by Lloyd's).[15] Similarly, when Lockton settled with DFS, the same fate befell Chubb's underwriting relationship with Petitioner. *See id.* Notably, both Chubb and Lloyd's later executed consent orders with DFS admitting their own violations of New York insurance law in underwriting Petitioner's illegal insurance products. *See id.* at 280-320. And even Petitioner signed a consent order with DFS in which it admitted serious violations of New York insurance law and agreed to pay a $2.5 million fine.[16]

Petitioner tries to bolster its censorship argument by incessantly accusing the Superintendent of regulatory overkill. Again and again, Petitioner makes the claim that the DFS

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15 Business between Lloyd's and Petitioner effectively ended months before the Superintendent supposedly spoke with Lloyd's executives in February 2018. In *November 2017*, Lockton voluntarily suspended selling Petitioner's insurance product after DFS started its regulatory investigation. *See* Pet. App. at 98. Again, once Lockton suspended sales, Lloyd's business relationship with Petitioner was necessarily severed. That outcome had nothing to do with *any* alleged coercion (the DFS guidance letters, the Superintendent's alleged discussions with Lloyd's, and the DFS consent orders), as, according to the complaint, none of it had even occurred yet.

16 *See generally* NRA Consent Order.

consent orders with Lockton, Chubb, and Lloyd's all barred those "three long-time NRA insurance partners . . . from entering into even entirely lawful commercial relationships with the NRA ever again." Pet. Br. at 1; *see also id.* at 11, 15, 19, 35, 37, 41, 46. It bears repeating that the frequency with which something is said does not necessarily establish its truth.

Here, Petitioner's argument is demonstrably false. The DFS consent orders bar Lockton, Chubb, and Lloyd's from underwriting or participating in any insurance program with the NRA, *see* Pet. App. at 270 ¶ 43 (Lockton); 289 ¶ 22 (Chubb); 306 ¶ 20 (Lloyd's) because *the NRA is not licensed to conduct insurance business in New York, see id.* at 267 ¶ 34 (explaining Lockton violated New York insurance law by compensating NRA for premiums collected by NRA without a license); *see also* NRA Consent Order ¶ 26 (NRA's admission of violating New York law by conducting unlicensed insurance). Petitioner's own DFS consent order explodes any argument that DFS-regulated entities have been banned "in perpetuity" from doing business with Petitioner. Pet. Br. at 11. That agreement specifically provides that, beginning in 2025, the NRA may participate "in *any activity* involving the marketing or solicitation of New York Insurance Policies" provided that "it must first apply for and obtain an insurance producer license from the Department." NRA Consent Order ¶ 30 (emphasis added).

Those facts make it impossible to allege plausibly that the Superintendent's claimed discussions with Lloyd's were part of some blacklisting scheme that caused Lloyd's to end its business dealings with Petitioner. Lloyd's ended its relationship with Petitioner because their business was illegal and DFS properly shut it down. That conclusion would have been clear to all reasonable DFS licensees. And given the timeline of events alleged in the complaint, that is the only reasonable inference to draw.

The substantive law may be another obstacle to Petitioner's claim. In the First Amendment context, "this Court has found it necessary to formulate a test for causation which distinguishes between a result caused by a constitutional violation and one not so caused." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977). Although that test continues to evolve as applied in different contexts*, see, e.g., Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1953-54 (2018) (rule defining "scope of First Amendment protections when speech is made in connection with, or contemporaneously to, criminal activity . . . must await a different case"), this Court has been mindful of the "tenuous causal connection between the defendant's alleged animus and the plaintiff's injury," *Reichle v. Howards*, 566 U.S. 658, 668 (2012) (discussing First Amendment retaliatory arrest claims).

Here, the Superintendent allegedly tried to blacklist Petitioner with Lloyd's because of Petitioner's pro-gun advocacy, but Lloyd's indisputably terminated its relationship with Petitioner for legitimate regulatory reasons. In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that to state an actionable First Amendment claim for retaliatory prosecution, *i.e.*, a prosecution in retaliation for the defendant's protected speech, the "absence of probable cause [for the prosecution] . . . must be *pleaded* and proven." *Id.* 265-66 (emphasis added). The Court reasoned that "the complexity of causation" involved in such a claim "should be addressed specifically in defining [its] elements." *Id.* at 265. By analogy, the Lockton consent order is the "probable cause" that snuffs out Petitioner's censorship claim because it negates the necessary causal element. *Id.* at 265.

CONCLUSION

The First Amendment stops the government from suppressing unpopular views, regardless of whether officials try to gag the speaker or intimidate the audience. But especially in the field of financial regulation, where crucial matters of public and private interest often collide, any claim of implicit coercion must be assessed in context. To protect consumers of financial products, the integrity and stability of competing market sectors, and valid political agendas, regulators frequently must give their licensees some tough advice. Whether such interactions cross the constitutional line from persuasion to coercion should depend on the nature of an agency's statements and the relative strength and sophistication of the regulated party. A lower threshold could, practically speaking, too often leave regulators with a Hobson's choice: stay quiet or be sued.

The Court should *affirm* the judgment below.

Respectfully submitted,
DANIEL S. ALTER*
ABRAMS FENSTERMAN LLP
81 Main Street, Suite 400
White Plains, NY 10601
(914) 607-7010
dalter@abramslaw.com
Counsel for Amici Curiae Former Executive Officers of the New York State Department of Financial Services

**Counsel of Record*

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