

No. 25-479

In the Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,
v.

MARIA T. VULLO,
Respondent.

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

**BRIEF OF THE CATO INSTITUTE AS *AMICUS
CURIAE* IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

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

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

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INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government.

Cato's interest in this case arises from the lack of legal justification for qualified immunity, the confusion it inevitably sows when it interacts with other doctrines such as First Amendment coercion and retaliation, and the deleterious effect it has on the ability of the people to vindicate their constitutional rights.

¹ Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

In 2017, Maria Vullo served as the powerful head of New York’s Department of Financial Services (DFS), which regulates financial and insurance companies across the state. That year, according to the National Rifle Association (NRA), a pro-gun control organization alerted DFS regulators to possible problems with insurance products the NRA marketed to its members. *NRA of Am. v. Vullo*, 602 U.S. 175, 181–82 (2024) (“*Vullo II*”). The NRA contends the agency seized upon this tip as a pretext to target the NRA and use its regulatory power to cut it off from financial services because of its pro-gun rights advocacy. *Id.* 182–83.

Notably, Vullo summoned the NRA’s insurers to private meetings and advised them to cease doing business with the group. *Id.* at 183. Banks and insurers soon terminated their relationships with the NRA and some, apparently, were offered regulatory leniency by Vullo if they agreed never to work with the NRA again. *Id.* At least one insurer called an NRA official to apologize, explaining his company’s fear of regulatory reprisal. *NRA of Am. v. Vullo*, 49 F.4th 700, 710 (2022) (“*Vullo I*”).

In 2018, the NRA filed suit in federal court under 42 U.S.C. § 1983, seeking injunctive relief and damages for alleged First Amendment violations. Despite Vullo’s heavy-handed conduct, in 2022 the court below went so far as to *commend* Vullo for her actions and dismissed the case. *Id.* at 721 (opining that “far from acting irresponsibly, Vullo was doing her job in good faith”). Last year, this Court unanimously reversed that dismissal, holding that the NRA had stated a plausible First Amendment claim. Yet despite

the Court’s unanimous ruling, on remand the Second Circuit granted Vullo qualified immunity, concluding it was “not clearly established” that Vullo “could not engage in the conduct at issue in this case.” Pet. App. 29a, 37a; *but see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

The decision below illustrates how, over the last half-century, the doctrine of qualified immunity has expanded far beyond its statutory and historical foundations. What began as an attempt to incorporate purported and limited common-law immunities into § 1983 has evolved into “an absolute shield” for public officials. *Kisela v. Hughes*, 584 U.S. 100, 121 (2018) (Sotomayor, J., dissenting).

We write to emphasize that qualified immunity finds no support in the text or history of § 1983. The statute’s plain language makes no mention of immunity, and lawmakers’ understanding at the time confirm that § 1983 was designed to eliminate, not preserve, official immunities. Nor did the common law of 1871 recognize anything resembling the sweeping protection that modern qualified immunity provides.

We also highlight that government coercion of third parties to suppress protected speech plainly violates the First Amendment. Yet under qualified immunity, officials escape liability unless the constitutional violation was “clearly established.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Second Circuit concluded that the law here was not “clearly established” because this Court’s precedent did not “make clear the more *particularized* application” of that precedent to these facts. Pet. App. 34a (emphasis added). The court below erred—the “clearly established” standard has never demanded a

prior case with near-identical facts. This Court was clear decades ago that “a government official cannot do indirectly what she is barred from doing directly.” *Vullo II*, 602 U.S. at 190 (citing *Bantam Books*, 372 U.S. at 71–72). Small factual differences cannot excuse clear constitutional violations.

Finally, if allowed to stand, the Second Circuit’s decision will have a profound chilling effect on speech. The First Amendment is regularly tested by states and the federal government. *See, e.g.*, Brent Skorup, *Deepfake Crackdowns Threaten Free Speech*, REASON (Nov. 22, 2024);² Brent Skorup, *Jimmy Kimmel, the FCC, and Why Broadcasters Still Have “Junior Varsity” First Amendment Rights*, CATO INST. (Sept. 19, 2025).³ Broad grants of qualified immunity embolden public officials to continue suppressing unpopular speech and violating rights—precisely what § 1983 was enacted to prevent.

ARGUMENT

I. THIS COURT SHOULD REVISIT ITS QUALIFIED IMMUNITY PRECEDENTS AND NARROW THE DOCTRINE’S SCOPE.

Qualified immunity shields government officials from liability unless a plaintiff can show “(1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow*, 457 U.S. at 818). The doctrine began as an effort to incorporate certain common-law immunities into § 1983. *See Pierson v.*

² Available at <https://tinyurl.com/35y6tued>.

³ Available at <https://tinyurl.com/ycy6vnm6>.

Ray, 386 U.S. 547, 554 (1967). But over time, this Court has greatly expanded the doctrine, citing policy considerations like litigation costs and government efficiency. *See Harlow*, 457 U.S. at 814–15. As the decision below demonstrates, modern qualified immunity bears little resemblance to its statutory or historical foundations and now stands as “an absolute shield” available to rights-violating state officials like Vullo. *Kisela*, 584 U.S. at 121 (Sotomayor, J., dissenting).

A. The Court’s early qualified immunity decisions were untethered to statutory text.

Section 1983 was enacted as part of the Ku Klux Klan Act of 1871 to give people—especially freedmen—the right to sue state officials who deprived them of their constitutional rights. Section 1983 provides, in its relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

42 U.S.C. § 1983.

This Court has long instructed judges to “enforce plain and unambiguous statutory language according to its terms.” *Hardt v. Reliance Std. Life Ins. Co.*, 560 U.S. 242, 251 (2010) (citations omitted). Few judicial doctrines have strayed further from this principle than qualified immunity. By its plain terms, *every person*

who violates a protected right is “liable to the party injured.” As this Court has acknowledged, “the statute on its face does not provide for *any* immunities.” *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

The Court’s early cases erecting the doctrine of qualified immunity did not point to any textual license for doing so. See Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 66 (1989) (“The Court never explains why, in the immunities context, statutory silence should lead it to the common law.”) In *Pierson v. Ray*, for instance, the majority incorporated immunities into § 1983 “[d]espite the plain import of [the statute’s] words.” *Pierson*, 386 U.S. at 559 (Douglas, J., dissenting). In *Harlow v. Fitzgerald*, the Court expanded qualified immunity due to its policy assessment of the “social costs” of litigation, *Harlow*, 457 U.S. at 814, but offered no explanation for why it had “authority to modify a test that was *supposedly* faithful to congressional intent.” Beermann, *supra*, at 68 (emphasis added). Recognizing qualified immunity despite § 1983’s plain text “turns the conventional approach to statutory interpretation on its head,” presuming “that Congress did not mean what it said.” *Briscoe v. LaHue*, 460 U.S. 325, 348 (1983) (Brennan, J., dissenting).

The historical context of § 1983 confirms Congress’s intent to ensure avenues for accountability. It was first passed by the Reconstruction Congress as part of the Ku Klux Klan Act, itself part of the “Enforcement Acts” designed to combat civil rights violations in southern states. See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 49 (2018). The Fourteenth Amendment had been

ratified just three years earlier, and many of its protections were far from what modern precedent would count as “clearly established law” in 1871. Incorporating qualified immunity as a § 1983 defense would have rendered Congress’s effort to confront pervasive postwar civil rights violations largely toothless.

B. As enacted by Congress, Section 1983 forecloses qualified immunity.

There is an even greater historical flaw undermining the legitimacy of qualified immunity: the Supreme Court has been construing the wrong statutory text. Shortly after Congress enacted the Civil Rights Act of 1871, the First Reviser of Statutes erroneously removed a sixteen-word clause from the statute during the codification process. *See* Alexander A. Reinert, *Qualified Immunity’s Flawed Foundation*, 111 CALIF. L. REV. 201, 235 (2023). These sixteen crucial words afford a cause of action “notwithstanding” any “law, statute, ordinance, regulation, custom, or usage of the State to the contrary.”⁴ *Id.* This clause clearly and unambiguously abrogates common-law immunities.

In 1874, the Reviser of Federal Statutes compiled and consolidated federal statutes in one place for the first time. *See id.* at 236–37; Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 L. LIBR. J. 213, 218–19 (2020). In doing so, the Reviser, for unknown reasons, erroneously omitted the Notwithstanding

⁴ This clause has been referred to as the “Notwithstanding Clause” and it appears “between the words ‘shall’ and ‘be liable’” in the original statutory text. Reinert, *supra*, at 235.

Clause from the text of Section 1983. *See Reinert, supra*, at 237. And while the Revised Statutes “were supplemented and corrected over time,” the omission of the Notwithstanding Clause was never corrected. *Id.*

The Reviser’s changes were meant to “consolidat[e] the laws,” not change their meaning. *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964). As this Court has explained, where a statutory change “was made by a codifier without the approval of Congress, it should be given no weight.” *Id.*; *see also Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 227 (1957) (Reviser’s changes “do not express any substantive change”); *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 510 (1939) (changes to the statutory text “were not intended to alter the scope of the provision”); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968) (Reviser’s removal of a clause in Section 1982 did not change the statute’s meaning); *United States v. Price*, 383 U.S. 787, 803 (1966) (removal of a clause in Section 241 was accompanied by “the customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance”).

The Court’s qualified immunity precedent follows from the premise that “Congress by the general language of its 1871 statute” did not intend “to overturn the tradition” of common law immunity. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *see also Pierson*, 386 U.S. at 555–57. Qualified immunity is derived from the Court’s understanding of historical state common law. *See Reinert, supra*, at 23; *Pierson*, 386 U.S. at 555–57; *Wood v. Strickland*, 420 U.S. 308, 318–20 & nn. 9, 12 (1975). But the original text of

Section 1983 fatally undermines that premise because it expressly displaces state common-law immunities.

C. From the Founding Era through the passage of § 1983, good faith was not a general defense to constitutional torts.

Qualified immunity is a generalized good-faith defense for all public officials, shielding “all but the plainly incompetent or those who knowingly violate the law.” *Malley*, 475 U.S. at 341. The court held that Vullo acted in good faith and therefore cannot be held liable. *See Vullo I*, 49 F.4th at 721. But because the sole historical defense in constitutional-tort was legality, there is no justification for importing a “good-faith” defense into § 1983. *See* Baude, *supra* at 55–58.

In the Founding Era, constitutional claims typically arose in suits to enforce common-law rights. For example, if an unconstitutional search was alleged, an individual might sue a federal officer for trespass, the defendant would then claim legal authorization as a federal officer, and the plaintiff would in turn claim that the trespass was unconstitutional to overcome this defense. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506–07 (1987). These lawsuits did not permit a good faith defense. *See generally* JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR 3–14, 16–17 (2017); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 414–22 (1986); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14–21 (1972).

The clearest example of this principle is Chief Justice Marshall's opinion in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). See 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 (2010) ("No case better illustrates the standards to which federal government officers were held"). The federal law at issue authorized seizure only of a ship going *to* a French port, but President Adams had issued broader instructions to also seize ships coming *from* French ports. See *Little*, 6 U.S. (2 Cranch) at 178. The question was whether a captain's reliance on the president's instructions was a defense against liability for a seizure that violated the federal law.

This Court rejected such a defense, rejecting the very rationales that now justify qualified immunity. Chief Justice Marshall, speaking for the Court, considered but ultimately rejected protecting officers from damages when they act in good faith. *Id.* at 179. Even if the defendant had acted with "pure intention," the Court held, "the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Id.*

This "strict rule of personal official liability, even though its harshness to officials was quite clear," persisted throughout the nineteenth century. Engdahl, *supra*, at 19. Its severity was mitigated by congressional indemnification. Pfander & Hunt, *supra*, at 1867. Still, for the first century of the Republic, courts routinely held public officials personally liable for unconstitutional conduct without adopting a good-faith defense. See, e.g., *Miller v.*

Horton, 26 N.E. 100, 100–01 (Mass. 1891) (per Holmes, J.) (holding officials acting under orders liable for killing an animal they mistakenly believed to be diseased).

Most importantly, this Court rejected a good-faith defense to § 1983 liability in particular. In *Myers v. Anderson*, 238 U.S. 368 (1915), the Court considered a suit against election officers who had refused to register Black voters under a discriminatory “grandfather clause” statute, thereby violating the Fifteenth Amendment. *Id.* at 377–78. The defendants argued that they could not be liable for money damages under § 1983 because they acted in good faith. *See* Br. for Pls. in Error at 23–45, *Myers*, 238 U.S. at 368 (Nos. 8–10). The *Myers* Court noted that “[t]he non-liability . . . of the election officers for their official conduct is seriously pressed in argument”—but still rejected their claims of immunity. *Myers*, 238 U.S. at 378–79.

Such rejection of any general good-faith defense “is exactly the logic of the founding-era cases, alive and well in the federal courts after Section 1983’s enactment.” Baude, *supra*, at 58 (citation omitted). Neither the text, congressional intent, nor history of § 1983 provides support for qualified immunity.

II. IT IS CLEARLY ESTABLISHED THAT COERCING THIRD PARTIES TO SUPPRESS PROTECTED SPEECH IS UNCONSTITUTIONAL.

The court below applied an excessively strict “clearly established test.” It held that even if Vullo had “offered[ed] leniency” to financial institutions on the condition that they “severed ties with the NRA,” she

could not have known that such conduct violated the First Amendment. But this Court has already recognized—in this very case—that the prohibition on government coercion of third parties to suppress speech is solidly established First Amendment law. *Vullo II*, 602 U.S. at 180 (“Six decades ago, this Court held that a government entity’s ‘threat of invoking legal sanctions and other means of coercion’ against a third party ‘to achieve the suppression’ of disfavored speech violates the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963). Today, the Court reaffirms what it said then . . .”).

The Second Circuit’s own precedent reflects that. In *Okwedy v. Molinari*, the Second Circuit found it unconstitutional for a borough president to threaten a billboard company with regulatory action if it did not remove a controversial advertisement. *Okwedy v. Molinari*, 333 F.3d 339, 342–44 (2d Cir. 2003) (per curiam, for a panel including Sotomayor, J.). Even though the borough president lacked direct regulatory authority, he could not exert an “impermissible type . . . of pressure” over third parties. *Id.* at 343 (finding that the threat was sufficient to cause the billboard company to fear that noncompliance would interfere with its business). Further, this principle has been Second Circuit precedent for decades. *See, e.g., Rattner v. Netburn*, 930 F.2d 204, 209–10 (2d Cir. 1991) (finding a plausible allegation of a First Amendment violation where an official threatened a newspaper with regulatory action if it kept airing certain views); *see also Hammerhead Enters. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983) (dicta) (recognizing the possibility of a First Amendment violation “where comments of a government official can reasonably be interpreted as

intimating . . . adverse regulatory action” for “failure to accede to the official’s request”). The Second Circuit acknowledged, as it had to, that “the cases cited above clearly establish that coercion amounting to censorship and retaliation violate the First Amendment.” Pet. App. 21a. Yet the court failed to hold that those precedents clearly established the law.

The Court’s previous decision in this case provided helpful reinforcement for the First Amendment, but it was not doctrinally groundbreaking—in terms of either this Court’s precedent or that of the Second Circuit. The impermissibility of coercing third parties in order to suppress others’ speech has been “beyond debate” since *Bantam Books* in 1963. *Ashcroft*, 563 U.S. at 741. It was lucidly established at the time Vullo violated the NRA’s constitutional rights.

III. THE SECOND CIRCUIT’S BROAD APPLICATION OF QUALIFIED IMMUNITY WILL HAVE A CHILLING EFFECT ON THE FIRST AMENDMENT.

Qualified immunity not only misunderstands § 1983 and invites official misconduct, it has a chilling effect on speech. When public officials can suppress ideas with little fear of liability, expression is chilled and people self-censor.

Even if a speaker proves that a government official violates its constitutional rights, in many cases, it cannot recover damages. Unsurprisingly, then, public officials frequently test the limits of the First Amendment.⁵ For instance, police incredulously

⁵ Though not subject to § 1983 liability, federal officials also frequently test First Amendment protections and benefit from qualified immunity. President Trump recently issued an executive

construed a meme about Charlie Kirk’s assassination as a threat to a local school and held a Tennessee man in jail for a month. Will Oremus & Ben Brasch, *A retired policeman posted a Charlie Kirk meme. He spent a month in jail.*, WASH. POST (Oct. 31, 2025).⁶ And California officials attempted to regulate “misinformation” regarding COVID-19, even though conformity to existing scientific consensus is not a prerequisite to constitutional protection. Julia Swerdin et al., *California Repeals Law Preventing Spread of Misinformation Regarding COVID-19*, THE FREE SPEECH PROJECT (July 26, 2023);⁷ see *United States v. Alvarez*, 567 U.S. 709 (2012). What is more, this Court recently granted certiorari in a case where a local Texas journalist was jailed for reporting

order directing federal prosecutors to pursue charges against individuals who “violate our laws” while burning a flag—an act long recognized by this Court as protected expression. Prosecuting Burning of the American Flag, Exec. Order No. 14,341, 90 Fed. Reg. 42127 (Aug. 25, 2025); *Texas v. Johnson*, 491 U.S. 397 (1989). Similarly, after the assassination of Charlie Kirk, Attorney General Pam Bondi declared that “we will absolutely target you, [and] go after you” for using hate speech (she later retracted this warning). Thomas A. Berry, *Pam Bondi Had to Walk Back Her ‘Hate Speech’ Comments—for Good Reason*, CATO INST. (Sept. 17, 2025), <https://tinyurl.com/4u26485s>. See also David Folkenflik, *Jimmy Kimmel’s suspension shows power of FCC’s Brendan Carr*, NPR (Sept. 19, 2025), <https://tinyurl.com/27a7c3aw>; Matthew Harwood, *The Global Free Speech Recession*, FOUND. INDIVIDUAL RTS. EXPRESSION (Oct. 30, 2025), <https://tinyurl.com/4khabza3> (Trump administration officials “leaning on” Facebook to remove an app); Brent Skorup, *House Judiciary Committee Report Documents More Evidence of Government Coercion of Social Media Companies*, CATO INST. (May 13, 2024), <https://tinyurl.com/c5jkz2dr>.

⁶ Available at <https://tinyurl.com/3994xazv>.

⁷ Available at <https://tinyurl.com/4r6ptmt9>.

critically on the conduct of government officials. John Fritze, *Supreme Court revives case of citizen journalist arrested for seeking information*, CNN (Oct. 15, 2025).⁸

Qualified immunity endangers speech. As the government finds ever more creative ways to infringe upon the First Amendment, qualified immunity dictates that courts sit idly by and deny those harmed any remedy. Absent the ability to recover for their losses, many would-be speakers will censor themselves in the face of official threats. Qualified immunity exchanges for the First Amendment's promise of a robust marketplace of ideas an awful vacuum of thoughts left unvoiced.

CONCLUSION

For these reasons and those given by Petitioner, this Court should grant the petition.

Respectfully submitted,

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⁸ Available at <https://tinyurl.com/3bssrh98>.