No. 25-479

In the
# Supreme Court of the United States

THE 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 AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF PETITIONER


**JAY ALAN SEKULOW**
*Counsel of Record*
**JORDAN A. SEKULOW**
**STUART J. ROTH**
**ANDREW J. EKONOMOU**
**WALTER M. WEBER**
**LIAM R. HARRELL**
**AMERICAN CENTER FOR LAW & JUSTICE**
[redacted]


November 19, 2025 *Counsel for Amicus Curiae*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

***Cases***

***Treatises***

## INTEREST OF AMICUS[1]

The American Center for Law & Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of religious liberty and freedom to speak on issues of public concern without governmental retaliation. The ACLJ has appeared before this Court in many cases, both as *amicus* and on behalf of parties, often on the issue of Section 1983 litigation, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Locke v. Davey*, 540 U.S. 712 (2004); *Olivier v. City of Brandon*, (No. 24-993), and on qualified immunity more specifically, *Landor v. Louisiana* (No. 23-1197).

## SUMMARY OF ARGUMENT

Qualified immunity has drifted far from anything Congress enacted in 1871. Section 1983 provides a straightforward remedial scheme: State officials who violate federal rights are liable for the injuries they cause. Congress included no immunity in that text. And the common law defenses in place at the time were narrow ones, tied to specific torts—and tied above all to situations involving fast, on-the-ground judgments that the law long treated with some solicitude. Whatever room there may be for such protections, it does not extend to deliberate

---

[1] Counsel of record for the parties received timely notice of the intent to file this brief, S. Ct. R. 37.2(a). No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

bureaucratic decisions made at leisure and with full opportunity for reasoned judgment.

This case illustrates how far the modern doctrine has departed from its source. The First and Fourteenth Amendments protect expressive activity from state retaliation, and Congress made that protection privately enforceable through Section 1983. More than sixty years ago, this Court held that government officials may not use regulatory pressure or implied threats to penalize disfavored speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). That rule governs this case. Acting as Superintendent of the New York Department of Financial Services, Maria Vullo engaged in a sustained campaign to coerce regulated financial institutions into cutting ties with a disfavored advocacy group. Her actions were not split-second assessments made in the heat of an unfolding situation. They were deliberate exercises of regulatory authority—planned, documented, and aimed at chilling protected association.

The court below nonetheless granted qualified immunity. It reasoned, first, that the conduct at issue was not directed at "expressive" activity, and second, that any differences from *Bantam Books*, however small, rendered the law not "clearly established." Neither premise is correct. The targeted activity here—advocacy and association—falls squarely within the First Amendment's protections. And *Bantam Books* is not a case about minute factual matching; it is a case about a principle. When officials use the power of their office to coerce private actors into penalizing protected expression, they violate the

Constitution. That rule is as clear today as it was in 1963.

The Second Circuit's contrary approach reflects a broader distortion in qualified immunity doctrine. Instead of asking whether the Constitution forbids the conduct, courts often search for factual variations that might suggest the law was not "clearly established." That method turns the doctrine into an all-purpose escape hatch—allowing courts to sidestep the very constitutional questions Congress meant Section 1983 suits to resolve. Qualified immunity was never meant to serve that function, and nothing in its history supports extending it to reasoned, bureaucratic acts of regulatory retaliation.

This Court should reaffirm that the reach of qualified immunity is narrow and must be rooted in history. The doctrine protects officials who must make rapid, on-the-spot decisions under uncertain conditions—not those who, with the power and time to reflect, choose to use regulatory authority to suppress protected expression.

## ARGUMENT

### I. Qualified Immunity has Strayed Far from its Legitimate Historical Foundation.

Section 1983 contains no textual basis for qualified immunity; nevertheless, this Court has "read into it harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley v. Briggs*, 475 U.S. 335, 339 (1986). That approach rested on the assumption that "Congress would have specifically so provided had it wished to

abolish" those common-law immunities—immunities that were "so well established in 1871" that ignoring them would have violated the general presumption against a change in the common law. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993).

Before Section 1983, plaintiffs enforced federal constitutional rights only indirectly through state law tort actions. A defendant would claim he acted according to some federal authority, and the plaintiff would respond that the act was unconstitutional, and thus *ultra vires*. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506 (1987). Because constitutional rights were litigated as common law torts, the associated common law defenses carried over as well. Early qualified immunity decisions respected Section 1983's statutory command by incorporating only narrow immunities with clear historical analogues.

This Court's first qualified immunity case involved officers who arrested a pastor under a statute later deemed unconstitutional. *Pierson*, 386 U.S. at 547. Because officers who were sued for false arrest at common law could raise the defenses of good faith and probable cause, *Pierson* held that the same defenses were available in a Section 1983 action. *Id*. at 556-57 (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)). *Pierson*'s good faith defense was therefore an application—not an expansion—of historically grounded tort principles.

Modern qualified immunity, however, departs dramatically from this foundation. It replaces traditional good-faith principles with an atextual and

historically unmoored "clearly established law" requirement. *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting). Courts must now ask whether the specific right at issue was "clearly established" at the time of the alleged violation. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That shift was intentional: as this Court later explained, *Harlow* "reformulated" the defense "along principles not at all embodied in the common law," expressly rejecting any "slavish[]" adherence to "arcane rules of the common law." *Anderson v. Creighton*, 483 U.S. 635, 644-45 (1987). That reformulation, however, constituted precisely the kind of "freewheeling policy choice" this Court is not authorized to make. *Ziglar v. Abbasi*, 582 U.S. 159 (2017) (Thomas, J., concurring) (quoting *Rehberg v. Paulk*, 566 U.S. 356, 262 (2012)). Unsurprisingly, divorced from common-law constraints, qualified immunity has experienced a "kudzu-like creep." *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring *dubitante*).

Nineteenth-century immunity doctrine bore no resemblance to the sweeping, results-oriented protection the doctrine now affords. While some form of immunity existed for certain government actors, it was narrow and context specific. For example, the good-faith defense to false arrest recognized in *Pierson* was widely described in contemporaneous treatises. *See* 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 326 (John Lewis ed., 3d ed. 1906) (quoting *Ball v. Rawles*, 28 P. 937 (Cal. 1892)). *See also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 53-54 (2018) (discussing *Filarsky v. Delia*, 566 U.S. 377 (2012)). In

*Scheuer v. Rhodes*, the Court examined the "scope of discretion and responsibilities of the office" when assessing immunity. 416 U.S. 232 (1974). And even before §1983's passage, the Court held officers liable for acts "without jurisdiction," or undertaken with "malice, cruelty, or willful oppression"—that is, "if the heart is wrong." *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 130-31 (1849). The modern approach has no such analogue. *Ziglar*, 582 U.S. at 158-59 (Thomas, J., concurring).

The contrast between early cases like *Wilkes* and modern qualified immunity illustrates how far the doctrine has drifted from the Reconstruction-era model the 42nd Congress understood. The functional turn in *Harlow* allowed the doctrine to expand far beyond its historical boundaries, undermining the very cause of action Congress created. Historically, officers acting outside their lawful authority were routinely liable for damages—a principle incompatible with today's qualified-immunity regime.

## II. The Lower Court's Decision Illustrates How the Modern Doctrine Encourages Judicial Avoidance.

The "clearly established law" standard not only lacks historical grounding; it also enables government officials to ignore virtually any limitation on their authority so long as "the violative nature of [their] *particular* conduct [was not] clearly established." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (emphasis in original). The standard has become a tool for avoiding constitutional adjudication by elevating immaterial factual distinctions. This case demonstrates the resulting distortions.

*Bantam Books* made clear more than sixty years ago that the First Amendment prohibits the government from using regulatory threats to suppress disfavored speech. 372 U.S. 58, 67 (1963). Yet the Second Circuit held that *Bantam Books* did not control because the threat here came through "government speech," and that in any event Vullo was entitled to qualified immunity. *NRA v. Vullo*, 49 F.4th 700 (2d Cir 2022). This Court unanimously reversed, holding that government officials cannot "wield [their] power . . . to threaten enforcement actions against . . . regulated entities in order to punish or suppress the NRA's gun-promotion advocacy." *NRA v. Vullo*, 602 U.S. 175, 187 (2024).

On remand, however, the Second Circuit again granted qualified immunity—this time by inventing a new distinction between government pressure on third parties to abandon "expressive" activity versus "nonexpressive" activity. As the Second Circuit phrased it, there was no clearly established law saying that exercising "regulatory power to pressure third-party regulated entities into refraining from *nonexpressive* activity" was unconstitutional. *NRA v. Vullo*, 144 F.4th 376 (2nd Cir. 2025) (emphasis added). In other words, per the Second Circuit, it was clearly established that a government entity opposing your speech could not pressure your landlord to take down your yard signs but not clearly established that the government could not pressure your landlord to *evict* you. Such a distinction is, of course, obtuse. As Justice Sotomayor warned, the qualified immunity standard "allows lower courts to split hairs in distinguishing facts or otherwise defining clearly established law at a low level of generality." *Lombardo v. City of St.*

*Louis*, 143 S. Ct. 2419, 2421 (2023) (Sotomayor, J., dissenting). This is exactly what happened here.

This newly minted distinction between the infliction of expressive and nonexpressive harms has no grounding in First Amendment doctrine, which has long treated, for example, financial burdens imposed on speech as constitutionally suspect. *See, e.g., Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (special tax on large newspapers unconstitutional); *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943) ("The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."); *Speiser v. Randall*, 357 U.S. 513, 530 (1958) ("a tax on belief and expression. . . constitutes a palpable violation of the First Amendment") (Black, J., concurring); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575 (1983) ("Differential taxation of the press . . . places a burden on the interests protected by the First Amendment that we cannot countenance such treatment."). Yet, by narrowing the conduct to its most granular description, the Second Circuit avoided acknowledging what this Court unanimously held to be a clear constitutional violation.

This case is a textbook illustration of how qualified immunity invites courts to avoid their responsibility "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). That avoidance is irreconcilable with Section 1983's purpose, which presupposes that federal courts will adjudicate constitutional claims rather than evade them. The Ku Klux Klan Act was enacted precisely to enforce the Reconstruction Amendments. Indeed, it is also known as the "Enforcement Act of 1871." *Baxter*, 140 S. Ct. at 1862.

Manufacturing reasons not to adjudicate constitutional claims undermines that core purpose.

## III. Even Under Current Doctrine, Qualified Immunity Should Not Protect Deliberate, High-Level Bureaucratic Retaliation.

The most persuasive justification for qualified immunity arises from the narrow context of officials who must make "singularly swift, on-the-spot decisions." *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring). Qualified immunity protects officers who "have a difficult job" requiring split-second judgments. *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007). That rationale collapses entirely when applied to officials acting from behind a desk, with full access to counsel, ample time for deliberation, and no exigency whatsoever.

Courts credit the doctrine as affording "due respect for the perspective of police officers on the scene and not with the greater leisure and acquired wisdom of judicial hindsight." *Gooden v. Howard Cnty.*, 954 F.2d 960, 964–65 (4th Cir. 1992). "What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992). But that justification is wholly absent when senior officials act through deliberate regulatory processes. And yet that is precisely what occurred here: the constitutional violation consisted of a typed memorandum on government letterhead followed by negotiated consent decrees. Pet.App.9a–10a.

*Myers v. Anderson* underscores the point. There, election officials enforcing an unconstitutional "grandfather clause" argued that they acted in good faith, believing the statute valid. 238 U.S. 368 (1915). This Court rejected that argument, holding that the Fifteenth Amendment's "inherently operative force" foreclosed any claim of nonliability. *Id.* at 378–79. As scholars have noted, *Myers* shows that good-faith or mistake-of-law defenses do not apply when an official deliberately violates a clear constitutional command. *See* Baude, *supra*, at 57–58.

Nothing in the history of Section 1983 suggests Congress intended to immunize officials who use regulatory authority to coerce private actors into punishing disfavored speech. Extending qualified immunity to calculated, bureaucratic actions leaves behind precisely the strongest justification for the doctrine. This maneuver distorts the doctrine beyond recognition and dilutes accountability for the very abuses Congress sought to remedy. A functional, context-specific understanding—rooted in 1871 common law—supports distinguishing between intentional regulatory retaliation by high-level officials and genuine split-second decisions by officers on the ground. To extend qualified immunity here would undermine deterrence and encourage precisely the abuses the statute was enacted to prevent. If qualified immunity is to persist at all, it must be confined to the narrow context that supplies its most plausible justification.

* * *

## CONCLUSION

This Court should grant review.

Respectfully submitted,

**JAY ALAN SEKULOW**
*Counsel of Record*
**JORDAN A. SEKULOW**
**STUART J. ROTH**
**ANDREW J. EKONOMOU**
**WALTER M. WEBER**
**LIAM R. HARRELL**
**AMERICAN CENTER FOR LAW & JUSTICE**
[redacted]

*Counsel for Amicus*