No. 22-842

In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

MARIA T. VULLO,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner filed this suit under 42 U.S.C. § 1983 for money damages relating to actions Respondent is alleged to have taken while serving as Superintendent of the New York State Department of Financial Services. The questions presented are:

1. Did the Second Circuit correctly apply settled precedent to hold that Respondent is entitled to qualified immunity for issuing public statements encouraging (but not requiring) the banks and insurance entities regulated by her agency to consider the reputational risks of their continued association with Petitioner and other gun-promotion organizations?
2. Did the Second Circuit correctly apply settled precedent to hold that Petitioner has not alleged a First Amendment violation by Respondent?

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INTRODUCTION

Petitioner the National Rifle Association ("NRA") urges that "[t]he public importance of this case cannot be overstated," Pet.7, contending that the decision below "departs from this Court's precedent" and "undermines fundamental First Amendment freedoms," *id.* at 3.

The decision below did nothing of the sort. The Second Circuit applied settled Supreme Court precedent to hold that Petitioner has not alleged facts sufficient to demonstrate that Respondent Maria Vullo violated Petitioner's First Amendment rights when she was Superintendent of the New York State Department of Financial Services ("DFS"). In correctly so holding, the Second Circuit established no new law and created no disagreement with the decision of any other court of appeals.

Moreover—and fatally for Petitioner—the Second Circuit found that, even if Petitioner has alleged a First Amendment claim, Respondent is entitled to qualified immunity. Petitioner virtually ignores that holding, but it is enough by itself to support the judgment below. It follows straightforwardly from this Court's precedents, implicates no disagreement among the courts of appeals, and is clearly correct. Thus, even if the Court were inclined to announce a new First Amendment rule in this case, that new rule could not disturb the judgment below as it would not have been clearly established at the time of Respondent's alleged actions.

There is nothing certworthy about this case. The petition should be denied.

STATEMENT[1]

Respondent served from 2016 to 2019 as Superintendent of the New York State DFS, the state agency charged with regulating banks and insurance firms chartered or licensed in New York and with enforcing state banking and insurance laws. App.190-91 ¶¶2-3.

A. The Investigation and Consent Orders

In October 2017, in response to a referral from the New York County District Attorney's Office, DFS's enforcement division initiated an investigation into "Carry Guard," App.206-07 ¶¶34-35, an insurance product endorsed by Petitioner that provided coverage for personal injury, criminal defense, and psychological expenses arising out of the use of a firearm, beyond coverage for reasonable use of force, App.205 ¶32; App.254-58 ¶¶5-14. The excess-line insurance broker Lockton Companies, LLC ("Lockton") administered the program, and it was underwritten by an insurance subsidiary of Chubb Limited ("Chubb"). App.205 ¶32. DFS's investigation focused on Lockton and Chubb, along with the insurance marketplace Lloyd's of London ("Lloyd's"). App.266 ¶31.

DFS concluded that Carry Guard violated New York insurance law by, among other things, including liability coverage for bodily injury arising from the wrongful use of a firearm. App.261-62 ¶18. The investigation culminated in consent orders between DFS and the above-mentioned insurance entities: with Lockton on May 2, 2018, App.252-79, with Chubb on

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[1] Respondent accepts Petitioner's allegations as true *solely* because the case is at the motion-to-dismiss stage. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

May 7, 2018, App.280-95, and with Lloyd's on December 20, 2018, App.296-320.[2] Each consent order identified the specific provisions of New York insurance law that the entity agreed it had violated, and imposed civil penalties: $7 million for Lockton, $1.3 million for Chubb, and $5 million for Lloyd's. App.214 ¶54; App.218 ¶62; App.225 ¶74. Although the consent orders prohibited sale of the illegal insurance products, they explicitly stated that the entities could "procur[e] insurance for the NRA's own corporate operations." App.270 ¶43; *see* App.289 ¶22.[3]

B. The Parkland Shooting and Its Aftermath

On February 14, 2018, the nation was rocked by the news of a tragic mass shooting at Marjorie Stoneman Douglas High School in Parkland, Florida. In the immediate aftermath of the shooting, a number of companies announced that they were dissociating themselves from Petitioner and other entities connected to the firearms industry. *See* App.247; App.250.

According to Petitioner's Second Amended Complaint ("Complaint"), eleven days after the Parkland shooting, Lockton's Chairman informed Petitioner

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[2] Lockton entered into a supplemental consent order with DFS in January 2019, concerning Lockton's non-NRA clients and non-firearm insurance policies. App.226-27 ¶78; App.322-24, ¶¶2-9.

[3] Notably unmentioned in the Petition, on November 13, 2020, long after Respondent had left DFS, Petitioner entered into a consent order with DFS based on its own illegal soliciting and marketing of Carry Guard without a license. N.Y. State Dep't of Financial Services, Consent Order, *In the Matter of The National Rifle Association of America*, Case No. 2020-0003-C (Nov. 13, 2020), available at https://www.dfs.ny.gov/system/files/documents/2020/11/ea20201118_co_nra.pdf.

that Lockton would be terminating its relationship with Petitioner for "fear of 'losing [its] license' to do business in New York." App.209 ¶42. However, the Complaint does not specify anything that anyone at DFS allegedly said to Lockton to give rise to any such concern. The next day, Lockton tweeted that it would "discontinue providing brokerage services for all NRA-endorsed insurance programs." App.210 ¶43 (emphasis omitted). The Complaint also alleges that, some days later, an (unnamed) insurance carrier with which Petitioner had purportedly been negotiating a renewal of its general liability insurance stated that it was unwilling to renew coverage. App.210 ¶44.

C. DFS's Public Statements

Unrelated to its Carry Guard investigation (which had commenced months earlier), DFS responded to the Parkland shooting and its aftermath by considering the implications of regulated entities' relationships with gun-promotion organizations.

On April 19, 2018, DFS issued two guidance memoranda titled "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations," one to insurance companies and one to banks and other financial institutions. App.211 ¶46; *see also* App.246-48; App.249-51. The memoranda noted that DFS was providing the guidance "in the wake of several recent horrific shootings, including in Parkland, Florida." App.246; App.249. As they described, "social backlash" against Petitioner had been strong, and the growing social movements in response to Parkland could not be ignored. App.246-47; App.249-50. Recognizing the role that financial institutions play in their communities as well as their experience "managing

risks," the memoranda "encourage[d]" the 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, if any." App.248; App.251. They also encouraged "continued assessment of compliance with [entities'] own codes of social responsibility." *Id.* In closing, the memoranda "encourage[d] regulated institutions to review any relationships they have with the NRA or similar gun promotion organizations, and to take prompt actions to manag[e] these risks and promote public health and safety." *Id.*

The same day, New York Governor Andrew Cuomo issued a press release noting that he had "directed [DFS] to urge insurance companies, New York State-chartered banks, and other financial services companies licensed in New York to review any relationships they may have with the National Rifle Association and other similar organizations." App.212-13 ¶50; App.243-45. Respondent was quoted in the release as stating, "DFS urges all insurance companies and banks doing business in New York to join the companies that have already discontinued their arrangements with the NRA, and to take prompt actions to manage these risks and promote public health and safety." App.244.

Neither the guidance memoranda nor Respondent's quote in Governor Cuomo's press release ordered or directed *any* regulated entity to take *any* action. They did not invoke *any* law or regulation that any regulated entity risked violating if it did not sever ties with Petitioner. They did not threaten that DFS would take *any* action against any entity for not severing those ties. And indeed, DFS took no such action.

D. The Alleged Private Statements

Petitioner also alleges that Respondent met privately with senior executives of Lloyd's and its American affiliate in February 2018. App.221 ¶67. In that alleged meeting,[4] Respondent supposedly "presented Defendants' views on gun control and their desire to leverage their powers to combat the availability of firearms, including specifically by weakening the NRA." *Id.* The Complaint further asserts that Respondent "made clear that Lloyd's could avoid liability for infractions relating to other, similarly situated insurance policies, so long as it aided DFS's campaign against gun groups." App.223 ¶69. The Complaint does not allege what Respondent said to "ma[k]e clear" this supposed point, nor does it explain what the reference to "other, similarly situated insurance policies" is supposed to have encompassed, nor does it claim that Respondent explained what it would mean to provide the "aid" to which she allegedly referred.

On May 9, 2018, Lloyd's publicly announced that it would stop offering insurance programs related to Petitioner. App.224 ¶72.

E. Procedural History

Petitioner's Complaint alleges that Respondent violated the First Amendment and the New York state constitution by establishing an "[i]mplicit [c]ensorship [r]egime" (Count I) and retaliating against Petitioner based on its speech (Count II), and that Respondent

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[4] The Complaint asserts that Respondent participated in "meetings" with Lloyd's, but it contains allegations about only one meeting and even those allegations are conclusory and wholly deficient. *See* App.199-200 ¶21; App.221 ¶67; App.223 ¶69.

violated the Fourteenth Amendment and the New York state constitution by selectively enforcing New York insurance law (Count III). App.230-39 ¶¶86-121.[5]

The district court dismissed the selective enforcement claim against Respondent, but allowed the First Amendment claims to proceed.[6] App.74. Notably, the district court denied Respondent qualified immunity, even though it was "inclined to agree … that there is no case clearly establishing that otherwise protected public statements transform into an unlawful threat merely because there is an ongoing, and unrelated, regulatory investigation." App.71.

Respondent appealed and the Second Circuit reversed in a unanimous opinion. On the merits of the First Amendment claims, the Second Circuit held that Petitioner had not pleaded a First Amendment violation because, even in the context of the consent orders described above, the guidance memoranda, press release, and alleged private meeting could not reasonably be construed as unconstitutionally threatening or coercive, and were instead a legitimate exercise of Respondent's prerogative, consistent with the First Amendment, to advocate for the government's policy positions. App.22-34.

The Second Circuit also held that, in any event, Respondent was "entitled to qualified immunity because

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[5] Petitioner also sued former Governor Cuomo and DFS; some of those claims remain pending before the district court. *See, e.g.*, *National Rifle Association of America v. Cuomo*, No. 1:18-cv-00566, ECF No. 381 (Mar. 20, 2023) (Cuomo motion for judgment on pleadings).

[6] Petitioner did not appeal the dismissal of its selective enforcement claim and it is not before this Court.

the law was not clearly established and any First Amendment violation would not have been apparent to a reasonable official at the time." App.34-38. The Second Circuit reversed and remanded the case with instructions to enter judgment for Respondent. App.38.

Petitioner's petition for rehearing en banc was denied without dissent. App.185-86.

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT'S QUALIFIED IMMUNITY HOLDING IS SUFFICIENT TO SUPPORT THE JUDGMENT AND IS SPLITLESS, FACTBOUND, AND CORRECTLY DECIDED.

Petitioner focuses overwhelmingly on the merits of its First Amendment claim, omitting discussion of the qualified immunity issue until a short section at the end of its brief. Pet.32-38.[7] It defends that treatment with the assertion that qualified immunity somehow "cannot stand apart from" the merits. Pet.32.

Whatever that is supposed to mean, it cannot change the fact that qualified immunity is "conceptually distinct from the merits of the plaintiff's claim." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985). Nor can it alter the reality that, even if the Complaint did

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[7] Of the seven amicus briefs supporting Petitioner, only one discusses qualified immunity—and it does so to propose a wholesale overhaul of the doctrine, which Petitioner does not seek. *See* Brief for Foundation for Individual Rights and Expression as Amici Curiae Supporting Petitioner at 13-17. The remaining amici focus on the merits or on matters irrelevant to this litigation. None provides any basis for granting certiorari.

successfully plead a First Amendment claim, the Second Circuit's qualified immunity holding is enough by itself to support the judgment. Indeed, any consideration of the merits can "have no effect on the outcome of the case" as long as the qualified immunity holding remains. *Pearson v. Callahan*, 555 U.S. 223, 237 (2009). Accordingly, even if the First Amendment issue pressed here did warrant this Court's review (and, as discussed *infra*, it does not), this case would be an inappropriate vehicle for that review.

There is, moreover, nothing certworthy in the Second Circuit's qualified immunity holding. The court concluded that governing Supreme Court and circuit caselaw "do not clearly establish that [Respondent]'s statements in this case were unconstitutionally threatening or coercive," because those cases all "involved very different circumstances and much stronger conduct." App.34-35. Petitioner does not assert that this holding created any new law on qualified immunity or that it deviated from established doctrine. Nor does Petitioner argue that the Second Circuit created a disagreement among the courts of appeals over the scope of that doctrine. Indeed, Petitioner fails to cite *any* case addressing qualified immunity in similar circumstances.

Instead, Petitioner simply takes issue with the Second Circuit's *application* of settled qualified immunity doctrine to the facts alleged here. That objection does not warrant this Court's review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law.").

In any event, the Second Circuit was correct in concluding that Respondent is entitled to qualified

immunity. Petitioner has not identified a single case clearly establishing that anything like Respondent's alleged actions crossed the line between permissible persuasion and unconstitutional coercion. To the contrary, as the Second Circuit recognized, "[t]he Complaint's factual allegations show that, far from acting irresponsibly, [Respondent] was doing her job in good faith." App.37.

A. The Second Circuit Applied the Well-Established, Longstanding Qualified Immunity Standard.

1. In addressing Respondent's entitlement to qualified immunity, the Second Circuit cited the familiar legal standard established by this Court:

> Qualified immunity shields government officials performing discretionary functions from suits for money damages unless their conduct violates clearly established law of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It gives government officials the breathing room to make reasonable, even if mistaken, judgments and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). It applies unless (1) the plaintiff sufficiently pleaded a constitutional violation and (2) the law the official allegedly violated was clearly established and apparent to a reasonable official at the time of the alleged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

App.21.

The relevant contours of qualified immunity are well settled. As this Court explained decades ago in *Harlow v. Fitzgerald*, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. That standard has been widely applied ever since. *See*, *e.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 151-52 (2017) (holding federal executive officials were entitled to qualified immunity); *al-Kidd*, 563 U.S. at 735, 741 (holding that Attorney General was entitled to qualified immunity). And that is the standard the Second Circuit applied here.

Petitioner does not contend otherwise. Specifically, Petitioner does not argue that the Second Circuit misstated the governing standard for qualified immunity, or that it ventured into an open area of law requiring this Court's intervention. *See* Pet.32-38. Nor does Petitioner assert that the Second Circuit's decision implicated disagreement among the lower courts over how the doctrine of qualified immunity should be applied. *Id.* And indeed it does not. In short, nothing about the Second Circuit's qualified immunity holding warrants this Court's review.

2. Perhaps recognizing the un-certworthiness of its qualified immunity arguments, Petitioner proposes the extraordinary relief of summary reversal because, it says, the Second Circuit did not "assume the truth of the NRA's well-pleaded allegations and draw reasonable inferences in its favor." Pet.32. Specifically, Petitioner faults the Second Circuit for purportedly failing to assume the truth of its claim that

Respondent threatened or coerced regulated entities to cut ties with Petitioner. But the failure here is Petitioner's, for ignoring the settled distinction between a factual allegation and a legal conclusion.

As this Court has instructed, "a complaint must contain sufficient *factual matter*, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (emphasis added). "[L]egal conclusions" and "naked assertions devoid of further factual enhancement" do not suffice and are not entitled to a presumption of truth. *Id.* (cleaned up); *see Bell Atl. Co. v. Twombly*, 550 U.S. 544, 555 (2007) (courts should "not … accept as true a legal conclusion couched as a factual allegation").

The Second Circuit scrupulously followed that instruction. *See* App.20 (courts at the motion to dismiss stage must "accept as true factual allegations but not conclusions"); *id.* (court's job is to "separate the complaint's factual allegations from its conclusions and then determine whether the remaining well-pleaded factual allegations plausibly allege entitlement to relief"). As it explained, "whether [Respondent] 'threatened' or 'coerced' entities in an unconstitutional sense are conclusions" that are not themselves entitled to a presumption of truth. App.27. That distinction follows straightforwardly from *Twombly* and *Iqbal*. Summary reversal here would upend the teaching of those cases. There is no basis for it.

B. The Second Circuit Correctly Held That No Case Clearly Established the Unconstitutionality of Respondent's Alleged Actions.

Not only did the Second Circuit's analysis of qualified immunity hew closely to the governing standard, it also is clearly correct. Respondent is entitled to qualified immunity because, when appropriately separated from its legal conclusions, the Complaint's factual assertions do not allege any conduct that was contrary to clearly established law.

Public officials "are entitled to qualified immunity … unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018) (cleaned up). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right." *al-Kidd*, 563 U.S. at 741 (emphasis added) (cleaned up). That is the case only when "existing precedent" has placed the question "beyond debate," *ibid.*—that is, when the rule is "dictated by controlling authority or a robust consensus of cases of persuasive authority," *Wesby*, 138 S. Ct. at 589-90 (cleaned up).

As the Court explained in *Ashcroft v. al-Kidd* (a case also involving allegations about a high-ranking official), qualified immunity is meant to "give government officials breathing room to make reasonable but mistaken judgments about open legal questions" and to "protect[] all but the plainly incompetent or those who knowingly violate the law." 563 U.S. at 743

(cleaned up). Accordingly, the contours of the right the official is alleged to have violated must have been apparent at the time with "a high degree of specificity" before it will be deemed to have been clearly established. *Wesby*, 138 S. Ct. at 590 (cleaned up). And this Court has "'repeatedly told courts … not to define clearly established law at a high level of generality' since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014) (quoting *al-Kidd*, 563 U.S. at 742).

Petitioner fails to heed the Court's directive, arguing that the Second Circuit erred because "it has long been clearly established that '[a] public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights.'" Pet.33 (quoting *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230-31 (7th Cir. 2015)). But that defines the asserted right at far too high a level of generality. Simply saying that a public official must not cross the line between permissible persuasion and unconstitutional coercion does nothing to guide the official in determining whether, "in the particular circumstances that he or she faced," *Plumhoff*, 572 U.S. at 779, a given course of action would cross that line. Much greater specificity is needed to conclude that "every reasonable official" would have known the action was unconstitutional. *al-Kidd*, 563 U.S. at 741 (cleaned up).

The need for more specific guidance at the time of the challenged conduct is especially great where, as here, the underlying constitutional doctrine is highly fact-dependent. Petitioner's core merits claim is that

Respondent's actions violated the First Amendment under *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), which invalidated a "system of informal censorship" intended to intimidate distributors into removing certain books from their shelves. *Id.* at 64, 71. In the many decades since *Bantam Books*, numerous circuit courts—including the Second Circuit here—have assessed whether communications by government officials permissibly sought to persuade the targeted entities to act in certain ways, or impermissibly coerced them to do so. "Although the line between persuasion and coercion is clear in theory, it can sometimes be difficult to distinguish between the two in practice." *Kennedy v. Warren*, 66 F.4th 1199, 1207-10 (9th Cir. 2023). Invariably, therefore, the analysis has focused on the *specific characteristics and context* of the challenged government speech, with courts observing that fine distinctions in things like word choice and context can make all the difference. *See, e.g.*, *id.* (considering "words on the page and the tone of the interaction"); *Backpage.com*, 807 F.3d at 230-34 (noting use of "'demand,' not request; … 'compels,' not persuades; … 'sever ties,' not 'refuse to make payments for ads in the adult section of the Backpage website'").

Where the contours of the asserted constitutional right are themselves so context-sensitive, a government official cannot be said to have violated clearly established law in the absence of precedent with closely analogous facts. *Cf. Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (noting, in Fourth Amendment context, that "specificity is especially important" where it is difficult for officials to determine how legal doctrine will apply to facts they confront). Thus, when

assessing qualified immunity from First Amendment claims under *Bantam Books*, "the fact that the general proposition that the First Amendment prohibits implied threats to employ coercive state power to stifle protected speech is well-established does not end [the] inquiry." *Zieper v. Metzinger*, 474 F.3d 60, 67 (2d Cir. 2007) (cleaned up).

At the time of Respondent's alleged actions, no precedent clearly established that her actions violated the First Amendment. Petitioner identifies no "controlling authority" or even "a robust consensus of cases of persuasive authority" addressing analogous conduct. *Wesby*, 138 S. Ct. at 589-90 (cleaned up). *No case* established that a public official violates the First Amendment by encouraging regulated entities to consider the reputational risk of continuing to associate with certain organizations. *No case* established that such encouragement violated a third party's constitutional rights because they were taken after the initiation of a separate, legally warranted investigation into concededly unlawful conduct by a few of those regulated entities. And *no case* established that offering leniency to an entity in connection with a separate investigation concerning that entity's admittedly unlawful conduct was unconstitutionally threatening.

1. None of the cases on which Petitioner relies provides enough specificity to put the question "beyond debate," *al-Kidd*, 563 U.S. at 741.

Bantam Books involved a state commission specifically created to, among other things, investigate and recommend criminal prosecution of violations of certain laws. *Id.* at 59-60. The commission sent notices to book distributors identifying certain books as "objectionable," reminding the distributors that the

commission had a duty to recommend that the state Attorney General prosecute purveyors of obscenity, and informing the distributors that lists of "objectionable" publications had been circulated to local police. *Id.* at 62-63. A police officer typically followed up with a visit to inquire about what actions distributors had taken in response to the notice, and several distributors reported that they had responded by returning copies of the targeted books. *Id.* at 63. Because the commission "deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim," the Court found that those actions amounted to a scheme of "informal censorship" that violated the distributors' First Amendment rights. *Id.* at 67.

The facts alleged here are a far cry from those at issue in *Bantam Books*. Respondent led a long-established state agency, not a commission established specifically to investigate associations with gun-promotion organizations. Respondent's statements *encouraged* but did not *demand* action, were not "phrased virtually as orders," *id.* at 68, were not followed up by any further actions—much less by visits from law enforcement—and did not warn that the recipients would be referred for criminal prosecution (or any other consequence) if they did not follow the suggestions. These are self-evidently significant points of distinction that more than justify the different outcomes in *Bantam Books* and this case. At the very least, there is no way that "every reasonable official" in Respondent's position would have known at the time that the alleged conduct violated *Bantam Books*. *al-Kidd*, 563 U.S. at 741 (cleaned up).

Petitioner next points to an out-of-circuit case, *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015), in which a sheriff sent a targeted letter to several credit card companies demanding that they "cease and desist" allowing use of their cards to purchase advertisements on Backpage.com and reminding companies of their legal duty to report sex trafficking, to which the sheriff claimed Backpage.com was integral. *Id.* at 231-33. The letter cited the federal money-laundering statute, explicitly invoked the sheriff's position as a law enforcement officer, and requested the contact information for an individual who would work with the sheriff on the issues raised. *Id.* The Seventh Circuit found that the letter likely constituted an unconstitutional attempt at coercion.

Backpage.com similarly does not clearly establish any legal rule that would have been violated by Respondent's alleged actions. The memoranda and public statements at issue here contained no legal language like the "cease and desist" language used by the sheriff in *Backpage.com*, cited no statutes or regulations that failure to comply would violate, and threatened no adverse consequences whatsoever for not heeding their suggestions. There also was no request for follow up and no insinuation that the thousands of recipients of Respondent's public statements were accomplices to any criminal activity, as was the case in *Backpage.com*. *See id.* at 231-32.

Moreover, even if it were not factually distinguishable, *Backpage.com* cannot clearly establish law for purposes of Respondent's qualified immunity. "[C]ontrolling authority"—*i.e.*, Supreme Court or in-circuit precedent—is typically required, or, at the very least, "a robust consensus of cases of persuasive authority,"

Wesby, 138 S. Ct. at 589-90. One out-of-circuit case is not a "robust consensus."

Petitioner also cites two Second Circuit cases. Pet.34-38. But as the Second Circuit correctly determined below, those cases likewise do not clearly establish that Respondent's alleged actions violated any rights. *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) (per curiam), involved a letter from the Staten Island Borough President to a company that owned several community billboards. *Id.* at 341-42. The letter invoked the president's authority, raised concerns about a message expressed on the billboards, noted the "substantial economic benefits" the company derived from its billboards, and instructed the company to contact the president's "legal counsel" and task force chair to discuss issues with the message. *Id.* at 344. Analyzing the particular characteristics and context of the letter, the Second Circuit concluded that the recipient could reasonably have believed that the president intended to "use his official power" against it absent compliance with his request. *Id.*

In *Rattner v. Netburn*, 930 F.2d 204 (2d Cir. 1991), a village trustee sent a letter to the village's chamber of commerce questioning its decision to publish in its newspaper an advertisement criticizing the village's spending. *Id.* at 205-06. When asked about the letter in a town meeting, the trustee stated that he had made a list of businesses at which he regularly shopped, which was perceived as a threat of a boycott or discriminatory enforcement of regulations. *Id.* at 206. In response, the chamber stopped publishing the newspaper and misled the plaintiff about when the paper would be discontinued to prevent him from placing material in the final issue. *Id.* at 206-07. The Second

Circuit held that the trustee's comments could reasonably be interpreted as "intimating that some form of punishment or adverse regulatory action would follow" noncompliance. *Id.* at 209 (cleaned up).

In contrast to those cases, Respondent's public statements to thousands of companies did not mention even the possibility of any regulatory interference with economic benefits or any direct economic sanction akin to a boycott—even as they noted the reputational risk that entities might face from continuing to associate with groups like Petitioner. The statements did not invoke any laws or regulations. They requested no follow up. There was no mention of punishment or other consequences to be meted out by DFS. And they requested no explanations from any regulated entity that continued associating with Petitioner. Respondent's communications were simply nothing like the intimations of punishment at issue in *Okwedy* and *Rattner*.

In sum, none of Petitioner's cases involved facts sufficiently analogous to clearly establish that Respondent's alleged actions amounted to unconstitutional coercion in violation of the First Amendment. Among other things, they do not even suggest—never mind establish—that a pre-existing, separate, and legitimate investigation can transform persuasion into coercion.

2. The Second Circuit below also noted two other in-circuit cases—neither of which is cited by Petitioner—that found no First Amendment violation on facts more extreme than those alleged here. *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56 (2d Cir. 1999), involved legislators who levied accusations against a security contractor, asked a government agency to

investigate the contractor, questioned the contractor's eligibility for a contract, and advocated that the contractor not be retained—after which the contractor lost its contract. *Id.* at 61-62. But because the legislators did no more than express their views, their actions were not found violative of the contractor's First Amendment rights. *Id.* at 69-72.

Similarly, in *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33 (2d Cir. 1983), a letter from the administrator of a city agency, written on official stationary and mailed to local department stores, was found not violative of the First Amendment even though it urged stores to refrain from carrying a controversial board game and told the stores that removing the game from their shelves would be "a genuine public service." *Id.* at 36-37.

Taken together with *Okwedy* and *Rattner*, *X-Men* and *Hammerhead* highlight the fact-intensive and context-dependent relationship between the First Amendment right to be free from coercive censorship and the right of government officials to speak out on matters of public concern. Moreover, the finding of *no* unconstitutionality in *X-Men* and *Hammerhead*—both of which presented more extreme facts—totally dispels any notion that Respondent's alleged conduct violated a clearly established right.

* * *

In holding that Respondent is entitled to qualified immunity, the Second Circuit adhered to settled doctrine. It did not create any split with any other court. Unable to argue otherwise, Petitioner is left to dispute the application of the qualified immunity standard to its allegations in this case. But even on that factbound

question, Petitioner's argument fails. No existing caselaw clearly established that "every reasonable official would [have understood] that what [Respondent] [wa]s doing violate[d a] right." *al-Kidd*, 563 U.S. at 741 (cleaned up). The Court need go no further to deny the petition.

II. THE FIRST AMENDMENT QUESTION IS SIMILARLY SPLITLESS, FACTBOUND, AND CORRECTLY DECIDED.

The Second Circuit's qualified immunity holding stands in the way of any consideration of Petitioner's underlying First Amendment claim. But there is also nothing certworthy in the Second Circuit's treatment of the merits.

The Second Circuit held that Petitioner failed to plausibly allege that the guidance memoranda and press release constituted unconstitutional threats or coercion, and that the consent orders and alleged meeting with Lloyd's did not transform those statements into threats or coercion. App.26-34. In doing so, it applied the same fact-intensive and context-dependent test that guides the First Amendment inquiry in this Court and all circuits. The attempts by Petitioner and its amici to manufacture a circuit split are unavailing; there is no split on the governing legal standard. Instead, Petitioner and its amici again take issue with how settled precedent was applied to the allegations in this case. Nothing in that splitless, factbound question warrants a grant of certiorari.

In any event, the Second Circuit was right that the Complaint does not adequately allege that Respondent crossed the line between permissible persuasion and unconstitutional coercion when, in the wake of the

Parkland shooting, she issued public statements to thousands of industry participants encouraging them to examine their ties to gun promotion organizations. Her agency's previously commenced nonpublic investigation of a few companies concerning *separate* and *unrelated* violations of New York insurance law, and her alleged meeting with one entity that later admitted such violations, did not transform those statements of encouragement into threats or coercion.

A. Courts—Including the Second Circuit Here—Consistently Use a Contextual, Multi-Factored Analysis to Police the Line Between Permissible Persuasion and Unconstitutional Coercion.

The circuit courts are aligned in their approach to claims like Petitioner's. Since *Bantam Books*, the circuits have used equivalent tests to distinguish between permissible attempts to persuade and impermissible attempts to coerce. Specifically, they all employ a fact-intensive approach that looks to several factors, including: whether the official or entity invoked his or her formal title or role, *e.g.*, *Okwedy*, 333 F.3d at 344; *Backpage.com*, 807 F.3d at 231; *Zieper*, 474 F.3d at 66; whether the communication included references to legal penalties or other regulatory consequences for noncompliance, *e.g.*, *Backpage.com*, 807 F.3d at 232, 236; *Garcia v. City of Trenton*, 348 F.3d 726, 727-28 (8th Cir. 2003); *Am. Fam. Ass'n, Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114, 1124-25 (9th Cir. 2002); word choice and tone, *e.g.*, *Backpage.com*, 807 F.3d at 232-33; whether the official had relevant regulatory authority, *e.g., R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 88 (3d Cir. 1984); and whether

the recipient of the communication reasonably perceived a threat, *e.g., id.* at 89; *Backpage.com*, 807 F.3d at 233.

The Second Circuit did just that here, looking to "(1) word choice and tone; (2) the existence of regulatory authority; (3) whether the speech was perceived as a threat; and, perhaps most importantly, (4) whether the speech refers to adverse consequences." App.25 (internal citations omitted); *see also Kennedy*, 66 F.4th at 1207 (citing *Vullo* and applying same four-factor test).

There is, then, no disagreement among the courts of appeals on the legal standard governing claims like Petitioner's.

B. Petitioner's and Amici's Claim of a Circuit Split is Mistaken.

1. Petitioner attempts to manufacture a circuit split by asserting that the decision below is at odds with the Seventh Circuit's decision in *Backpage.com*. *See* Pet.4. But *Backpage.com* and the Second Circuit here applied equivalent tests, looking at the specific facts and context at issue. The disparity in outcomes stems not from a disagreement on the law, but from significant differences in the facts. *See supra*.

Both the Seventh Circuit in *Backpage.com* and the Second Circuit here considered whether the defendant had regulatory or decision-making authority over the recipient entities. *See Backpage.com*, 807 F.3d at 231 (noting sheriff was "using the power of his office"); App.28-29 (noting that Respondent "had regulatory authority over the target audience"). Both courts considered whether the recipient entities perceived the challenged speech as a threat. *See Backpage.com*, 807

F.3d at 233 (noting that "causality is obvious" where "credit card companies broke with Backpage" "within days"); App.29 (assuming without deciding that some may have perceived the guidance memoranda and press release as threats); *id.* at 13-15 (discussing reaction of regulated entities and market). And both considered—in great detail—the particular wording and tone of the challenged communications. *See Backpage.com*, 807 F.3d at 231-32 (considering, among other things, use of "legal term 'cease and desist,'" citation to federal money-laundering statute and suggestion of "susceptibility" to prosecution, and "demand" in accompanying press release); App.27-29 (considering, among other things, use of "encourag[ing]" and other "words intended to persuade rather than intimidate," and absence of reference to possible regulatory action). Contrary to Petitioner's suggestion, the Second Circuit did not focus solely on whether the challenged speech included an explicit threat. Instead, it examined many of the same aspects of the communications that the *Backpage.com* court focused on in determining whether they could reasonably be interpreted as coercive.

Notably, the Ninth Circuit recently discussed both *Backpage.com* and the decision below—*and saw no conflict between them*. *See Kennedy*, 66 F.4th 1199. That case involved a letter from Senator Elizabeth Warren to Amazon, asking the retailer to modify its algorithms to avoid directing consumers to a book that the plaintiff had written about COVID-19. *Id.* at 1204-05. The Ninth Circuit held that the letter likely constituted permissible persuasion and did not violate the plaintiff's First Amendment rights. *Id.* at 1212. In doing so, it cited the Second Circuit's decision below and

applied the same governing test. *Id.* at 1207. The Ninth Circuit also compared the facts before it to the facts of *Backpage.com*. Nowhere in its analysis did it suggest that there was any conflict between *Backpage.com*'s analysis and the Second Circuit's. *Id.* at 1209-12. And indeed, there is no conflict. As discussed *supra* in connection with qualified immunity, and as the Ninth Circuit evidently recognized, the fact that these two cases came out differently is the straightforward consequence of significant differences in their facts.[8]

2. In their amicus submission supporting Petitioner, several State Attorneys General attempt to manufacture a circuit split of their own, asserting that the Second Circuit in this case and the Tenth Circuit

[8] Even if it were possible to read the Second Circuit's decision here as somehow in tension with *Backpage.com*, any split would be extremely shallow. *Backpage.com* has been cited by circuit courts only twice: once by the Ninth Circuit in *Kennedy*, which, as noted above, distinguished *Backpage.com* on its facts, *see* 66 F.4th at 1209-12; and once by the Fourth Circuit, which recently cited *Backpage.com* for the general proposition that the First Amendment protects government expression but forbids intimidation and distinguished it briefly in a footnote, *see Speech First, Inc. v. Sands*, 69 F.4th 184, 194 n.10, 198 (4th Cir. 2023). Even in the Seventh Circuit, *Backpage.com* has been invoked on relevant issues only twice, and was distinguished both times. *See Speech First, Inc. v. Killeen*, 968 F.3d 628, 642 (7th Cir. 2020), *as amended on denial of reh'g and reh'g en banc* (Sept. 4, 2020) (holding university's invitation to voluntary meeting fell "well short of the level of coercion the Sheriff invoked in *Backpage*"); *Black Earth Meat Mkt., LLC v. Vill. of Black Earth*, 834 F.3d 841, 850 (7th Cir. 2016) (finding *Backpage.com* offered a "faulty analogy" to village's threat of litigation against a slaughterhouse). *No* court of appeals decision anywhere in the country has applied *Backpage.com* to find a First Amendment violation.

in *VDARE Found. v. City of Colo. Springs*, 11 F.4th 1151 (10th Cir. 2021), "departed from th[e] consensus approach" by "opting for a formalist focus on explicit threats." Brief for Montana, et al. as Amici Curiae Supporting Petitioner ("State Amici Br.") at 12. Specifically, amici contend that seven cases—*Okwedy*, 333 F.3d 339; *Backpage.com*, 807 F.3d 229; *Blankenship v. Manchin*, 471 F.3d 523 (4th Cir. 2006); *Garcia*, 348 F.3d 726; *R.C. Maxwell Co.*, 735 F.2d 85; *Am. Fam. Ass'n, Inc.*, 277 F.3d 1114; *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011 (D.C. Cir. 1991)—employed the "correct" approach because they "look[ed] through form to substance" and analyzed context. State Amici Br. at 6.

But that contention misreads the Second and Tenth Circuit opinions, both of which look to *the exact same factors* the State Amici favor. The Second Circuit below considered word choice and tone, regulatory authority, perception, the absence of reference to adverse consequences, and external context—including the ongoing investigation. App.26-34. The Tenth Circuit in *VDARE* proceeded similarly. 11 F.4th at 1156-57, 1166-68. Neither court confined its analysis to a "formalistic focus on explicit threats."

In the end, all of the decisions relied upon by Petitioner and the State Amici employ the *same* fact-intensive and context-dependent test used by the Second Circuit in this case. Any supposed circuit split on this point is illusory.

C. Petitioner Seeks Factbound Error Correction.

There is no disagreement on the law in this case. All agree that government officials are entitled to

express their policy views publicly and are "not barred by the Free Speech Clause from determining the content of what [they] say[]." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). All agree that government speech infringes the First Amendment if it '"can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request."' App.24 (quoting *Hammerhead*, 707 F.2d at 39). And all agree that a fact-intensive, contextual analysis is required to assess whether any particular instance of government speech constitutes impermissible coercion. App.25 (applying multi-factor analysis and citing *Bantam Books*); Pet.14 (identifying three factors and citing *Backpage.com* and *Bantam Books*).

The only disagreement is about how that settled legal standard should be applied to the facts alleged in this case. That, of course, is the sort of factbound question for which this Court's certiorari jurisdiction is not intended. But in any event, there is no error here; the Second Circuit was correct to hold that Petitioner has not plausibly alleged a First Amendment violation.

D. Respondent Did Not Violate the First Amendment.

The Second Circuit correctly held that Respondent did not violate the First Amendment by expressing her views regarding a national tragedy and encouraging regulated entities to consider their relationships with gun-promotion organizations.

The ability to opine on important questions of public policy is vital to the work of many government officials. *See Pleasant Grove City v. Summum*, 555 U.S.

460, 468 (2009). The First Amendment allows public officials "to say what [they] wish[]" and "to select the views that [they] want[] to express." *Id.* at 467-68 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)). Only when that speech crosses the line from "an attempt to persuade" to "an attempt to coerce" does it offend the First Amendment. *Kennedy*, 66 F.4th at 1207.

As noted above, and as the Second Circuit explained, courts monitor that line by looking to a range of factors, including "(1) word choice and tone; (2) the existence of regulatory authority; (3) whether the speech was perceived as a threat; and, perhaps most importantly, (4) whether the speech refers to adverse consequences." App.25. Respondent's actions here—individually and collectively—did not cross that line. Instead, as the Second Circuit found, her statements were "clear examples of permissible government speech," App.28, and "plainly reasonable" executions of "her duties as DFS Superintendent," App.33.

1. As the head of DFS, Respondent had regulatory authority over the recipients of the challenged statements. But the existence of regulatory authority by itself is not dispositive. *E.g.*, *Okwedy*, 333 F.3d at 343-44. Otherwise, officials with such authority would be precluded from ever speaking out on matters of public concern. The challenged statements were broadly disseminated and not targeted at just a few entities. And the statements were not accompanied by any exercise of Respondent's regulatory authority.

2. Guidance memoranda. Even considered in light of Petitioner's other allegations, the guidance

memoranda cannot reasonably be construed as coercive.

Word choice and tone. The guidance memoranda used language of encouragement, not intimidation. They made no demands or direct requests, and they did not contain anything comparable to the "legal term 'cease and desist.'" *Backpage.com*, 807 F.3d at 231. Instead, they simply "*encourage[d* regulated entities] to continue evaluating and managing their risks," to "review any relationships" with gun-promotion organizations, and to take appropriate actions in response. App.248; App.251 (emphasis added).[9] They are thus far from the notices "phrased virtually as orders" that crossed the line into coercion in *Bantam Books*, 372 U.S. at 68, and *Backpage.com*, 807 F.3d at 232-33.

Reference to adverse consequences. The guidance memoranda did not mention any "adverse *regulatory* action [that] will follow the failure to accede" to their suggestions. *Hammerhead*, 707 F.2d at 39 (emphasis added). They merely noted the possibility of any "risks, including reputational risks" that might arise from continued association with Petitioner and other gun-promotion organizations, App.248; App.251 (emphasis added). "A First Amendment problem arises only if the official intimates that *she* will use *her* authority to turn the government's coercive power against the target if it does not change its ways."

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[9] Stronger language would not necessarily have crossed the line either. Even direct requests are not impermissibly coercive if they are "framed as a request rather than a command." *Kennedy*, 66 F.4th at 1208. Here, the absence of more pointed language simply underscores the non-coercive nature of the communications, which surely would have been grasped by the sophisticated financial institutions that received the memoranda.

Kennedy, 66 F.4th at 1209 (emphasis added). Here, Respondent's reference to the possibility of "reputational risk" flowing from *the general public's views* about gun-promotion organizations was not impermissibly coercive—especially given the fact that numerous other companies had already announced their own decisions to dissociate from such groups. *See* App.247; App.250.

This conclusion is bolstered by the complete absence of reference to any law or regulation that the recipient entities might violate by not heeding DFS's suggestion. *See Kennedy*, 66 F.4th at 1209 (distinguishing *Backpage.com* because of "absence of a clear allegation of legal violations or threat of specific enforcement actions"); *compare Backpage.com*, 807 F.3d at 232 (noting citation to federal money-laundering statute). Petitioner makes much of the fact that the memoranda referenced risk management, Pet.21, but nowhere cites *any* law or regulation authorizing Respondent to impose any kind of penalty simply because a regulated entity did not heed a guidance memorandum. And indeed, there is no such authority. The mere reference to entities' risk-management obligations (which are well recognized in the financial industry) thus cannot have constituted a threat.

Perception of a threat. The Petition cites to a single statement by an industry commentator and to (unnamed) insurance carriers' reactions to the separate Carry Guard investigation to argue that the guidance memoranda were perceived as a threat. Pet.25 (citing App.213-14 ¶53; App.227-28 ¶81). But those references do not allege anything about how any entity subject to DFS's authority actually perceived the guidance

memoranda, nor do they allege that any regulated entity took any action because it perceived a threat.

Moreover, even if the Complaint did allege that entities terminated relationships with Petitioner in response to the guidance memoranda, that would "more plausibly reflect[] the [entity's] concern over reputational risks in the court of public opinion rather than fears of liability in a court of law." *Kennedy*, 66 F.4th at 1211; *see also* App.248; App.251 (noting potential reputational risks).

3. Press release. The same conclusion follows for the Cuomo press release that announced the guidance memoranda. App.243-45. Like the memoranda, the press release made no demands for concrete action and mentioned no adverse legal consequences for not following its advice. Instead, it "urge[d]" regulated entities to "review any relationships they may have with the National Rifle Association and other similar organizations," and to "consider whether such ties harm their corporate reputations and jeopardize public safety." App.243. While Respondent's quote in the press release encouraged regulated entities "to join the companies that have already discontinued their arrangements with the NRA," App.244, that wording does not render the statement impermissibly coercive. Like the guidance memoranda it described, the press release encouraged but did not command any action.

4. Consent orders. Petitioner does not deny that the consent orders that DFS entered into with Lockton, Chubb, and Lloyd's were within Respondent's authority, or that the entities' underlying conduct (*viz.*, administering and issuing Carry Guard and similar products) violated New York law.

Instead, Petitioner's principal claim seems to be that the consent orders provided "context" that somehow rendered Respondent's other speech coercive. *See* Pet.22. But that reads far too much into these concededly legitimate orders. Consistent with DFS's standard practice, these orders each stated explicitly that they were imposed for specific violations of New York insurance law. *See, e.g.*, App.261-62. And while the orders limited the regulated entities' ability to offer *illegal* insurance products marketed by Petitioner, they *explicitly* permitted the entities to continue assisting Petitioner in procuring, or themselves providing, insurance for Petitioner's own corporate operations. App.270; App.289; App.306. The orders thus restricted the entities only in areas where they had previously broken the law; continued lawful association with Petitioner was not affected. Accordingly, they cannot have contributed to any reasonable perception of unlawful coercion.

5. Alleged private statements. Similarly, the Complaint's references to supposed private statements by Respondent to Lloyd's—one of the entities that entered into a consent order for its unlawful involvement with Carry Guard and like products—do not plausibly allege unconstitutional coercion. The Complaint asserts, in vague and conclusory fashion, that Respondent "made clear" to Lloyd's during an alleged private meeting in February 2018—months *before* the guidance memoranda and press release—that "DFS was less interested in pursuing the infractions" related to "other, similarly situated insurance policies," "so long as Lloyd's ceased providing insurance to gun groups, especially the NRA." App.199-200 ¶21; App.223 ¶69.

Word choice and tone. These allegations—which do not specify the form of the communication, let alone what words were said and in what tone—are too vague to enable a court to assess them. *Id.* What is Respondent supposed to have said to "ma[k]e clear" to Lloyd's? The Complaint does not say. Petitioner cannot ask a court to accept its conclusory characterization of the alleged communication; the law requires Petitioner to allege *facts* that allow a court to draw its own conclusions. *Iqbal*, 556 U.S. at 678.

Reference to adverse consequences. Likewise, Petitioner offers no well-pleaded facts upon which a court could rely in concluding that Respondent referred to adverse consequences, since it provides no description at all of what Respondent is supposed to have said. App.199-200 ¶21; App.223 ¶69.

Respondent is not alleged to have made any express reference to adverse consequences during her supposed meeting with Lloyd's. *Id.* And in context, it is not clear what any implicit threat could have been about. After all, in December 2018, ten months after this alleged meeting in February 2018, Lloyd's entered into the above-described negotiated consent order with DFS and paid a $5 million civil penalty to resolve its past, concededly unlawful conduct. App.296-320. So when Lloyd's announced many months earlier in May 2018 that it would stop offering insurance policies related to Petitioner, App.224 ¶72, what adverse consequences was it avoiding? Although the Complaint labels Respondent's supposed threat "clear and unambiguous," App.200 ¶21, it alleges no concrete *facts* to support that conclusory assertion. It therefore is not entitled to any presumption of truthfulness. *Iqbal*, 556 U.S. at 681.

Perception of a threat. Moreover, even if Lloyd's had perceived some kind of threat, that perception would not be enough to render Respondent's actions coercive. The question is whether Petitioner has alleged facts sufficient for a court to conclude that it would have been *reasonable* for Lloyd's to perceive a threat in the circumstances. *See Penthouse, Int'l*, 939 F.2d at 1015 (letter did not threaten to use coercive power even if recipients interpreted it as doing so); *Zieper*, 474 F.3d at 67 (challenged actions "could reasonably be interpreted as an attempt to coerce"). The Complaint offers nothing on that front. Because it makes no specific, factual allegations upon which a court could rely to assess the reasonableness of any perception of a threat, its assertions about the alleged private statements cannot support a First Amendment claim.

6. Even considered collectively, Respondent's speech—the guidance memoranda, press statement, and alleged private communications—did not constitute "an unconstitutional implied threat to employ coercive state power to stifle protected speech." *Okwedy*, 333 F.3d at 342 (cleaned up). There was no legal demand or request for response as in *Backpage.com*, 807 F.3d at 236; no threat of economic sanction as in *Rattner*, 930 F.2d at 210; no "virtual[] orders" as in *Bantam Books*, 372 U.S. at 68. Instead, Respondent simply "t[ook] a position" on a matter of significant public concern—which she was clearly permitted to do under the First Amendment, *Walker*, 576 U.S. at 208—and encouraged regulated entities to consider whether they agreed. That does not even approach the line between persuasion and coercion. "Indeed, it is not easy to imagine how government could function if

it lacked this freedom" to express its views on matters of public concern. *Summum*, 55 U.S. at 468.

7. Any other conclusion would not only depart from settled First Amendment doctrine, but also undermine effective government. If a business or organization could immunize itself from regulation simply by expressing politically controversial views and then crying foul whenever the government disagrees with those views while also enforcing the law, government would be hamstrung. *See Penthouse Int'l*, 939 F.3d at 1016 ("If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized."). That is not what the First Amendment requires, and the Court should reject Petitioner's invitation to change the law to provide otherwise—especially since any such rule was not clearly established at the time and thus could not be applied against Respondent here.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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