No. 22-842

In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,

v.

MARIA T. VULLO

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

BRIEF FOR PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This case raises the question of whether newly popular theories of corporate governance and exaltation of regulatory form over substance provide a way around the longstanding rule that a government agency may not "produce a result which it could not command directly," by restricting access to financial markets in order to discourage the exercise of constitutionally-protected rights. *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (cleaned up). The Second Circuit answered "yes." But the text and structure of the Constitution and this Court's precedent firmly answer "no."

Respondent issued "nonbinding" guidance warning that financial institutions could be subject to sanctions for doing business with Second Amendment activist groups, supposedly because the public "backlash" could threaten the institutions' stability. Pet. App. 246-251. Presumably a different regulatory entity could have said the same about doing business with Black Lives Matter (BLM), or any other group active in public debate. The National Rifle Association sued, and unsurprisingly, survived Respondent's motions to dismiss. Pet. App. 30-38, 93-95, 183. But the Second Circuit reversed, reasoning that the guidance could not be interpreted as a threat, because it was

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution toward the brief's preparation or submission. Counsel of record for all parties received timely notice of the intent of *amicus curiae* to file this brief.

theoretically nonbinding, and that the warning was justified as a measure to protect corporate stability under "corporate social responsibility" (CSR) theory. Pet. App. 27, 30 n.14.

This ignores the obvious reality: Financial institutions are subject to such complex regulations that they depend on the approval of "nonbinding" guidance for legal safety and will almost never act contrary to this guidance. And using CSR—a controversial theory positing that taking popular or "socially responsible" stances may increase corporate profits—to justify curtailing First Amendment rights poses a grave threat to all constitutionally-protected individual rights. Indeed, the Constitution protects the exercise of various rights precisely *because* they are unpopular or cause inconvenience. The Second Circuit's decision, by contrast, creates what amounts to a heckler's veto enforced via regulators claiming that unfashionable views or actors create an impermissible financial risk from the hecklers. See *Forsyth County* v. *Nationalist Movement,* 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

Protection of constitutional rights—especially Fourth Amendment rights—is a key mission of *amicus curiae* Project for Privacy and Surveillance Accountability, Inc. (PPSA), a nonprofit, nonpartisan organization dedicated to protecting privacy rights and guarding against an expansive surveillance state. PPSA urges this Court to send a clear message that the government may not punish the exercise of any constitutional rights, even through opaque regulatory

schemes or with CSR theory as a supposed justification.

SUMMARY OF ARGUMENT

Given the complex, opaque, and discretionary regulatory environment surrounding financial institutions, they depend on guidance from regulatory agencies, "binding" or not, to perform their work without exposure to inordinate legal risk. See generally Br. of Fin. & Bus. Law Scholars as *Amici Curiae* in Support of Pet'r (merits stage) (Br. Fin. & Bus. Law Scholars). Guidance thus grants the equivalent of a license to those who comply with it.

Declaring an action out of compliance with guidance penalizes that action by revoking this license-equivalent. And penalties for expressing certain viewpoints (or doing business with those who do) must withstand strict scrutiny. *Citizens United* v. *Federal Election Comm'n*, 558 U.S. 310, 340 (2010). This is true even if the regulator did not intend the result, *ibid.*, or if the guidance is framed as a condition on granting this license-equivalent, rather than revocation of it, *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 231 (1987).

Respondent's "corporate social responsibility" (CSR) justifications cannot satisfy strict scrutiny in any constitutional context. CSR theory posits that taking "responsible" actions—in this case, refusing to do business with those holding supposedly "irresponsible" views—will increase corporate profits, either by winning over public opinion or increasing social welfare generally and reaping some share of the increase. It is controversial in academic literature, and

even its supporters generally only tie it to modest profit increases. Its modest purported benefits are nowhere near a compelling interest, and there are numerous other, less restrictive means of ensuring corporate profit and stability.

CSR-based regulations also threaten rights beyond those secured by the First Amendment, including even privacy rights protected by the Fourth Amendment. CSR provides a ready-made tool to add a veneer of economic justification to laws punishing any disagreement or tyrannically advancing any particular vision of social utility—exactly the sort of justifications the Constitution secures rights against. See, *e.g.*, *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 271 (1964). The Court should thus address the issue presented here at a level of abstraction that includes, but goes beyond, the First Amendment interests at stake, making clear that there are no magic words to avoid constitutional scrutiny.

ARGUMENT

The Constitution protects individual rights from majoritarian pressures, from the whims of a mob, and from bureaucrats' views of optimal social policy. See, *e.g.*, *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 67 (2022); *Raines* v. *Byrd*, 521 U.S. 811, 829 (1997) (discussing the "counter-majoritarian" effect of judicial review itself); *New York Times*, 376 U.S. at 271. The government may not evade these protections with veiled threats or shell games. *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). And it may not restrict or punish expression of particular viewpoints without the gravest of justifications; appeals to popular opinion or possible changes in corporate

profits won't do. *Citizens United*, 558 U.S. at 340. Indeed, they amount to government enforcement of a "heckler's veto." See *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) ("Nor under our Constitution does protected speech *** readily give way to a 'heckler's veto.'" (citation omitted)); *Forsyth County* v. *Nationalist Movement,* 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."); *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4 (1949).

Yet that is exactly what was allowed to happen here. Respondent issued "nonbinding" guidance—which was for all practical purposes dispositive—and appealed to a supposed threat of public "backlash" to prohibit doing business with groups advocating disfavored views. This was a clear violation of the First Amendment.

But it is not a problem that will remain confined to the First Amendment if this Court does not intervene. The approach would be unconstitutional as applied to virtually any constitutional right and is a particular threat to rights protecting the unpopular—such as Fourth Amendment rights. The fundamental lesson of a written constitution, an independent judiciary, and judicial review is that constitutional rights are protected not because they will always be popular, but precisely in spite of their unpopularity at any given moment.

I. Respondent's Revocation of a Regulatory Safe-Harbor from Those Who Do Business with Parties Who Hold Unpopular Viewpoints Is Subject to Strict Scrutiny.

Complex industries are often subject to an "'almost impenetrable maze'" of regulations, and "[a]midst this confusion, it comes as no surprise that some regulations may overlap or conflict." *Baker* v. *United States Dep't of Agric.*, 928 F. Supp. 1513, 1519 (D. Idaho 1996) (quoting *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 606 (1987) (Powell, J., concurring in part)). So, as other *amici* have explained, financial institutions rely on guidance from regulatory agencies to ensure they are not ensnared by competing interpretations of laws and regulations to which they are subject, and will almost never act contrary to such guidance. See generally Br. Fin. & Bus. Law Scholars; see also Br. of Fin. & Bus. Law Scholars as *Amici Curiae* in Support of Pet'r 3-23 (cert. stage).

Regulatory guidance thus effectively functions as a licensing system. *License*, *Black's Law Dictionary* (11th ed. 2019) ("A privilege granted by a state *** the recipient of the privilege then being authorized to do some act or series of acts that would otherwise be impermissible"). And removing this imprimatur subjects financial institutions to such significant legal risks that it is effectively a revocation of a license.

Accordingly, revocation of a license, or its equivalent, for engaging in a specific action has the effect of prohibiting that action—even if the regulator did not intend that result. *Citizens United*, 558 U.S. at 340; see also Br. for *Amicus Curiae* Americans for Prosperity Foundation in Support of Pet'r 13-15. A

regulator may not indirectly "produce a result which it could not command directly" through such a system. *Perry*, 408 U.S. at 597 (cleaned up). The result this guidance produces is discrimination based on viewpoint or speaker identity, see Pet. App. 246 (discussing the NRA "and similar organizations"). Thus, it is subject to strict scrutiny. *Citizens United,* 558 U.S. at 340.

But even if the guidance were not a threat of punishment, it imposes a condition on enjoying the legal safe harbor it offers. As explained above, this protection functions similarly to a license; thus, it is a form of public benefit. See *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 608 (2013) (citing *Frost* v. *Railroad Comm'n of State of Cal.*, 271 U.S. 583, 592-593 (1926)) (a "business license" is a public benefit); *R.S.W.W., Inc.* v. *City of Keego Harbor*, 397 F.3d 427, 434 (6th Cir. 2005). When a public benefit is conditioned on refraining from exercising a constitutional right, the condition is generally subject to the same level of scrutiny as a direct penalty. *Arkansas Writers' Project*, 481 U.S. at 231 (applying strict scrutiny); *Perry*, 408 U.S. at 597; see also *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 547 (2001) (explaining the Unconstitutional Conditions doctrine is necessary "lest the First Amendment be reduced to a simple semantic exercise"). Here, that is strict scrutiny.

II. CSR-Based Justifications Do Not Satisfy Strict Scrutiny.

While CSR may be a permissible approach for a corporation to adopt as its own governance model, its benefits are too small, too uncertain, and far from compelling enough to satisfy strict scrutiny when it is imposed by a regulatory authority. Moreover, there are almost always less restrictive ways to protect those interests.

Corporate Social Responsibility (CSR) and Environmental-Social-Governance (ESG) theorists argue that corporations may increase their profits with "socially responsible" actions—either because societal prosperity will increase, and corporations will reap some share of this growing pie, or because taking these responsible stances will increase popularity and result in greater sales or decreased regulatory burdens. See, *e.g.*, Witold Henisz et al., *Five Ways that ESG Creates Value*, McKinsey Q. 1, 6, 10 (Nov. 2019); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience*: *The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev. 381, 435 (2020).

But researchers are divided on the efficacy of these policies on both theoretical and empirical grounds. See, *e.g.*, Stefan Hirsch et al., *CSR and firm profitability: Evidence from a meta-regression analysis*, 37 J. Econ. Surv. 993, 998 (2023) (noting a range of studies finding positive, negative, or essentially nonexistent impact of CSR on firm performance); Schanzenbach & Sitkoff, *supra*, at 433-434 ("Some empirical evidence validates these arguments, although the findings are mixed and

contextual, and highly dependent on the research design."); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 Cornell L. Rev. 91, 95-96 (2020) ("we conduct in this Article an economic, empirical, and conceptual analysis of stakeholderism ***. Our analysis indicates that stakeholderism should be expected to produce only illusory benefits as well as seriously detrimental effects.").

Even studies finding that CSR benefits corporations tend to find only modest effects. See Hirsch et al., *supra*, at 993 (noting a "small positive link"); Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies,* 5 J. Sustainable Fin. & Investment 210, 225 (2015) (finding "overall correlation averages *** could be considered rather 'small'"). And these analyses are confounded by risks of p-hacking or other selective reporting issues. See Hirsch et al., *supra,* at 999 ("publication bias can lead to a 'file drawer problem' whereby authors tend to withhold nonsignificant results"); see also Holger Spamann & Jacob Fisher, *Corporate Purpose: Theoretical and Empirical Foundations/Confusions*, at i (Eur. Corp. Governance Inst., Law Working Paper No. 664/2022), available at http://ssrn.com/abstract_id=4269517 ("Many arguments for or against (particular) corporate purpose(s) are fallacies, red herrings, or, for empirics, cherry-picking.").

Even if CSR's supporters are correct, moreover, its benefits are not a compelling government interest, a category limited to "only those interests of the highest order." *United States* v. *Hardman*, 297 F.3d 1116, 1127

(10th Cir. 2002) (quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972)). Small changes in profits predicted by empirical studies, much less nebulous risks of "backlash," fall far short. Pet. App. 30. Even the stability of a single company is not enough; the government cannot override the Bill of Rights to slightly reduce the rate of corporate bankruptcies. Nor can a theoretical contribution of a small risk to something like a banking crisis justify treating it as a compelling interest. Compare *Cutter* v. *Wilkinson*, 544 U.S. 709, 723 n.11 (2005) (prison security is a compelling interest) with *Holt* v. *Hobbs*, 574 U.S. 352, 363 (2015) (marginal gain in prison security from prohibiting inmate from growing short beard is not a compelling interest). If unpopularity were enough to justify restricting constitutionally-protected corporate conduct, then the public (or the most extreme members thereof) would always have a heckler's veto on such conduct, enforced by viewpoint-biased regulators. See *Forsyth County,* 505 U.S. at 134 ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

And CSR initiatives will almost never be the least restrictive means to achieve corporate stability. Other corporate governance tools, including modifications to executive pay, modifying bank reserve requirements, and measures increasing responsiveness to stockholders are available, and may be more effective. See, *e.g.*, Schanzenbach & Sitkoff, *supra*, at 436 ("The theoretical relationship between firm value and environmental and social factors has some empirical support, though not as strong as that in favor of governance factors."); Christian Glocker, *Reserve*

Requirements and Financial Stability, 71 J. Int'l Fin. Mkts., Insts. & Money 1, 2 (2021) (discussing different theories on reserve requirements' effects on stability); Lucian A. Bebchuk et al., *What Matters in Corporate Governance,* 22 Rev. Fin. Stud. 783, 783-787 (2009) (constructing a six-factor corporate governance index, focusing on shareholders' ability to influence directors).

The Second Circuit erred by failing to recognize the threat posed by this guidance, by failing to apply the appropriate level of scrutiny, and by failing to recognize that CSR theory does not meet this level of scrutiny. The decision should be reversed.

III. If Allowed To Stand, Vullo's Actions Threaten All Constitutionally-Protected Individual Rights, Particularly Fourth Amendment and Privacy Rights.

In addition to infringing First Amendment rights, CSR theory, by tying supposed financial risk to actions that are unpopular, poses a particularly grave threat to Fourth Amendment rights. Nowadays, a significant number of Fourth Amendment issues involve data held by a third party—typically a technology company—where the actual target of the search may not be aware of the search. See, *e.g.*, *Carpenter* v. *United States*, 138 S. Ct. 2206, 2217 (2018). Thus, the third party is in the best position to protect the right at issue but has a limited incentive to do so. When they do, these third parties become subject to controversy, and a degree of "backlash." See, *e.g.*, Cyrus Farivar & Thomas Brewster, *Google Just Killed Warrants That Give Police Access To Location Data*, Forbes (Dec. 14, 2023), http://tinyurl.com/kvpatbwt; Peter Dujardin,

Law Enforcement Worries Over Beefed-Up Phone Encryption, Daily Press (Apr. 12, 2015), http://tinyurl.com/4tmnxk4u (noting then-FBI Director Comey's comments against Apple).

Allowing a regulatory agency to punish these courageous stances by treating the resulting controversy as illegally poor risk management would make protecting Fourth Amendment rights against certain searches nearly impossible. And even if there were no organic backlash, the government could bootstrap it. A simple press conference, accusing a pro-privacy company of endangering the public, or supporting criminals or terrorists, would likely be enough to threaten share prices or profits, thus empowering the government to create its own regulatory justification under CSR theory.

Such government actions pose an enormous risk constitutional rights, especially Fourth Amendment rights. The individual rights enshrined in the Constitution are precisely those that are so important, yet so often subject to the winds of politics, that they are not subject to revocation when they are unpopular, or exercised by the unpopular, or conflict with some trending social vision. See, *e.g.*, *Kennedy*, 597 U.S. at 534 (discussing the anti-heckler's-veto principle); *Bruen*, 597 U.S. at 67; *Raines*, 521 U.S. at 829 (discussing the "counter-majoritarian" effect of judicial review itself); *New York Times,* 376 U.S. at 271. A theory of the corporation that mandates government-enforced punishment or ostracism of those who exercise such rights has no place in any State's regulatory arsenal. Richard A. Epstein, *The Excessive Ambitions of Stakeholder Ideology*, 77 Bus.

Law. 755, 761 (2022) ("ESG and stakeholder advocates impose their authoritarian lockstep view of the world that not only binds those companies that believe in these objectives, but ostracizes and condemns those that do not. These closely allied movements then become yet another cog in the 'disinformation' machine or 'cancel' culture.").

Because the regulatory theory endorsed by the Second Circuit here has constitutional implications far beyond just the First Amendment, PPSA urges the Court to analyze this case at an appropriately broader level of generality, and to emphasize in its opinion that using such pressure tactics against any constitutional right must meet the level of scrutiny for the right in question.

CONCLUSION

CSR-based justifications for constitutional infringements, which appeal to both public opinion and thinly justified predictions of societal welfare, are impermissible in the face of any constitutional right, not just speech rights protected by the First Amendment. For that reason, and those stated by Petitioner, the Second Circuit's decision should be reversed.

Respectfully submitted,

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