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 FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because protection of the freedoms of expression and association, guaranteed by the First Amendment, is essential for a free society, and the atextual judicial doctrine of qualified immunity undermines the rule of law.

SUMMARY OF ARGUMENT

This Court's opinion in *National Rifle Association of America v. Vullo* began,

> Six decades ago, this Court held that a government entity's 'threat of invoking legal sanctions and other means of coercion' against a third party 'to achieve the suppression' of disfavored speech violates the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). Today, the Court reaffirms what it said then: Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief. AFPF timely notified all counsel of its intent to file.

602 U.S. 175, 180, (2024) ("*Vullo I*").

This unanimous reaffirmation of First Amendment law predating even *Pierson v Ray*'s creation of qualified immunity is both concise and unsurprising. *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (holding qualified immunity is available under § 1983). Thus, *Bantam* survived the creation of qualified immunity.

On remand, however, to consider the issue of qualified immunity, the Court of Appeals held that this reaffirmation actually broke new ground in a way that could not be anticipated by government officials, and in doing so, expanded the qualified immunity doctrine in the Second Circuit, making it even more difficult to vindicate First Amendment rights and shielding even more government officials from accountability under § 1983 for violating them.

The point is not merely that the Court of Appeals was in error—but rather that the doctrine of qualified immunity, when applied to slow-moving First Amendment infringements, is so amenable to innovative application that it can always be interposed to protect government officials when they silence disfavored speech.

Review by this Court has been sought on several occasions to address the use of qualified immunity as a method to preemptively eliminate plaintiffs' ability to seek a remedy for constitutional harm by creatively circumventing established fact patterns. As judge-made law, this Court is the proper forum to right-size the application of qualified immunity or to eliminate it altogether for slow-moving infringements, especially in First Amendment cases. But seldom has such a clear example been presented of how pernicious qualified immunity is in free speech cases as here where the Court has already spoken on the merits—declaring the law to be settled—and yet the lower court found uncertainty on remand in the same case.

The time has come to pare back the damage qualified immunity has wrought and put an end to the moral hazard created by assuring government actors that so long as they are creative enough to evade a previously-adjudicated fact-pattern, they will be protected against liability for violation of civil rights.

Here, there was not even an attempt to be clever—indeed, Vullo openly stated her intent to use her office to silence the NRA. And, having been reassured by this Court that the law was settled, on remand, something more was needed to let Vullo evade redress.

Thus, the lower court imposed two additional steps beyond typical qualified immunity cases, by asking not just whether the right was established and whether a reasonable official would understand that she was violating the right, but also whether a *specific theory of liability* applied and whether the chain of causation was supported *at each step* by caselaw.

This approach undermines First Amendment protection of speech and renders qualified immunity a further absurdity by protecting state actors unless the challenged infringement is not only clear but is also framed to satisfy the elements of a cause of action, *i.e.*, the state agent must not only be familiar with the Constitution, but must be an expert in litigation strategy as well.

Moreover, even where, as here, there is a clear statement of intent, followed by action and intended result, that causative chain can be broken by a lack of prior caselaw that mirrors each step. This extended causation analysis eschews the traditional but-for and foreseeability elements causation (which in this case is alleged through Vullo's expression of intent to do the very thing she did) and substitutes a novel theory that requires each step in the causative chain to be independently supported by caselaw with a matching fact pattern.

The genius of this case is how clearly it demonstrates the unconstitutional effect of applying qualified immunity to slow moving First Amendment infringements. Here, this Court has already held that infringement was viably pled and broke no new ground in doing so. Nevertheless, on remand two new obstacles to remedy were inserted into an already unworkable qualified immunity analysis.

The Second Circuit demonstrates the danger of the judicial creation of qualified immunity, an atextual judicial carve out from § 1983 that has become increasingly capacious until the exceptions swallow the whole. The moral hazard of such an approach is self-evident. Now, even where the government official fails to be sufficiently clever in evading liability, it can rely on a court to innovate in its stead.

The Court should grant *certiorari* to finally address the threat to the rule of law created by qualified immunity and the ease with which it undermines First Amendment protections.

FACTS

Vullo did not stumble into an accidental violation of First Amendment rights. She made clear from the outset her intent to use government power to silence disfavored speech:

- "On February 27, Vullo met with senior executives at Lloyd's. There, speaking on behalf of DFS and then-Governor Andrew Cuomo, Vullo presented their views on gun control and their desire to leverage their powers to combat the availability of firearms, including specifically by weakening the NRA." *Vullo I*, 602 U.S. at 183 (cleaned up).
- "Vullo and Governor Cuomo issued a joint press release that . . . included a quote from Vullo urging all insurance companies and banks doing business in New York' to join those that have already discontinued their arrangements with the NRA." *Id.* at 184 (cleaned up).

Vullo acted on her intent to use government power to silence disfavored speech:

- "Vullo made it clear to Lloyd's that it could avoid liability for infractions relating to other, similarly situated insurance policies, so long as it aided DFS's campaign against gun groups". *Id.* at 183 (cleaned up).

Vullo succeeded in using government power to silence disfavored speech:

- "Vullo and Lloyd's struck a deal: Lloyd's would instruct its syndicates to cease underwriting firearm-related policies and would scale back its NRA-related business, and in exchange, DFS would focus its forthcoming affinity-insurance enforcement action solely on those syndicates which served the NRA, and ignore other syndicates writing similar policies." *Id.* at 183 (cleaned up).

- "The press release cited Chubb's decision to stop underwriting Carry Guard as an example to emulate." *Id.* at 184 (cleaned up).
- "Less than two weeks after the Guidance Letters and press release went out, DFS entered into consent decrees with Lockton (on May 2), and Chubb (on May 7)." *Id.* at 185 (cleaned up).
- "Both Lockton and Chubb admitted liability, agreed not to provide any NRA-endorsed insurance programs (even if lawful) but were permitted to sell corporate insurance to the NRA, and agreed to pay fines of $7 million and $1.3 million respectively." *Id.* at 185 (cleaned up).
- "On May 9, Lloyd's officially instructed its syndicates to terminate existing agreements with the NRA and not to insure new ones. It publicly announced its decision to cut ties with the NRA that same day." *Id.* at 185 (cleaned up).

ARGUMENT

I. QUALIFIED IMMUNITY SHOULD NOT SHIELD CONSTITUTIONAL INFRINGEMENT IN SLOW-MOVING FIRST AMENDMENT CASES.

In cases of alleged infringement of First Amendment rights, particularly where, as here, a slow-moving chain of events unfurls as a result of multiple deliberate actions, qualified immunity should be applied rarely, if at all. This is because, the crucial question is whether the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right" and not that "the very action in question has previously been held unlawful.", *i.e.* "in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In cases implicating bedrock First Amendment activity, a legal doctrine that excuses—even incentivizes—ignorance is a poor fit. An expanded doctrine such as the one advanced below that incentivizes the exact opposite: in-depth knowledge of how to evade liability for certain causes of action, is even worse.

Qualified immunity is said to serve two purposes: to ensure fair notice for government employees before personal liability can be imposed—consistent with the constitutional due process requirement of fair notice;[2] and to promote official action recognized under the common law as necessary to society by protecting government employees from lawsuits that may discourage them from doing their jobs or accepting employment that would create legal exposure.[3] Thus,

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[2] "Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful" *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (cleaned up).

[3] *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit."). *See also* 1 Thomas M. Cooley, *A Treatise on The Law*

prior to *Harlow v. Fitzgerald,* "qualified" or "good faith" immunity was an affirmative defense with both an "objective" and a "subjective" aspect. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (citing *Gomez v. Toledo*, 446 U.S. 635 (1980); *Wood v. Strickland*, 420 U.S. 308, 322 (1975)). The objective element involved "a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.'" *Id.* The subjective element referred to "permissible intentions," *i.e.*, not malicious. *Id.* Although, the Court abandoned the subjective element in favor of the "objective," "clearly established" test, *Harlow*, 457 U.S. at 818–19; *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866–67 (2017) (applying the objective test in § 1983 cases), it is instructive to understand the goals qualified immunity has traditionally served.

With the near elimination of the good-faith defense, fair notice has become largely dispositive.

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of Torts or The Wrongs Which Arise Independently of Contract 326 (John Lewis ed., 3d ed. 1906) (citation omitted).

> It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so doing, it is the established rule, that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. This rule is founded upon grounds of public policy, in order to encourage the exposure of crime[.]

Regarding due process and clarity in settled law, there is a distinction between unclear or erroneous laws for which a government actor could not reasonably be deemed to have fair notice and acts that are so clearly unconstitutional or otherwise unlawful that a government actor should be expected to know better. On the one hand, "imagine an officer engages in conduct that has been explicitly blessed by the Supreme Court but nonetheless is sued for it, and in the course of that litigation, the Supreme Court overrules its prior decision. Presumably imposing liability on that officer would offend principles of fair notice." Aaron L. Neilson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, n.57 (2018) (cleaned up). In that case, it would be unreasonable to hold the officer to a higher standard of knowledge than the Court itself. Notably, this standard is more lenient on government officials than the standard applied to private litigants who are granted no "good faith" exception from liability when the Court recognizes a novel interpretation of a statute. *E.g.*, *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 662 (2020).

On the other hand, when the law is clear, the government actor is bound by it and may be liable even in the face of contrary commands from a superior. *Little v. Barreme*, 6 U.S. 170, 179 (1804) (holding "instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass"). This approach, refusing to shield reliance on a patently invalid law has stood the test of time. *See, e.g.*, *Illinois v. Krull*, 480 U.S. 340, 355 (1987). Thus, agreement between an agency official and the executive to take an unlawful approach to speech rights is no excuse.

Fair notice that speech is protected is readily satisfied because claims of First Amendment infringement are among the most frequently discussed and hotly asserted constitutional rights. It is thus reasonable to expect a public official with even the most rudimentary understanding of our constitutional system to be aware that government attempts to punish speech should be met with a jaundiced eye and—at a minimum—pause and seek guidance about whether a course of action is lawful. As the Court held in *Harlow*, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." 457 U.S. at 815–19. The alternative would be to promote official ignorance of the Constitution as a shield against liability.

Moreover, in cases like this one, in which the type of action has already been subject to review by this Court, the official in question is high-ranking and powerful, and the infringement took place both in public and in private, with multiple other parties involved, it is doubtful whether qualified immunity should ever apply. *Vullo I*, 602 U.S. at 180–85.

This issue is particularly acute in settings where an unconstitutional policy can be modified slightly to elude the plaintiff's specific fact pattern or where, as here, an official can insert multiple cat's paws to implement the infringement, making the slow-moving nature of the infringement a means to evade legal liability rather than an opportunity to avoid infringing behavior. Justice Thomas acknowledged this issue relative to university campuses in the denial of certiorari in *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of cert.) ("But why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?").

Accordingly, if this Court retains the qualified immunity doctrine, then it should severely limit its application in the First Amendment context and such application should be informed by the amount of time available to the state actor to consider whether the proposed course of action is constitutional.

II. *REDUCTIO AD ABSURDUM* OR THE ONE-WAY RATCHET EFFECT.

A. The Anti-Precedent Trap Already Shields Novel Infringement of Established First Amendment Rights.

The one-way ratchet effect of applying qualified immunity in slow-moving First Amendment cases has been evident for some time. Even when confined to the baseline elements of an established right coupled with a non-novel fact pattern, the insistence on puzzle-perfect precedent creates what has been deemed the "anti-precedent trap."

Qualified immunity "involves a presumptive knowledge of and respect for basic, unquestioned constitutional rights." *Harlow*, 457 U.S. at 815 (*citing Wood*, 420 U.S. at 322). First Amendment speech rights are the very type of rights that are objectively "basic" and "unquestioned". *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (collecting cases) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions."). It is thus, the second element: whether "a reasonable person would have known" the conduct violated the established right that has become the sticking point. *Harlow*, 457 U.S. 800, 818 (1982). *Anderson* warned that the rule is not that an "official action is protected by qualified immunity unless the very action in question has previously been held unlawful." Rather, "in the light of pre-existing law the unlawfulness must be apparent," *Anderson v. Creighton*, 483 U.S. at 640. But that is not how the doctrine has evolved, especially now in the Second Circuit.

Instead, qualified immunity has been used to iteratively limit development of precedent by only allowing cases to go forward if precedent already exists with a tightly coupled fact pattern. Thus, cases with clear infringement of First Amendment rights are killed in utero and the body of precedent the courts demand is precluded from developing. This anti-precedent trap was summarized by Judge Willett in his dissent in *Zadeh v. Robinson*:

> To rebut the officials' qualified-immunity defense and get to trial, [plaintiff] must plead facts showing that the alleged misconduct violated clearly established law.
>
> * * *
>
> Controlling authority must explicitly adopt the principle; or else there must be a robust consensus of cases of persuasive authority. Mere implication from precedent doesn't suffice.

* * *

> But owing to a legal *deus ex machina*—the clearly established prong of qualified-immunity analysis—the violation eludes vindication.
>
> * * *
>
> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = not clearly established. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

928 F.3d 457, 474, 477, 478–80 (2019) (Willett, J., concurring in part, dissenting in part).

The one-way ratchet was already the state of the law before this case and was nominally the law that was applied below. Pet. App. 24a (*citing White v. Pauly*, 580 U.S. 73, 78-79 (2017) *(per curiam)* (*quoting Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015) *(per curiam)*; *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 741 (2011) ("existing precedent must have placed the statutory or constitutional question beyond debate")).

B. The Second Circuit Expanded the Test for Qualified Immunity from a Two-Part Test to a Four-Part Test, Rendering it Near-Unassailable.

Notwithstanding the apparent applicability of the existing two-part test for qualified immunity and the unanimous opinion of this Court that the First Amendment right in question was recognized in *Bantam Books*, the lower court stretched the existing two-part test for overcoming qualified immunity into a self-referential four-part test that would be well-nigh impossible to satisfy unless a government official with handy legal counsel deliberately tried to be sued.

The expanded test works like this: first the question of whether a "clearly established" constitutional or statutory right has been asserted is resolved by looking at the other elements of the test, making the first element dependent on resolution of the second element. Pet. App. 25a. ("For a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate . . . such that the ensuing rules declare with a high degree of specificity which conduct is permitted and not") (cleaned up). This approach collapses the two elements into one and limits basic First Amendment protection of speech rights to a list of highly specific infractions on which a controlling court has already spoken.

Next, perhaps because this Court had already answered the second question of whether the law was clearly established at the time, *Vullo I*, 602 U.S. at 180 ("the Court ***reaffirms*** what it said then: Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors") (emphasis added), the lower court added two more steps to the process, requiring, (1) that "the conduct alleged here -- regulatory action directed at the nonexpressive conduct of third parties" be previously adjudicated under the same two claims brought in this case: coercion or retaliation; and (2) that "the effect of her alleged coercion of and retaliation against these regulated entities on the NRA's speech [not be] significantly more attenuated here than in the cases cited above." Pet. App. 29a. Now, at least in the Second Circuit, the test for overcoming qualified immunity has four-parts: 1) an established right; 2) non-novel facts; 3) litigation history relying on the same theory of liability; and 4) causation that is not too "attenuated."

This level of parsing is not knowledge the reasonable government official would be expected to have, unless the official were trying to thread the needle on clear infringement by invoking specialized legal knowledge of likely causes of action to evade one or more elements while still silencing the speaker.

For example, to "state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff 's speech." *Vullo*, 602 U.S. at 191. Here, Vullo intentionally did just that and succeeded. And, yet, a savvy official who knew the elements of "coercion" before acting could avoid satisfying them by, for example, extending the chain of causation by inserting an additional party, such that the pressure was conveyed by a "fourth" party rather than by a "third" party. Or, perhaps, the pressure would be placed by imposing an outcome that would be injurious to the plaintiff but that many people would not consider punishing. Increased knowledge of the elements of coercion would aid, rather than impede, the motivated official who wanted to silence certain viewpoints.

If this analysis sounds fanciful, the analysis below, which distinguishes pre-*Vullo I* third parties (conduits for speech) from post-*Vullo I* third parties (non-expressive entities) provides just such an example. To even attempt to draw such a distinction, a government official would have to be intimately familiar with the caselaw on coercion and recognize a potential defense. Pet. App. 28a. ("Reasonable officials in Vullo's position 'would [not] have known for certain,' . . . based on the cases cited above, that her conduct crossed the line from forceful but permissible persuasion to impermissible coercion and retaliation."). Likewise, the notion that liability could be avoided if "the effect of her alleged coercion . . . is significantly more attenuated here **than in the cases cited above**," Pet. App. 29a (bold added), is a lawyerly defense that is at odds with purposefully establishing an effective line of causation to accomplish the very outcome intended. Notably, the attenuation here is not the intervention of unforeseeable events or unrelated actors, but the deliberate and calculated use of the cat's paw to silence the disfavored message. Lest there be any doubt about foreseeability or control, Vullo announced *before she took action*, her intent and then acted accordingly. *Vullo I*, 602 U.S. at 190.

By contrast, *Bantam Books*, simply "stands for the principle that a government official cannot do indirectly what she is barred from doing directly." *Vullo I*, 602 U.S. at 183–85

Evading that general rule to take refuge in the particulars either demonstrates deep understanding of the law on which liability rests, *i.e.* the right was known and knowingly infringed; or a deliberate attempt to insert uncertainty into the claim. If this were not enough, each of the new steps must have its own caselaw support. Thus the "precedent trap" is embedded in each step—providing an escape route for the most legally knowledgeable and an incentive to insert at least one step in the chain of causation that has not been previously litigated. Even if such caselaw existed, the notion that a reasonable official would have such a plethora of caselaw in mind to map each step in the causative chain for a given theory of liability is unrealistic; and for the oddity of an officer who keeps a library of caselaw in mind, creates a moral hazard in which the official navigates applicable caselaw to evade causes of action rather than upholding rights.

Either way, it is the very opposite of the protective purpose of qualified immunity: merely shielding liability where an official lacked notice or the time to make a considered decision.

C. This Case Exemplifies How Qualified Immunity in Slow-Moving Free Speech Cases is Subject to Moving the Goal Posts to Eliminate Redress for Infringement.

The point is not that the Second Circuit should be reversed on a narrow legal error but rather that this case demonstrates how a clear violation of the First Amendment can be construed to require ever more restrictive violations to establish liability. Thus, a judge-made theory of defense against unforeseeable outcomes has morphed into an insurmountable obstacle course for plaintiffs subjected to constitutional harms and an invitation to government officials to employ counsel not to advise them on how to comply with the Constitution but on how to construct a Rube Goldberg machine with just enough steps to ensure they can avoid liability.

Now, in addition to the anti-precedent trap we have what might be coined the indirect-harms trap, where notwithstanding *Bantam Books* a government official *can* do indirectly what she cannot do directly as long as the means are sufficiently obscure—even if she announces it ahead of time. This is an issue inherent in the articulation of the qualified immunity doctrine when applied to any slow-moving constitutional violation, but especially when applied to a right as broad as speech; and it cannot be cured by trimming back one erroneous application.

The simple, and obvious solution to this kudzu of legal doctrines is to hold it inapplicable in cases of slow-moving infringement of First Amendment rights.

III. SECTION 1983 IS NOT A BYPASS OPTION FOR VIOLATING CONSTITUTIONAL RIGHTS.

The Court of Appeals framed the relationship between a First Amendment violation and whether qualified immunity bars liability as follows:

> the question of whether a plaintiff has adequately alleged a First Amendment violation is distinct from the question of

> whether the defendant is entitled to qualified immunity based on existing precedent. *See Farid v. Ellen*, 593 F.3d 233, 245 (2d Cir. 2010) ("For qualified immunity purposes, however, there is a separate question, which is whether the right violated by this conduct was clearly established."); *see also McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 277 (2d Cir. 1999) ("[I]t is not necessary for a district court to determine whether in fact the First Amendment was violated before deciding whether a defendant is entitled to qualified immunity.").

Pet. App. 21a–22a.

By its text, Section 1983 provides no escape valves. 42 U.S. Code § 1983. A plain reading would allow no bypass for qualified immunity. But at a minimum the moral hazard of allowing innovative approaches to silencing speech to create a qualified immunity offramp in the face of straightforward precedent should be avoided.

Moreover, there is a difference between rights and remedies, and thus whether a plaintiff may satisfy the elements of § 1983 does not determine whether it has alleged a clear constitutional violation for purposes of qualified immunity. Thus, the lower court here made the very error Judge Oldham highlighted in his concurrence in *Villarreal v. City of Laredo, Texas*, in which he stated that it is "irrelevant [to the qualified immunity inquiry] whether an officer should have known about the existence and nature of a cause of action to remedy that unlawful conduct." 134 F.4th

273, 280 (5th Cir. 2025) (petition for cert. filed July 7, 2025) (Oldham, J. concurring). In other words, whether a remedy may be had under § 1983 is different from whether rights were violated.

The illogic of conflating these concepts is demonstrated here where freedom of speech is relevant to the question of qualified immunity, but the availability of a § 1983 remedy could turn on which causes of action petitioners chose to assert.

Treating these discrete inquiries as interchangeable creates two moral hazards. First, it encourages government actors to become experts in litigation for the purpose of strategic evasion of viable causes of action, inverting the legal knowledge element of qualified immunity so that greater knowledge of the law leads to greater immunity from complying with the Constitution. Thus, the knowledgeable official may violate a known right so long as he knows how to do it in a way that is difficult to plead. Litigation tactics displace the Bill of Rights.

Second, in cases involving slow-moving violations of First Amendment rights, if finding an obscure lever of governmental power would create a bridge to immunity, long time horizons would incentivize developing prolix and, as here, multi-party approaches. If anything, making an "attenuated" chain of causation a *Get Out of Jail Free* card would draw more private actors into the government official's unconstitutional scheme as a shield against liability.

If the Constitutional "established right" element of qualified immunity can be nullified by displacing it with the statutory requirements of § 1983 or by cutting off liability for any but the most simpleminded of plans, then the speech protections of the First Amendment come to naught, and the remedy provided by § 1983 is a hollow promise.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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