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 OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. When Vullo implemented her scheme against the NRA, was it clearly established that the First Amendment did not allow a government official to coerce a disfavored speaker's service providers to punish or suppress disfavored speech on her behalf?

2. When it is obvious that a government official's conduct violates the Constitution under longstanding Supreme Court precedent, is the violation clearly established for purposes of qualified immunity despite some factual distinctions that are irrelevant under the governing constitutional rule?

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended freedom of expression without regard to speakers' political orientation through public advocacy, strategic litigation, and participation as *amicus curiae* in free speech cases. *See*, *e.g.*, *Volokh v. James*, 148 F.4th 71 (2d Cir. 2025), *cert. accepted*, 44 N.Y.3d 963 (2025); *Novoa v. Diaz*, No. 4:22-cv-324-MW/MAF, 641 F. Supp. 3d 1218, (N.D. Fla. 2022), *appeal docketed*, No. 22-13994 (11th Cir. argued June 14, 2024); *NetChoice, LLC v. Bonta*, 770 F. Supp. 3d 1164 (N.D. Cal. 2025), *appeal docketed*, No. 25-2366 (9th Cir. Apr. 14, 2025).

FIRE often seeks damages for clients on claims against government officials who have violated free expression rights protected by the First Amendment and thus confronts qualified immunity arguments in free speech cases. *Villarreal v. City of Laredo*, 94 F.4th 374 (5th Cir. 2024), *vacated*, *Villareal v. Alaniz*, 145 S. Ct. 368 (2024); *Spectrum WT v. Wendler*, 151 F.4th 714 (5th Cir. 2025), *reh'g en banc granted, opinion vacated*, No. 23-10994, 2025 WL 3008019 (5th Cir.

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1. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief. FIRE provided timely notice to counsel for all parties under Rule 37.2.

Oct. 27, 2025); *Diei v. Boyd*, 116 F.4th 637 (6th Cir. 2024).

FIRE has also appeared as *amicus curiae* in cases illustrating the impact of qualified immunity on vindicating First Amendment rights. *See* Brief for FIRE as *Amicus Curiae* Supporting Petitioner, *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (No. 20-1066), 2021 WL 916341; Brief of FIRE as *Amicus Curiae* Supporting Plaintiff-Appellant, *Cunningham v. Blackwell*, 41 F.4th 530 (6th Cir. 2022) (No. 21-6172), 2022 WL 613218; Brief of FIRE as *Amicus Curiae* Supporting Plaintiff-Appellant, *Novak v. City of Parma*, 33 F.4th 296 (6th Cir. 2022) (No. 21-3290), 2021 WL 3604583; Brief of FIRE et al., as *Amici Curiae* Supporting Appellee, *R. W. v. Columbia Basin Coll.*, 842 F. App'x 153 (9th Cir. 2021) (No. 19-35849).

Thus, with decades of experience combating censorship, FIRE is well acquainted with how free speech suffers when courts broadly apply qualified immunity.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *National Rifle Association of America v. Vullo*, 602 U.S. 175 (2024) (*Vullo I*), this Court unanimously held that Superintendent Maria T. Vullo likely violated the First Amendment when she threatened insurance companies with adverse consequences if those companies did not assist in her efforts to censor gun rights advocates by terminating insurance services to the advocates. The Court explicitly stated it was "not break[ing] new ground" but "only reaffirm[ing] the general principle from *Bantam Books*." *Id.* at 197 (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).

While the Court declined to address the qualified immunity question presented by the Petitioner, *Nat'l Rifle Ass'n of Am. v. Vullo*, 144 S. Ct. 375 (2023), and left that issue for the Second Circuit to consider on remand, *Vullo I*, 602 U.S. at 186 n.3, the Court's resolution of the merits should have foreclosed a subsequent finding of qualified immunity. But the Second Circuit nevertheless granted qualified immunity by ignoring this Court's clear direction and confusing what it means for the law to be "clearly established."

For six decades, courts, including the Second Circuit, have applied principles this Court articulated in *Bantam Books*, focusing on the distinction between governmental persuasion, which is constitutional, and governmental coercion, which is not. Courts routinely find coercion when government officials threaten—directly or impliedly—to take adverse action if their censorial demands are not followed. As this Court unanimously reaffirmed in this case, government officials cannot use coercion to suppress speech, irrespective of who is being coerced. Nevertheless, the Second Circuit held Superintendent Vullo was protected by qualified immunity because she could not know for certain that her threats were prohibited by *Bantam Books*. *Nat'l Rifle Ass'n of Am. v. Vullo*, 144 F.4th 376, 390–94 (2d Cir. 2025) (*Vullo II*).

The decision below transparently evades this Court's holding in *Vullo I*, highlighting the peril of using qualified immunity as a form of judicial clemency and making it necessary to now clarify the qualified immunity doctrine and its limits in First Amendment cases. Not only must the Court stress that it meant what it clearly said in *Vullo I*, it should also use this case to address some of the problems that have long plagued how qualified immunity is applied.

Qualified immunity may make sense where exigencies render it difficult in certain circumstances to determine whether government action adheres to constitutional limits. But that is not the issue here. Government officials—like Superintendent Vullo—generally do not face a comparable situation when enforcing policies that violate the First Amendment or when they take the time to hatch a plan to restrict speech that plays out over a period of months. The justification for qualified immunity all but disappears when the exigent and potentially dangerous circumstances sometimes associated with making arrests, using force, or carrying out searches are not present. *See Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (statement of Thomas, J., respecting the denial of *certiorari*).

Having unanimously reaffirmed that public officials violate the First Amendment when they threaten to use government authority as Vullo undisputedly did here, this Court now should grant *certiorari* to ensure lower courts get the message that the governing principles applied here were clearly established all along. Governmental threats targeting speech violate the First Amendment regardless of *who* Vullo leaned on to suppress the NRA's advocacy. This case also presents an ideal vehicle for the Court to clarify how qualified immunity applies to free speech violations where the government actor has ample time to consider—and even seek counsel on—whether their actions will violate the First Amendment.

ARGUMENT

I. BY APPLYING QUALIFIED IMMUNITY THE SECOND CIRCUIT CONFUSED WHAT CONSTITUTES A CLEARLY ESTABLISHED RIGHT.

The Second Circuit held Superintendent Vullo is entitled to qualified immunity because, in its view, she was unlikely to understand her actions would violate the First Amendment. *Vullo II*, 144 F.4th at 394. It reached this conclusion in the face of decades of jurisprudence applying the principles this Court articulated in *Bantam Books*, which the Court unanimously reaffirmed in *Vullo I*. In fact, this Court affirmed *the same factors* the Second Circuit had previously set forth for identifying government coercion, but found the lower court had misapplied them. *Vullo I*, 602 U.S. at 189–91. Nevertheless, on remand, the Second Circuit seized on the idea that the insurance companies' activities were "nonexpressive." *Vullo II*, 144 F.4th at 380. On that basis, it held "the law was not clearly established that the conduct alleged here—regulatory action directed at the nonexpressive conduct of third parties—constituted coercion or retaliation violative of the First Amendment." *Id.* This conclusion is wrong under *Bantam Books* and *Vullo I*, and serves only to confuse doctrine this Court just reaffirmed.

A. *Vullo I* reaffirmed what has been the law for more than six decades—that the First Amendment does not permit censorship by threats and informal actions.

In *Bantam Books,* this Court held the First Amendment prohibits government officials from relying on the "threat of invoking legal sanctions and other means of coercion ... to achieve the suppression" of disfavored speech. *Bantam Books*, 372 U.S. at 67. Since then, courts, including the Second Circuit, have set the bounds of an unlawful coercion claim by identifying various factors that distinguish attempts to persuade from impermissible attempts to coerce. It is the use of coercion to dissuade disfavored speech that defines the constitutional violation.

When this case was last before this Court, its unanimous decision surveyed cases and identified the relevant criteria that help determine whether a government official's conduct amounts to unconstitutional coercion. They include: "(1) word choice and tone; (2) the existence of regulatory authority; [and] (3) whether the speech was perceived as a threat;" but the Court emphasized that "(4) whether the speech refers to adverse consequences" is "perhaps [the] most important[]" factor. *Vullo I*, 602 U.S. at 189 (internal quotation marks omitted). On the facts as pled, the Court held the NRA sufficiently alleged Vullo threatened insurance companies with negative consequences to elicit their assistance in silencing the NRA. But even before this unanimous opinion, prior case law put Vullo on notice that making threats to silence speech is a First Amendment violation.

In *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983), for example, the Second Circuit held a valid claim lies "[w]here comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request." The court held that an official's letters to department stores urging them to refrain from selling a satirical board game that criticized the government did not constitute coercion, but only because the "letter refer[red] to no adverse consequences that might be suffered by stores selling Public Assistance games." *Id*. at 36 n.2, 39. The court later reinforced this distinction in *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam), stressing that "[w]hat matters is the distinction between attempts to convince and attempts to coerce."[2]

In *Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015), which this Court cited with approval in *Vullo I*, 602 U.S. at 190, the Seventh Circuit found a First Amendment violation where a sheriff

2. *Compare R.C. Maxwell Co. v. Borough of New Hope*, 735 F.2d 85, 89 (3d Cir. 1984) (finding no violation where township's letters to landowner lacked threats of sanctions), *and Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991) (finding no threat to "use the coercive power of the state"), *with Drive In Theatres, Inc. v. Huskey*, 435 F.2d 228, 230 (4th Cir. 1970) (sheriff's campaign to halt the exhibition of allegedly obscene films by threatening arrest and confiscation amounted to coercive "informal censorship").

pressured credit card companies to refuse financial services to the online classified ad site Backpage.com because it published escort advertisements that "may include illegal services, such as prostitution."[3] *Backpage*, 807 F.3d at 231. The sheriff's intent to coerce was evident from the use of his official title and letterhead; use of the term "cease and desist"; a demand that the companies cut all ties with Backpage; references to the financial institutions' legal duty to file suspicious activity reports and to adhere to federal money laundering statutes; and a request that the credit card companies identify individuals within their organizations that the sheriff could work with on the issue. *Id.* at 231–32. The court found that the sheriff wanted to "suffocat[e]" the website, "depriving the company of ad revenues by scaring off its payments-service providers." *Id.* at 231.

Here, the NRA's claims fall squarely within the activities found to be coercive in prior cases. The NRA alleged Vullo wielded the state's regulatory power to threaten selective enforcement of insurance laws against companies that continued doing business with the NRA, and that she did so to suppress its political speech. *Vullo I*, 602 U.S. at 192–93. "The message was therefore loud and clear: Lloyd's 'could avoid liability for [unrelated] infractions' if it 'aided DFS's campaign against gun groups' by terminating its business relationships with them." *Id.* As this Court observed, Vullo knew "the NRA relied on insurance and financing 'to disseminate its message.'" *Id.* at 197. The

3. Because the Seventh Circuit's review in *Backpage.com* was on the denial of a motion for preliminary injunction, the decision did not address damages or qualified immunity.

point was that "her actions were aimed at punishing or suppressing speech." *Id*. at 196.

B. The Second Circuit focused on a nonmaterial factual distinction in granting qualified immunity.

This Court must rectify the Second Circuit's misapplication of qualified immunity in response to the unanimous reaffirmation of the First Amendment principle in *Vullo I*.

The critical question in a First Amendment coercion claim is whether the government's ultimate objective is to censor speech, not whether the immediate target of its threat—the intermediary—is expressive. This has been the consistent holding of courts applying *Bantam Books*, which the Court unanimously reaffirmed here. *Vullo I*, 602 U.S. at 197. Before Vullo issued her threats, a robust body of law throughout the circuits clearly established the First Amendment prohibits government officials from indirectly censoring speech by coercing third parties supporting expressive activity—without regard to the nature of the business being pressured.

The court below seemed reluctant to consider cases outside the Second Circuit,[4] but even the case law in that circuit demonstrates that the activity of the

4. Even though the court acknowledged its duty to consider persuasive authority from other circuits, it evaluated only *Bantam Books* and two Second Circuit cases to support its conclusion that a reasonable public official in Vullo's position might not have known *for certain* that the challenged coercive conduct was unlawful. *Vullo II*, 144 F.4th at 390–92.

threatened party is not material to the determination of whether a government official has engaged in unlawful coercion to suppress speech. For example, in *Hammerhead* the Second Circuit stated the government official would have violated the First Amendment if he had threatened consequences for any department store that sold the offending satirical boardgame. 707 F.2d at 39. But operating a department store is no more expressive than providing insurance unless those services are in support of expressive activities.

Courts both in and outside the Second Circuit have always focused on the purpose of the coercion, not the nature of the intermediary's activity. For example, owning land is not inherently expressive, but it becomes expressive when the landowner erects billboards to display advertising. *See R.C. Maxwell Co.*, 735 F.2d at 88 (applying *Bantam Books* but finding no unlawful coercion). Similarly, the ordinarily mundane operations of a convention center can take on an expressive character through the actions of its lessees. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1159 (9th Cir. 2000) (finding the First Amendment protects against threats to revoke convention center's liquor license if it allowed an erotic art exhibition to occur).

Backpage.com, where the Seventh Circuit held the First Amendment protects against threats to credit card companies providing financial services to an online classified advertising website, 807 F.3d at 231, 235, is another case in point. The court described the credit card companies as "remote intermediaries," *id.* at 234, and focused on whether the sheriff designed his actions to suppress the website's speech. *Id.* at 231. It did not address the nature of the intermediaries' business, nor ask whether it was "expressive."

The abbreviated footnote discussion of *Backpage.com* in *Vullo II* illustrates the problem with the Second Circuit's analysis. 144 F.4th at 393 n.11. It brands *Backpage.com* as "inapposite" by claiming "the incursion on speech was much more direct" than in this case, *id.*, but this misses the point.[5] Just as Vullo targeted "business practices and relationships" of banks and insurance companies to avoid their sending the "wrong message" through their relationships with the NRA, Sheriff Dart pressured credit card companies to cut ties with a classified ad website because of its adult section. *Vullo I*, 602 U.S. at 196. As this Court put it, the sheriff "interfered with a website's business relationships with payments-service providers" to deprive the business of revenue, adding—in reference to Vullo—"[*s*]*o too here*." *Id.* at 196–197 (emphasis added).

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5. Even the minor distinction the Second Circuit relied on is factually unsupportable given that Vullo's office, the Department of Financial Services, regulates more than just insurance companies and the Complaint included allegations that Vullo pressured other types of financial services as well as insurance companies. *See Vullo I*, 602 U.S. at 183–84 ("Vullo sent one of the letters to insurance companies and the other to financial services institutions."); *id.* at 184 ("The press release included a quote from Vullo 'urg[ing] all insurance companies and *banks* doing business in New York' to join those 'that have already discontinued their arrangements with the NRA.'") (emphasis added, citations to complaint omitted).

The dispositive fact, the Court explained, was that Vullo's actions "were aimed at punishing or suppressing speech," and it was of no moment that the "business activities" she targeted were non-expressive. *Id.* at 196. For the Second Circuit to grant qualified immunity by focusing on whether the coerced business was "expressive" badly confuses the doctrine and cries out for clarification by this Court.

II. THE COURT SHOULD CLARIFY QUALIFIED IMMUNITY TO PREVENT COURTS FROM USING IT TO ABSOLVE INFORMAL CENSORSHIP.

This Court has consistently maintained that state officials ought to receive qualified immunity only for actions that reflect reasonable decisions based on the "scope of discretion and responsibilities of the office" and "the circumstances as they reasonably appeared at the time of the action." *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974). Subsequent cases honed the definition of "clearly established law" as the marker for the boundary of the official's constitutional power. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Notwithstanding this clarification, there is serious question whether qualified immunity should apply the same way to government officials who follow a considered and extended course of action—such as Commissioner Vullo's months-long efforts here, *see Vullo I*, 602 U.S. at 181–85—as it does to those who must make immediate, on-the-spot calls. *See Hoggard*, 141 S. Ct. at 2422 (statement of Thomas, J., respecting the denial of *certiorari*).[6] As Justice Thomas aptly asked, why should administrators "who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as," for example, "a police officer who makes a split-second decision to use force in a dangerous setting?" *Id.*

The case at bar serves as a prime example. Vullo faced no emergency. To the contrary, she had every opportunity to reflect before deliberately embarking on the course of action leading to this lawsuit, and to confer with counsel, if desired. As shown above, it did not require the Court to break any new ground to deem those actions unconstitutional under its bedrock principle that "[g]overnment officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors." *Vullo I*, 602 U.S. at 180 (citing *Bantam Books*, 372 U.S. at 67). For that reason, the facts alleged here present an especially weak basis for qualified immunity. Yet the court on remand awarded qualified immunity by making determinative an immaterial factor that played no role in whether Vullo's actions violated the First Amendment.

The history of the qualified immunity doctrine under Section 1983 counsels that courts should not grant such broad protection as allows government officials to ignore the constitutional boundary of their

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6. *See also* F. Andrew Hessick & Katherine C. Richardson, *Qualified Immunity Laid Bare*, 56 Wake Forest L. Rev. 501, 529 (2021) (arguing that "immunity is less warranted in situations where officers have more opportunity to ensure that their decisions comply with the law").

authority in circumstances that allow its reasonable ascertainment.[7] Executives such as Commissioner Vullo have neither the powers of arrest nor authority to use force, so need not evaluate at a moment's notice whether discretion counsels use of either. The typical situation subject to an executive exercise of discretion, rather, permits investigation of facts and decisions regarding the constitutionality of any proposed action. When officials deliberately violate the First Amendment despite having time to consider and weigh the constitutional principles limiting their authority, justifications for qualified immunity evaporate.

This accordingly presents the "appropriate case" in which the Court "should reconsider either [its] one-size-fits-all test or … qualified immunity more

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7. This Court's recent holdings highlight the disparity between split-second decisions and more deliberative ones in the qualified immunity inquiry. Compare the recent decisions affirming grants of qualified immunity in *City of Tahlequah v. Bond*, 595 U.S. 9, 14 (2021) (per curiam), and *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 8 (2021) (per curiam), with those denying qualified immunity even though no cases existed with identical facts, *e.g.*, *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (per curiam) (officials who kept prisoner in feces-filled jail cells for days obviously violated the prisoner's rights). *See also Thompson v. Ragland*, 23 F.4th 1252, 1260 (10th Cir. 2022) (where college administrator punished a student for criticizing a professor "the law was clear that discipline cannot be imposed on student speech without good reason"); *Ballentine v. Tucker*, 28 F.4th 54, 65 (9th Cir. 2022) (the First Amendment right to be free from retaliatory arrest clearly established a constitutional violation where detective arrested activists for "chalking" anti-police messages on sidewalks); *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 867 (8th Cir. 2021) (citing *Hoggard*, 141 S. Ct. at 2422).

generally." *Hoggard*, 141 S. Ct. at 2422 (statement of Thomas, J., respecting the denial of *certiorari*). When government officials have time to coolly assess the constitutionality of their actions—particularly those any reasonable official in their shoes should know to be unlawful—they should not enjoy qualified immunity in a *post facto* bid for amnesty.

CONCLUSION

To ensure courts give full deference to the Court's unanimous decision in *Vullo I*, and to clarify how courts should adjust qualified immunity analysis in non-exigent First Amendment cases, the Court should grant *certiorari*.

Respectfully submitted,

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November 19, 2025