

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

**BRIEF OF ALLIANCE DEFENDING FREEDOM
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

1. When Respondent Maria T. 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

Alliance Defending Freedom (ADF) is a nonprofit, public-interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect First Amendment freedoms and to vindicate violations of First Amendment rights. Since its founding in 1994, ADF has played a key role in numerous First Amendment cases before the United States Supreme Court, including *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), and *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018), as well as in hundreds of other cases in state and federal courts. ADF has also litigated qualified-immunity disputes involving premeditated violations of First Amendment rights. *See, e.g., Josephson v. Ganzel*, 115 F.4th 771 (6th Cir. 2024); *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868 (8th Cir. 2020). ADF thus has a strong interest in seeing the Supreme Court vindicate the First Amendment rights at the heart of this case.

SUMMARY OF ARGUMENT

Jawboning is a growing problem. And given that it often happens in the shadows, it is a particularly pernicious form of government suppression of speech. But precisely because this suppression often occurs covertly, victims of jawboning face significant challenges in seeking judicial recourse. When qualified-

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were provided timely notice of *Amicus Curiae*'s intent to file this brief.

immunity principles are applied incorrectly in these circumstances, it can make matters worse, giving government officials a wide escape hatch even in those jawboning lawsuits that find a foothold in court—as happened here on remand.

Qualified immunity should not bar jawboning cases like this one that involve allegations of unmistakable violations of First Amendment rights. As a growing chorus of jurists and scholars recognize, qualified-immunity doctrine has strayed from the text and original meaning of 42 U.S.C. § 1983. Accordingly, the Court must take care to apply its qualified-immunity caselaw to comport with the original meaning of § 1983. Doing so requires recognizing that where, as here, a government official is alleged to have acted deliberately to violate First Amendment rights, general principles of law provide fair notice for qualified-immunity purposes, even when the government official acts under circumstances that are different from past precedent. Allegations like these involving deliberate and systemic attacks on free speech differ substantially from the paradigmatic cases in which police officers must make split-second decisions in emergency situations that could impact public safety. The Court should take this case to make at least that point clear.

ARGUMENT

I. THE ORIGINAL MEANING OF § 1983 CANNOT SUPPORT QUALIFIED IMMUNITY FOR PREMEDITATED FIRST AMENDMENT VIOLATIONS LIKE THIS CASE.

An examination of the text and enactment history of § 1983 demonstrates that the Court’s modern

qualified-immunity doctrine rests on shaky analytical footing. Proper application of the doctrine would, at minimum, lead to the conclusion that premeditated attacks on the First Amendment, like those alleged in this case, should not be immune from judicial scrutiny.

This Court has “stressed over and over again in recent years” that “statutory interpretation must begin with, and ultimately heed, what a statute actually says.” *Groff v. DeJoy*, 600 U.S. 447, 468 (2023) (cleaned up). And in doing so, courts must interpret Congress’s statutes “consistent with their ordinary meaning . . . at the time Congress enacted them.” *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (cleaned up). “After all, only the words on the page constitute the law adopted by Congress and approved by the President.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 288 (2023) (Gorsuch, J., concurring) (cleaned up). And federal judges lack authority to “freely invest old statutory terms with new meanings” beyond or contrary to the terms’ original meaning. *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019). Yet in four ways, the Court’s modern qualified-immunity jurisprudence stands in significant tension with § 1983.

First, because Congress purportedly did not address in the text of § 1983 whether state common-law immunities would be available to defendants, this Court declined to read its “general language” creating a private right of action to “covert[ly]” eliminate immunities “grounded in history and reason.” See *Tennessee v. Brandhove*, 341 U.S. 367, 376 (1951). For this reason, the Court has read § 1983 “in harmony with

general principles of tort immunities and defenses” available to defendants in analogous cases when § 1983 was first enacted in 1871. *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976).

But this premise was arguably flawed “from its inception.” *Rogers v. Jarrett*, 63 F.4th 971, 979 (5th Cir. 2023) (Willett, J., concurring). In fact, “the Reconstruction Congress had explicitly stated,” in the “original statutory text,” that “it was nullifying all common-law defenses against § 1983 actions.” *Id.*

When first enacted in 1871, the law that was later codified in § 1983 stated that “any person” who violated others’ constitutional rights “shall, **any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding**, be liable to the party.” Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (1871) (emphasis added). This “notwithstanding” clause “explicitly displace[d] common-law defenses,” “erasing any need for unwritten, gap-filling implications.” *Rogers*, 63 F.4th at 979–80, 979 n.5 (Willett, J., concurring) (citing Alexander A. Reinert, *Qualified Immunity’s Flawed Foundation*, 111 Calif. L. Rev. 201, 235, 235 n.230 (2023)); accord *Price v. Montgomery County*, 144 S. Ct. 2499, 2500 n.2 (2024) (Sotomayor, J., statement respecting the denial of certiorari).

But for “unclear reasons,” and without “any authority to alter positive law,” the first Reviser of Federal Statutes omitted the notwithstanding clause from the statute in an 1874 codification. Reinert, *supra*, at 207, 237. This and later clerical changes, however, were “not intended to alter the scope of the

provision.” *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 510 (1939) (quoting the 1871 enactment, including the notwithstanding clause, before making this point); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 203 n.15 (1970) (Brennan, J., concurring in part and dissenting in part) (observing how the original statute was “changed without comment into its present form” by the 1874 Reviser and “assum[ing] that the linguistic differences between the original” law and § 1983 as revised “are immaterial”).²

Yet when first embarking on its modern qualified-immunity excursion, the Court looked to the statute’s revised version, saw nothing therein speaking to background immunities, and then concluded from that silence that Congress did not intend to abrogate those immunities. *Tenney*, 341 U.S. at 369, 376; *see also Imbler*, 424 U.S. at 417–18, 417 n.10 (purporting to quote the original enactment “in full,” but omitting the notwithstanding clause, and then reading § 1983 “in harmony with general principles of tort immunities and defenses”); *accord City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258, 258 n.17 (1981);

² The notwithstanding clause might have been thought surplusage. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 n.29 (1968) (“presum[ing]” that similar language in what is now codified at 42 U.S.C. § 1982 was “deleted . . . as surplusage” by the 1874 Reviser because the language simply “emphasiz[ed]” the “supremacy” of the statute “over inconsistent state or local laws”). That would only underscore the original meaning of the text, even as now codified. *See, e.g.,* Antonin Scalia & Bryan A. Garner, *Reading Law* 176–77 (2012) (“Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach.”).

Owen v. City of Independence, 445 U.S. 622, 624 n.1, 637 (1980); *Procunier v. Navarette*, 434 U.S. 555, 556 n.1, 561 (1978); *Pierson v. Ray*, 386 U.S. 547, 548 n.1, 553–54 (1967).³

In other words, arguably this Court’s foundational “justification for qualified immunity—that Congress wouldn’t have abrogated common-law immunities absent explicit language—is faulty” because the text of the law as originally enacted “*expressly included such language*.” *Rogers*, 63 F.4th at 980 (Willett, J., concurring). Thus, particularly “in this text-centric judicial era,” modern qualified-immunity doctrine has a shaky analytical foundation. *Id.*

Second, even absent the notwithstanding clause, the Court still misread § 1983 when the Court laid the groundwork for modern qualified-immunity doctrine in *Tenney*. There, the Court relied on the derogation canon—that statutes “in derogation of the common law” are to be “taken strictly” to preserve as much of the common-law backdrop that they can be read not to abrogate, *e.g.*, *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 367 (1797)—to avoid reading § 1983 to “overturn the tradition” of immunities “grounded in history and reason” in the common law. *Tenney*, 341 U.S. at 376. That is, since 1951, this Court has not read the “all-encompassing language of § 1983 . . . literally,” *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983), and so it has “declined to construe” the text “as automatically

³ On one occasion—albeit in passing and without any explanation or analysis—the Court did recite the full, original text before opining that it “said nothing about immunity for state officials.” *Butz v. Economou*, 438 U.S. 478, 502 & n.29 (1978).

abolishing such traditional immunities by implication,” *Fact Concerts*, 453 U.S. at 258 (collecting authorities).

But this invocation of the derogation canon was questionable. For one, the canon was (and is) a poor tool for discerning the meaning of the 1871 statute because, as one leading commentator of the day observed, the canon “had ‘entirely passed away’” as a valid tool for statutory interpretation “by the mid-nineteenth century.” Reinert, *supra*, at 219 (quoting Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law* 270 (2d ed. 1874)); see also, e.g., *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (referencing this treatise to elucidate a “basic principle of statutory construction”); *French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1871) (same).

Further, even if the canon were properly applied to § 1983, *Tenney* and its progeny repeatedly misapplied it to the statute because “none of the case law leading up to and surrounding Reconstruction” applied the canon to preserve “common law defenses into a newly created cause of action.” Reinert, *supra*, at 222–23. Even under the canon, “[d]efenses . . . were not conceived of as . . . deserving of protection from derogation.” *Id.* at 225. Thus, “Reconstruction-era legislators would not have understood the canon as operating to dilute § 1983 by implying common-law defenses.” *Rogers*, 63 F.4th at 980 n.8 (Willett, J., concurring); cf. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010) (describing another interpretive canon as providing a “stable background against

which Congress can legislate with predictable effects”).

Thus, while the Court has repeatedly paid lip service to the “principle that its proper role in interpreting § 1983 is determining what the 42d Congress intended,” it has seemingly ignored, or else turned on its head, the background law that “members of the 42d Congress were . . . familiar with” when discerning their intent about § 1983’s effects on common-law immunities. *See Smith v. Wade*, 461 U.S. 30, 65–68, 67 n.6 (1983) (Rehnquist, J., dissenting) (collecting authorities).

Third, even if § 1983 could properly be read to preserve background immunities available in analogous cases in 1871, the Court probably has misunderstood the nature of those immunities. *See, e.g., Ziglar v. Abbasi*, 582 U.S. 120, 159 (2017) (Thomas, J., concurring in part and concurring in the judgment) (“[S]ome evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine.” (citing William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 51–62 (2018))).

Under the Court’s precedent, whether a government official is afforded immunity under § 1983 “begins with the common law as it existed when Congress passed § 1983 in 1871.” *Filarsky v. Delia*, 566 U.S. 377, 383–84 (2012). Thus, in principle, the “immunity historically accorded the relevant official at common law” in 1871 dictates that official’s immunity under § 1983 today. *Imbler*, 424 U.S. at 420; *accord Buckley v. Fitzsimmons*, 509 U.S. 259, 267–68 (1993);

Malley v. Briggs, 475 U.S. 335, 342 (1986); *Tower v. Glover*, 467 U.S. 914, 921–23 (1984).

And supposedly based on the common law as it existed in 1871, the Court originally crafted a qualified-immunity test requiring both objective and subjective good faith. That is, to receive immunity, the government-official defendant had to establish both “reasonable grounds for the belief” under existing law that the offending conduct was lawful and actual “good-faith belief” accordingly. *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974), *abrogated in part by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Thus, qualified immunity was unavailable (1) if the official either “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights” of the plaintiff, or (2) “if he took the action with the malicious intention to cause a deprivation of constitutional rights.” *Wood v. Strickland*, 420 U.S. 308, 322 (1975), *abrogated in part by Harlow*, 457 U.S. 800.

But as recent scholarship has “made clear, and more and more judges have come to recognize,” even this blanket, two-part, common-law test for qualified immunity likely “cannot withstand scrutiny.” *McKinney v. City of Middletown*, 49 F.4th 730, 756–57 (2d Cir. 2022) (Calabresi, J., dissenting) (collecting authorities). For one, “there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment.” Baude, *supra*, at 55–58 (discussing, *inter alia*, *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (Marshall, C.J.) and *Myers v. Anderson*, 238 U.S. 368 (1915)); accord Joanna C.

Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1801 (2018) (“[H]istory does not support the Court’s claims about qualified immunity’s common-law foundations.”). Also, “to the limited extent a good-faith defense did exist in some common-law suits, it was part of the elements of a common-law tort, not a general immunity” available uniformly to government officials. Baude, *supra*, at 55, 58–60. In other words, there appears to be “no justification for a one-size-fits-all, subjective immunity based on good faith.” *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from the denial of certiorari).

Fourth, even if such a defense could be found generally in the common law of 1871⁴ and could be found implicit within the text of § 1983, this Court has acknowledged that its modern qualified-immunity test does not adhere to the common law of 1871. In 1982, the Court renounced half of the good-faith, common-law test it had previously articulated for qualified-immunity cases in favor of a “balancing of competing values” approach. *Harlow*, 457 U.S. at 815–18. This approach was “not at all embodied in the common law.” *Anderson v. Creighton*, 483 U.S. 635, 645 (1987); *accord Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting). According to the

⁴ See, e.g., *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 122, 130 (1849) (observing, in a trespass action brought by a naval officer against his commanding officer for excessive corporal punishment during the Wilkes Expedition, that the officer could claim immunity for “acts within the limits of [his] discretion” but could not claim immunity for *ultra vires* acts or acts “attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling”).

Harlow Court, including the “subjective good faith of government officials” in the analysis proved too “cost[ly]” in terms of litigation burdens on government officials. *Harlow*, 457 U.S. at 816–18. So that component of the test had to go—moving forward, qualified immunity would depend solely “on the objective reasonableness of an official’s conduct, as measured by reference to clearly established law.” *Id.* at 818.

As it stands today, then, the doctrine of qualified immunity “stray[s] from the statutory text” of § 1983. *Baxter*, 140 S. Ct. at 1862 (Thomas, J., dissenting from the denial of certiorari). And even the criteria that arguably find some basis in contemporaneous common law—objective and subjective good faith—would not save from liability the government actors in this case, who, according to the complaint, consciously coerced financial institutions to stop doing business with the NRA based on speech disfavored by New York. Given the original meaning and history surrounding § 1983, this Court should not allow qualified immunity to govern in cases like this.

II. THIS COURT SHOULD READ ITS QUALIFIED-IMMUNITY PRECEDENTS IN LIGHT OF THE ORIGINAL MEANING OF § 1983 AND VINDICATE THE FIRST AMENDMENT RIGHTS AT ISSUE IN THIS CASE.

In an appropriate case, this Court could “reappraise” the “true scope” of § 1983 in light of the “original text” of the law “left out in the Revised Statutes” and overlooked in this Court’s qualified-immunity jurisprudence. *See Monroe v. Pape*, 365 U.S. 167, 221, 223, 228 (1961) (Frankfurter, J., dissenting). “[P]art

of ‘judicial humility,’” after all, is “admitting and in certain cases correcting . . . mistakes,” even in statutory-interpretation cases where Congress “could have legislatively overruled” the Court. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407–12 (2024) (overruling *Chevron* because, “[d]espite reshaping judicial review” in the administrative-law context, it “was a judicial invention” that failed to “grapple[] with” the text of the Administrative Procedure Act).

At minimum, at the next opportunity, this Court should undo *Harlow*’s concededly atextual detour and return to the pre-*Harlow* good-faith test that finds at least some footing in the common law of 1871. *See, e.g., Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., statement respecting the denial of certiorari) (recognizing that *Harlow*’s “clearly established” test “cannot be located in § 1983’s text and may have little basis in history”).

Until it does, the Court must allow § 1983 and the common-law immunity principles ostensibly implicit in the text to exert a “gravitational pull” in qualified-immunity cases. *United States v. Rahimi*, 602 U.S. 680, 730 (2024) (Kavanaugh, J., concurring). Of course, as a matter of horizontal stare decisis, “[c]ourts must respect” their own precedent (at least when not weighing whether to overrule them). *Id.* But even when applying horizontal stare decisis, “text and history still matter a great deal.” *Id.* Indeed, rightly understood, precedents are simply “evidence of the law”; so perceived, they cannot permit a court “in future cases to depart from what the . . . laws” themselves prescribe. *Loper Bright Enters.*, 603 U.S. at 418, 423 (Gorsuch, J., concurring); *cf. Gamble v.*

United States, 587 U.S. 678, 719 (2019) (Thomas, J., concurring) (“If a prior decision demonstrably erred in interpreting [a statute], federal judges should exercise the judicial power—not perpetuate a usurpation of the legislative power—and correct the error.”).

Thus, even when following precedent purporting to construe and apply the law (albeit erroneously), the Court must put a thumb on the interpretive scale in favor of the text and its original meaning “[w]hen determining how broadly or narrowly to read a precedent” or “when determining whether to extend, limit, or narrow a precedent.” *Rahimi*, 602 U.S. at 730 (Kavanaugh, J., concurring); *see also Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 615 (2007) (“It is a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic.”).

Accordingly, even if this Court chooses to adhere to the “clearly established” standard, it should apply that standard recognizing that the test would not have shielded instances of premeditated constitutional violations based on the common law of 1871 (which was itself arguably excluded by the original text of § 1983). In other words, the Court should apply this standard as much as possible to comport with the 1871 Congress’s directive that the presumption for “state actors who violate Americans’ federal rights is not immunity, but liability.” *Rogers*, 64 F.4th at 980 (Willett, J., concurring). And this gravitational pull must be given exceptional force where, as discussed below, the decision at issue extended qualified immunity past its breaking point.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR THE COURT AT LEAST TO CLARIFY ITS MODERN QUALIFIED-IMMUNITY CASELAW IN LIGHT OF THE ORIGINAL MEANING OF § 1983.

Application of qualified-immunity principles, especially in light of the original meaning of § 1983, yields an easy answer in this case. This Court has already held that it did not have to “break new ground” to find that the NRA plausibly alleged that Vullo violated its First Amendment rights. *NRA v. Vullo*, 602 U.S. 175, 197 (2024). And that was because the Court’s decision more than “[s]ix decades ago” in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), made clear that a government official “cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors” and that a “government official cannot do indirectly” (dragooning third parties to do the suppression) “what she is barred from doing directly.” *Id.* at 180, 185, 187–94, 197. Accordingly, Vullo’s qualified-immunity defense at the pleadings stage should have been readily dispatched on remand.

But pulling on one thread of the Court’s modern qualified-immunity jurisprudence, the Second Circuit concluded that Vullo was entitled to qualified immunity because the means she allegedly used to deliberately violate the NRA’s First Amendment rights had not themselves been clearly established as unconstitutional. And it held as much even though the principle that “coercion amounting to censorship and retaliation violate[s] the First Amendment as a general matter” was “clearly established” and even though Vullo’s alleged actions were premeditated. *NRA v. Vullo*, 144 F.4th 376, 381–83, 388–96 (2d Cir. 2025).

Thus, this case presents a great opportunity for the Court to clarify that general principles from prior cases clearly establish the law for qualified-immunity purposes where, as here, they unambiguously apply to alleged premeditated actions, even if the defendant acted in factually different circumstances when violating those principles.

The Court's efforts to operationalize *Harlow's* "clearly established" standard have resulted in conflicting formulations creating a vague spectrum. On one hand, the Court has suggested that the same standard applies "across the board," being "unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated." *Anderson*, 483 U.S. at 642–43 (cleaned up); *accord Ziglar*, 582 U.S. at 159 (Thomas, J., concurring). On the other hand, the Court has recognized that "clearly established" is context-dependent: sometimes, "general statements of the law" in prior cases suffice when they "apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful"; and other times, as when earlier cases "expressly leave[] open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary." *Hope v. Pelzer*, 536 U.S. 730, 740–41 (2002) (cleaned up); *see also, e.g., Lyons v. City of Xenia*, 417 F.3d 565, 579 (6th Cir. 2005) (Sutton, J.) (discussing these "two paths" under the "clearly established" standard).

Providing a potential path through this wilderness, the Court has emphasized repeatedly that the throughline of modern qualified-immunity doctrine is to ensure that government officials have “fair notice” that they could be subject to liability under § 1983. *Hope*, 536 U.S. at 739; *accord Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). And what “fair notice” looks like will often depend on the circumstances of the case.

For instance, “specificity is especially important in the Fourth Amendment context” given the abstract nature of Fourth Amendment rights and the split-second judgments law-enforcement officials must often make to protect public safety. *Mullenix v. Luna*, 577 U.S. 7, 12–14 (2015) (per curiam); *cf. Anderson*, 483 U.S. at 639 (expressing concerns about “unqualified liability” based on alleged violations of “extremely abstract rights”). On the other hand, abstract articulations of constitutional rights can provide “fair warning” in non-emergency situations where the government official’s actions, even though “novel” for qualified-immunity purposes, were “clearly” unconstitutional. *Hope*, 536 U.S. at 737–38, 741 (involving violations of the Eighth Amendment’s prohibition on “unnecessary and wanton” pain).

In other words, although the Court’s cases contain conflicting formulations, the “clearly established” standard can be understood as an *ad hoc* “sliding scale” test. *E.g., Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) (Gorsuch, J.); *accord Guertin v. Michigan*, 924 F.3d 309, 314–15 (6th Cir. 2019) (Sutton, J., concurring in the denial of rehearing en banc).

Given this sliding-scale feature of modern qualified-immunity doctrine, government officials who have time to deliberate before making “calculated choices about enacting or enforcing unconstitutional policies” should not “receive the same protection” as, say, “a police officer who makes a split-second decision to use force in a dangerous setting.” *Hoggard*, 141 S. Ct. at 2422 (Thomas, J., statement respecting the denial of certiorari); *accord Villarreal v. City of Laredo*, 134 F.4th 273, 277–78, 282–83 (5th Cir. 2025) (Oldham, J., concurring), *cert. docketed*, No. 25-29 (U.S. July 7, 2025). General principles are well-suited to give fair notice in the former setting in a way that they might not be able to in the latter context. *See Villarreal*, 134 F.4th at 283–84 (Oldham, J., concurring) (finding “some support” for this distinction “in the Supreme Court’s precedents”).

But unclear directives in this Court’s cases give courts cover to engage in a choose-your-own-adventure application of qualified immunity while seeming to paint inside the lines of the Court’s precedents. This case illustrates that danger.

Governmental conduct targeting “particular views taken by speakers on a subject” is a “blatant” First Amendment violation. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also*, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that stifles speech on account of its message . . . contravenes this essential right.”). And that

principle has long been clearly established in this Court’s cases. *See, e.g., Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983) (recognizing that the First Amendment prohibits discrimination against particular “ideas” (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959))). Likewise, the Court has long recognized that viewpoint discrimination is unconstitutional under the First Amendment whether it is direct or indirect. *See, e.g., Am. Commc’ns Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 402 (1950) (“[T]he fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect ‘discouragements’ undoubtedly have the same coercive effect upon the exercise of First Amendment rights . . .”).

For these reasons, when this case was previously before the Court, it recognized that it did “not break new ground” but simply “reaffirm[ed]” what it said in *Bantam Books* more than “[s]ix decades ago” in finding that the NRA had plausibly alleged a First Amendment claim against Vullo for her efforts to indirectly “stifle the NRA’s pro-gun advocacy.” *Vullo*, 602 U.S. at 180–81, 197.

But despite all this, on remand the Second Circuit concluded that Vullo was entitled to qualified immunity because “no case” before this one “had clearly established that a regulator could indirectly infringe the First Amendment rights of one entity (the NRA) by coercing third-party associates (the insurers) into refraining from nonexpressive, nonspeech activity (writing certain NRA-endorsed policies).” *Vullo*, 144 F.4th at 392. Instead, all prior relevant cases involved

government targeting the “means through which” the plaintiff was “actually engaging in expressive activity” (such as a third-party book distributor or a billboard operator). *Id.* at 392. That distinction, the Second Circuit reasoned, meant that “a reasonable officer in Vullo’s position likely would have thought that her conduct . . . was permissible”; meaning “existing precedent did not adequately define the contours of the First Amendment right at issue such that Vullo would not have been on notice that her specific conduct violated it.” *Id.* at 393.

In other words, although the NRA plausibly alleged that Vullo set out to indirectly “punish or suppress the NRA’s gun-promotion advocacy” in blatant violation of the First Amendment under well-settled and well-defined principles, *Vullo*, 602 U.S. at 187–90, she was deemed immune because she sought to accomplish clearly unconstitutional ends in a different factual scenario. And to justify this conclusion, the Second Circuit rejected as inadequate “general pronouncements” from prior First Amendment cases. *See Vullo*, 144 F.4th at 389–90, 393–94 (referencing *White v. Pauly*, 580 U.S. 73 (2017) (per curiam), *al-Kidd*, 563 U.S. 731, and *Mullenix*, 577 U.S. 7, all Fourth Amendment qualified-immunity cases).

This problem—where courts stare blatant and premeditated unconstitutional conduct in the face and nevertheless conclude that the offending official is entitled to qualified immunity because of differing ancillary details—is not unique to the Second Circuit. Consider *Wetherbe v. Texas Tech University System*, 138 F.4th 296 (5th Cir. 2025), *cert. docketed*, No. 25-530 (U.S. Oct. 31, 2025), a First Amendment retaliation

case. There, all agreed it was “clearly established that a state official could not impose adverse employment actions on a state employee on account of that employee’s outside speech on a matter of public concern.” *Id.* at 302. The plaintiff, a state-university employee, had been essentially demoted for outside speech about tenure at public universities. *Id.* at 298–99. And several prior cases provided “rules and analyses” that “could reasonably apply to suggest” that the plaintiff’s speech about tenure “was on a matter of public concern.” *Id.* at 305. But because “none of [its] cases have held that speech regarding tenure is on a matter of public concern,” the court granted the defendants qualified immunity, concluding that the “general principles” from the cases relied on by the plaintiff did not suffice to clearly establish the law. *Id.*

Turning Point USA, 973 F.3d 868, is similar. The plaintiff, a public-university student, alleged that university officials violated her First Amendment rights by limiting her ability to “table” on campus outside of university-designated “Free Expression Areas” without first registering her organization with the university. *Id.* at 873–74. The Eighth Circuit concluded that the university’s tabling policy was unconstitutional as applied under its own and this Court’s precedents going back more than fifty years. *Id.* at 875–79. The court nonetheless granted the university officials qualified immunity because there was a way to read an admittedly “distinguishable” Eighth Circuit case—an erroneous way, the court explained—to permit that policy. *Id.* at 879–81.

Given this state of affairs in the lower courts, the Court should take this case at least to clarify that

general principles suffice to clearly establish the law under *Harlow*—especially in the First Amendment context—when they apply to the premeditated actions of government officials, even if the actions violate those general principles in factual circumstances that differ from prior precedent.

For one, doing so would be consistent with *Harlow*’s “balance of competing values” approach to qualified immunity, *Harlow*, 457 U.S. at 807, which seeks to “hold public officials accountable when they exercise power **irresponsibly**” while shielding them from liability “when they perform their duties **reasonably**,” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (emphases added). In this balance, “particularly when so much is at stake,” qualified-immunity doctrine should incentivize government officials who have the opportunity to deliberate before acting to “turn square corners in dealing with the people.” *See DHS v. Regents of Univ. of Cal.*, 591 U.S. 1, 24 (2020) (cleaned up). And there is no question about the stakes here— “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . or other matters of opinion” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *accord Vullo*, 602 U.S. at 187 (“At the heart of the First Amendment’s Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society.”).

Heightening the stakes, jawboning is a growing problem. *See generally* Press Release, *Sen. Cruz: We Must Better Protect Americans from Government Jawboning*, U.S. Sen. Comm. on Commerce, Science, &

Transp. (Oct. 8, 2025), <https://tinyurl.com/3tx5w6af>; Christopher Frey, Comment, *Bad to the [Jaw]Bone: How Courts Should Approach First Amendment Jawboning Challenges*, 55 Seton Hall L. Rev. 205 (2024); Will Duffield, *Jawboning Against Speech*, Cato Inst. (Sept. 12, 2022), <https://tinyurl.com/4a6cb3a3>; Genevieve Lakier, *Informal Government Coercion and the Problem of “Jawboning,”* Lawfare (July 26, 2021), <https://tinyurl.com/bp83c5ej>. And given that jawboning “often occurs in the shadows, absolving the government speaker from accountability and shifting blame to the coerced actor for removing speech from the public eye,” it is a particularly pernicious form of governmental suppression of speech. Frey, *supra*, at 253–54; *see also, e.g., Murthy v. Missouri*, 603 U.S. 43, 108 (2024) (Alito, J., dissenting) (identifying the “serious threat to the First Amendment” by the “unrelenting pressure” the government placed on third parties to “suppress Americans’ free speech” in that case). These dangers are especially pronounced in the context of financial-services regulation, where even the most prosaic sounding statements from regulators about reputational risk tend to make regulated firms feel bound to follow such “guidance.” *See generally* Br. of Fin. & Bus. L. Scholars as *Amici Curiae* in Supp. of Pet’r, *NRA v. Vullo*, No. 22-842 (U.S. Jan. 10, 2024).

Precisely because jawboning is often done surreptitiously, plaintiffs face inherent challenges when seeking to hold officials accountable for it. *See, e.g., Murthy*, 603 U.S. at 58–76 (majority opinion) (holding that the plaintiffs lacked standing to challenge jawboning because, in pertinent part, they did not show that the censorship they faced was fairly traceable to the government’s coercion rather than the third

parties’ “independent judgment”). With these difficulties already facing the victims of jawboning, the Second Circuit’s version of qualified immunity provides a ready escape hatch to government officials even in those cases that manage to get a foothold in court.

In this context especially, then, government officials should not be permitted to “act as they choose until there is a case on all fours.” *Josephson*, 115 F.4th at 789. Instead, such officials should be “made to hesitate” before embarking on premeditated, unconstitutional conduct by the prospect of a damages remedy under § 1983. *Harlow*, 457 U.S. at 819; *cf. Horvath v. City of Leander*, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part) (“Public officials who violate the law without consequence only further fuel public cynicism and distrust of our institutions of government.” (cleaned up)).

More importantly, ruling for the NRA would help bend this Court’s qualified-immunity doctrine back toward the original meaning of § 1983, which at minimum allows bad faith to defeat any claim of immunity, regardless of how creatively the government official acts to violate constitutional rights. *See supra* Section I. Thus, taking this case to clarify the “clearly established” standard in this way would at least be one step in the right direction toward ending this Court’s modern project of wrongly “amending” § 1983 “outside the ‘single, finely wrought and exhaustively considered, procedure’ the Constitution commands.” *New Prime*, 586 U.S. at 113 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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