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

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy.

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal agencies, and sometimes even the Judiciary, have neglected them for so long. NCLA aims to defend these civil liberties, primarily by advocating for constitutional constraints on the administrative state.

NCLA opposes the judge-made doctrine of qualified immunity because it defies the text of a statute enacted by Congress—and thus both violates the Separation of Powers and deprives Americans of a vital means of obtaining redress for, and deterring,

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[1] In accordance with Supreme Court Rule 37.2, NCLA provided timely notice to counsel of record for the parties of its intention to file this brief. No party's counsel authored any portion of this brief, and no party, party counsel, or person other than *amicus curiae* made a monetary contribution intended to fund this brief's preparation or submission. *See* S. Ct. R. 37.6.

violations of rights guaranteed by federal law and the United States Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 42 U.S.C. § 1983, Congress provided that "[*e*]*very person*" acting "under color" of state law who deprives another of rights, privileges or immunities secured by the U.S. Constitution or federal laws "*shall be liable* to the party injured in an action at law …" (emphasis added). Yet this Court has created a qualified-immunity doctrine under which state actors often *cannot* be held liable under § 1983 for their violations of federal law or constitutional rights, despite the statute's clear text, which provides for no immunities or other exceptions.

First, the Court held in *Pierson v. Ray*, 386 U.S. 547 (1967), that officers sued under § 1983 could raise a "good faith and probable cause" defense that supposedly was available at common law, which Congress supposedly intended to preserve when it enacted the Civil Rights Act of 1871. *Id*. at 557. Later, the Court greatly expanded qualified immunity in *Harlow v. Fitzgerald*, holding § 1983 makes state actors liable only for actions that "violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982).

The Court should, at a minimum, *overrule Harlow* to the extent that its "clearly established" law standard protects officials like Respondent Vullo who engage in deliberate decision-making and have time to seek legal advice before acting.

Harlow's "clearly established law" standard directly contradicts the statute's text and history. The statute's terms demand liability for *every* violation of constitutional rights—not just violations based on conduct specifically held to be unconstitutional in a previous court decision. *See* 42 U.S.C. § 1983 ("*Every* person … ." (emphasis added)).

Further, by adding the "clearly established law" rule to § 1983, the Court improperly assumed a legislative role. *Harlow* deemed the rule necessary to balance "competing values": on the one hand, the need to redress violations of federal law; on the other hand, "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." 457 U.S. at 814. But the weighing of such values is the exclusive role of Congress; as the Court frequently recognizes in other contexts, courts may not rewrite statutes based on judges' own views on public policy or guesses about what Congress might have wanted.

Moreover, the "clearly established law" rule does not even achieve the "balance" it purports to seek. It does not merely weed out "insubstantial" claims to eliminate needless burdens on state actors and the courts, *Malley v. Briggs*, 475 U.S. 335, 341 (1986); rather, it broadly bars redress for—and reduces state actors' incentive to avoid—even egregious constitutional violations. It also stunts the development of constitutional law, as it allows courts to avoid reaching the merits of constitutional claims, which prevents the law from ever becoming "clearly established."

Harlow expressed concern over the prospect of liability "dampen[ing] the ardor" of officials in

carrying out their duties. 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). But there is little reason to believe that the prospect of liability—however valid that concern might be for law-enforcement officers who make split-second, heat-of-the-moment decisions—it makes no sense for officials—like Respondent Vullo—who do not act in the heat of the moment but engage in deliberate decision making. Besides, the law *should* "dampen the ardor" of such officials who—like Respondent Vullo—are inclined to use their power to suppress speech of which they disapprove. *See id*. Making state decision makers stop to think twice about the constitutionality of their actions is not an unforeseen side effect of § 1983—it's one of the statute's primary benefits and purposes.

Further, the Court's initial recognition of qualified immunity in *Pierson* was ill-founded. Again, the statute's plain text is absolute, with no exception for the common-law "good faith" defense that *Pierson* recognized. In fact, Congress's original language in the Civil Rights Act of 1871, which was somehow erroneously omitted when federal statutes were codified in 1874, made clear that officials were to be held liable *notwithstanding* any state law to the contrary—demonstrating that Congress meant to *abrogate*, not preserve, any common-law defenses. And recent scholarship has shown that the *Pierson* Court's belief that the common law gave government officials a "good faith" defense was incorrect—so there was no such defense that Congress could have intended to preserve. *See infra* at 17-19.

The "clearly established law" rule does not warrant the benefit of *stare decisis*, at least outside the context of split-second, life-or-death decisions. It

is contrary to § 1983's unambiguous text and the product of unconstitutional judicial lawmaking. Moreover, the standard is unworkable, as courts have, for decades, struggled and failed to apply it in an objective, consistent way—resulting in absurd, unjust results like the lower court's decision here. The Court should prevent such cases from arising in the future—as they otherwise inevitably will—by overruling *Harlow*, at least as it applies to officials who engage in deliberate decision making.

I. THE COURT SHOULD OVERRULE THE "CLEARLY ESTABLISHED LAW" STANDARD

A. The Judge-Made "Clearly Established Law" Standard Lacks Any Textual or Historical Basis

The "clearly established law" standard at issue in this case lacks any textual or historical basis. Section 1983 is clear:

> *Every person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured in an action at law, suit in equity, or other proper proceeding for redress … .

42 U.S.C. § 1983 (emphasis added).

The statute makes no reference to immunity. To the contrary, "[i]ts language is absolute and

unqualified," with "no mention … made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Independence*, 445 U.S. 622, 635 (1980). *See also Malley*, 475 U.S. at 339 ("[T]he statute on its face admits of no immunities."); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (same). It applies "categorically to [every] deprivation of constitutional rights under color of state law." *Baxter v. Bracey*, 140 S. Ct. 1862, 1862-63 (2020) (Thomas, J., dissenting from denial of certiorari).

Despite the statute's unequivocal statement that *"every*" state actor "*shall* be liable" for constitutional violations, 42 U.S.C. § 1983 (emphasis added)—and even though "statutory interpretation" is supposed to "begin[] with the text," *Ross v. Blake*, 578 U.S. 632, 638 (2016)—*Pierson* read a good-faith defense into the statute. *Pierson* said that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," 386 U.S. at 556 (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled by*, *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658 (1978)). It thus held that the defense of good faith and probable cause available to officers in common-law actions for false arrest and imprisonment also provided a "good faith" defense to § 1983 claims.

As discussed below, *infra* at 14-20, that conclusion is dubious enough—but at least it was (ostensibly) grounded in the common law of 1871, the background against which Congress enacted § 1983. But the Court eliminated even that common-law foundation for immunity in *Harlow*. *Pierson* had adopted a "good faith" defense based on the elements of the torts at issue in that case, false arrest and imprisonment; *Harlow*, however, recast the defense as

an across-the-board immunity, untethered to common-law torts and their defenses. *See Anderson v. Creighton*, 483 U.S. 635, 642-43 (1987); *see also* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 60-61 (2018). Under *Harlow*, courts no longer ask whether a particular defense was available at common law; instead, the question is whether the defendant "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

Thus, the "clearly established law" standard lacks any basis in the statute's text—and lacks any analytical connection to the reasoning that underlay *Pierson*'s recognition of a good-faith defense in the first place. *See Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting); *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume."); *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity … we have diverged to a substantial degree from the historical standards.").

B. By Balancing Policy Concerns in Adopting the "Clearly Established Law" Standard, the Court Inappropriately Assumed a Legislative Role

In adopting the "clearly established law" standard, the Court rewrote § 1983 and thus substituted its own public-policy views for those of

Congress. The Court has at times insisted that the standard emanates from § 1983 itself and is not simply a "freewheeling policy choice." *Malley*, 475 U.S. at 342. *See also Rehberg v. Paulk*, 566 U.S. 356, 363 (2012); *Tower v. Glover*, 467 U.S. 914, 922-23 (1984) ("We do not have a license to establish immunities from" suits brought under the Act "in the interests of what we judge to be sound public policy."). But in fact, the Court's "qualified immunity precedents … represent precisely the sort of freewheeling policy choices that [the Court has] previously disclaimed the power to make." *Ziglar v. Abbasi*, 582 U.S. 120, 159-60 (2017) (Thomas, J., concurring) (cleaned up). *See also Crawford-El*, 523 U.S. at 611-12 (Scalia, J., dissenting).

"[I]t is never [the Court's] job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have" wanted. *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017); *see also Nieves v. Bartlett*, 587 U.S. 391, 413 (2019) (Gorsuch, J., concurring in part and dissenting in part) ("[This Court's] job isn't to write or revise legislative policy but to apply it faithfully."); *Crawford-El*, 523 U.S. at 611-12 (Scalia, J., dissenting) (describing the Court's qualified-immunity jurisprudence as an "essentially legislative" project).

Yet *Harlow* itself makes clear that the Court engaged in precisely the sort of balancing of public-policy concerns that is Congress's exclusive domain. The Court justified the "clearly established law standard" by asserting that it is "the best attainable accommodation of competing values": on the one hand, the need to redress violations of federal law, and on the other "the expenses of litigation, the diversion

of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. The Court deemed it necessary to shield state officials from financial liability and the burden of litigation to avoid deterring "able citizens from … public office" and "dampen[ing] the ardor" of officials executing their duties. *Id*. at 814.

The Court should now reject this undue incursion on Congress's authority by, at a minimum, eliminating the "clearly established law" standard and limiting § 1983 defenses to those recognized by common law as it stood in 1871.

C. Policy Reasons Do Not Justify the "Clearly Established Law" Standard —Especially Outside the Law-Enforcement Context in Which It Arose

In addition, the Court should overrule *Harlow* because experience has shown that its "clearly established law" rule does not even achieve the "balance" at which the Court was aiming.

Instead of shielding government officials from "insubstantial" claims and ensuring effective government functioning, *Malley*, 475 U.S. at 341, the "clearly established law" standard has harmed the citizens § 1983 was enacted to protect—not only by denying relief for constitutional violations but also by assuring government actors that they will almost never be held accountable for violations. The Court's qualified-immunity jurisprudence sends an "alarming signal" that "palpably unreasonable conduct will go unpunished." *Kisela v. Hughes*, 584 U.S. 100, 121 (2018) (Sotomayor, J., dissenting); *Young v. Borders*, 850 F.3d 1274, 1299-1300 (11th Cir. 2017) (Martin, J.,

dissenting from denial of rehearing en banc); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1814-20 (2018). Instead of ensuring that government employees carry out their lawful duties with appropriate "ardor," qualified immunity incentivizes them to act without due concern for constitutional rights. *See Kisela*, 584 U.S. at 121 (Sotomayor, J., dissenting).

The "clearly established law" rule also "inhibits the development of [constitutional] law." *Lombardo v. City of St. Louis*, 143 S. Ct. 2419, 2421 (2023) (Sotomayor, J., dissenting from denial of certiorari). This Court's precedents allow courts to sidestep the question whether an official's actions violated a constitutional right and simply dispose of a § 1983 claim on the ground that, whatever the merits, the official's action did not violate "clearly established law." *See Pearson v. Callahan*, 555 U.S. 223, 236-242 (2009). As a result, "[i]mportant constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books." *Lombardo*, 143 S. Ct. at 2421 (Sotomayor, J., dissenting) (quoting *Zadeh v. Robinson*, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, J., concurring *dubitante*)). This prevents the law from becoming "clearly established" for future cases, giving state officials—who base their practices, policies, and training on court decisions—no reason to take corrective action. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 65-66, 69-70 (2017). Thus, "grave constitutional violations" may go both unpunished and undeterred. *N.S. v. Kan. City Bd. of Police Comm'rs*, 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting from denial of certiorari).

Moreover, *Harlow*'s concern for "potentially disabling threats of liability" is unwarranted because most jurisdictions indemnify state officials or carry insurance to cover the cost of litigation and liability. *See* Schwartz, *The Case Against Qualified Immunity*, *supra*, at 1804 n.45. As the Court has recognized, "fear of unwarranted liability" holds no sway where insurance coverage exists. *Richardson v. McKnight*, 521 U.S. 399, 411 (1997). And granting qualified immunity where there is indemnification effectively gives the *government* indemnity to which it is not entitled. *See Owen*, 445 U.S. at 638.

Further, the availability of the qualified-immunity defense may *add* to, rather than reduce, the time and expense of litigation, with both qualified immunity and the merits litigated, often separately and sequentially. Schwartz, *The Case Against Qualified Immunity*, *supra*, at 1824. Thus, rather than "avoid[ing] excessive disruption of government" by making it easier to resolve "insubstantial claims on summary judgment," *Malley*, 475 U.S. at 341, more time elapses and more delays occur. Schwartz, *The Case Against Qualified Immunity*, *supra* at 1824; Schwartz, *How Qualified Immunity Fails*, *supra*, at 69. And the prospect of such protracted litigation, combined with the potential for qualified immunity to ultimately bar recovery, may discourage injured parties from bringing meritorious § 1983 lawsuits.

Nor can an interest in protecting law-enforcement officers who are forced to make split-second decisions in volatile situations save the "clearly established law" standard.

And even if policy concerns could justify the "clearly established law" standard in high-risk, heat-

of-the-moment situations,[2] it could not justify applying the standard to officials like Respondent Vullo, whose censorious actions were the result of deliberation. *See Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement regarding denial of certiorari) ("[W]hy 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?"). In the deliberate-decision-making context, where officials have time to obtain and act on legal advice, the risk of uncertainty should be placed on the officials who can weigh the decision and then act—or not act—rather than on the innocent individual (or organization) whose rights are involuntarily and illegally infringed. Balancing the equities in this way promotes protection of important rights by incentivizing care in decision making.

Further, especially when it comes to suppressing speech, "dampening" officials' "ardor" is *a good thing*—not something the Court should invent or maintain dubious doctrines to discourage. *See Horvath v. City of Leander*, 946 F.3d 787, 802 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part) ("[T]he fear of chilling public officials does not

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[2] Even that rationale is questionable. It is not obviously true that officers acting in the heat of the moment weigh the prospect of civil liability, especially given the greater deterrent of criminal liability for violent misconduct. And because no liability attaches for the use of reasonable force, even without qualified immunity, § 1983 does not require officers to be perfect—it merely requires them to act reasonably. And, again, indemnification and insurance eliminate litigation and liability costs from the equation. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014).

justify a 'clearly established' requirement unsupported by text" in part because "[w]hen it comes to the First Amendment, for example, we are concerned about government chilling the citizen—not the other way around."). And checking officials' ardor to censor is all the more important at a time when many academics and politicians increasingly attack the very concept of free speech and seek to suppress speech of which they disapprove, both directly and, as in this case, indirectly, by pressuring private third parties. *See* Christopher Keleher, *The Antidote of Free Speech: Censorship During the Pandemic*, 73 Cath. U. L. Rev. 213, 245-52, 256-58 (2024); Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 Harv. J. L. & Pub. Pol'y 571, 609-620, 653-76 (2022).

Finally, it is simply perverse that "[i]n the upside-down world of qualified immunity, everyday citizens are demanded to know the law's every jot and tittle, but those charged with *enforcing* the law are only expected to know the 'clearly established' ones," so that "ignorance of the law *is* an excuse—for government officials." *Villareal v. City of Laredo*, 94 F.4th 374, 407 (5th Cir. 2024) (Willett, J., dissenting), *cert. granted, vacated & remanded*, *Villareal v. Alaniz*, 145 S. Ct. 368 (2024); *see also* Baude, *supra*, at 76-77 (noting that this Court has held that a circuit split deprived officials of sufficient "notice" under the "clearly established" standard, but "[c]riminal defendants never get such solicitude"). "Such blithe 'rules for thee but not for me' nonchalance is less qualified immunity than unqualified impunity," *Villareal*, 94 F.4th at 407 (Willett, J., dissenting)—the opposite of what Congress sought to achieve in § 1983.

For all these reasons, the "clearly established law" rule should not protect state officials who violate constitutional rights—or at least those who, like Respondent Vullo in this case, act deliberately to violate First Amendment rights.

II. QUALIFIED IMMUNITY WAS TEXTUALLY AND HISTORICALLY BASELESS FROM THE START

Like the "clearly established law rule," the qualified-immunity defense as a whole—even in *Pierson*'s narrow form—lacks any basis in the statute's text or history.

A. The Plain Language and Historical Context of § 1983 Provide No Basis for Qualified Immunity

The qualified-immunity doctrine lacks any basis in the plain language of § 1983. As Justice Douglas emphasized in his *Pierson* dissent, most people would read "every person" in § 1983 to "mean *every person*"—no exceptions. 386 U.S. at 559 (Douglas, J., dissenting) (emphasis added). *Pierson* defies the principle that "[o]nly the written word is the law." *Bostock v. Clayton County*, 590 U.S. 644, 653 (2020). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," *Milner v. Dep't of Navy*, 562 U.S. 562, 569 (2011)—so *Pierson*'s interpretation of § 1983 in defiance of its text was improper.

The historical context of Section 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (later codified in § 1983), also confirms that Congress did not intend to provide immunity to those acting under color of

state law but rather sought to *abrogate* various state-law defenses.

Congress passed that law in the aftermath of the Civil War "for the express purpose of 'enforc(ing) the Provisions of the Fourteenth Amendment.'" *Mitchum v. Foster*, 407 U.S. 225, 238 (1972) (quoting ch. 22, 17 Stat. 13). At that time, a "condition of lawlessness existed in certain of the States, under which people were being denied their civil rights." *Pierson*, 386 U.S. at 559 (Douglas, J., dissenting). "Armed with its new [Fourteenth Amendment] enforcement powers, Congress sought to respond to 'the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States.'" *Baxter*, 140 S. Ct. at 1862 (Thomas, J., dissenting from denial of certiorari) (quoting *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983)). In response to the violence, Congress sought to establish the federal government as the "guarantor of basic federal rights against state power." *Mitchum*, 407 U.S. at 239.

To achieve that goal, Congress "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution." *Id.* Indeed, the "very purpose" of the Act "was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *Id.* at 242. *See also* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 239 (2023) ("[T]he legislative record is replete with evidence that supporters of the Civil Rights Act did not trust state courts to protect constitutional rights."); Richard A. Matasar, *Personal Immunities*

Under Section 1983: The Limits of the Court's Historical Analysis, 40 Ark. L. Rev. 741, 772 (1987) (noting Congress's assumption that the "shall be liable" standard "would apply to *all* officials—legislators, judges, and executive officers").

The historical record leaves no room to conclude that Congress sought to preserve rather than abrogate various state-level defenses to claims of violations of federally guaranteed rights.

B. No Well-Established Good-Faith Defense Existed When Congress Enacted § 1983

Pierson erred in presuming that, because "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, ' … Congress would have specifically so provided had it wished to abolish' them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson*, 386 U.S. at 554-55).

In fact, recent scholarship has shown that "lawsuits against officials for constitutional violations did *not* generally permit a good-faith defense during the early years of the Republic," and that the "'strict rule of personal official liability, even though its harshness to officials was quite clear,' was a fixture of the founding era." Baude, *supra*, at 55-56 (emphasis added) (quoting David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 19 (1972)). *See also Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (naval officer liable for illegal vessel seizure despite his "pure intention" in following an order directing it because "the instructions [could not] change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass");

James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1863-64 (2010); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Res. L. Rev. 396, 414-422 (1987). Thus, even if Congress had intended to preserve common-law defenses as they existed in 1871, *no good-faith defense existed to preserve.*

Thus, *Pierson*—which did not address either the Founding- or Reconstruction-era precedents—rests on a false premise.

C. *Pierson*'s Reliance on the "Derogation" Canon of Construction Was Unsound

Pierson's reasoning has a second fatal flaw: it rested on the incorrect belief, referred to as the "derogation canon" of construction, that, if Congress had intended to abolish immunities "well grounded in history and reason," it "would have specifically so provided." *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (quoting *Imbler*, 424 U.S. at 418); *Pierson*, 386 U.S. at 554-55.

The Court should not have relied on that "canon" because it is "a relic of the courts' historical hostility to the emergence of statutory law." Reinert, *supra*, at 218 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012)). And, whatever the soundness of that canon, "since the Founding era, [this] Court had only used the Derogation Canon (criticized by mid-nineteenth century courts and treatises for arrogating power to judges) to protect preexisting common law *rights*, never to import common law *defenses* into new

remedial statutes." *Rogers v. Jarrett*, 63 F.4th 971, 980 n.8 (5th Cir. 2023) (Willett, J., concurring). "The more applicable canon, around which Reconstruction-era courts *had* coalesced, was a contrary one: remedial statutes—such as § 1983—should be read broadly." *Id*. Indeed, it makes no sense to believe that, when Congress enacted a statute specifically "to remedy the inadequacies of the pre-existing law, including the common law," it would seek to preserve the common law. *Pierson*, 386 U.S. at 561 (Douglas, J., dissenting).

D. Section 1983's Legislative History Confirms the *Pierson* Court's Error

The original text of Section 1 of the Civil Rights Act, as debated and passed by Congress, further confirms Congress meant to abrogate rather than preserve common-law defenses for government officials accused of violating constitutional rights.

As originally enacted, that statute provided:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress … .

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (emphasis added).

By including the language italicized above, Congress made clear that a person acting "under color" of state law "*shall* … be liable" *notwithstanding contrary state law or custom or usage*. *Id*. So, to the extent that "good faith" or other immunities had been available defenses, Congress meant for officials to be liable *notwithstanding* them. *See* Reinert, *supra*, at 235-36.

Soon after the Act's passage, Congress undertook the first codification of federal law, culminating in the passage of the Revised Statutes of 1874.[3] The codified version of Section 1 of the Civil Rights Act of 1871 lacked the "notwithstanding" clause—but, for two reasons, this change in language does not reflect any changes in the statute's substance or meaning.

First, the codification process sought merely to consolidate and simplify the law, not to substantively change it. *See* Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1013 (1938). Thus, the excision of the "notwithstanding" clause in that process strongly suggests that the clause was "surplusage," the deletion of which did not alter the statute's meaning. *Cf. Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 n.29 (1968) (concluding Congress dropped identical "notwithstanding" language from § 1982 in codification because it was "surplusage"). That means § 1983's codified version is no less absolute than the

[3] Section 5596 of the Revised Statutes repealed all prior federal statutes covered by the revision.

original language, with neither version contemplating a qualified-immunity defense.

Second, if there were any ambiguity in § 1983's text, the "notwithstanding" clause would confirm that the "shall be liable" language was always understood to trump state-law defenses, including immunities. Shortly after Congress first codified the federal statutes, this Court explained the relevance of the original statutory language in interpreting the newly codified Revised Statutes of 1874: "where there is substantial doubt as to the meaning of the language used in the revision, the old law is a valuable source of information." *United States v. Bowen*, 100 U.S. 508, 513 (1879); *see also Myer v. Car Co.*, 102 U.S. 1, 8 (1880). And where the text of a reenacted statute is "fairly susceptible" of two meanings, "the argument from the provision of the statute as it stood before the revision [is] *conclusive*." *Bowen*, 100 U.S. at 513 (emphasis added).

Thus, § 1983's pre-codification language provides "conclusive" evidence that the statute does not allow for state-law immunity defenses. *Id.* It "underscore[s] that what the 1871 Congress meant for state actors who violate Americans' federal rights is not immunity, but liability—indeed, liability *notwithstanding* any state law to the contrary." *Rogers*, 63 F.4th at 980 (Willett, J., concurring). And it confirms that the Court's qualified-immunity doctrine "does not merely *complement* the text—it brazenly *contradicts* it." *Id.* at 981.

III. *STARE DECISIS* CANNOT JUSTIFY KEEPING THE CURRENT "CLEARLY ESTABLISHED LAW" STANDARD

Though the parties here argue only about whether the lower court correctly applied the "clearly established law" rule, the Court should reconsider the rule—and, at a minimum, revise it to clarify that government officials "who have time to make calculated choices" are not entitled to "the same protection as a police officer who makes a split-second decision to use force in a dangerous setting." *Hoggard*, 141 S. Ct. at 2422. *Stare decisis*, though generally "the preferred course," is "not an inexorable command," *Janus v. AFSCME*, 585 U.S. 878, 916-17 (2018), and it should not stop the Court from overruling *Harlow* to the extent that it applies to officials engaged in deliberate decision making.

"An important factor in determining whether a precedent should be overruled is the quality of its reasoning." *Id.* at 917. As shown above, both *Harlow* and *Pierson* were poorly reasoned. *Harlow* was based on the false premise that Congress meant to preserve a "good-faith" defense—when, in fact, Congress *abrogated* all existing state-law defenses, and no "good-faith" defense for government officials existed to preserve. *See supra* at 14-17. And *Pierson* did not even attempt to tie its "clearly established law" rule to *Harlow*'s reasoning based on common-law defenses and instead made the rule up, without *any* legal reasoning, based on the Court's own policy judgments. *See supra* at 7-9; *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from denial of certiorari).

"Another relevant consideration in the *stare decisis* calculus is the workability of the precedent in

question." *Janus*, 585 U.S. at 921. The "clearly established law" standard has proven unworkable. The "line between" what is and is not "clearly established" in the law "has proved to be impossible to draw with precision," *id*., leading to different results in different federal circuits and absurd outcomes like the lower court's decision here, which let Vullo off the hook for an obvious, deliberate First Amendment violation. *See* Petition at 19-23.

Making matters worse, the Court has instructed that "clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79 (2017). But it has also said, to lower courts' confusion, that the doctrine "do[es] not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Thus, even after dozens of decisions from this Court on the question, "lower courts remain persistently confused and divided on how to answer the nebulous question of how similar the facts of a prior case must be for the law to be clearly established." Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, Cato Inst. Policy Analysis No. 901, at 10 & n.65 (Sept. 14, 2020) (citing examples)[4]; *see also Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) ("[C]ourts of appeals are divided—intractably—over precisely what degree of factual similarity must exist.").

The Court can and should reverse the lower court's egregious application of the rule in this case—

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[4] https://www.cato.org/sites/cato.org/files/2020-09/PA%20901_1.pdf.

which certainly falls on the "clearly established" side of the line, wherever that line might be—but it cannot police all applications of the rule. And there is no reason to believe that it could tweak the rule to ensure consistent application—or that it would be worth trying yet again, after many decades, for the sake of saving such an ill-founded doctrine and protecting officials who engage in deliberate decision making like Respondent Vullo.

Stare decisis should not control for the additional reason that "developments since [*Harlow* and *Pierson*], both factual and legal, have also eroded the decision[s'] underpinnings and left [them] an outlier" in the Court's jurisprudence. *Janus*, 585 U.S. at 924 (cleaned up). Again, scholarship has shown that *Harlow*'s assumption about Congress's supposed aim to preserve common-law defenses was incorrect. *See supra* at 14-17. And *Harlow* and *Pierson* are outliers in the Court's jurisprudence because they flagrantly disregard the oft-applied fundamental principles that (1) statutory construction must begin with the text and (2) that the Court must not substitute its own policy judgments for those of Congress.

Finally, no reliance interest can justify retaining the current "clearly established law" standard. *See Janus*, 585 U.S. at 926. Government officials have no legitimate reliance interest in continuing to violate constitutional rights with impunity. That they have been wrongly allowed to get away with much in the past is no reason to allow them to do so in the future. *See id.* at 927 (concluding that it would be "unconscionable to permit free speech rights to be abridged in perpetuity" and that the precedent's beneficiaries had no "entitlement" that

could "establish the sort of reliance interest that could outweigh [individuals] having their constitutional rights fully protected").

Qualified immunity is entirely "a creation of [the Court's] own design," and so are the difficulties in application and manifold injustices it has produced. *Lombardo*, 143 S. Ct. at 2421 (Sotomayor, J., dissenting from denial of certiorari). The Court can and should "reexamine the doctrine of qualified immunity and the assumptions underlying it," *id.*, and correct its mistakes by overruling *Harlow*—or at least limiting its application to the law-enforcement context in which qualified immunity arose.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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