No. 25-479

In The
Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

MARIA T. VULLO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Institute for Justice is a nonprofit public-interest law firm. It defends the foundations of a free society by securing greater protection for individual liberty. Central to IJ's mission is the principle that the government and its agents must be held accountable when they violate the Constitution. IJ advances this principle through its Project on Immunity and Accountability, which seeks to remove unwarranted obstacles between rights and remedies.

IJ has litigated dozens of immunity and accountability issues across the country, including in this Court.[2] Germane here, IJ has repeatedly urged the Court to reconsider or recalibrate the doctrine of qualified immunity.[3] And IJ has published multiple scholarly works explaining how the doctrine contradicts congressional intent and reflects improper judicial policymaking.[4]

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[1] No counsel for a party authored this amicus brief in whole or in part. No person other than Amicus has made any monetary contributions intended to fund the preparation or submission of this brief. Amicus timely notified the parties it intended to file this brief under Rule 37.6.

[2] *E.g., Martin* v. *United States*, 605 U.S. 395 (2025); *Gonzalez* v. *Trevino*, 602 U.S. 653 (2024); *DeVillier* v. *Texas,* 601 U.S. 285 (2024); *Brownback* v. *King*, 592 U.S. 209 (2021).

[3] *E.g.*, *Jimerson* v. *Lewis*, 145 S. Ct. 1220 (2025) (mem.); *Martinez* v. *High*, 145 S. Ct. 547 (2024) (mem.); *Novak* v. *City of Parma*, 143 S. Ct. 773 (2023) (mem.).

[4] *E.g.*, Patrick Jaicomo & Daniel Nelson, *Section 1983 (Still) Displaces Qualified Immunity*, 9 Harv. J.L. & Pub. Pol'y (forthcoming 2026); Jason Tiezzi, Robert McNamara & Elyse Smith Pohl, *Unaccountable* (2024); Patrick Jaicomo & Anya Bidwell, *Unqualified Immunity*, 126 Dick. L. Rev. 719 (2022); Patrick

SUMMARY OF ARGUMENT

The Court has recently and repeatedly pronounced that the legislature, not the judiciary, is the branch of government best suited to weigh the policy considerations implicated in deciding whether to provide a damages remedy for constitutional violations.[5] For those committed under color of state law, Congress did just that by enacting Section 1983. But the Court's creation of the qualified immunity doctrine in *Pierson* v. *Ray*, *Harlow* v. *Fitzgerald*, and their progeny disregards the statutory text and congressional prerogative.

With sweeping and unqualified language, Section 1983 guarantees that "[e]very person who subjects any person to the deprivation of any rights secured by the Constitution shall be liable in an action at law." 42 U.S.C. 1983 (abridged). Yet, as this case exemplifies, qualified immunity thwarts this liability: A New York State bureaucrat orchestrated a sophisticated pressure campaign to punish a policy advocacy group for its protected speech. In its earlier decision here, the Court unanimously held this was unconstitutional. *NRA* v. *Vullo*, 602 U.S. 175 (2024). Even so, qualified immunity ensures, contrary to the text of Section 1983, that Vullo shall *not* be liable—unless this Court intervenes again.

Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity*, 112 J. Crim. L. & Criminology 105 (2022).

[5] See, *e.g.*, *Egbert* v. *Boule*, 596 U.S. 482, 490–492 (2022); *Hernandez* v. *Mesa*, 589 U.S. 93, 99–102 (2020); *Ziglar* v. *Abbasi*, 582 U.S. 120, 130–137 (2017).

The NRA's petition rightly criticizes the Second Circuit for its misapplication of qualified immunity's clearly established test. But the doctrine's application is just a symptom. The Court should grant certiorari to probe the real source of the constitutional disease: qualified immunity. The doctrine overrides the policymaking role of Congress in our constitutional system. The Court initially justified the doctrine, in *Pierson* v. *Ray*, on the premise that the "legislative record [for Section 1983] g[ave] no clear indication that Congress meant to abolish wholesale all common-law immunities." 386 U.S. 547, 554 (1967). But both the statute's text and its original "notwithstanding clause" prove *Pierson*'s premise was false. Worse still, the Court entirely decoupled qualified immunity from Section 1983 and the common law in *Harlow* v. *Fitzgerald*. As it exists today, the doctrine represents pure judicial policymaking.

In addition to usurping the role of Congress, qualified immunity is bad policy. The doctrine is more protective of desk-bound bureaucrats concocting schemes to silence their critics than well-meaning police making split-second decisions about the use of force. The doctrine should be, at a minimum, withheld from the former and limited to the latter. And it should never, as the Court long ago promised, shield the "plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Unfortunately, research and experience have shown that qualified immunity is *more* protective of officials like Vullo than beat cops making difficult decisions under deadly circumstances, and the doctrine routinely spares the incompetent and malicious from the

liability created in Section 1983. To see an example, the Court need only look to the facts here.

The Court should grant the petition, revisit the doctrine of qualified immunity, and deny its ample protection to officials like Vullo, who are insulated from the difficulties of on-the-spot decision making.

ARGUMENT

I. Qualified immunity has a false premise.

The Court engrafted qualified immunity onto Section 1983 in *Pierson* v. *Ray*, drawing its elements from the Mississippi common-law defense of good faith and probable cause. 386 U.S. at 555–557. Although the Court acknowledged that the text of Section 1983 "makes liable 'every person' who under color of law deprives another person of his civil rights," *Pierson* concluded that the "legislative record g[ave] no clear indication that Congress meant to abolish" common-law defenses and immunities. *Id.* at 554. So *Pierson* interpreted Section 1983 to incorporate a qualified immunity, sparing police officers liability if they "reasonably believed in good faith" that their actions were constitutional. *Id.* at 557. But *Pierson*'s premise was badly wrong.

A. Through the notwithstanding clause, the legislative record shows that immunities were excluded from Section 1983.

Congress passed what is now Section 1983 as part of the Civil Rights Act of 1871—"An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Ch. 22, § 1, 17 Stat. 13. As originally enacted, Reconstruction Congress's language removed any

doubt that it intended to create strict constitutional liability: "That any person who shall subject any person to the deprivation of any rights secured by the Constitution shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured." *Ibid.* (abridged, emphasis added). Although the petitioner cited it,[6] and the Court has quoted it both before and after,[7] *Pierson* made no mention of the statute's notwithstanding clause. This is peculiar because, surely, it provides the indication *Pierson* claimed was lacking in the record.

Still, *Pierson* may have overlooked the notwithstanding clause because it was snipped from the statute just three years after enactment. During codification, as the Revisers worked diligently to organize and streamline the unwieldy body of federal law into the

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[6] Brief for Petitioner, *Pierson* v. *Ray*, 386 U.S. 547 (1967) (Nos. 79 & 94), 1966 WL 100720, at 3 n.* (arguing notwithstanding clause "textually made it even clearer that no [] immunity was intended").

[7] *Ngiraingas* v. *Sanchez*, 495 U.S. 182, 188 n.8 (1990); *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 723 (1989); *Wilson* v. *Garcia*, 471 U.S. 261, 262 n.1 (1985); *Chapman* v. *Housing Welfare Rts. Org.*, 441 U.S. 600, 608 n.15 (1979); *Butz* v. *Economou*, 438 U.S. 478, 502 n.29 (1978); *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 691–692 (1978); *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 582 n.11 (1976); *Monroe* v. *Pape*, 365 U.S. 167, 181 n.27 (1961); *Screws* v. *United States*, 325 U.S. 91, 99 n.8 (1945); *Hague* v. *Commission for Indus. Org.*, 307 U.S. 496, 510 (1939); *Civil Rights Cases*, 109 U.S. 3, 16 (1883); see also *Briscoe* v. *LaHue*, 460 U.S. 325, 357 n.17 (1983) (Marshall, J., dissenting); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 203 n.15 (1970) (Brennan, J., concurring in part and dissenting in part).

first United States Code, the clause was omitted. Like the other statutes being trimmed (often substantially[8]), the Civil Rights Act was pruned for concision. The notwithstanding clause was omitted through this process. Compare Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (clause), with Rev. Stat. § 1979 (1874) (no clause). And though intentional, it was expected to have no substantive effect. As one of the Revisers put it, a statute that contained a notwithstanding clause would retain its full effect—with or "without that clause."[9]

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[8] Congress directed the Revisers to codify all the federal public laws from the first 17 volumes of the U.S. Statutes at Large (excluding, it seems, volumes 6–8, which cover private laws and treaties). These 14 volumes total over 13,000 pages. The Revisers' ability to condense down to under 2,700 pages was much due to obsolete laws, which they did not need to codify. Without question though, the Revisers also lowered the page count by substantially simplifying text where they could. That is clear by comparing their revisions to any number of statutes as originally enacted in the Statutes at Large. Compare Act of Apr. 30, 1790, ch. 9, § 10, 1 Stat. 112, 114 (original enactment containing 124 words), with Rev. Stat. § 5323 (1874) (reducing provision to 42 words), and 2 Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose 2561 (1872) (2 Revisers' 1872 Draft at 2113) (reducing to 25 words). The Revisers also removed unnecessary formal words wherever they could. Compare Act of Feb. 9, 1871, ch. 22, § 1, 16 Stat. 594 ("That the President be, and he hereby is, authorized and required to appoint * * * ."), with 2 Revisers' 1872 Draft at 2113 ("There shall be appointed by the President"), and Rev. Stat. § 4395 (1874) (same).

[9] Ambassadors and Other Public Ministers, 7 Op. Att'ys Gen. 186, 216 (1855); see also Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1013 (1938) (noting Caleb Cushing, former Attorney General, was Reviser chairman).

Congress likewise believed that omitting Section 1983's notwithstanding clause would leave the statute's sweep unchanged. Its stated goal with the Revised Statutes of 1874 was to bring together and simplify, yet "preserve," the law as it was. See 2 Cong. Rec. 4220 (1874) (statement of Sen. Conkling). So when the Revisers submitted their draft of the code, Congress spent the next year undoing any revisions that might alter substance, while *leaving in* "mere changes of phraseology not affecting the meaning of the law." 2 Cong. Rec. 646 (1874) (statement of Rep. Poland). This is why Congress did not undo the Revisers' omission of Section 1983's notwithstanding clause (or their omission of near-verbatim clauses in Sections 1981 and 1982[10]). Congress knew the omission did not change the statutory meaning, and the evidence is overwhelming. See generally Patrick Jaicomo & Daniel Nelson, *Section 1983 (Still) Displaces Qualified Immunity*, 49 Harv. J.L. & Pub. Pol'y (forthcoming 2026) (providing a full analysis of the notwithstanding clause and the history surrounding its omission from Section 1983).

Recent scholarship has rediscovered the "game-changing" text, history, and context of the notwithstanding clause.[11] *Rogers* v. *Jarrett*, 63 F.4th 971, 980

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[10] Compare Civil Rights Act of 1866, § 1, 14 Stat. 27 (guaranteeing rights "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding"), with Rev. Stat. § 1977 (1874) (omitting clause); compare Act of May 31, 1870, § 16, 16 Stat. 144 (same clause), with Rev. Stat. § 1977 (1874) (omitting clause).

[11] Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201 (2023); see also Jaicomo & Bidwell, *Unqualified Immunity*, 126 Dick. L. Rev. at 730 n.66, 735 n.87;

(5th Cir. 2023) (Willett, J., concurring). The notwithstanding clause's "language is unsubtle and categorical, seemingly erasing any need for unwritten, gap-filling implications, importations, or incorporations. Rights-violating state actors are liable—period—*notwithstanding* any state law to the contrary."[12] *Ibid.* *Pierson* was simply wrong to overlook one crucial aspect of the "legislative record": the original statutory text.

B. Even without the notwithstanding clause, the text of Section 1983 creates strict liability.

As *Pierson* observed, Section 1983 still admitted no exceptions, even stripped of its notwithstanding clause. At the time, as today, it provided: "Every person who subjects any person to the deprivation of any rights secured by the constitution shall be liable in an action at law." 42 U.S.C. 1983 (abridged); *Pierson*, 386 U.S. at 548 n.1.

From its text, Section 1983 provides a strict liability statutory tort. See generally Matteo Godi, *Section 1983: A Strict Liability Statutory Tort*, 113 Calif. L. Rev. 101 (forthcoming 2025). "[T]he injurious act—the deprivation of a federal right—is the trigger for liability; the only standard of conduct (or duty) is to refrain

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Jaicomo & Bidwell, *Recalibrating Qualified Immunity*, 112 J. Crim. L. & Criminology at 122 n.118.

[12] Accord *Price* v. *Montgomery County*, 144 S. Ct. 2499, 2500 n.2 (2024) (mem.) (Sotomayor, J., respecting the denial of cert.); *Price* v. *Montgomery County*, 72 F.4th 711, 727 n.1 (6th Cir. 2023) (Nalbandian, J., concurring in part and concurring in judgment).

from depriving another of any right, privilege, or immunity secured by federal law." *Id.* at 112.

And the strict liability nature of Section 1983 is reaffirmed when considered alongside other provisions of the Civil Rights Act of 1871. Compare, for instance, Sections 1985(3) and 1986. See Civil Rights Act of 1871, ch. 22, §§ 2, 6, 17 Stat. 13, 13–15. Unlike Section 1983, neither Section 1985(3) nor 1986 creates strict liability because Congress specifically included requirements of purpose and knowledge, respectively. 42 U.S.C. 1985(3) ("for the purpose of"), 1986 ("having knowledge that"). This demonstrates that "Congress knew how to write a cause of action for a fault-based tort. It just chose not to for Section 1983." *Godi*, 113 Calif. L. Rev. at 113.

With or without the notwithstanding clause, the text is clear. Congress made "every person" liable for "any" violation of constitutional rights. Congress went out of its way to draft a statute that would not be subject to restrictions or other considerations external to its text. "Congress plainly enacted a broad statute that imposes strict liability for all deprivations of rights under federal law at the hands of state actors, and that would normally be the end of any judicial inquiry." *Godi*, 113 Calif. L. Rev. at 117. It should have been.

C. *Pierson* overlooked Section 1983 to create qualified immunity.

Pierson overlooked the text and legislative record of Section 1983. Both communicated that Congress intended to displace all defenses or immunities to liability under the statute, but *Pierson* created qualified immunity anyhow. This new defense allowed

Mississippi police to avoid liability under Section 1983 for arresting freedom riders under an unconstitutional state statute. All the officers had to do was establish their good faith and reasonableness in following the law. *Pierson*, 386 U.S. at 557 ("[I]f the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional."). And just like that, some people who violated constitutional rights under color of state law were no longer liable under Section 1983.

Once *Pierson* injected immunity into the statute, the Court continued to spread it without revisiting the underlying (false) premise. In *Scheuer* v. *Rhodes*, for instance, the Court transported *Pierson*'s immunity from the context of police making an illegal arrest in Mississippi to shield claims made against the Governor of Ohio for his actions related to the Kent State shootings. 416 U.S. 232, 233–234 (1974). In *Wood* v. *Strickland*, the Court extended immunity to school officials, clarifying that the standard contained both subjective ("good faith") and objective ("reasonableness") elements. 420 U.S. 308, 321–322 (1975). And in *Procunier* v. *Navarette*, the Court ultimately extended qualified immunity to all state and local officials. See 434 U.S. 555, 568 (1978) (Stevens, J., dissenting).

By this point, the Court's theoretical reliance on the common law was coming loose. *Procunier*, 434 U.S. at 568–569 (Stevens, J., dissenting). The qualified immunity defense had no purported connection to the elements of any specific common-law privilege. Instead, it provided a one-size-fits-all immunity to government officials accused of any constitutional

violations, regardless of circumstance. And the notwithstanding clause had all but faded from memory.

Were the Court's qualified immunity jurisprudence still tethered to the common law or text of Section 1983, the foregoing would be doctrinally fatal. But the Court has explicitly and fully unmoored its qualified immunity jurisprudence from Section 1983's text and the text's ostensible incorporation of the common law. So, it is genuinely unclear whether the text or common law remains salient to the analysis.

II. The Court expanded qualified immunity by abandoning the text of Section 1983 and the common law.

In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987). Announcing a new "clearly established" test, the Court gave up the pretext of statutory interpretation and shifted exclusively to judicial policymaking. See *Crawford-El* v. *Britton*, 523 U.S. 574, 594 & n.15 (1998) (noting that the text of Section 1983 does not "provide any support for * * * the qualified immunity defense").

Harlow began from the dubious premise that "government officials are entitled to some form of immunity from suit for damages." 457 U.S. at 806 (citing *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982)). But see 42 U.S.C. 1983 ("Every person * * * shall be liable."). From there, *Harlow* determined it would weigh competing values: on one side of its policy scale, it placed "protect[ing] the rights of citizens"; on the other, it laid shielding officials from "insubstantial lawsuits."

Harlow, 457 U.S. at 806–807, 813–815. To reach its preferred policy balance, *Harlow* determined that *Pierson's* qualified immunity "require[d] an adjustment." *Id.* at 815.

According to the Court, adjudicating good faith was simply too costly because it required factfinding. *Harlow*, 457 U.S. at 816–817. *Harlow*, therefore, struck good faith from consideration and announced the "clearly established" test that still governs today:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights[13] of which a reasonable person would have known.

Id. at 818. In announcing this test, *Harlow* assured, however, that it provided "no license to lawless conduct." 457 U.S. at 819. This promise is impossible to defend today.

Since *Harlow*, the Court has repeatedly modified qualified immunity in ways that have no relationship to the text of Section 1983 or the common law. Instead, the Court has continued to make policy-based

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[13] *Harlow*'s exclusive reliance on "clearly established statutory or constitutional rights" is perplexing because Justice Powell, who authored *Harlow*, had just seven years earlier objected to that standard as a requirement for immunity in *Wood* v. *Strickland*, 420 U.S. at 328 (Powell, J., dissenting in part). Dissenting in *Wood*, Justice Powell argued that the reliance on "clearly established" law "rest[ed] on an unwarranted assumption as to what lay * * * officials know or can know about the law and constitutional rights." *Id.* at 328–329.

additions to the doctrine, nearly all of which make it more difficult to vindicate constitutional violations under Section 1983.

First, although *Harlow* involved claims against federal officials—allowing the Court to avoid any consideration of Section 1983's text—the Court took the doctrine and attached it to Section 1983. But, unlike in *Pierson*, the Court nowhere purported to consider the text or appropriate background principles. Instead, the Court merely observed, "our cases have recognized that the same qualified immunity rules apply in suits against state officers under § 1983 and in suits against federal officers under *Bivens*." *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984). But see generally Patrick Jaicomo & Anya Bidwell, *Unqualified Immunity*, 126 Dick. L. Rev. 719 (2022) (discussing how the Court has inconsistently used *Bivens* to build up qualified immunity while simultaneously tearing down *Bivens*).

Second, the Court greatly expanded the otherwise narrow and selective collateral order doctrine—and along with it, all federal appellate jurisdiction—to permit immediate interlocutory appeals for qualified immunity denials. *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). But see 28 U.S.C. 1291 (limiting jurisdiction to the review of "final decisions"). The Court again appealed to policy. Relying on the observation that *Harlow* created "an *immunity from suit* rather than a mere defense to liability," the Court determined that the policy benefits of qualified immunity would be "lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526. And the same considerations, the Court went on to hold, also allow multiple

appeals in a single case. *Behrens* v. *Pelletier*, 516 U.S. 299, 310–311 (1996).

This procedural grant has transformed Section 1983 litigation. A recent empirical study found that 96% of all qualified immunity appeals are interlocutory. Jason Tiezzi, Robert McNamara & Elyse Smith Pohl, *Unaccountable* 19 fig. 6, 27 (2024), available at https://ij.org/report/unaccountable/. As a result, cases involving qualified immunity last 23% longer than other lawsuits. *Id.* at 27. By making litigation a war of attrition, *Mitchell* has been a windfall to government officials accused of constitutional chicanery. And real-world analysis proves that Justice Brennan *Id*was right in *Mitchell*: "[A] rule allowing immediate appeal imposes enormous costs on plaintiffs and on the judicial system as a whole." 472 U.S. at 555 (Brennan, J., concurring in part and dissenting in part); *id.* at 556 ("I fear that today's decision will give government officials a potent weapon to use against plaintiffs, delaying litigation endlessly with interlocutory appeals.").

Third, the Court stealthily shifted the burden of overcoming the clearly established test from defendants to plaintiffs. Although the Court has never directly addressed this issue, it has repeatedly placed the burden on plaintiffs. See, *e.g.*, *Rivas-Villegas* v. *Cortesluna*, 595 U.S. 1, 6 (2021) (per curiam) ("Cortesluna [the plaintiff] must identify a case that put Rivas-Villegas [the defendant] on notice that his specific conduct was unlawful."); *Plumhoff* v. *Rickard*, 572 U.S. 765, 779–780 (2014) ("To defeat immunity here, then, respondent [the plaintiff] must show at a

minimum * * * .”). Unlike most defenses,[14] all a Section 1983 defendant must do is cry out, “Qualified immunity!” Then, courts rush to demand the plaintiff prove the defendant is not entitled to it. See, *e.g.*, *Joseph* v. *Bartlett*, 981 F.3d 319, 328–331 (5th Cir. 2020) (discussing how qualified immunity “involves significant departures from the norms of civil litigation”).

Fourth, the Court has continuously constricted the meaning of “clearly established law.” Victims of constitutional abuse cannot rely on the violation of their “general right[s],” but must identify “particularized” applications of those rights, making them “sufficiently clear that a reasonable official would understand that what he is doing violates” them. *Anderson*, 483 U.S. at 638–641. Eventually, this standard came to require such specificity that “every” reasonable official would have understood his “particular conduct” was unconstitutional. *Ashcroft* v. *al-Kidd,* 563 U.S. 731, 741–742 (2011). Then, “existing precedent [had to] place[] the constitutional question beyond debate.” *Reichle* v. *Howards*, 566 U.S. 658, 664 (2012). Finally, the Court announced that a “reasonable officer [must] have known *for certain* that the conduct was unlawful.” *Ziglar* v. *Abbasi*, 582 U.S. 120, 152 (2017) (emphasis added). Otherwise, she is immune.

So exacting are these standards that qualified immunity is effectively a matter of judicial grace. If a Court wants to grant immunity, it can identify some

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[14] Under *Pierson*’s immunity regime, the defendant had the burden of establishing entitlement to immunity. *Gomez* v. *Toledo*, 446 U.S. 635, 638–641 (1980); *id.* at 640 (citing Fed. R. Civ. P. 8(c); 5 Charles Wright & Arthur Miller, *Federal Practice & Procedure* § 1271 (1969)).

uncertainty. Tiezzi et al., *Unaccountable*, at 20–21 & figs. 9, 11 (noting enormous disparities among the circuits in the application of qualified immunity). This is what the Second Circuit did below to immunize Vullo for her unconstitutional jawboning campaign. Pet. App. 25a, 28a–29a (citing *Liberian Cmty. Ass'n of Conn.* v. *Lamont*, 970 F.3d 174, 187 (2d Cir. 2020) ("known for certain"), and concluding, "Vullo is entitled to qualified immunity because the effect of her alleged coercion of and retaliation against these regulated entities on the NRA's speech is significantly *more attenuated here* than in the cases cited [by the NRA].").

III. Qualified immunity is most protective of the least deserving.

In *Harlow*, the Court assured that "[b]y defining the limits of qualified immunity essentially in objective terms, [the Court] provide[s] no license to lawless conduct." But the long arc of qualified immunity raises (at least) two questions about its value as a policy tool. *First*, if qualified immunity was created to protect police who make good faith mistakes, has its expansion helped or hurt the archetypal recipient of the doctrine's protection? *Second*, is the Court's oft-quoted statement—that qualified immunity protects all "but the plainly incompetent or those who knowingly violate the law"—true? *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). The answer to both questions is, "No."

This case, again, illustrates the ugly truth about qualified immunity. Sitting behind a desk in her high office, Vullo had all the time she needed to think, all the counsel she could have imagined to decide, and

full perspective to inform her how to act. Rather than reconsider her plan, she used all those things to silence a voice she disliked. Vullo knew her intentional campaign to silence the NRA for its speech and advocacy violated the First Amendment or she was staggeringly incompetent. Either way, she was spared the liability Section 1983's text requires.

A. Qualified immunity benefits bureaucrats violating the First Amendment more than police accused of mistakes in force.

As Justice Thomas recently noted, "the one-size-fits-all doctrine [of qualified immunity] is [] an odd fit for many cases because the same test applies to officers who exercise a wide range of responsibilities and functions." *Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2421 (2021) (mem.) (respecting denial of cert.). After all, "why should * * * 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?" *Id.* at 2422. The answer is certainly nowhere to be found in the text of Section 1983 or the common law of 1871. *Id.* at 2421–2422.

As Fifth Circuit Judge Andrew Oldham has observed, the "archetypal qualified immunity case" is one involving "excessive [police] force." Andrew S. Oldham, *Official Immunity at the Founding*, 46 Harv. J.L. & Pub. Pol'y 105, 107 (2023). "Officers are often forced to decide, in the blink of an eye, if using deadly force is necessary to save or protect themselves or the innocent public." *Villarreal* v. *City of Laredo*, 134 F.4th 273, 282 (5th Cir. 2025) (en banc) (Oldham, J., concurring). If the purpose of qualified immunity is—

as it was in *Pierson*—to shield these officers under these circumstances, it is not apparent why the doctrine should *ever* shield an official like Vullo. *Id.* at 283.

Vullo had sufficient "time to make calculated choices." *Hoggard*, 141 S. Ct. at 2422 (Thomas, J., respecting denial of cert.). This means that she "cannot complain that [she was] compelled to take action which turned out to be founded on a mistake." *Villarreal*, 134 F.4th at 283 (Oldham, J., concurring) (cleaned up, citation omitted). "Before acting, [Vullo] could have read Supreme Court precedent, studied the history of the First Amendment, or even consulted counsel. [She] thus had or should have had ample 'fair notice' of the lawfulness *vel non* of [her] conduct." *Ibid.* (citation omitted); see also *McMurry* v. *Weaver*, 142 F.4th 292, 304–307 (5th Cir. 2025) (Ho, J., concurring).

Granting Vullo immunity under these circumstances makes little sense, and it conflicts with the Court's jurisprudence confirming that qualified immunity does not apply to obvious constitutional violations. *Taylor* v. *Riojas*, 592 U.S. 7 (2020) (per curiam); *Hope* v. *Pelzer*, 536 U.S. 730 (2002). As Judge Oldham explained, the obviousness-exception cases take an "approach to the level-of-granularity problem" that "might be explained by the absence of split-second decision-making." *Villarreal*, 134 F.4th at 284.

Here, the NRA ably explains why Vullo's actions were obviously unconstitutional and, otherwise, violated clearly established law. Still, the Court should engage with these issues from first principles to provide clarity to the bench and bar about when qualified

immunity should and should not apply to desk-bound bureaucrats like Vullo. The need is urgent for two reasons.

First, some circuits have already set to work narrowing *Taylor*'s exception to qualified immunity. See *Hershey* v. *Bossier City*, 156 F.4th 555, 559 (5th Cir. 2025) (Ho., J., concurring) ("In our circuit, *Hope* and *Taylor* apply only to the Eighth Amendment claims of incarcerated criminals. They do not apply to the First Amendment claims of law-abiding citizens."). But see, *e.g.*, *Rosales* v. *Bradshaw*, 72 F.4th 1145, 1156–1159 (10th Cir. 2023) (applying the obviousness exception outside the prison context).

Second, recent research shows that 50% of all qualified immunity appeals involve claims against non-police, and 21% involve neither police nor prison officials. Tiezzi et al., *Unaccountable*, at 4, 17 fig. 3. In total, just 23% of qualified immunity appeals involve the archetypal scenario: police accused of excessive force. *Id.* at 4, 23. Perhaps surprisingly, though relevant here, 18% of appeals address First Amendment violations. *Id.* at 18 & fig. 4. And of these, 59% involved allegations of premeditated abuse by government officials in retaliation for protected activity. *Id.* at 4, 24 & fig. 14.

B. Qualified immunity routinely shields the intentional and incompetent.

Not only do Vullo's actions highlight the questions surrounding whether qualified immunity should protect desk-bound bureaucrats, they also challenge *Malley*'s rhetorical exclusion from qualified immunity of intentional and incompetent acts. Vullo is not an outlier in this regard.

Among the Institute for Justice's cases alone, there are many examples of lawless behavior, carried out by intentionally malicious or incompetent government officials, who were granted qualified immunity. Here are ten:

- FBI agent granted qualified immunity for raiding wrong house without checking posted address. *Martin* v. *United States*, No. 23-10062, 2024 WL 1716235 (11th Cir. Apr. 22, 2024), rev'd on other grounds, 605 U.S. 395 (2025).
- Police officer granted qualified immunity for disclosing domestic violence victim's confidential report to abuser, causing brutal assault. *Martinez* v. *High*, 91 F.4th 1022 (9th Cir. 2023), cert. denied, 145 S. Ct. 547 (2024) (mem.).
- Police officer granted qualified immunity for arresting pedestrian in retaliation for speech critical of officer. *Murphy* v. *Schmitt*, No. 22-1726, 2023 WL 5748752 (8th Cir. Sept. 6, 2023), rev'd on other grounds, 145 S. Ct. 122 (2024) (mem.).
- SWAT commander granted qualified immunity for raiding wrong house without checking posted address. *Jimerson* v. *Lewis*, 94 F.4th 423 (5th Cir. 2024), cert. denied, 145 S. Ct. 1220 (2025) (mem.) (Sotomayor & Jackson, JJ., would grant cert.).
- Child-welfare official granted qualified immunity for retaliating against family that threatened lawsuit. *J.T.H.* v. *Missouri Dep't of Soc. Servs.*, 39 F.4th 489 (8th Cir. 2022), cert. denied sub nom. *J.T.H.* v. *Cook*, 143 S. Ct. 579 (2023).

- Police granted qualified immunity for raiding and arresting man for parodying them on social media. *Novak* v. *City of Parma*, 33 F.4th 296 (6th Cir. 2022), cert. denied, 143 S. Ct. 773 (2023) (mem.).
- County road engineer granted qualified immunity for seizing and detaining trucks and employees of local business he disliked. *Central Specialties, Inc.* v. *Large*, 18 F.4th 989 (8th Cir. 2021), cert. denied, 143 S. Ct. 369 (2022) (mem.).
- Police officer granted qualified immunity for pointing gun at and seizing 12- and 14-year-old brothers, while searching for adult suspects. *Pollreis* v. *Marzolf*, 9 F.4th 737 (8th Cir. 2021), cert. denied, 142 S. Ct. 904 (2022) (mem.)
- Mayor and city officials granted qualified immunity for having critic arrested. *Gonzalez* v. *Trevino*, 42 F.4th 487 (5th Cir. 2022), rev'd on other grounds, 602 U.S. 653 (2024).
- Police granted qualified immunity for destructively entering house they had consent and a key to search. *West* v. *City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), cert. denied sub nom. *West* v. *Winfield*, 141 S. Ct. 111 (2020) (mem.).

Were it true that incompetence or intentionality excluded officials from qualified immunity, none of the preceding decisions would have entered. But the reality is that qualified immunity has made constitutional accountability into a game of judicial whack-a-mole.

* * *

The doctrine of qualified immunity has no basis in Section 1983 or good policy. It is long past time for the Court to revisit one of its worst lines of precedent and tear it out, root and branch. Because qualified immunity perpetuates an egregious, damaging error, is based on exceptionally weak reasoning, necessitates unworkable rules, disrupts other areas of law, and cannot support a reliance interest, it should be reconsidered. See *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 267–292 (2022) (stating bases for overruling precedent).

As Justice Story long ago explained, "this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands that the injured party should receive a suitable redress." *The Apollon*, 22 U.S. (9 Wheat.) 362, 367 (1826). Any other considerations, like those of policy, "belong more properly to another department of the government." *Id.* at 366. Since it is the province of the judiciary to say what the law is, not what it should be, the Court should revisit qualified immunity, or at least rein it in. The doctrine has no foundation in Section 1983 or the common law that existed when Congress passed America's landmark civil rights statute in the wake of the Civil War.

If we, the people, must follow the law, the agents of our government must follow our Constitution. But in contravention of the statutory text passed by Congress, qualified immunity regularly excuses them from their oaths.

CONCLUSION

The Court should grant the petition and reconsider the doctrine of qualified immunity or, at least, limit the doctrine to the greatest extent possible within the scope of the questions presented.

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