

No. 22-842

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IN THE  
**Supreme Court of the United States**

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NATIONAL RIFLE ASSOCIATION OF AMERICA,  
*Petitioner,*

v.

MARIA VULLO,  
*Respondent.*

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

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**BRIEF OF *AMICUS CURIAE* BRADY CENTER  
TO PREVENT GUN VIOLENCE IN SUPPORT  
OF RESPONDENT**

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**INTEREST OF *AMICUS CURIAE***

The Brady Center to Prevent Gun Violence (“Brady”) is the nation’s oldest nonpartisan, nonprofit organization dedicated to reducing gun violence through education, research, and legal advocacy. Brady works across Congress, courts and communities, uniting gun owners and non-gun-owners alike to take action to prevent gun violence. Brady has a substantial interest in ensuring that the Constitution is construed to protect Americans’ fundamental right to live. Brady has filed *amicus* briefs in many cases involving the regulation of firearms, including in this Court.

Brady has a particular interest in this case because it raises important questions about the ability of businesses to take account of reputational risks in their dealings with the National Rifle Association (“NRA”) and similar organizations.<sup>1</sup>

**INTRODUCTION AND  
SUMMARY OF ARGUMENT**

A central premise of the NRA’s argument in this case is that it was “coercive” for the Superintendent of the New York Department of Financial Services (“DFS”) to issue guidance that licensed banks and insurers should consider the “reputational risk” of doing business with the NRA or similar gun promotion organizations. This *amicus* brief addresses

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<sup>1</sup> *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus*, its members or its counsel made a monetary contribution intended to fund the brief’s preparation or submission.

why that guidance, far from being coercive, stated a truism. Banks and insurers in the State of New York (and throughout the country) are obligated to consider “reputational risk” as part of their conventional, ongoing operations. More broadly, throughout the economy, companies properly place important weight on “reputational risk” in structuring their businesses—irrespective of any guidance from regulators.

Further, around the time that various New York banks and insurers severed ties with the NRA, a wave of mass shootings across the country led to a nationwide, grass-roots campaign calling on businesses to cease doing business with the NRA. This campaign resulted in legitimate decisions by dozens of businesses across the country to discontinue those commercial relations. This reinforces the “reputational risk” companies faced in continuing to support the NRA’s operations, and demonstrates why New York banks and insurers could reasonably have decided to sever ties with the NRA because of an “obvious alternative explanation” separate from any DFS-issued guidance.<sup>2</sup>

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<sup>2</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 682 (2009) (explaining that a complaint is not plausible if it requires a court to ignore “obvious alternative explanation[s]” (citation omitted)); see also Resp. Br. 37.

## ARGUMENT

### **I. The Superintendent’s Guidance Stated an Established General Principle and Was Therefore Not “Coercive.”**

In deciding this case, it is critical for the Court to appreciate the extensive regulatory and practical backdrop to the events at issue here, which provides additional context for why regulated entities would not have reasonably perceived the guidance from the Superintendent of DFS to be “coercive” or a threat to penalize them if they did business with the NRA or similar organizations.<sup>3</sup>

The Superintendent’s guidance was that banks and insurers should “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. This guidance to “continue evaluating and managing . . . reputational risks” cannot reasonably be viewed as “coercive” (Pet. Br. 17) because it states a truism and a settled principle: banks and insurers are obligated by their regulators to consider and manage “reputational risks” in their operations, and more broadly businesses across the economy regularly take account of “reputational risks” as an inherent element of their overall operations.

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<sup>3</sup> Under the test articulated by this Court in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 72 (1963), this brief focuses on the “distinction between attempts to convince and attempts to coerce.” *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003).

### **A. Banks and Insurers Are Required by Their Regulators to Manage Reputational Risk.**

Federal financial regulators have long required financial institutions to manage reputational risk effectively. In 1995, for instance, the then-Comptroller of the Currency stated:

Our common risk vocabulary is based on nine categories of risk: credit risk, interest rate risk, liquidity risk, price risk, foreign exchange risk, transaction risk, compliance risk, strategic risk, and *reputation* risk. We believe that these categories, along with subcategories we have also defined, comprise the full range of risks faced by virtually any financial services firm, including banks.<sup>4</sup>

This supervisory focus on reputational risk continues to this day. To that end, the Office of the Comptroller of the Currency (“OCC”) currently defines reputational risk as “the risk to current or projected financial condition and resilience arising from negative public opinion.”<sup>5</sup> Other financial regulators define reputational risk similarly.<sup>6</sup> Both

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<sup>4</sup> Remarks of Eugene A. Ludwig, Comptroller of the Currency, on Supervision by Risk, 14 OCC Q.J. 49, 51, 1995 WL 786812, at \*4 (Sept. 26, 1995) (emphasis added).

<sup>5</sup> OCC, *Comptroller’s Handbook: Safety and Soundness, Corporate and Risk Governance, Version 2.0*, at 4 (last updated July 2019), <https://perma.cc/PA8W-VJVU>.

<sup>6</sup> Bd. of Governors of Fed. Rsrv. Sys., *Commercial Bank Examination Manual* § 4012.1, at 1 (Oct. 2023), (...continued)

federal regulations and regulatory guidance instruct financial institutions to consider reputational risk, and caution that failure to do so may undermine the integrity of the organization.<sup>7</sup>

For most large banks, the requirement to manage reputational risk effectively is codified in federal regulations and related guidance. The OCC issued a regulation in 2014 that requires banks with \$50 billion or more in average total consolidated assets to “establish and adhere to a formal, written risk governance framework” that should address, among other things, “reputation risk.”<sup>8</sup> This regulation implements provisions of the Federal Deposit Insurance Act that require federal banking agencies to prescribe standards for “safe and sound” banking.<sup>9</sup> In a separate rule governing national banks’ investments in securities, the OCC similarly directs

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<https://perma.cc/3CJD-PRUH>; Fed. Deposit Ins. Corp., *Annual Report* at 160 (2020), <https://perma.cc/ZQ6E-FF8T> (Office of Inspector General’s Assessment); Letter from Nat’l Credit Union Admin. to Fed. Credit Union Officials re Risk-Focused Examination Program at 5 (May 2002), <https://perma.cc/QE9X-VKCV>.

<sup>7</sup> See, e.g., 12 C.F.R. pt. 30, App. D. §§ II.A, B (OCC rule for large banks); News Release, U.S. Dep’t of Treas., OCC, Categories of Risk at 4 (Jan. 4, 1996), <https://perma.cc/92R2-EWCF> (“Banks which actively associate their name with products and services, such as with fiduciary services, are more likely to have higher reputation risk exposure. As the bank’s vulnerability to public reaction increases, its ability to offer competitive products and services may be affected.”).

<sup>8</sup> 12 C.F.R. pt. 30, App. D. §§ II.A, B.

<sup>9</sup> 12 U.S.C. § 1831p-1.

banks to “consider, as appropriate . . . reputation risks presented by a proposed activity.”<sup>10</sup>

Financial institutions of all sizes also are subject to federal regulatory guidance setting forth similar supervisory expectations for effective management of reputational risk.<sup>11</sup> For instance, the capital adequacy rules of the National Credit Union Administration (“NCUA”) require credit unions to consider reputational risk when “develop[ing] and maintain[ing] a capital plan.”<sup>12</sup> The plan, in relevant part, must include “[a] discussion of how the credit union will, under expected and unfavorable conditions, maintain stress test capital commensurate with all of its risks, including *reputational* . . . risks.”<sup>13</sup> The OCC, for its part, has also published guidance directing both large bank<sup>14</sup> and community bank<sup>15</sup>

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<sup>10</sup> 12 C.F.R. § 1.5(a).

<sup>11</sup> See sources cited *supra* notes 5–7.

<sup>12</sup> 12 C.F.R. §§ 702.304(a)(1), (b)(2).

<sup>13</sup> *Id.* § 702.304(b)(2) (emphasis added).

<sup>14</sup> OCC, *Comptroller’s Handbook: Examination Process, Large Bank Supervision, Version 1.2*, at 35–37 (last updated Mar. 2022), <https://perma.cc/ZLD6-RMG7> (current guidance directing large bank examiners to evaluate the “quality of reputation risk management”); see also OCC, *Comptroller’s Handbook: Examination Process, Bank Supervision Process, Version 1.1*, at 28 (last updated Sept. 2019), <https://perma.cc/ZLD6-RMG7> (current guidance directing bank examiners to evaluate reputation risk).

<sup>15</sup> OCC, *Comptroller’s Handbook: Examination Process, Community Bank Supervision, Version 1.1*, at 211–12 (last updated Sept. 2019), <https://perma.cc/P6EE-QNEG> (current guidance directing community bank examiners to evaluate reputation risk).



examiners to evaluate “the quality of reputation risk management.”<sup>16</sup> This guidance, in relevant part, instructs examiners to consider factors such as the “[e]ffectiveness of social media monitoring and management of negative news,” and the “[b]ank management’s willingness and ability to adjust strategies based on regulatory or technological changes, market disruptions, market or public perception, and legal losses.”<sup>17</sup>

Likewise, the National Association of Insurance Commissioners (“NAIC”), which provides expertise, data and analysis for insurance commissioners to effectively regulate the insurance industry, also identifies reputation as one of the nine risk classifications that insurance examiners should consider when evaluating insurance companies’ risk management processes.<sup>18</sup>

### **B. Banks Are Often Expected to Manage Reputational Risk by Considering the Reputation of Individual Clients.**

The mandate that banks effectively manage reputational risk often requires them to evaluate the reputational risk posed by third parties, including

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<sup>16</sup> OCC, *Comptroller’s Handbook: Examination Process, Large Bank Supervision*, *supra* note 14, at 35–37.

<sup>17</sup> *Id.* at 37.

<sup>18</sup> NAIC, *Financial Condition Examiners Handbook* at 196–97 (2023). The NAIC defines reputation risk as “[n]egative publicity, whether true or not, [that] causes a decline in the customer base, costly litigation, and/or revenue reductions.” *Id.* at 197.

individual customers.<sup>19</sup> This is because a customer's reputation could affect its creditworthiness (i.e., its ability to repay the bank) as well as the bank's business opportunities and standing with other counterparties that care about the bank's reputation and customer profile.

For instance, federal financial regulators often expect financial institutions to conduct reputational-risk screens of individual customers when performing due diligence to fulfill their "know your customer" obligations under the Bank Secrecy Act ("BSA").<sup>20</sup> Similarly, the OCC, NCUA, Federal Reserve and FDIC have all promulgated rules requiring that financial institutions maintain programs to detect and prevent identity theft, all of which require financial institutions to identify specific accounts that

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<sup>19</sup> See, e.g., *In re Wachovia Bank, N.A.*, Enft Action No. 2008-27, 2008 WL 7087237, at \*1 (O.C.C. Apr. 24, 2008) (describing an OCC-initiated enforcement action against a bank for, among other things, "failure to conduct suitable due diligence on [particular] accounts even though the Bank had reason to know that the payment processors and direct telemarketers were high-risk customers that posed significant legal, reputational and monetary risks to the Bank and monetary risk to consumers").

<sup>20</sup> See 12 C.F.R. § 21.21(c)(2); see also *In re City Nat'l Bank*, Enft Action No. 2005-16, 2005 WL 3967711, at \*3-4 (O.C.C. Feb. 23, 2005) (remedial provisions of a BSA-related consent order requiring a bank to, among other things, establish "well-defined policies and procedures for investigating and resolving the Bank's response to transactions that have been identified as posing greater than normal risks for compliance with the BSA and the Bank's BSA compliance program, including resolving customer relationships that could be detrimental to the Bank's reputation").

pose reputation risk.<sup>21</sup> The Federal Reserve’s rules, for example, provide that banks should screen for accounts “for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, *reputation*, or litigation risks.”<sup>22</sup>

That said, contrary to the NRA’s assertion that a regulated entity’s disregard of a DFS 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,”<sup>23</sup> *operating with* reputational risk is not illegal under New York law and “cannot serve as the basis for a standalone enforcement action.”<sup>24</sup> Instead, it is the failure to *manage* reputational risk that leaves a financial institution susceptible to supervisory action—typically because poor reputational risk management has contributed other harms to the institution through credit, liquidity or legal problems. Moreover, the supervisory expectation that a financial institution consider a higher-risk customer’s reputation does not mean that the institution is forbidden from working with a customer that poses reputational risk. Financial institutions can manage reputational risk in many ways, including through

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<sup>21</sup> See 12 C.F.R. § 41.90 (OCC); *id.* § 222.90 (Fed. Rsrv.); *id.* § 334.90 (FDIC); *id.* § 717.90 (NCUA).

<sup>22</sup> 12 C.F.R. § 222.90 (emphasis added).

<sup>23</sup> Pet. Br. 30.

<sup>24</sup> Resp. Br. 48.

active monitoring of and engagement with higher-risk customers.

A review of federal and state bank enforcement actions demonstrates that federal regulators and the DFS have not brought such actions solely to address deficiencies in reputational-risk management, let alone for working with particular customers that pose reputational risk. Publicly available bank enforcement actions that mention reputational risk have all been focused on broader systematic issues such as “unsafe and unsound” banking practices,<sup>25</sup> Office of Foreign Assets Control (“OFAC”) violations,<sup>26</sup> and failures to maintain “sufficient transparency to reasonably ensure the legitimacy of the sources and uses of customer funds.”<sup>27</sup> In these cases, a reputational-risk management deficiency was just one of the many issues that the regulator cited as justification for the action.

In sum, federally regulated financial institutions—including the vast majority supervised by DFS—are already required as a matter of federal law to manage reputational risk effectively, which can include taking into account and controlling for the reputational risk posed by individual customers. Similar expectations apply to insurance companies. Given these longstanding requirements, the Superintendent’s guidance is properly viewed as a truism that reminded regulated entities to continue

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<sup>25</sup> *In re City Nat’l Bank*, 2005 WL 3967711, at \*1.

<sup>26</sup> *Id.* at \*6.

<sup>27</sup> *In re Merchants Bank of Cal., N.A.*, Enf’t Action No. 2014-84, 2014 WL 12834080, at \*3 (O.C.C. June 26, 2014).

managing reputational risk—as they were already obligated to do. For this reason, that guidance could not reasonably have been perceived as a coercive threat against financial institutions that do business with the NRA or similar organizations.

### **C. Across the Economy, Businesses Take Account of Reputational Risk in Structuring Their Operations.**

Even aside from federal regulatory requirements, businesses regularly, legitimately and voluntarily take account of reputational risk in structuring their operations—not only in the financial services sector, but across the economy more broadly. This trend further undermines the NRA’s argument that the regulated parties would have interpreted the Superintendent’s statements about reputational risk as a threat.

#### **1. Reputational Risk Is an Important Business Consideration.**

Directors and officers of public companies are keenly aware of the importance of reputational risk. At one level, this is because companies with positive reputations are better able to attract employees and customers, and to engender loyalty among their customer base.<sup>28</sup> For example, as the Second Circuit noted in the proceedings below, “according to a study published in 2017—less than one year before the Parkland shooting—seven out of ten Americans believed companies had an obligation to take action to

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<sup>28</sup> Robert G. Eccles et al., *Reputation and Its Risks*, Harv. Bus. Rev. (Feb. 2007), <https://perma.cc/CP3U-378C>.

address key social and environmental issues, even if those issues were not relevant to everyday business operations.”<sup>29</sup>

At another level, companies also understand that reputational harms can significantly damage their operations. A recent report noted that “[r]eputational crises and the losses they cause occur with such regularity that nine out of [ten] S&P 500 companies now disclose that reputational risks, in addition to all their underlying operational risks, are material perils.”<sup>30</sup> “[I]n an economy where 70% to 80% of market value comes from hard-to-assess intangible assets such as brand equity, intellectual capital, and goodwill, organizations are especially vulnerable to anything that damages their reputations.”<sup>31</sup>

Accordingly, companies have implemented a wide array of reputational risk-management protocols. Certain companies focus more on “reactive” reputational-risk management, which is akin to crisis management for threats that have already surfaced.

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<sup>29</sup> Pet. App. 30 n.14 (citing *Americans Willing to Buy or Boycott Companies Based on Corporate Values, According to New Research by Cone Communications*, Cone (May 17, 2017)).

<sup>30</sup> Nir Kossovsky, *How Risk Managers Can Take Charge of Reputation Risk*, Risk Mgmt. Mag. (Sept. 30, 2019), <https://perma.cc/2BZ4-5ESZ>; see also Xiaoqian Zhu et al., *What Drives Reputational Risk? Evidence from Textual Risk Disclosures in Financial Statements*, 9(1) Human. & Soc. Sci. Commc’ns at 1 (2022), <https://perma.cc/XB9C-GDHS> (“Based on 352,326 risk headings extracted from 11,921 annual reports released by 1,570 U.S. financial institutions from 2006 to 2019, a total of 13 reputational risk drivers are identified to extend upon existing studies.”).

<sup>31</sup> Eccles et al., *supra* note 28.

Others, by contrast, have started instituting proactive reputational-risk protocols to mitigate current and potential threats to reputation.<sup>32</sup> In fact, at least one consulting firm has noted the “tremendous benefits” in embracing a third-party risk-management framework that considers reputational risk, noting that “today’s competitive business environment demands it.”<sup>33</sup> To that end, certain insurance companies have even started offering “reputation risk insurance” to provide a safety net to mitigate the market effects of a negative reputational event.<sup>34</sup>

## **2. Businesses Often Make Decisions Based on Concerns Over Reputational Risk.**

Recent years have seen notable examples of business decisions made to avoid or reduce reputational risk. For instance, the auditing firm Mazars ceased its proof-of-reserves services to cryptocurrency clients, explaining that its decision reflected concerns about how the public would view the provision of such services and would be “understood by the public.”<sup>35</sup> The accounting firm Armanino also discontinued its auditing practice for

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<sup>32</sup> *Id.*; see also *Third-Party Risk Is Becoming a First Priority Challenge*, Deloitte, <https://perma.cc/BPS5-U9B4> (archived Feb. 27, 2024).

<sup>33</sup> Deloitte, *supra* note 32.

<sup>34</sup> Nadine Gatzert et al., *Assessing the Risks of Insuring Reputation Risk*, 83 J. Risk & Ins. 641, 650–56 (2016) (cataloguing policies).

<sup>35</sup> Dan Milmo & Alex Hern, *Binance Auditor Withdraws from Working with Crypto Company*, The Guardian (Dec. 16, 2022) <https://perma.cc/8TZX-XK7W>.

cryptocurrency clients due to pressure from other clients “concerned that reputational risk to the firm” would call their own audits into question.<sup>36</sup>

As another example, a number of public companies—including Disney, Apple, Warner Brothers Discovery, Paramount Global, Lions Gate Entertainment, Comcast and IBM—discontinued advertising on X (formerly known as Twitter) after its former CEO and principal shareholder, Elon Musk, agreed with a social media post accusing “Jewish communities” of stirring “hatred against whites.”<sup>37</sup> Reflecting the importance of reputation for these public companies, they made clear that their decisions were based on a desire not to be associated with the remarks by Mr. Musk.<sup>38</sup> IBM stated that its decision was because the company “has zero tolerance for hate speech and discrimination.”<sup>39</sup> Lions Gate also stated that its decision was spurred by “Elon’s tweet.”<sup>40</sup>

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<sup>36</sup> Emily Mason, *FTX.US Accounting Firm Armanino Ends Crypto Audit Practice*, Forbes (Dec. 15, 2022), <https://perma.cc/QUZ5-84UA>.

<sup>37</sup> Jonathan Vanian, *Apple, Disney, Other Media Companies Pause Advertising on X After Elon Musk Boosted Antisemitic Tweet*, CNBC (Nov. 17, 2023), <https://perma.cc/XBU2-R9A8>.

<sup>38</sup> Ryan Mac et al., *Advertisers Flee X as Outcry Over Musk’s Endorsement of Antisemitic Post Grows*, N.Y. Times (Nov. 17, 2023), <https://perma.cc/5RRM-6VQZ>.

<sup>39</sup> *Id.*

<sup>40</sup> Trisha Thadani et al., *Disney, Comcast, Lionsgate Pull Ads from X Over Antisemitic Posts*, Wash. Post (Nov. 17, 2023), <https://perma.cc/A5D4-3449>.



A further example involves decisions by a number of public companies—including Netflix, Hulu, TripAdvisor and Wayfair—to cease advertising on Laura Ingraham’s Fox News program after she mocked a survivor of the Parkland shooting.<sup>41</sup> Wayfair stated that the company did not want to advertise on a show whose statements were “not consistent with our values,” while TripAdvisor stated that “we believe strongly in the values of our company” and that “inappropriate comments made by this broadcaster . . . cross the line of decency.”<sup>42</sup>

Similarly, more than twenty-five public companies—including Samsung, Farmers Insurance, Western Digital/SanDisk, Graze and Toyota—stopped advertising on Tucker Carlson’s former primetime Fox News show in response to comments he made about immigration.<sup>43</sup> Again, companies were clear that their decision reflected a desire to protect their brands and reputations from associational taint. Western Digital/SanDisk stated that its decision stemmed from a desire to “work with advertising partners who share our core values,” while Graze

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<sup>41</sup> Cristiano Lima, *Companies Pull Ads from Fox’s Ingraham After Her Jab at Parkland Student*, Politico (Mar. 29, 2018), <https://perma.cc/UVB5-ARG3>.

<sup>42</sup> Emily Shugerman, *All of the Advertisers That Have Dropped Laura Ingraham’s Fox News Show Since She Mocked Parkland School Shooting Survivor*, The Independent (Mar. 30, 2018), <https://perma.cc/LZ8X-NPJ3>.

<sup>43</sup> Jeremy Barr, *‘Tucker Carlson Tonight’ Loses at Least 26 Advertisers After Immigration Comment*, Hollywood Reporter (Dec. 17, 2018), <https://perma.cc/WJL7-486W>.

stated that advertising on the show “goes against our brand values.”<sup>44</sup>

In the same vein, public companies have discontinued relationships with public figures due to concerns over reputational risk. For example, after Ye, the rapper formerly known as Kanye West, made antisemitic remarks in public, brands such as Adidas and Gap severed their ties with him.<sup>45</sup> Adidas, which had long been known for its sale of the rapper’s clothing and shoe line Yeezy, stated that the rapper’s speech violated the company’s values, which include “mutual respect and fairness.”<sup>46</sup> Likewise, the Air Academy Federal Credit Union ended its partnership with former Denver Broncos linebacker Brandon Marshall after Marshall knelt during the national anthem at the Broncos’ regular-season opener, stating that his actions were “not a representation of our organization and membership.”<sup>47</sup>

Similarly, CNN parted ways with certain on-air personalities following comments they made. In 2018, CNN terminated its relationship with pundit Marc Lamont Hill, following his call for a “free Palestine

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<sup>44</sup> *Id.*

<sup>45</sup> Jordan Valinsky, *Adidas Says Dropping Kanye West Could Cost It More Than \$1 Billion in Sales*, CNN (Feb 10, 2023), <https://perma.cc/57N4-WRAX>.

<sup>46</sup> *Id.*

<sup>47</sup> John Breech, *Broncos’ Marshall Dumped by Sponsor After Protesting During National Anthem*, CBS Sports (Sept. 9, 2016), <https://perma.cc/47LJ-DTMH>.

from the river to the sea.”<sup>48</sup> Separately, in April 2023, CNN parted ways with another on-air personality, Don Lemon, following his comment that Republican presidential candidate Nikki Haley was “past her prime.”<sup>49</sup>

Given that businesses regularly make decisions based on concerns over reputational risk, adopting the NRA’s “view of coercion would chill speech necessary for a functional government.” Resp. Br. 50.

## **II. Circumstances Unrelated to Any Regulatory Guidance Could Explain Decisions by Banks and Insurers to Sever Ties with the NRA.**

While the NRA suggests that regulatory actions taken by the Superintendent of DFS caused banks and insurers to cease working with the NRA in 2018, that claim overlooks the “obvious alternative explanation[s]” for why they ceased doing business with the NRA at that time.<sup>50</sup> These include a spate of mass shootings that occurred in the fall of 2017 and spring of 2018, the ensuing March for Our Lives in Washington, and a nationwide grass-roots campaign aimed at encouraging businesses to voluntarily cease doing business with the NRA. These developments demonstrate why banks, insurers and other

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<sup>48</sup> Oliver Darcy, *CNN Severs Ties with Liberal Pundit Marc Lamont Hill After His Controversial Remarks on Israel*, CNN (Nov. 30, 2018), <https://perma.cc/K7H2-KQ9X>.

<sup>49</sup> David Bauder, *Don Lemon Fired from CNN After Divisive Morning Show Run*, Associated Press (Apr. 24, 2023), <https://perma.cc/H7C8-VUFK>.

<sup>50</sup> *Iqbal*, 556 U.S. at 678, 682; *see also* Resp. Br. 37.

businesses could have reasonably decided to sever ties with the NRA at that time—for reasons entirely unrelated to any regulatory guidance from DFS.

In particular, the nation experienced fourteen mass shootings<sup>51</sup> between the fall of 2017 (when the New York County District Attorney’s Office referred the investigation of defects in the Carry Guard program to DFS<sup>52</sup>) and May 9, 2018 (when Chubb, Lloyd’s of London and Lockton Affinity all communicated their decision to cut ties with the NRA<sup>53</sup>). This included seventeen killed in Parkland, Florida, twenty-five killed in Sutherland Springs, Texas, and sixty killed in Las Vegas, Nevada. In each of the fourteen mass shootings that occurred over the course of this half-year, four or more people were killed.<sup>54</sup>

Of all these tragedies, the Parkland shooting perhaps loomed largest in the minds of the public. That tragic event generated a massive public outcry because it occurred at a high school, with many of the victims as young as fourteen years old.<sup>55</sup> The

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<sup>51</sup> *Mass Killings in America, 2006–Present*, Associated Press, <https://perma.cc/R8U9-R7P3>.

<sup>52</sup> Pet. App. 3.

<sup>53</sup> See Pet. App. 210 (Lockton), Pet. App. 224 (Lloyd’s); Suzanne Barlyn, *Insurer Chubb Says Will Stop Underwriting NRA Insurance for Gun Owners*, Reuters (Feb. 23, 2018), <https://www.reuters.com/article/idUSKCN1G7249/> (Chubb).

<sup>54</sup> *Mass Killings in America*, *supra* note 51.

<sup>55</sup> Emily Shapiro et al., *Parkland School Shooting 6 Years Later: Remembering The 17 Victims*, ABC News (Feb 14, 2024), <https://perma.cc/F4PN-744L>.

revulsion at that time over this and other mass shootings soon coalesced into a concerted grass-roots campaign aimed at ending the United States' gun violence epidemic and insisting on accountability for the wave of mass shootings sweeping the country.<sup>56</sup>

On March 24, 2018, hundreds of thousands of students, parents, community leaders and celebrities took to the streets of Washington, D.C., to participate in the historic March for Our Lives, a protest organized by the student survivors of the Parkland shooting to remember its victims and to call for change.<sup>57</sup>

The marchers' message called not only for an end to gun violence, but specifically singled out the NRA, with marchers chanting "Hey-hey, ho-ho, the N.R.A. has got to go!"<sup>58</sup> Even in the lead-up to the event, youth leaders publicly called out the NRA's influence on national politics, and sought to shame industry and business leaders they considered responsible for lax gun laws.<sup>59</sup> The message of the Parkland survivors resonated with the American public: in the month after the Parkland shooting, polling indicated that

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<sup>56</sup> Vivian Yee & Alan Blinder, *National School Walkout: Thousands Protest Against Gun Violence Across the U.S.*, N.Y. Times (Mar. 14, 2018), <https://perma.cc/PB34-6E6A>; Charlotte Alter, *The School Shooting Generation Has Had Enough*, Time (Mar. 22, 2018), <https://perma.cc/667U-GWZW>.

<sup>57</sup> Samantha Raphelson & Emma Bowman, *Hundreds of Thousands March for Gun Control Across the U.S.*, NPR (Mar. 24, 2018), <https://perma.cc/N7F6-265M>.

<sup>58</sup> Yee & Blinder, *supra* note 56.

<sup>59</sup> Alter, *supra* note 56.

71% of Americans wanted stricter gun violence prevention laws.<sup>60</sup>

In short, the NRA was under intense scrutiny during this time period, with public opinion trending against it.<sup>61</sup> Even many who had traditionally been staunch supporters of the NRA questioned their continued support for the organization.<sup>62</sup>

These events led to a nationwide campaign aimed at encouraging businesses to cease doing business with the NRA, which began gaining traction mere days after the Parkland shooting.<sup>63</sup> The #BoycottNRA hashtag, the unofficial unifier of the movement, appeared more than 10,000 times in a single four-hour period nearly two weeks after the Parkland shooting.<sup>64</sup> Commentators observed that the boycott movement gained traction with exceptional speed and fulfilled a “significant symbolic purpose.”<sup>65</sup>

In the wake of these developments, several companies that had nothing to do with the DFS’s

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<sup>60</sup> *Gun Laws, Feb 2018*, Marist Nat’l Poll (Feb. 23, 2018), <https://perma.cc/22YB-PU8Z>.

<sup>61</sup> Patrice Taddonio, *How a Group of High-School Students Put the NRA in the Hot Seat*, PBS (Mar. 24, 2020), <https://perma.cc/KD69-4H5B>.

<sup>62</sup> Steven Shepard, *Gun Control Support Surges in Polls*, Politico (Feb. 28, 2018), <https://perma.cc/D2CY-PCAQ>.

<sup>63</sup> Tiffany Hsu, *Big and Small, N.R.A. Boycott Efforts Come Together in Gun Debate*, N.Y. Times (Feb. 27, 2018), <https://perma.cc/38RP-WZD5>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

investigation severed relations with the NRA of their own volition. Numerous large public companies—including Enterprise, Delta Air Lines, United Airlines, Symantec and TrueCar—cut ties with the NRA in quick succession.<sup>66</sup> Companies that terminated their relationships with the NRA at this time did not ascribe their decisions to regulatory pressure—or anything that could conceivably be attributed to the DFS guidance—and instead said they were animated by concerns for their corporate values and how a continued relationship with the NRA would bear on those values. For instance, Delta Air Lines stated that its “decision was not made for economic gain and our values are not for sale.”<sup>67</sup>

Other financial services companies that had no relationship with the DFS also severed ties with the NRA around this time. First National Bank of

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<sup>66</sup> See, e.g., Marc Fisher, *Why the NRA Doesn't Much Care If Businesses Spurn Them*, Wash. Post (Mar. 2, 2018), <https://perma.cc/PUR2-E26A>; Aric Jenkins, *Delta Just Doubled Down on Its Decision to Cut Ties with the NRA*, Time (Mar. 2, 2018), <https://perma.cc/G96J-LG2S>. Meanwhile, other companies took their own measures to compensate for the lack of federal gun legislation. Walmart, Kroger, and L.L. Bean raised the age limit for in-store gun purchases to twenty-one, while Dick's Sporting Goods moved to ban sales of assault rifles in its stores. See Andrew Wong, *The NRA Faces a New Kind of Opponent: Kids Who Understand Social Media*, CNBC (Mar. 5, 2018), <https://perma.cc/WAV7-Y2VE>. REI similarly moved to stop purchases from Vista Outdoor, which operates firearm brands including Remington, until the company provided a public statement to outline its strategy to move forward from the Parkland shooting. *Id.*; see also *Our Brands*, Vista Outdoors, <https://perma.cc/Z7TQ-2GCT> (archived Feb. 27, 2024).

<sup>67</sup> Jenkins, *supra* note 66.

Omaha, the nation's largest privately owned bank, stated on February 22, 2018 that it would not renew its contract with the NRA to offer an NRA-branded Visa credit card. The company attributed its decision to public concern, stating that “[c]ustomer feedback has caused us to review our relationship with the NRA.”<sup>68</sup> Likewise, MetLife, an insurer that was not associated with the DFS investigation, said on February 23, 2018 that it was ending its discount program for NRA members.<sup>69</sup>

Accordingly, the “obvious alternative explanation”<sup>70</sup> for why Lockton, Chubb and Lloyd’s stopped doing business with the NRA was this widespread, grass-roots campaign. Their decisions were consistent with those made by many businesses across the country to sever ties with the NRA around the same time.

But even aside from the nationwide campaign to encourage businesses to discontinue their relationships with the NRA, Lockton, Chubb and Lloyd’s were all subjects of a lawful DFS investigation in which all three conceded that their arrangements with the NRA were unlawful. This is yet another

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<sup>68</sup> Paul Davidson, *NRA-Branded Visa Card Dropped by First National Bank of Omaha*, USA Today (Feb. 22, 2018), <https://perma.cc/HU9P-5RES>.

<sup>69</sup> Jacey Fortin, *A List of Companies Cutting Ties with the NRA*, N.Y. Times (Feb. 24, 2018), <https://perma.cc/H2TA-7QJQ>.

<sup>70</sup> *Iqbal*, 556 U.S. at 678, 682.



“obvious alternative explanation” for why these entities cut ties with the NRA.<sup>71</sup>

Thus, in the period following the Parkland shooting and the March for Our Lives, companies of all types from across the country severed ties with the NRA due to concerns over their values and public reputations—not due to any regulatory coercion. Companies have the right to make this choice based on their corporate values and beliefs about how best to serve their stakeholders and long-term interests. The fact that Lockton, Chubb and Lloyd’s happened to make that choice in parallel with the separate and lawful investigation by the DFS, or in connection with the Superintendent’s guidance, does not make that speech and conduct coercive.

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<sup>71</sup> *Id.*

**CONCLUSION**

The regulatory guidance issued by the Superintendent of DFS stated a truism that banks and insurers should continue to monitor their operations for reputational risk. For that reason, the guidance cannot properly be viewed as “coercive”—particularly because it is consistent with traditional decisions by businesses throughout the economy to take account of reputational risk in structuring their operations. Further, mass shootings in the fall of 2017 and spring of 2018, and the nationwide revulsion and response to those shootings, provide “obvious alternative explanations” for the decisions made at that time by banks, insurers and businesses across the country to sever ties with the NRA—for reasons unrelated to any regulatory guidance.

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