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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As the NRA's Petition explained, the decision below defied this Court's prior ruling in this very case, contravened decades of this Court's qualified-immunity precedent, and clashed with the holdings of several other circuits. In her response brief, Vullo does not dispute that officers who engage in "obvious" constitutional violations are not entitled to qualified immunity. Nor does she dispute that it has been the settled rule for decades that the government violates the First Amendment when it coerces a third party to cut off services to a speaker in order to punish or suppress the speaker's protected expression. Nor does she have any coherent explanation for how the violation here was not blazingly obvious under that clear governing rule.

Instead, Vullo urges this Court to accept a view of qualified immunity that would allow government officials to blatantly violate long-established constitutional rights without consequence as long as they do so in a way that does not too closely resemble the facts of any prior case. But the primary factual distinction she relies on—that the services cut off here were not themselves "expressive"—is obviously irrelevant under the governing constitutional rule, and so no reasonable official could have relied on it in seeking to punish and suppress the NRA's protected speech. Indeed, as the NRA pointed out (Pet. 2), under that distinction, a pro-life governor could have coerced NARAL's insurers into canceling its insurance in order to punish it for engaging in pro-choice speech—and would have been entitled to immunity for that flagrant violation. Vullo has no response, and her silence is deafening.

The Court should grant certiorari to clarify that qualified immunity is not available for such obvious violations. At minimum, the Court should summarily reverse to enforce its prior decision in this case.

ARGUMENT

I. THE DECISION BELOW DEFIES THIS COURT'S PRIOR RULING IN THIS CASE.

In its prior decision in this case, this Court emphasized that there was no need to "break new ground" to hold that Vullo's conduct violated the First Amendment. Her conduct fell squarely within the rule announced six decades ago in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), that "a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 190 (2024). Nonetheless, on remand, the Second Circuit maintained that "a reasonable officer in Vullo's position likely would have thought that her conduct . . . was permissible." Pet.App.32a.

Vullo claims that there is no inconsistency between this Court's saying that its decision broke no new ground and the Second Circuit's saying that it created new law. BIO 28–29. But that makes no sense. If the Court was "applying a general legal principle to novel factual circumstances" (*id.* 28) in a manner that resolved open questions or lingering doubts about the scope of that principle, it *would* be breaking new ground. Indeed, Vullo's argument that "this Court's analysis of the constitutional merits" of this case "clearly establishes the law moving forward" (*id.*) confirms her view that the Court's prior decision in

this case changed the state of First Amendment law. But this Court could not have been more clear that it did no such thing, instead "only reaffirm[ing]" the law established by *Bantam Books*. *Vullo*, 602 U.S. at 197.

Contrary to Vullo's argument, then, this case bears no resemblance to *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009). There, the Court applied a fact-intensive reasonableness standard established in a prior case to a new factual context, holding that the search in question was unreasonable and violated the Fourth Amendment. *Id.* at 377–78. Nonetheless, the Court granted qualified immunity based on "doubt that [the Court was] sufficiently clear in the prior statement of law" to establish how the reasonableness standard applied in the specific context at issue. *Id.* at 378–79. Qualified immunity applied precisely because the Court's decision *did* break new ground.

Nothing of the sort happened here, where the Court merely reaffirmed—not clarified—the longstanding rule that a government official cannot coerce regulated parties into punishing or suppressing speech on the official's behalf. Vullo is wrong that the Second Circuit's original panel decision demonstrates confusion about the *Bantam Books* rule. BIO 26. As this Court explained, the fatal flaw in that panel decision was its misreading of the facts alleged in the complaint, not its misunderstanding of First Amendment principles. *See Vullo*, 602 U.S. at 194–95. Indeed, the original panel never so much as hinted that coercing the NRA's insurers to cut ties with the NRA in order to punish and suppress the NRA's protected speech would be allowed under the First

Amendment. And that is because no reasonable official possibly could have thought so.

Finally, acknowledging that this Court's prior decision should have been dispositive of the qualified-immunity question does not "collapse[] the two steps of the qualified-immunity test," as Vullo suggests. BIO 26. To be sure, "there is no inconsistency between finding a constitutional violation at step one before granting qualified immunity at step two." BIO 27. There *is* inconsistency, though, in finding at step one that the unconstitutionality of the conduct at issue was squarely established by decades-old precedent before granting qualified immunity at step two. The Second Circuit's ruling on remand thus cannot be squared with this Court's prior decision.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S OTHER PRECEDENTS.

Even setting aside this Court's prior decision in this very case, the Second Circuit's decision on remand cannot be squared with this Court's other qualified-immunity cases. As those cases make clear, factually identical precedent is not necessary to defeat qualified immunity if existing caselaw provides "fair and clear warning" that the conduct at issue is unconstitutional. *United States v. Lanier*, 520 U.S. 259, 271 (1997). When factual distinctions make no plausible difference under the established constitutional rule, qualified immunity does not apply. Pet. 19–23.

Under the clear rule of *Bantam Books*, "[a] government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." *Vullo*, 602 U.S. at 190. Vullo contends that because she coerced third parties to cut off "nonexpressive"

services to the NRA in order to punish and suppress its speech, she "infringed [the NRA's] First Amendment rights in a much more attenuated manner." BIO 22 (quoting Pet.App.31a). But that does not make the violation any less clear. Under *Bantam Books*, the constitutional violation is based on the effect on *the NRA's* speech, not the third party's, so it makes no difference whether the third-party services were "expressive" or "non-expressive." All that matters is whether the government coerced the third party to cut off those services as a means of punishing or suppressing the NRA's speech. *See Backpage.com, LLC v. Dart*, 807 F.3d 229, 231 (7th Cir. 2015) ("The analogy is to killing a person by cutting off his oxygen supply rather than by shooting him.").

Vullo fares no better with any of the other factual distinctions she asserts between this case and *Bantam Books*, none of which were relied on by the Second Circuit as a basis for granting qualified immunity. For example, Vullo contends that the conduct at issue in *Bantam Books* was "much stronger" than the conduct at issue here, because the defendants there were responsible for "investigating and recommending the prosecution" of certain offenses, while this case does not involve criminal prosecutions. BIO 23 (cleaned up). But that distinction makes no sense. Like the commission in *Bantam Books*, Vullo had sweeping authority over the regulated entities she coerced, including the power to launch criminal investigations and refer potential prosecutions to state prosecutors. Pet.App.265a. And the civil enforcement actions Vullo took were not slaps on the wrist; the penalties ran into the millions of dollars. *See, e.g.,* Pet.App.287a ($5 million fine). Any reasonable official would have

understood that the threatened enforcement actions were coercive—and no court has ever suggested otherwise.

Ultimately, Vullo resorts to asserting that the rule that "the government cannot use its coercive power to indirectly punish or suppress a speaker's protected speech is stated too broadly to constitute clearly established law." BIO 29 (cleaned up). On Vullo's view, that rule is no more specific than "the right to due process." BIO 29–30. But that comparison beggars belief. A reasonable official may well have questions about what "the right to due process" demands in particular situations, because that is a vague standard and not a bright-line rule. By contrast, the rule of *Bantam Books* could not be clearer: an official cannot use government power to coerce a regulated party into punishing or suppressing someone else's protected speech, period. *Vullo*, 602 U.S. at 190. That is exactly what Vullo allegedly did here, and she has not identified anything unclear about how the *Bantam Books* rule applies to her conduct. Nor could she. That rule "appl[ies] with obvious clarity to the specific conduct in question," and qualified immunity is unavailable as a result. *Lanier*, 520 U.S. at 271.

Tellingly, Vullo does not dispute that her view would have granted immunity to government officials even if they targeted the medical providers the NRA's employees relied on, the airlines they traveled on, or the schools their children attended—all in order to punish or suppress the NRA's protected speech. Pet. 22–23. Even though such conduct obviously would have violated the First Amendment under *Bantam Books*, it would not matter on her view. Unless the government had previously taken those specific

actions, been sued for them, and lost the case in a binding opinion on the same facts, officials would have been free to take such actions with impunity. That view refutes itself.

III. THE CIRCUITS ARE DIVIDED.

Although the above authorities make clear that the Second Circuit's approach below was improper, "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" to find a clearly established constitutional violation. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part). As the Petition explained, the Sixth, Seventh, Tenth, and Eleventh Circuits have all embraced this Court's cases holding that exact factual identity is not required to clearly establish that conduct is unconstitutional. Pet. 24–26. But the Second Circuit below has joined the Fifth Circuit in treating constitutionally irrelevant factual distinctions as sufficient to grant qualified immunity. Pet. 26–29.

Without analyzing any of the cases the Petition highlighted as part of the split, Vullo insists that there is no split because the Sixth, Seventh, Tenth, and Eleventh Circuits all sometimes grant qualified immunity, and because "all circuits follow this Court's rule that existing precedent must put the unconstitutionality of the officers' alleged conduct beyond debate." BIO 17–19 (cleaned up). But that misses the point. The Sixth, Seventh, Tenth, and Eleventh Circuits have all denied qualified immunity despite a lack of factually on-point precedent where the factual distinctions are constitutionally irrelevant. Pet. 24–26. The Second and Fifth Circuits, however,

may quote the same language from this Court's cases about the nature of "obvious" violations, but nonetheless continue to grant qualified immunity in cases in which it would be denied in other circuits.

Vullo's examples prove the point. In each of the cases she cites in which the Seventh, Eighth, Tenth, and Eleventh Circuits granted qualified immunity, the pertinent factual distinctions went to the elements of the established constitutional test or otherwise involved open legal questions. In *Shockency v. Ramsey Cnty.*, for example, the law "was clearly established that deputies to the sheriff were free to speak on matters of public concern without fearing adverse employment actions." 493 F.3d 941, 950 (8th Cir. 2007). However, existing "law defining adverse employment actions [was] fact intensive," with "no clear guidelines." *Id.* Because the alleged adverse employment action at issue fell within the grey area in the case law, qualified immunity was appropriate: "the law was not clearly established that the actions [the defendant] took . . . had employment consequences serious enough to amount to adverse employment actions." *Id.*

Here, by contrast, the factual distinction that the Second Circuit relied on to justify qualified immunity—that Vullo targeted "the nonexpressive conduct of third parties," rather than their expressive conduct, to suppress or punish the NRA's speech—is utterly irrelevant to the constitutional rule of *Bantam Books*. As the Seventh Circuit recognized on materially identical facts, this purported distinction amounts to nothing more than the difference between "killing a person by cutting off his oxygen supply rather than by shooting him." *Backpage.com*, 807 F.3d

at 231. Or to put a finer point on it, it is equally obvious that the First Amendment prohibits a government official from coercing (a) emergency room doctors to deny medical services to NRA employees and (b) billboard owners to deny advertising services to them. The fact that the latter involves expressive services and the former does not is utterly irrelevant. Thus, in the Seventh Circuit, as in most other circuits, a public official's reliance on such a flimsy and obviously irrelevant distinction would require denying qualified immunity. The Second Circuit's contrary holding here is in direct conflict.

IV. This Case Is An Ideal Vehicle To Resolve The Questions Presented.

This case provides an ideal vehicle to clarify the qualified-immunity standard, particularly because this Court has already held the conduct at issue violated the First Amendment and analyzed the precedents that compelled that conclusion. Pet. 29–30.

Vullo attempts to manufacture vehicle problems, but none withstand scrutiny. *First*, Vullo claims that this is a poor vehicle because the allegations against her turn in part on her "motivation," and the "'defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated.'" BIO 13–14 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998)). But qualified immunity here does not turn on Vullo's subjective motive; it turns on whether the law was *objectively* clear that she could not use the coercive power of the state to force third parties to cut off services to the NRA to punish and suppress its protected speech. Similarly, Vullo offers no support for

her claim that "[c]ases involving retaliation" are categorically poor vehicles to address qualified immunity. BIO 14 (citing *Reichle v. Howard*, 566 U.S. 658 (2012)). *Reichle* itself was a retaliation case that addressed qualified immunity. 566 U.S. at 660. And unlike *Reichle*, this is not a case of a simple probable-cause arrest that the plaintiff claims was *also* driven by retaliatory motives. Rather, as this Court has already explained, the allegation is that Vullo, through various means, "threatened to wield her power against those refusing to aid her campaign to punish the NRA's gun-promotion advocacy." *Vullo*, 602 U.S. at 194.

Second, Vullo claims that "a decision on qualified immunity would be fundamentally pointless" here because the allegations "seek to hold [Vullo] liable for conduct" for which she claims absolute immunity. BIO 14–15. This Court has already expressed skepticism that "a financial regulator like Vullo is entitled to such immunity in the administrative context." *Vullo*, 602 U.S. at 195 n.5. And no court has endorsed Vullo's sweeping conception of absolute immunity in this case—in fact, no court has even addressed it, because Vullo did not argue that absolute immunity applied to the NRA's First Amendment claims until the case reached this Court. *Id.* She therefore forfeited the defense, which is not jurisdictional and which this Court therefore need not consider. *Nevada v. Hicks*, 533 U.S. 353, 373 (2001).

Finally, Vullo claims that this is a poor vehicle because the allegations against her are "false." BIO 15. But since this appeal arises from a motion to dismiss, the allegations must be taken as true at this stage. The mere possibility that Vullo could prevail on the merits

if the allegations in the Complaint are not proven is not a reason to deny review. Were it otherwise, this Court could never grant certiorari from decisions dismissing complaints or granting summary judgment to defendants. Indeed, the Court already rejected a similar argument from Vullo in this very case. *Vullo*, 602 U.S. at 195 (noting that "this Court cannot simply credit Vullo's assertion" that the claims against her are false).

V. In The Alternative, This Court Should Summarily Reverse The Second Circuit's Decision.

Alternatively, and at minimum, the decision below should be summarily reversed. Although Vullo attempts to frame the Second Circuit's decision as a "run-of-the-mill application of the qualified-immunity standard," BIO 31, that view fails to grapple with the fact that the Second Circuit disregarded this Court's clear holding that its First Amendment holding did not "break new ground." *Vullo*, 602 U.S. at 197. Such a "conspicuous[] disregard[]" of this Court's precedent is precisely the type of ruling that calls for summary reversal. *Taylor v. Riojas*, 592 U.S. 7, 11 (2020) (Alito, J., concurring in the judgment). Indeed, this Court has summarily reversed in cases involving far less blatant departures from this Court's qualified-immunity precedents. *See, e.g., id.* at 9–10.

CONCLUSION

The Court should grant the Petition.

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Respectfully submitted,

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