

No. 25-479

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 FOR CONSUMERS' RESEARCH
AS AMICUS CURIAE IN SUPPORT
OF PETITIONER**

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of <i>Amicus Curiae</i>	1
Summary of the Argument	2
Reasons for Granting the Writ.....	4
I. Government coercion to suppress disfavored viewpoints is increasingly common, putting consumers at special risk.	4
II. Government action through coercion evades administrative law requirements.....	14
III. Minute factual distinctions should not remove liability for unlawful coercion.	16
Conclusion.....	18

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987).....	17, 18
<i>Azar v. Allina Health Servs.</i> , 587 U.S. 566 (2019).....	14
<i>Bantam Books, Inc. v. Sullivan</i> , 372 U.S. 58 (1963).....	18
<i>City of Arlington v. FCC</i> , 569 U.S. 290 (2013).....	4
<i>DHS v. Regents of the Univ. of Cal.</i> , 591 U.S. 1 (2020).....	14
<i>Fed. Mar. Comm’n v. S.C. State Ports Auth.</i> , 535 U.S. 743 (2002).....	4
<i>Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.</i> , 561 U.S. 477 (2010).....	4, 15
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	17, 18
<i>Joint Anti-Fascist Refugee Comm. v. McGrath</i> , 341 U.S. 123 (1951).....	14
<i>Kisor v. Wilkie</i> , 588 U.S. 558 (2019).....	15, 16
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	14
<i>Murthy v. Missouri</i> , 603 U.S. 43 (2024).....	11

<i>Nat’l Rifle Assoc. v. Vullo</i> , 602 U.S. 175 (2024).....	2, 5, 12, 15, 16, 18
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1973).....	13
<i>Sackett v. EPA</i> , 566 U.S. 120 (2012).....	15
<i>Seila Law LLC v. CFPB</i> , 591 U.S. 197 (2020).....	5
<i>Smith v. Goguen</i> , 415 U.S. 566 (1974).....	16
<i>Talk Am., Inc. v. Michigan Bell Tel. Co.</i> , 564 U.S. 50 (2011).....	15
<i>W. Virginia v. EPA</i> , 597 U.S. 697 (2022).....	4

OTHER AUTHORITIES

C. Teh, <i>One of MyPillow CEO Mike Lindell’s Banks has Cut Ties with Him a Month After Citing Him as a ‘Reputation Risk,’</i> Business Insider (Feb. 14, 2022), https://perma.cc/P9VT-GUWA	10
E. Crane, <i>Barron Trump was Denied a Bank Account Due to ‘Cancel Mob,’ Mom Melania Claims</i> , N.Y. Post (Oct. 9, 2024), https://perma.cc/7U96-HEGR	10
Exec. Order 14331, 90 Fed. Reg. 38925 (Aug. 7, 2025)	11

House Comm. on Oversight & Gov't Reform, <i>Comer Investigates FDIC's Potentially Politically Motivated Attempts to Suppress Crypto-Related Activity</i> (Feb. 28, 2025), https://perma.cc/KB5R-QM8Z	9
FDIC, <i>Annual Historical Bank Data</i> , https://perma.cc/JH5D-HVNJ (last visited Jan. 8, 2024).....	12
House Comm. on Oversight & Gov't Reform, <i>The Department of Justice's "Operation Choke Point"</i> (May 29, 2014), https://perma.cc/XU8F-LHUC	5, 6, 7, 8
J. Cox, <i>Chase Bank Cancels National Committee for Religious Freedom's Account Just Like it Canceled Family Council's</i> , Family Council (Oct. 19, 2022), https://perma.cc/F5PU-RXJQ	9
Letter from Daniel Cameron to Jamie Dimon (May 2, 2023), https://perma.cc/2CR7-UHE3	9
N. Gorsuch & J. Nitze, <i>Over Ruled: The Human Toll of Too Much Law</i> (2024)	4
R. Cass, <i>Rulemaking Then and Now: From Management to Lawmaking</i> , 28 Geo. Mason L. Rev. 683 (2021)	4
R. Keller, <i>Despite Chase Bank Reversal, Donald Trump Jr. Event in St. Charles Remains Canceled</i> , Missouri Independent (Nov. 18, 2021), https://perma.cc/3JJ3-GVKA	10

Staff of House Comm. on the Judiciary and House Select Subcomm. on the Weaponization of the Fed. Gov't, 118th Cong., <i>The Censorship-Industrial Complex: How Top Biden White House Officials Coerced Tech to Censor Americans, True Information, & Critics of the Biden Administration</i> (Comm. Interim Report 2024)	11
T. Zywicki, <i>Cancel Culture Comes to Banking</i> , Newsweek (Jan. 13, 2022), https://perma.cc/8Y3H-NHRW	8, 12, 18

INTEREST OF *AMICUS CURIAE*

Consumers' Research is an independent educational 501(c)(3) nonprofit organization whose mission is to increase the knowledge and understanding of issues, policies, products, and services of concern to consumers and to promote the freedom to act on that knowledge and understanding. Consumers' Research believes that the cost, quality, availability, and variety of goods and services used or desired by American consumers—from both the private and public sectors—are improved by greater consumer knowledge and freedom. To that end, Consumers' Research engages in research, policy advocacy, and public engagement initiatives. Consumers' Research has extensive experience studying consumer-related issues involving the banking and technology companies whose conduct is particularly susceptible to government pressure via regulatory threats. For that reason, Consumers' Research has a significant interest in this case.*

* Under Rule 37.2, *amicus* provided timely notice of its intention to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

The growth of the modern administrative state has accompanied increased government involvement in all areas of American life. With that heightened power comes a stronger temptation and ability for the government to achieve its ends indirectly via threats. This pressure is often easier, faster, and more effective than going through the messy process of legal regulation or action. And it can be just as deadly as outright confrontation. It is, as this Court said, like “killing a person by cutting off his oxygen supply rather than by shooting him.” *Nat’l Rifle Assoc. v. Vullo*, 602 U.S. 175, 197 (2024) (cleaned up). Yet even though this Court recognized the constitutional problem with this pressure last time around, the court below invoked qualified immunity to avoid accountability. This brief highlights three considerations that support another intervention by this Court in this case.

First, the increasing use of government threats and pressure to indirectly regulate puts constitutional rights at risk, especially the rights of individual consumers. Governments appear to be wielding the varied tools of regulation more often to pressure private parties to take actions against third parties. When those third parties are individual consumers, the risk is especially great. Those consumers lack the resources of large entities to fight the government’s intrusion and to find alternative services to replace those scared off by the government. Those individuals whose views are unpopular will suffer most. These individuals may face discrimination and hostility even on the best of days from companies in rapidly

consolidating industries, companies that often roll over against minor social media campaigns. When an official government regulator exerts even slight pressure on these companies, the consumer stands little chance.

Second, this indirect government pressure not only affects constitutional rights, but it also enables evasion of basic administrative law and due process requirements. These requirements are a foundation of the rule of law. They are also inconvenient for the government. So when the government can achieve its goals via indirect pressure without ever promulgating a regulation or meeting a courtroom burden, it will do so. Once again, what's lost are the rights of individuals to be free of government burdens imposed outside the law's strictures.

Third, this Court has already recognized some of these problems in this very case. But the decision below let the government officials off scot-free, focusing on factual minutiae with no bearing on the clear-cut constitutional violation alleged here. This approach practically negates this Court's prior opinion recognizing a constitutional violation. The broad range of administrative rules and procedures means there will always be *some* factual differences across cases. Those differences should not be enough to erase the government's liability for unconstitutionally pressuring private entities. The Court should again grant certiorari.

REASONS FOR GRANTING THE WRIT

I. Government coercion to suppress disfavored viewpoints is increasingly common, putting consumers at special risk.

“The proliferation of Government, State and Federal, would amaze the Framers,” who “could not have anticipated the vast growth of the administrative state.” *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) (cleaned up). The government “now wields vast power and touches almost every aspect of daily life.” *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). “[L]aw in our country has simply exploded.” N. Gorsuch & J. Nitze, *Over Ruled: The Human Toll of Too Much Law* 16 (2024).

“[A] central feature of modern American government” is that much of this power is wielded by unelected bureaucrats. *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). In practice, these bureaucrats often “exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules.” *Id.* at 312–13. These agencies continue to spawn, see *id.* at 313, and each year, “federal administrative agencies adopt something on the order of three thousand to five thousand final rules,” *W. Virginia v. EPA*, 597 U.S. 697, 741 n.2 (2022) (Gorsuch, J., concurring) (quoting R. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 Geo. Mason L. Rev. 683, 694 (2021)). All this means that the

government—often unelected administrators—have ready “authority to bring the coercive power of the state to bear on millions of private citizens and businesses.” *Seila Law LLC v. CFPB*, 591 U.S. 197, 219 (2020).

With this tremendous authority comes ample potential for abuse. Of course, not all abuse is intentional, and the line between proper pursuit of government priorities and violation of citizens’ liberties may be narrow. But the mere existence of abundant authority opens the door to government coercion. This Court has condemned such coercion, emphasizing that “[g]overnment officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors.” *Vullo*, 602 U.S. at 180. In fact, if government officials are pursuing enforcement activities to “punish or suppress . . . protected expression,” that their targets may have actually violated the law does not excuse their coercive efforts. *Id.* at 196.

Many examples suggest that such coercion—with effects on private citizens that go beyond the government’s lawful authority and violate citizens’ rights—is increasingly common.

Start with 2013, when the Department of Justice began an investigation of banks and payment processors known as “Operation Choke Point.”¹ “The ostensible goal of the investigation” was “to combat mass-market consumer fraud by foreclosing

¹ House Comm. on Oversight & Gov’t Reform, *The Department of Justice’s “Operation Choke Point”* 2 (May 29, 2014), <https://perma.cc/XU8F-LHUC>.

fraudsters’ access to payment systems”—systems “that every business needs to survive.”² Invoking subpoena authority intended “to give the Department the tools to pursue civil penalties against entities that commit fraud *against* banks, not private companies doing legal business,” the Department issued many subpoenas to banks.³ These subpoenas were largely targeted at banks’ relationships with payday lending, a lawful industry then disliked by the Department.⁴

In echoes of the actions against the NRA in this case, the Department justified its subpoenas by reference to vague, hypothetical “risks” that may “affect” financial institutions, while admitting that no “actual losses” had occurred.⁵ The subpoenas and subsequent settlement proposals that “included specific bans on doing business with whole categories of lawful financial services” (including payday lenders) had their inevitable effect.⁶ The targeted businesses began receiving bank account cancellation letters en masse, with one typical letter reading: “We are unable to effectively manage your Account(s) on a level consistent with the heightened scrutiny required by our regulators for money service businesses due to the transactional characteristics of your business.”⁷

Thus, the Department achieved indirectly what it had no authority to do directly: drive lawful companies out of business by depriving them of the

² *Id.* at 1–2.

³ *Id.* at 1.

⁴ See *id.* at 5.

⁵ *Id.* at 3–4.

⁶ *Id.* at 5–6.

⁷ *Id.* at 6.

fundamental services necessary to operate. The Department acknowledged this inevitable result with this blasé dismissal:

Although we recognize the possibility that banks may have therefore decided to stop doing business with legitimate lenders, we do not believe that such decisions should alter our investigative plans. Solving that problem—if it exists—should be left to legitimate lenders themselves who can, through their own dealings with banks, present sufficient information to the banks to convince them that their business model and lending operations are wholly legitimate.⁸

This dismissal underscores the coercive dangers here. First, by exceeding its authority, the Department avoided having to prove *anything* about the affected companies and instead forced them to prove to another private entity that they are acceptable. Second, other private entities would be reluctant to extend services—few accounts would be worth the publicity and costs of a “potentially ruinous” government investigation.⁹ Third, the Department’s actions had an *in terrorem* effect on other industries, too, as “merely providing normal banking services to certain merchants” could be seen to “create[] a ‘reputational risk’ that is an actionable violation.”¹⁰

⁸ *Id.* at 7.

⁹ *Id.* at 9.

¹⁰ *Id.* at 8.

One set of victims is relevant here: “firearms and ammunition merchants.”¹¹

None of this surprised the government. The *in terrorem* effect of government coercion was the point. Indeed, “reputational risk” becomes a self-fulfilling prophecy, as the government takes actions like investigations or subpoenas that will inevitably bring negative attention to an entity and thus damage its reputation. As the Department crowed after six months of Operation Choke Point, “many banks have decided to stop processing transactions in support of Internet payday lenders,” and “[w]e consider this to be a significant accomplishment and positive change for consumers.”¹² Whether or not it was a positive change for consumers, it was one that depended on the government exceeding its apparent authority and using coercive pressure to run lawful companies out of business.

Similar examples have only mounted in the last decade, and many affect individuals’ constitutional rights. “Paypal, major credit card networks and banks . . . stopped processing payments for organizations they deem ‘hate groups.’”¹³ The Family Council, a conservative advocacy group, was dropped by its payment processor (a JPMorgan Chase entity) because it was deemed “High Risk.”¹⁴ JPMorgan

¹¹ *Id.* at 9.

¹² *Id.* at 7.

¹³ T. Zywicki, *Cancel Culture Comes to Banking*, Newsweek (Jan. 13, 2022), <https://perma.cc/8Y3H-NHRW>.

¹⁴ J. Cox, *Chase Bank Cancels National Committee for Religious Freedom’s Account Just Like it Canceled Family Council’s*, Family Council (Oct. 19, 2022), <https://perma.cc/F5PU-RXJQ>.

Chase also terminated the checking account of the National Committee for Religious Freedom and refused to provide an explanation.¹⁵ After public controversy ensued, “Chase contacted NCRF to note that the bank would restore the account, but only if NCRF provided” “[a] list of NCRF’s donors,” “[a] list of political candidates NCRF intended to support,” and “[a]n explanation of the criteria NCRF used to determine its endorsements and support.”¹⁶ “Recent reports also indicate that numerous individuals and businesses may have been unlawfully debanked during the Biden Administration because of their interest in the cryptocurrency space.”¹⁷

One citizen, outspoken on recent public controversies, found his bank account being terminated due to perceived “reputation risk.” Highlighting the self-fulfilling nature of government coercion, a bank official on an apparent recording justified the action by explaining: “But what if somebody came in and said, ‘You know what? We’re going to subpoena all of his account records and this and that,’ and we make the news?”¹⁸ In other words, the mere threat of a subpoena—and certainly an

¹⁵ Letter from Daniel Cameron to Jamie Dimon 3 (May 2, 2023), <https://perma.cc/2CR7-UHE3>.

¹⁶ *Ibid.*

¹⁷ House Comm. on Oversight & Gov’t Reform, *Comer Investigates FDIC’s Potentially Politically Motivated Attempts to Suppress Crypto-Related Activity* (Feb. 28, 2025), <https://perma.cc/KB5R-QM8Z>.

¹⁸ C. Teh, *One of MyPillow CEO Mike Lindell’s Banks has Cut Ties with Him a Month After Citing Him as a ‘Reputation Risk,’* Business Insider (Feb. 14, 2022), <https://perma.cc/P9VT-GUWA>.

actual subpoena—can drive debanking decisions based on a person’s advocacy.

Likewise, a JPMorgan Chase subsidiary cancelled payment processing for an event in Missouri featuring Donald Trump Jr. because it was allegedly “promoting ‘hate, violence, racial intolerance, terrorism, the financial exploitation of a crime, or items or activities that encourage, promote, facilitate, or instruct others regarding the same.’” “After further review,” Chase backtracked, albeit too late for the event to proceed, claiming: “To be clear, we have never and would never close an account due to a client’s political affiliation.”¹⁹

President Trump’s son Barron “was told he couldn’t open [a bank] account at [the family’s] preferred financial institution in the weeks following the Trumps leaving the White House in early 2021.”²⁰ First Lady Melania Trump attributed the denial to “a political ‘cancel mob.’”

In short, as a recent executive order explained, “[b]ank regulators have used supervisory scrutiny and other influence over regulated banks to direct or otherwise encourage politicized or unlawful debanking activities.”²¹ “As a result, individuals, their businesses, and their families have been subjected to debanking on the basis of their political affiliations, religious beliefs or lawful business activities, and

¹⁹ R. Keller, *Despite Chase Bank Reversal, Donald Trump Jr. Event in St. Charles Remains Canceled*, Missouri Independent (Nov. 18, 2021), <https://perma.cc/3JJ3-GVKA>.

²⁰ E. Crane, *Barron Trump was Denied a Bank Account Due to ‘Cancel Mob,’ Mom Melania Claims*, N.Y. Post (Oct. 9, 2024), <https://perma.cc/7U96-HEGR>.

²¹ Exec. Order 14331 § 1, 90 Fed. Reg. 38925 (Aug. 7, 2025).

have suffered frozen payrolls, debt and crushing interest, and other significant harms to their livelihoods, reputations, and financial well-being.”²²

Technology companies too have acted under pressure by government agencies to censor protected advocacy. To take just one example, the House Subcommittee on the Weaponization of the Federal Government found that the Biden White House had engaged in a “monthslong campaign” to coerce social media companies to censor Americans’ protected speech.²³ “[I]n 2021 and 2022, a coterie of officials at the highest levels of the Federal Government continuously harried and implicitly threatened Facebook with potentially crippling consequences if it did not comply with their wishes about the suppression of certain COVID–19-related speech.” *Murthy v. Missouri*, 603 U.S. 43, 79 (2024) (Alito, J., dissenting).

Still, that many of these examples come from the banking industry is both unsurprising and deeply troubling, for three reasons. First, in the modern economy, banking services are a necessity. “[T]he right to open a business, to express your views or simply to earn a living are of little value if you cannot get access to a bank account to collect or make

²² *Ibid.*

²³ See generally Staff of House Comm. on the Judiciary and House Select Subcomm. on the Weaponization of the Fed. Gov’t, 118th Cong., *The Censorship-Industrial Complex: How Top Biden White House Officials Coerced Tech to Censor Americans, True Information, & Critics of the Biden Administration* (Comm. Interim Report 2024).

payments.”²⁴ Second, “financial services is one of the most heavily regulated sectors of the economy, characterized by vague and varying regulatory standards articulated in no manual or published rule.”²⁵ Third, banking power resides in fewer and fewer institutions. Reflecting industry consolidation, the number of FDIC-insured commercial banks has plummeted from over 14,000 in 1986 to barely 4,000 in 2022.²⁶ New entrants are deterred by significant barriers to entry.²⁷

Taken together, these features exacerbate the dangers to individual rights of indirect government pressure on banks. A person debanked has fewer and fewer alternatives. That person cannot meaningfully operate—or advocate—without robust financial services. And it takes precious little pressure from a government regulator for a bank to boot a person from its services. See *Vullo*, 602 U.S. at 198 (“[I]ntermediaries will often be less invested in the speaker’s message and thus less likely to risk the regulator’s ire.”). Because of significant ideological conformity in large institutions like the dominant banks, individuals who dissent from the prevailing orthodoxy are at risk even before any government pressure is applied. The official pressure makes the bank’s decision inevitable and easy. It also chills the individual’s exercise of constitutional rights. In short, “[t]he combination of thick, discretionary regulation

²⁴ Zywicki, *supra* note 13.

²⁵ *Ibid.*

²⁶ FDIC, *Annual Historical Bank Data*, <https://perma.cc/JH5D-HVNJ> (last visited Jan. 8, 2024).

²⁷ See Zywicki, *supra* note 13.

and high barriers to entry raise concerns that the financial services industry could increasingly be used to stifle free speech, democratic participation and access to legal products and services.”²⁸ Such “viewpoint discrimination is uniquely harmful to a free and democratic society.” *Vullo*, 602 U.S. at 187.

Though examples involving organizations being debanked tend to be well publicized, the danger of government coercion to individual consumers is even more severe. While an organization might have resources to defend itself in the press, in court, and in any internal bank process, an individual consumer is far less able to do so. More often, they will simply receive a letter announcing that their account has been closed, and that’s the end of the matter. The effect on constitutional rights is just as destructive, and the consumer will have no meaningful recourse to fight the banking sector (or a government puppet master) to defend their rights.

For these reasons, courts must be vigilant to protect individual rights from even slight government pressure on financial institutions. That pressure can readily lead to drastic consequences on individuals and deprive them of constitutional rights. See *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (“[A] state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.” (cleaned up)).

²⁸ *Ibid.*

II. Government action through coercion evades administrative law requirements.

Another significant problem with government pressure like that deployed below is that it enables the government to avoid procedures that are the cornerstone of the rule of law. “It is procedure that spells much of the difference between rule by law and rule by whim or caprice.” *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring). Procedure not only promotes good government but also provides the means “by which federal agencies are accountable to the public.” *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020) (cleaned up). Government pressure exerted informally to ends that would otherwise require proper procedures deprives the people of this accountability and undermines the rule of law.

The government commonly requires adherence to procedures before taking actions affecting citizens. For instance, federal and state notice-and-comment rules “give[] affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and [they] afford[] the agency a chance to avoid errors and make a more informed decision.” *Azar v. Allina Health Servs.*, 587 U.S. 566, 582 (2019). More fundamental due process requirements, rooted in the Fifth and Fourteenth Amendments, mandate “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (cleaned up).

These procedures are not always—or ever—convenient for the government. But “convenience and

efficiency are not the primary objectives—or the hallmarks—of democratic government.” *Free Enterprise Fund*, 561 U.S. at 499 (cleaned up). Thus, courts must take care that required procedures not be disregarded in the pursuit of perceived government objectives.

As the Court has explained, legal “doctrines must take account of the far-reaching influence of agencies and the opportunities such power carries for abuse.” *Kisor v. Wilkie*, 588 U.S. 558, 589 (2019). Agencies’ seeking “new means to the same ends” is hardly new. *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring); see, e.g., *Sackett v. EPA*, 566 U.S. 120, 131 (2012) (rejecting agency effort to “enable the strong-arming of regulated parties into ‘voluntary compliance’”).

The government pressure deployed below against the NRA is another example of an effort to achieve the government’s ends without jumping through procedural hoops. As discussed, when it comes to consolidated, heavily-regulated industries like financial services, the required government pressure will be light—increasing the temptation for government actors to achieve the same results through mild pressure that would otherwise require involved procedures. For, “[s]uch a strategy allows government officials to expand their regulatory jurisdiction to suppress the speech of organizations that they have no direct control over.” *Vullo*, 602 U.S. at 197–98 (cleaned up).

Vague regulatory language—like that focused on “reputational risk”—heightens these problems. “Due process requires that all be informed as to what the

State commands or forbids, and that men of common intelligence not be forced to guess at the meaning of the” law. *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (cleaned up). When regulations are vague, citizens and institutions “are left always a little unsure what the law is, at the mercy of political actors and the shifting winds of popular opinion, and without the chance for a fair hearing before a neutral judge.” *Kisor*, 588 U.S. at 613 (Gorsuch, J., concurring). A vague regulation thus makes it easier to pressure private institutions—and deprives citizens of recourse. It also makes it easier for the government to shift blame for adverse action, making the ballot box “an especially poor check” on government authority in such cases. See *Vullo*, 602 U.S. at 198. “The rule of law begins to bleed into the rule of men.” *Kisor*, 588 U.S. at 613 (Gorsuch, J., concurring).

III. Minute factual distinctions should not remove liability for unlawful coercion.

Though this Court unanimously recognized the unconstitutionality of the type of government pressure allegedly employed here, see *Vullo*, 602 U.S. at 180, the decision below denied official accountability by granting Vullo qualified immunity. Under this Court’s precedents, government officials have qualified immunity from civil action for their “discretionary functions” if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A right is “clearly established” when “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is

doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Liability does not require that “the very action in question ha[ve] previously been held unlawful.” *Ibid.* Yet the Second Circuit essentially required just that.

In holding that the constitutional right Vullo allegedly violated in this case was not “clearly established,” the Second Circuit relied on minute factual divergences that lack legal significance. The primary distinction that the Second Circuit drew between these facts and those of previous cases that had denounced similar government coercion was that the “third parties” Vullo allegedly pressured “were not disseminating speech on the NRA’s behalf or otherwise engaging in expressive activity,” Pet. App. 31a, though the NRA was itself engaging in expressive activity. According to the Second Circuit, it *would* have been a “clearly established” violation of the NRA’s constitutional rights to “coerce[] a convention center into canceling the NRA’s annual meeting.” *Ibid.* But Vullo apparently could not be reasonably expected to know that she violated the NRA’s rights by allegedly coercing a bank into cancelling the NRA’s account or an insurance company into cancelling its policy—even though doing so hindered the NRA’s ability to continue its advocacy protected by the First Amendment.

This distinction is hardly viable, especially in light of the necessity of banking services.²⁹ It would be obvious to a reasonable person in Vullo’s position that “coercing the third party” financial institutions into

²⁹ See Zywicki, *supra* note 13.

“limiting or ceasing” their ties with the NRA “also meant limiting or terminating the *plaintiff’s* speech and expression.” Pet. App. 30a (emphasis in original). And it was the unconstitutionality of just such “limiting or terminating [of] the *plaintiff’s* speech and expression” that the Second Circuit found to be the “clearly established” law of *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), and its own precedents. See Pet. App. 30a. Along the same lines, in finding that Vullo’s alleged conduct violated the NRA’s rights, this Court emphasized it was “reaffirm[ing] what it said” in *Bantam Books*, rather than breaking new constitutional ground. See *Vullo*, 602 U.S. at 180.

Finding a distinction like the Second Circuit drew sufficient to hold that Vullo’s alleged actions did not violate a “clearly established” constitutional right would green-light the pressure that this Court unanimously recognized violates the First Amendment. Because of the wide variety of administrative schemes, regulations, and enforcement mechanisms, noted above, there will nearly always be *some* factual differences among coercive government pressure campaigns. As this Court has noted, “[w]hen government officials abuse their offices, ‘action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.’” *Anderson*, 483 U.S. at 638 (quoting *Harlow*, 457 U.S. at 814). Accepting the lower court’s unjustifiably expansive application of qualified immunity would cut off this vital avenue, threatening citizens’ First Amendment right to speak.

CONCLUSION

The Court should grant certiorari.

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