No. 22-842

In the Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,

v.

MARIA T. VULLO,
Respondent.

ON 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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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.*

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* 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. This brief addresses two particularly severe problems with this approach, which was used to full effect on the National Rifle Association to deprive it of insurance options.

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 a minor Twitter campaign. 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.

Because the decision below elides these severe problems and dismisses what is apparent coercion to suppress protected advocacy, the Court should reverse.

ARGUMENT

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).

"[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*, 142 S. Ct. 2587, 2620 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*, 140 S. Ct. 2183, 2200 (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. Unfortunately, many examples suggest that this type of 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

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[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.

ostensible goal of the investigation" was "to combat mass-market consumer fraud by foreclosing 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 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]

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[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.

Thus, the Department achieved indirectly what it had no authority to do directly: drive lawful companies out of business by depriving them of the 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, in several respects. First, by exceeding its authority, the Department avoids having to prove *anything* about the affected companies and instead forces them to prove to another private entity that they are acceptable. Second, that other private entity would have a heavy thumb against extending 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

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[8] *Id.* at 7.
[9] *Id.* at 9.

be seen to "create[] a 'reputational risk' that is an actionable violation."[10] One set of victims, relevant here? "[F]irearms 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's 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 have has already 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)

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[10] *Id.* at 8.
[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.

because it was deemed "High Risk."[14] JPMorgan 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]

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?"[17] In other words, the mere threat of a subpoena—and certainly an actual subpoena—can drive de-banking decisions based on a person's advocacy.

Likewise, a JPMorgan Chase subsidiary cancelled payment processing for an event in Missouri featuring

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[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.
[15] Letter from Daniel Cameron to Jamie Dimon 3 (May 2, 2023), available at https://perma.cc/2CR7-UHE3.
[16] *Ibid.*
[17] 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.

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."[18]

Technology companies too have acted under pressure by government agencies to censor protected advocacy. To take just one example, the Fifth Circuit recently held that "federal officials ran afoul of the First Amendment by coercing and significantly encouraging social-media platforms to censor disfavored speech, including by threats of adverse government action like antitrust enforcement and legal reforms." *Missouri* v. *Biden*, 83 F.4th 350, 373 (5th Cir.), *cert. granted sub nom. Murthy* v. *Missouri*, 144 S. Ct. 7 (2023).

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 payments."[19] Second, "financial services is one of the most heavily regulated sectors of the economy,

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[18] 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.

[19] Zywicki, *supra* note 13

characterized by vague and varying regulatory standards articulated in no manual or published rule."[20] 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.[21] New entrants are deterred by significant barriers to entry.[22]

Taken together, these features exacerbate the dangers to individual rights of indirect government pressure on banks. A person de-banked 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. 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 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."[23]

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[20] *Ibid.*
[21] FDIC, Annual Historical Bank Data, https://perma.cc/JH5D-HVNJ (last visited Jan. 8, 2024).
[22] See Zywicki, *supra* note 13.
[23] *Ibid.*

Though examples involving organizations being de-banked 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)).

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.*, 140 S. Ct. 1891, 1905 (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 action with effects on 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.*, 139 S. Ct. 1804, 1816 (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*, 139 S. Ct. 2400, 2423 (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.

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). 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*, 139 S. Ct. at 2438 (Gorsuch, J., concurring). A vague regulation thus makes it easier to pressure private institutions—and deprives citizens of recourse. "The rule of law begins to bleed into the rule of men." *Ibid.*

The danger that government pressure will enable routine evasion of core rule of law requirements is another reason to reject the decision below.

CONCLUSION

For these reasons, the Court should reverse.

Respectfully submitted,

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