Article III — Cases or Controversies — Certiorari — National Rifle Ass'n of America v. Vullo

The Supreme Court has traditionally emphasized its duty to resolve specific "Cases" or "Controversies,"[1] and not to declare general principles of law wholly unmoored from the case at hand.[2] Last Term, in *National Rifle Ass'n of America v. Vullo*,[3] the Supreme Court held that the National Rifle Association of America (NRA) had plausibly alleged a First Amendment violation when it claimed New York's Superintendent of the Department of Financial Services coerced financial institutions into severing their relationships with the NRA.[4] Irrespective of the merits of the NRA's First Amendment claim, *Vullo* represents how the Court's tools of agenda control — like the questions presented certiorari practice — allow it to shift between a dispute resolution and law declaration model by focusing on the issues the Court wants to decide, even if those issues have no bearing on the final outcome of the case. While the Court has discretion to shape its certiorari docket through the questions presented process,[5] when the Court uses its power to "add[]," "subtract[]," or reformulate questions presented,[6] it can engage in a particularly aggressive form of law declaration rather than dispute resolution.

In 2017, New York's Department of Financial Services (DFS) and its Superintendent, Maria Vullo, began investigating the NRA's affinity insurance program.[7] This program allowed NRA members to buy insurance covering intentional wrongdoing and legal services associated with a criminal proceeding related to self-defense with a legally owned firearm.[8] DFS focused its efforts on two insurance companies, Chubb Ltd. and Lockton Affinity, LLC, which underwrote and administered the program.[9] The investigation uncovered numerous violations of New York insurance law.[10] Following the Parkland school shooting, some of the NRA's business affiliates began to cut ties; for example, Lockton told

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[1] U.S. CONST. art. III, § 2.

[2] Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 707 (2012); *see also* United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89 (1947) ("As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.").

[3] 144 S. Ct. 1316 (2024).

[4] *Id.* at 1322.

[5] *See* Benjamin B. Johnson, Essay, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 840–45 (2022) (detailing the development of the questions presented practice and questioning its coherence).

[6] *Id.* at 795; *see id.* at 796–97 (collecting cases).

[7] Nat'l Rifle Ass'n of Am. v. Cuomo, 350 F. Supp. 3d 94, 104–05 (N.D.N.Y. 2018).

[8] *Id.* at 105.

[9] *Id.*

[10] *Id.* at 105–06.

the NRA that it would end their relationship to avoid losing its New York business license.[11]

At the same time, Vullo began meeting with insurance companies that worked with the NRA and explaining that Governor Andrew Cuomo wanted to combat gun violence by weakening the NRA.[12] She also discussed the regulatory violations that were commonplace in the affinity insurance market and disclosed that DFS would be less interested in imposing liability for these infractions if the companies stopped selling insurance to gun groups.[13] Shortly thereafter, Governor Cuomo issued a press release and Vullo issued a guidance letter in which DFS urged companies to sever their relationships with the NRA.[14] One insurance company struck a deal with DFS wherein it would tell its partners to stop underwriting firearms policies, and DFS, in return, would focus any affinity insurance enforcement actions on companies that served the NRA.[15] Likewise, Chubb and Lockton entered into consent orders with DFS where they agreed not to enter into any affinity insurance program with the NRA regardless of whether such insurance policies otherwise complied with New York law.[16] As a result of these enforcement actions and deals, the NRA struggled to find replacement insurance carriers and banking services because prospective carriers and banks were unwilling to risk the ire of DFS.[17]

The NRA sued Cuomo, Vullo, and DFS.[18] Its complaint alleged that the defendants had established a system designed to suppress the NRA's speech based on its viewpoint.[19] The NRA also alleged that the defendants violated the NRA's freedom of association, equal protection rights, and due process rights.[20] Finally, it asserted 42 U.S.C. § 1983 and tortious interference claims against Vullo and Cuomo in their individual capacities.[21] The United States District Court for the Northern District of New York eventually dismissed all of the claims except the free speech claims against Vullo in her individual capacity because she was not entitled to qualified immunity.[22]

After an interlocutory appeal by Vullo, the Second Circuit reversed the district court's denial of qualified immunity.[23] Writing for the panel,

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11 *Vullo*, 144 S. Ct. at 1323.
12 *Id.*
13 *Id.*
14 *Cuomo*, 350 F. Supp. 3d at 106–07.
15 *Vullo*, 144 S. Ct. at 1324.
16 *Cuomo*, 350 F. Supp. 3d at 107–09.
17 *Id.* at 110–11.
18 *Id.* at 104.
19 *Id.* at 111.
20 *Id.* at 119, 122, 130.
21 *Id.* at 137–40.
22 *Id.* at 143; Nat'l Rifle Ass'n of Am. v. Cuomo, 525 F. Supp. 3d 382, 402–03, 411 (N.D.N.Y. 2021).
23 Nat'l Rifle Ass'n of Am. v. Vullo, 49 F.4th 700, 712 (2d Cir. 2022).

Judge Chin[24] explained that because this was an interlocutory appeal, the court would review only "(1) whether the plaintiff sufficiently pleaded the violation of a constitutional right and (2) whether, at the time of the alleged violation, the defendant's actions, as alleged by the plaintiff, violated clearly established law."[25] If both of those elements were met, Vullo would not be entitled to qualified immunity.[26] The Second Circuit, however, determined that the NRA failed to plausibly plead entitlement to relief on its free speech claims[27] and that, even if the NRA had pleaded a violation of a constitutional right, the law was not clearly established.[28]

Beginning with the constitutional violation, the Second Circuit explained that the central question was whether Vullo's statements "were 'implied threats to employ coercive state power to stifle protected speech.'"[29] Typically, the government is free to speak about topics that it chooses without worrying about viewpoint neutrality.[30] But in some situations, the government can go too far and engage in threats or coercion that suppress speech.[31] To determine if the government's speech crossed that line, the panel considered four factors: "(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."[32] Applying those factors to this case, the court held that Vullo's words in the guidance letters and press release could not "reasonably be construed as . . . coercive."[33] In the panel's eyes, "in light of the serious insurance law violations, it was only natural for Vullo to take steps — including investigating, negotiating, and resolving apparent violations — to enforce the law."[34] Thus, Vullo's statements were an exercise of legitimate law enforcement action, not an unconstitutional suppression of speech.

Although that was sufficient to grant Vullo qualified immunity,[35] the court proceeded to evaluate whether the law was clearly established.[36]

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[24] Judge Chin was joined by Judges Pooler and Carney.

[25] *Vullo*, 49 F.4th at 712 (citing Tellier v. Fields, 280 F.3d 69, 78–79 (2d Cir. 2000)).

[26] *See id.* at 714 (explaining qualified immunity is designed to shield officials from suits for money damages over their "discretionary functions" in order to give "officials the breathing room to make reasonable, even if mistaken, judgments" (citing Malley v. Briggs, 475 U.S. 335, 341 (1986))).

[27] *Id.* at 716.

[28] *Id.* at 719.

[29] *Id.* at 714 (quoting Hammerhead Enters., Inc. v. Brezenoff, 707 F.2d 33, 39 (2d Cir. 1983)).

[30] *See id.* at 714–15.

[31] *Id.* at 715 (citing *Hammerhead*, 707 F.2d at 39).

[32] *Id.* (citations omitted) (citing Zieper v. Metzinger, 474 F.3d 60, 66 (2d Cir. 2007); Okwedy v. Molinari, 333 F.3d 339, 343 (2d Cir. 2003) (per curiam); Rattner v. Netburn, 930 F.2d 204, 210 (2d Cir. 1991); *Hammerhead*, 707 F.2d at 39.).

[33] *Id.* at 716.

[34] *Id.* at 719.

[35] *Id.* at 714 ("[I]f the complaint fails to sufficiently plead the violation of a constitutional right, the second question is moot." (citing X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 66 (2d Cir. 1999))).

[36] *Id.* at 719.

It concluded that "the various cases addressing the issue did not provide clear and particularized guidance but involved very different circumstances and much stronger conduct."[37] And without that particularized guidance, "a reasonable official . . . would [not] have understood that" she was making unconstitutionally threatening statements.[38] Absent analogous cases, the Second Circuit was unwilling to hold that Vullo had violated clearly established law.[39]

The NRA petitioned for a writ of certiorari on both parts of the qualified immunity inquiry, but the Supreme Court granted review of only whether the NRA adequately pleaded a constitutional violation.[40]

The Supreme Court vacated and remanded.[41] Writing for a unanimous Court, Justice Sotomayor held that the NRA had plausibly alleged a First Amendment violation.[42] First, the Court acknowledged that the government does not have to remain viewpoint neutral when it engages in its own speech.[43] Rather, "[a] government official can share her views freely and criticize particular beliefs, and she can do so forcefully in the hopes of persuading others to follow her lead."[44] Relying on *Bantam Books, Inc. v. Sullivan*,[45] the Court distinguished "permissible persuasion" from "impermissible coercion."[46] *Bantam Books* involved a state commission that would send notices to distributors of blacklisted publications; those notices emphasized the commission's duty to recommend prosecution for violations of the state's obscenity law and explained that a distributor's cooperation in removing the publications from circulation would obviate the need for prosecution.[47] The Court understood *Bantam Books* as standing "for the principle that . . . [a] government official cannot coerce a private party to punish or suppress disfavored speech on her behalf."[48]

Applying *Bantam Books* to this case, the Court concluded that the NRA had pleaded a sufficient allegation that Vullo violated the First Amendment by coercing companies into cutting ties with the NRA in order to suppress its speech.[49] Justice Sotomayor emphasized that because the case was still at the motion to dismiss stage, the Court assumed

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[37] *Id.*

[38] *Id.*

[39] *See id.* at 719–20.

[40] Nat'l Rifle Ass'n of Am. v. Vullo, 144 S. Ct. 375, 375 (2023) (mem.).

[41] *Vullo*, 144 S. Ct. at 1332.

[42] *Id.* at 1321–22.

[43] *Id.* at 1326.

[44] *Id.*

[45] 372 U.S. 58 (1963).

[46] *Vullo*, 144 S. Ct. at 1327 (quoting Missouri v. Biden, 83 F.4th 350, 380 (5th Cir. 2023), *rev'd and remanded sub nom.* Murthy v. Missouri, 144 S. Ct. 1972 (2024)).

[47] *See Bantam Books*, 372 U.S. at 61–63.

[48] *Vullo*, 144 S. Ct. at 1328 (citing *Bantam Books*, 372 U.S. at 67–69; Backpage.com, LLC v. Dart, 807 F.3d 229, 231 (7th Cir. 2015); Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam); Penthouse Int'l, Ltd. v. Meese, 939 F.2d 1011, 1016 (D.C. Cir. 1991)).

[49] *Id.*

the complaint's factual allegations were true.[50] So taking those facts as a given, the Court began by analyzing Vullo's authority.[51] Because Vullo had direct regulatory and enforcement power over the relevant companies in this case, her power actually exceeded that of the commission in *Bantam Books*, which could only refer cases for prosecution.[52] Additionally, her communications with the insurance companies in which she offered to focus enforcement actions solely on syndicates working with the NRA could "be reasonably understood as a threat or as an inducement" — either of which is coercive.[53] And the response — cutting ties with the NRA — reinforced that those statements were understood by the insurance syndicates as coercive.[54] The public statements Vullo made in her guidance letters singling out the NRA only served to confirm that *Bantam Books* prohibited Vullo's conduct here.[55]

Justice Sotomayor then addressed the Second Circuit's analysis.[56] She concluded that it mistakenly evaluated each allegation in isolation without taking into account the larger context alleged in the complaint.[57] Additionally, the Court did not accept the argument that, because Vullo was merely enforcing New York's insurance law, any First Amendment concerns were defeated.[58] Under *Bantam Books*, the invocation of state law cannot "insulate [a government official] from First Amendment scrutiny"; instead, what matters is whether the enforcement of state law is done for the purpose of "punish[ing] or suppress[ing]" protected speech.[59] Then, the Court rejected Vullo's argument that business relationships were not protected, expressive activity.[60] *Bantam Books* again foreclosed government officials' attempts to regulate business activities in an attempt to punish disfavored speech.[61]

Finally, the Court emphasized that its opinion did not preclude the even-handed enforcement of state laws.[62] Nor did the opinion prevent the government from forcefully advocating for its own views.[63] What the First Amendment prohibits is the selective enforcement of laws to punish speech either directly or through intermediaries.[64]

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[50] *Id.* at 1322.
[51] *Id.* at 1328.
[52] *Id.* at 1328–29.
[53] *Id.* at 1329.
[54] *See id.*
[55] *See id.* at 1329–30.
[56] *See id.* at 1330.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 1331.
[60] *See id.*
[61] *Id.*
[62] *See id.* at 1331–32.
[63] *Id.* at 1332.
[64] *Id.*

In a brief concurrence, Justice Gorsuch reiterated that the Second Circuit's use of a discrete, multifactor test may have led it astray.[65] He emphasized that while such a test may be helpful in some cases, the central inquiry for lower courts remains whether the conduct in context could be reasonably understood to threaten punishment in order to suppress speech.[66]

Justice Jackson also authored a concurring opinion.[67] Her opinion focused on the idea that government coercion alone does not violate the First Amendment.[68] She stressed that the threats in *Bantam Books* crossed the line because they effectively created a system of prior restraint through the government's coercion of conduits of speech.[69] In most cases, the coercion and censorship of speech will overlap, but in this case, the link between Vullo's threats and censorship of the NRA's message was weaker.[70] So instead of using the Court's censorship cases as a guidepost, Justice Jackson would have focused on the retaliatory nature of Vullo's actions.[71] Because the retaliation theory was not resolved below, Justice Jackson agreed that the Court was correct to not resolve it here, but she made clear that the lower courts should be careful not to lump the two theories together upon remand.[72]

By focusing on just one prong of the qualified immunity inquiry, *Vullo* highlights how the Court can use the certiorari process to answer the legal question it is interested in answering. *Vullo* was, in the Court's eyes, a straightforward application of *Bantam Books*.[73] The curiosity with *Vullo* is that the Court answered a question that potentially has no bearing on the case. Although Justice Sotomayor explained in a footnote that "the Second Circuit is free to revisit the qualified immunity question in light of this Court's opinion" so the NRA "could obtain 'effectual relief' on remand,"[74] *Vullo* demonstrates how the Court's certiorari process allows it to switch to a law declaration mode when it chooses.

Typically, scholars divide the Court's approach to adjudication into two models.[75] The dispute resolution model posits that the "Court's task is to resolve" the "actual dispute between the litigants."[76] In this model,

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[65] *See id.* at 1333 (Gorsuch, J., concurring).

[66] *Id.*

[67] *Id.* (Jackson, J., concurring).

[68] *See id.* at 1333–34.

[69] *See id.* (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70–71 (1963)).

[70] *See id.* at 1334–35 (citing *Bantam Books*, 372 U.S. at 70).

[71] *See id.* at 1335.

[72] *See id.* at 1335–36.

[73] *See id.* at 1332 (majority opinion) ("The Court does not break new ground in deciding this case. It only reaffirms the general principle from *Bantam Books* that where, as here, the complaint plausibly alleges coercive threats aimed at punishing or suppressing disfavored speech, the plaintiff states a First Amendment claim.").

[74] *Id.* at 1325 n.3 (quoting Chafin v. Chafin, 568 U.S. 165, 172 (2013)).

[75] Monaghan, *supra* note 2, at 668.

[76] *Id.*

the focus is on the individual parties, and the plaintiff represents the individualized wrong that has been committed.[77] The law declaration model, in contrast, focuses on "the judicial role in saying what the law is" and is less concerned with the impact declaring the law will have on the particular litigants before the Court.[78] This model deems the resolution of contested interpretations of law to be the primary role of the Court, suggesting that the Court should devote resources to broadly declaring the law for the public, not just the parties.[79] The dominant, traditional view is that the Court portrays itself as focused on dispute resolution; the "Court still disclaims any freestanding authority to pronounce on issues of constitutional law."[80] Some scholars defend the law declaration model from a normative standpoint,[81] and there are good descriptive arguments that federal courts in general have shifted toward the law declaration model at least since the Burger Court.[82] But to the extent the appearances the Court maintains matter, the rhetoric that the Court traditionally employs emphasizes the Court does not have an "abstract interest[] in the government's compliance with the rule of law."[83]

However, in subtle ways, the Court can slip into the law declaration model while still attempting to assure the public that it is focused on dispute resolution.[84] One such way is through agenda control.[85] Agenda control mechanisms provide the Court with the ability to decide the cases it wants to decide.[86] To be certain, the Court needs *some* agenda control tools; it would be overwhelmed otherwise.[87] But give the Court too much agenda control and even any façade of the dispute resolution model falls by the wayside.[88]

Vullo's plucking of an isolated question presented does more to declare the law than resolve a dispute. In all likelihood, the Court's

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[77] *See* Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 21 (1979).

[78] Monaghan, *supra* note 2, at 668.

[79] *See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 284 (1990).

[80] Monaghan, *supra* note 2, at 707.

[81] *See, e.g.*, Richard H. Fallon, Jr., Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 14–16, 24–27 (2003) (arguing that the Supreme Court has a "special function" in declaring the law).

[82] *See, e.g.*, Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1260–61 (2019).

[83] RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 74 (7th ed. 2015) (collecting cases).

[84] *See* Monaghan, *supra* note 2, at 707–08.

[85] *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 860–61 (2005).

[86] *See* Monaghan, *supra* note 2, at 689–707 (highlighting some mechanisms as they relate to the agenda setting phenomenon).

[87] *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1650, 1685, 1704–05 (2000) (describing the motivation behind making more of the docket discretionary).

[88] *See* Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* The Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1, 25–26 (2019) (arguing the law declaration model has come to dominate the current Court's jurisprudence).

decision will not affect the outcome of the case. Recall that the Second Circuit determined not only that the NRA had failed to adequately plead a constitutional violation,[89] but also that regardless of whether the NRA had pleaded a constitutional violation, the law was not clearly established.[90] Because the Court did not review the Second Circuit's holding — that "even assuming the NRA sufficiently pleaded" a constitutional violation, "Vullo is nonetheless entitled to qualified immunity because the law was not clearly established"[91] — the Court's opinion did not affect the Second Circuit's ultimate judgment.[92] That is, the Court said nothing about the Second Circuit's determination that the law was not clearly established. Because either proposition — that there was no constitutional violation or that the law was not clearly established — is a sufficient condition for the Second Circuit's judgment, the Court's opinion, which repudiated only one proposition, did little to disturb the Second Circuit's ultimate grant of qualified immunity.

In two footnotes, the Court rejected the respondent's argument that isolating the qualified immunity prong had deprived the Court of jurisdiction under Article III. The respondent argued the case should be dismissed as improvidently granted because the limited grant of certiorari barred effectual relief.[93] The Court rejected this argument, noting that "[o]n remand, the Second Circuit is free to reconsider whether Vullo is entitled to qualified immunity."[94] In its view, this instruction ensured that the NRA could still obtain "effectual relief."[95]

While the Court's footnotes might be enough to avoid Article III's bar on advisory opinions,[96] *Vullo* demonstrates how the questions presented process functions as a mechanism of agenda control, allowing the Court to declare the law. The questions presented process allows the Court to pick and choose which issues to resolve. The Court could have evaluated the Second Circuit's qualified immunity holding in toto.[97] Instead, it was able to isolate just one particular question of law that it wanted to resolve — whether the NRA stated a valid First Amendment claim — without addressing the larger dispute overall — whether Vullo was entitled to qualified immunity. Again, this looks more like the Court

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89 Nat'l Rifle Ass'n of Am. v. Vullo, 49 F.4th 700, 718–19 (2d Cir. 2022).

90 *Id.* at 719.

91 *Id.*

92 *See Vexillology*, DIVIDED ARGUMENT, at 01:25:15 (June 1, 2024), https://www.dividedargument.com/episodes/vexillology/transcript [https://perma.cc/F4TS-Y3NX] (discussing whether the Court's opinion requires the Second Circuit to reevaluate its qualified immunity holding).

93 Brief for Respondent at 21, *Vullo*, 144 S. Ct. 1316 (No. 22-842).

94 *Vullo*, 144 S. Ct. at 1332 n.7.

95 *Id.* at 1325 n.3 (quoting Chafin v. Chafin, 568 U.S. 165, 172 (2013)).

96 *See Vexillology*, *supra* note 92, at 01:26:55.

97 *See* Petition for a Writ of Certiorari Public Copy-Sealed Materials Redacted at ii, *Vullo*, 144 S. Ct. 1316 (No. 22-842).

was focused on declaring First Amendment law than really resolving the underlying dispute. This shift toward the law declaration model is subtle, but it is a by-product of the questions presented practice.[98] Other agenda control mechanisms rely to an extent on the parties' litigation choices.[99] The questions presented control mechanism, on the other hand, allows the Court almost unfettered discretion to declare the law without worrying about the underlying dispute or litigants.[100]

Additionally, it is not even clear where the Court's power to free the Second Circuit to reconsider its qualified immunity holding comes from. The Court did not grant review of the clearly established law issue,[101] so what gives it the power to proclaim that the Second Circuit can revise its decision on remand? Maybe the Court's supervisory power over lower federal courts gives it the authority to release lower courts from their prior decisions even when the Court does not review those decisions, but even that is doubtful.[102] Likewise, the Court's current questions presented practice is rooted in neither history nor the text of the certiorari statute, so it would be a shaky basis for the Court's authority to do what it did in *Vullo*.[103] In other words, there is nothing in the Court's jurisdictional structure, history, or statutory text that provides a clear basis for the Court's authority to instruct a lower court to reconsider a prior holding on remand when the Court did not itself review that holding. But in an attempt to declare the law and work around the problem that the Court itself had created by granting certiorari on only one prong of the qualified immunity question, the Court announced that the Second Circuit could revisit its other holding without identifying the basis for that pronouncement.[104] Thus, *Vullo* demonstrates how the Court's current certiorari practice potentially distorts the Court's power when it uses that practice to declare the law.

The Court's approach to certiorari as an agenda control tool emboldens it to pontificate about questions of law that it wants to decide. The Court's ability to draft its own questions for resolution[105] plus its view that a footnote allowing the lower court to reconsider its other,

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[98] *See* Healy, *supra* note 85, at 860–63; Johnson, *supra* note 5, at 801, 864.

[99] *See* Monaghan, *supra* note 2, at 691–707 (listing agenda control instruments that depend, at least in part, on the litigants' strategic choices). Perhaps the ultimate grounds for a decision is another agenda control device that does not depend on the parties' choices, *see id.* at 705–07, but the litigants at least have some control over which grounds they ask the Court to affirm on — even if, as in *Vullo*, the Court eventually ignores those requests.

[100] *See id.* at 690 (noting examples of the Court adding questions without the litigants asking it to); Johnson, *supra* note 5, at 795–97 (same).

[101] *See* Nat'l Rifle Ass'n of Am. v. Vullo, 144 S. Ct. 375, 375 (2023) (mem.).

[102] *See* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 332–33 (2006) (describing the Court's supervisory power as focused on "generally applicable" procedural rules and not "case-specific commands").

[103] *See* Johnson, *supra* note 5, at 797–801.

[104] *See Vullo*, 144 S. Ct. at 1332 n.7.

[105] *See* Johnson, *supra* note 5, at 800.

independent holdings is sufficient to provide the possibility of "effectual relief"[106] means that the Court can work around the dispute resolution model and shift to a law declaration model in the cases that it thinks are important. And such conduct is worrisome.[107] Used selectively, the Court can broadly declare the law when it chooses to and then retreat to the dispute resolution model when it pleases. For the Supreme Court in particular, its limited capacity to provide lower courts guidance may make the declaration model particularly apt.[108] But if the Court is concerned about providing guidance to lower courts, resolving *more*, not *less*, provides greater guidance.

To be sure, some scholarship has emphasized the Court's law declaration function sometimes requires an ostensible relaxing of Article III's constraints in the name of agenda control.[109] There is a difference, however, between a relaxing of some constraints[110] and shifting entirely to a law declaration norm.[111] The central problem is trying to determine when these tools become too powerful and therefore problematic. The certiorari practice embodied in *Vullo* toes that line because, unlike other forms of agenda control, it is almost entirely discretionary.[112]

Vullo is a straightforward decision applying *Bantam Books*. It is also a decision highlighting how the Court's questions presented certiorari practice functions as a tool of agenda control. By only granting certiorari on one half of the qualified immunity inquiry, the Court was able to unilaterally focus on one aspect of law — a hallmark of the declaration model. If the Court can use the questions presented process as it did in *Vullo*, it can pass upon essentially whatever question it chooses while still retaining the guise of the dispute resolution model.

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106 *See Vullo*, 144 S. Ct. at 1325 n.3 (quoting Chafin v. Chafin, 568 U.S. 165, 172 (2013)).

107 *Cf.* Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 202 (2011) (describing the harms of having the Court decide issues that it wants to decide without constraint).

108 *See* Fallon, *supra* note 81, at 34.

109 *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1801–02 (1991).

110 *Cf.* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 301 (1988) (discussing the purpose behind relaxing mootness doctrine).

111 Even proponents of the law declaration function recognize the importance of some degree of constraint. *See, e.g.*, Fallon & Meltzer, *supra* note 109, at 1802 ("The Court has never claimed competence to pronounce on constitutional norms except when considering a more or less traditionally framed case.").

112 *See* Monaghan, *supra* note 2, at 691–707 (listing appointment of amici, concessions, stipulations, and choice of decision grounds as other agenda control tools). To be clear, there is a great deal of discretion in all of these tools. The point is only that most of these tools require at least one party to make a choice — declining to defend the judgment below, stipulating to certain facts, waiving certain arguments below, etc. — for the Court to invoke these tools with a straight face. The adding, subtracting, or rewriting of questions presented occurs without any choice by litigants.