No. 25-____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Maria T. Vullo is a former New York official who used her regulatory power to coerce third parties into taking action against Petitioner, the National Rifle Association of America, to punish and suppress its protected First Amendment speech.

Last year, in *NRA v. Vullo*, 602 U.S. 175 (2024), this Court unanimously held that these allegations stated a claim against Vullo for violating the NRA's First Amendment rights. In doing so, the Court emphasized that it "d[id] not break new ground" but instead only "reaffirm[ed]" its decades-old precedent in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), which "stands for the principle 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." *Vullo*, 602 U.S. at 190. As the Court explained, *Bantam Books* squarely 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." *Id*. at 180.

On remand, however, the Second Circuit ruled for Vullo on qualified immunity, because "a reasonable officer in Vullo's position likely would have thought that her conduct . . . was permissible." Pet.App.32a.

The questions presented are:

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?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner is the National Rifle Association of America ("NRA"), which was the plaintiff-appellee in the Second Circuit.

Respondent is Maria T. Vullo, who was the defendant-appellant in the Second Circuit.

LIST OF RELATED PROCEEDINGS

National Rifle Assoc. v. Cuomo, No. 18-cv-0566-TJM-CFH (N.D.N.Y.) (decision and order denying in part and granting in part defendants' motion to dismiss issued November 6, 2018; decision and order denying Vullo's motion to dismiss issued March 15, 2021).

Vullo v. National Rifle Assoc., No. 21-636 (2d Cir.) (opinion reversing the District Court and ordering entry of judgment for Vullo issued September 22, 2022; order denying rehearing en banc issued on November 9, 2022; order regarding qualified immunity on remand issued July 17, 2025).

National Rifle Assoc. of Am. v. Vullo, No. 22-842 (U.S.) (opinion reversing the Second Circuit and remanding for further proceedings issued May 30, 2024).

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INTRODUCTION

To punish and suppress the NRA's core political speech, Maria Vullo used her power as Superintendent of New York's Department of Financial Services to coerce the NRA's insurance providers into cutting ties with the NRA. As this Court unanimously recognized last year, that effort was a straightforward First Amendment violation under decades-old precedent holding that government officials cannot coerce third parties "to achieve the suppression" of disfavored speech. *NRA v. Vullo*, 602 U.S. 175, 180 (2024) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)). Reaching that conclusion did not require this Court to "break new ground"—instead, the Court made clear that it did no more than "reaffirm[]" its holding from *Bantam Books* 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." *Id*. at 190.

Despite all this, on remand, the Second Circuit insisted that the Supreme Court *had* broken new legal ground in holding that the First Amendment barred Vullo from coercing third parties into punishing or suppressing the NRA's speech. While this Court explained that *Bantam Books* had long ago established that such coercion was constitutionally impermissible, the Second Circuit disagreed. Instead, the Second Circuit said *Bantam Books* stood only for the narrower proposition that government officials cannot coerce third-party *conduits* of speech to suppress that speech. That is, on the Second Circuit's view, Vullo could not have known that she was not allowed to wield her regulatory power to punish or suppress the NRA's

speech, as long as she targeted the NRA's insurance—as opposed to its internet service—providers. Thus, the Second Circuit concluded, "we can surmise only that a reasonable officer in Vullo's position likely would have thought that her conduct . . . was permissible." Pet.App.32a.

If that proposition is shocking, it should be. Suppose, for example, a Pro-Life governor had approached the insurance providers of NARAL Pro-Choice America and said, "I hate NARAL's speech and want to shut it down, and I need your help. I therefore need to you cancel its insurance. And if you don't, I'm going to investigate you for a bunch of technical infractions that I don't care about, and that I don't investigate as to anyone else." Under the Second Circuit's position, a reasonable official would not have known that violates the First Amendment and would be immunized from liability. That is obviously wrong. And that hypothetical is indistinguishable from the allegations in the NRA's Complaint.

Under the clear and longstanding constitutional rule, it is obviously irrelevant *how* the government coerces third parties in order to punish or suppress protected expression. All that matters is *whether* the government is using its official powers to engage in such coercion. Nor can the Second Circuit's narrow construction of *Bantam Books* be squared with how this Court reached its prior decision in this very case, which expressly held that it did not "break new ground." This Court should grant certiorari to clarify when a constitutional violation can be sufficiently obvious to preclude qualified immunity even in the absence of prior cases involving exactly identical facts.

In the alternative, the Court should summarily reverse to enforce its prior decision.

OPINIONS BELOW

The district court's two decisions are reported at 350 F. Supp. 3d 94 and 525 F. Supp. 3d 382, and reproduced at Pet.App.165a and Pet.App.113a, respectively. The Second Circuit's initial decision is reported at 49 F.4th 700 and reproduced at Pet.App.78a. This Court's decision reversing the Second Circuit is reported at 602 U.S. 175 and reproduced at Pet.App.39a. The decision of the Second Circuit on remand, holding that Vullo is entitled to qualified immunity, is reported at 144 F.4th 376, and reproduced at Pet.App.1a.

JURISDICTION

The Second Circuit entered judgment on July 17, 2025, and this petition is timely because it is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254.

PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the government for a redress of grievances."

42 U.S.C. § 1983 provides, as relevant here: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights,

privileges, or immunities secured by the Constitution . . . shall be liable to the party injured . . . ."

STATEMENT

A. Factual Background

Petitioner, the National Rifle Association ("NRA"), is an advocacy organization incorporated in the State of New York. Pet.App.254a.[1] "[P]olitical speech is a major purpose of the NRA," and the organization uses a wide variety of expressive means to convey its pro-Second Amendment message. Pet.App.257a.

The NRA, like many others, depends on services from banks and insurance companies to enable its advocacy activities—for example, the NRA maintains various types of insurance coverage and relies on bank deposit accounts, wire-transfer capabilities, and other basic banking services. Pet.App.266a–67a.

Moreover, the NRA has historically offered its members "affinity" insurance programs as a benefit of membership. Pet.App.267a. These programs bear the NRA's name, logo, and endorsement (and generate royalties for the NRA), but are brokered, serviced, and underwritten by insurance companies. Pet.App.267a. These affinity insurance policies include general life, health, property, and casualty policies, as well as "Carry Guard," a policy offering coverage for personal-injury and criminal-defense expenses arising out of

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[1] As this Court previously explained, "[a]t this [motion-to-dismiss] stage . . . the Court must assume the well-pleaded factual allegations in the complaint are true." *Vullo*, 602 U.S. at 195. The facts in this Statement are therefore drawn from the Second Amended Complaint, a redacted copy of which is reproduced at Pet.App.251a, except as otherwise noted.

the use of a legally possessed firearm. Pet.App.268a. The NRA historically contracted with three insurers to offer these policies: Lockton Companies, LLC; Chubb; and Lloyd's. Pet.App.268a.

Respondent Maria Vullo is a former Superintendent of New York's Department of Financial Services ("DFS"). Pet.App.254a. Vullo was appointed to this position by then-Governor Andrew Cuomo, who is also a defendant below. Pet.App.255a. As head of DFS, Vullo had significant regulatory power over all financial services institutions and insurance companies in the State. Among other things, DFS has sweeping power over licensing and rulemaking for the industries it regulates, as well as the power to launch civil and criminal investigations and civil enforcement actions. Pet.App.265a.

In the fall of 2017, Vullo received a tip from an anti-NRA advocacy group, alleging that the Carry Guard program violated certain DFS regulations. Pet.App.269a. Vullo launched an investigation, which quickly expanded to include not only Carry Guard but other NRA-endorsed policies, including those having nothing to do with firearms. Pet.App.269a–71a. This included policies that were similar or identical to affinity policies offered by many other organizations in the State, including the New York State Bar Association, the New York Association of Professional Land Surveyors, and the New York State Psychological Association. Pet.App.270a–71a. DFS explained to Lockton that despite these similarities, it was only interested in pursuing the NRA, not other organizations offering similar plans. Pet.App.287a.

Vullo increased her pressure after a school shooting in Parkland, Florida, in February 2018 led to intense backlash against the NRA. In particular, Vullo began meeting with executives at the insurance companies that did business with the NRA. In her meetings with Lloyd's, she "presented [her] views on gun control and [her] desire to leverage [her] powers to combat the availability of firearms, including specifically by weakening the NRA." Pet.App.283a. As she had previously suggested to Lockton, she told Lloyd's that it "could avoid liability for infractions relating to other, similarly situated insurance policies, so long as it aided DFS's campaign against gun groups." Pet.App.285a. Getting the message, "Lloyd's agreed that it would instruct its syndicates to cease underwriting firearm-related policies and would scale back its NRA-related business." Pet.App.285a. In return, DFS agreed to "focus its forthcoming affinity-insurance enforcement action" against Lloyd's "solely on those syndicates which served the NRA, and ignore other syndicates writing similar policies" for other organizations. Pet.App.285a–86a.

Lockton, too, cut ties with the NRA. Its chairman "placed a distraught telephone call to the NRA," explaining that despite Lockton's desire to continue working with the NRA, it was planning to sever ties out of fear that it would otherwise lose its license to do business in New York. Pet.App.272a.

Shortly after, Vullo issued two nearly identical guidance letters on DFS letterhead, one to insurance companies and one to financial services institutions, each entitled "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations." Pet.App.274a n.27. In the letters,

Vullo claimed that businesses that had severed their ties with the NRA were "fulfilling their corporate social responsibility" and "encourage[d]" DFS-regulated entities to follow their lead by (1) "evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations," (2) "review[ing] any relationships they have with the NRA or similar gun promotion organizations," and (3) "tak[ing] prompt actions to manag[e] these risks and promote public health and safety." Pet.App.52a, 292a.

On the same day Vullo issued the letters, Vullo and Governor Cuomo issued a joint press release in which Vullo "urg[ed] all insurance companies and banks doing business in New York" to "discontinue[] their arrangements with the NRA." Pet.App.275a–76a. The next day, Cuomo tweeted a similar message, "urg[ing] companies in New York State to revisit any ties they have to the NRA and consider their reputations, and responsibility to the public." Pet.App.276a.

Less than two weeks later, DFS entered into consent decrees with Lockton and Chubb. Pet.App.277a–82a. Beyond stipulating that Carry Guard violated New York insurance law, the consent decrees provided that Lockton and Chubb both agreed not to provide any NRA-endorsed insurance programs moving forward, even if they were lawful. Pet.App.277a–82a. Lockton and Chubb each also paid substantial fines. Pet.App.277a–82a. Soon after, Lloyd's publicly announced its decision to cut ties with the NRA, later entering into a similar consent decree with DFS. Pet.App.286a–87a.

In the meantime, the NRA's corporate insurer had also severed ties with the NRA, refusing to renew coverage at any price, citing concerns about potential regulatory reprisals. Pet.App.273a. Given Vullo's pressure campaign, the NRA struggled to find new insurance coverage. Pet.App.289a.

B. Initial Lower-Court Proceedings

The NRA sued Cuomo, Vullo, and the DFS. As relevant here, the NRA alleged that Vullo violated the First Amendment by using her regulatory powers to coerce third parties to punish or suppress the NRA's core political speech. Pet.App.293a–96a.

Vullo moved to dismiss, claiming that the alleged conduct did not amount to unconstitutional coercion and that, in any event, she was entitled to qualified immunity. Pet.App.116a–17a, 184a. The district court denied that motion, concluding that the NRA plausibly alleged that Vullo's actions crossed the First Amendment line and that Vullo had not established a right to qualified immunity. Pet.App.147a, 199a.

The Second Circuit reversed. In its view, the allegations against Vullo amounted to nothing more than permissible government speech and legitimate law enforcement, not efforts to coerce third parties to punish or suppress the NRA's speech. Pet.App.82a. That is, the Second Circuit concluded that in both her letters and her private meetings with insurance executives, Vullo "was merely carrying out her regulatory responsibilities." Pet.App.107a. The Second Circuit discounted the NRA's allegations that Vullo's goal was to punish or suppress its protected speech, concluding instead that Vullo was simply "motivated by her duty to address [the insurers'

regulatory] violations." Pet.App.107a. In other words, despite the NRA's allegations to the contrary, the Second Circuit held that "[t]he well-pleaded allegations of the Complaint show that [Vullo] was simply executing her duties as DFS Superintendent and engaging in legitimate enforcement action." Pet.App.108a.

In the alternative, the Second Circuit held that even if the NRA had stated a First Amendment claim, the law was not clearly established at the time Vullo acted, so she was entitled to qualified immunity. Pet.App.108a. Specifically, the Second Circuit held that it was not clearly established that "making statements like those in the Guidance Letters and Press Release, which use only suggestive language and rely on the power of persuasion," could cross the line into unconstitutional coercion. Pet.App.110a. Similarly, the court reasoned that it was not clearly established that a government official could not "make[] purportedly threatening statements urging an entity to cut ties with what is essentially its accomplice during an ongoing, legitimate investigation." Pet.App.111a.

C. This Court's Prior Decision

The Court granted certiorari and unanimously reversed, holding that the NRA stated a First Amendment claim against Vullo. *Vullo,* 602 U.S. at 180. As the Court explained, "[s]ix 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." *Id.* (quoting *Bantam Books*, 372 U.S. at 67). That is, the

Court "reaffirm[ed]" what *Bantam Books* said: "Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors." *Id*. "*Bantam Books* stands for the principle 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." *Id*. at 190.

In reaching its holding, the Court emphasized that it "d[id] not break new ground in deciding this case." *Id*. at 197. The Second Circuit had erred not in interpreting the First Amendment, but in construing the allegations in the Complaint: it could conclude that "Vullo was merely carrying out her regulatory responsibilities" only "by taking the allegations in isolation and failing to draw reasonable inferences in the NRA's favor in violation of this Court's precedents." *Id*. at 194–95 (cleaned up). That is, "[g]iven the obligation to draw reasonable inferences in the NRA's favor and consider the allegations as a whole, the Second Circuit erred in reading the complaint as involving only individual instances of 'permissible government speech' and the execution of Vullo's 'regulatory responsibilities.'" *Id*. at 195.

Although the Court had not addressed whether Vullo was entitled to qualified immunity, it noted that on remand, "the Second Circuit [was] free to revisit the qualified immunity question in light of this Court's opinion." *Id*. at 186 n.3.

D. The Second Circuit's Decision on Remand

On remand, the Second Circuit reaffirmed its prior holding that Vullo is entitled to qualified immunity, but it did so on grounds unrelated to its original qualified immunity holding. Rather than focusing on whether it was clearly established that purportedly "suggestive language" or threats in the course of an otherwise "legitimate investigation" could constitute coercion, as it had before, the Second Circuit instead held that qualified immunity applies because "the law was not clearly established that the conduct alleged here—regulatory action directed at the nonexpressive conduct of third parties—constituted coercion or retaliation violative of the First Amendment." Pet.App.3a. Thus, the Second Circuit concluded, "we can surmise only that a reasonable officer in Vullo's position likely would have thought that her conduct . . . was permissible." Pet.App.32a.

In reaching that conclusion, the Second Circuit analyzed the NRA's First Amendment "censorship" claim separately from its First Amendment "retaliation" claim. Pet.App.14a–15a. As to censorship, the Second Circuit reasoned that "coercion violative of the First Amendment operates on two planes: *who* is being coerced and *what* conduct is being targeted." Pet.App.15a. The Second Circuit concluded that while most First Amendment censorship cases involve "impermissible coercion against a speaker targeting his or her expressive activity," *Bantam Books* "further instructs that a First Amendment claim may exist even where the coercion targets expressive activity but is more indirect because it targets a *conduit* of speech rather than the speaker."

Pet.App.16a. Despite this Court's express explanation that it was not "break[ing] new ground" in holding that Vullo's alleged actions violated the First Amendment, the Second Circuit concluded that the Court's prior decision in this case in fact extended *Bantam Books* by also "instruct[ing] that a First Amendment claim may lie even when the challenged conduct targets a third-party business associate that does not itself engage in expressive activity." Pet.App.18a. Because Vullo "was not required to foresee that the Supreme Court would rule as it did" in this case, she was entitled to qualified immunity. Pet.App.34a.

Similarly, on the NRA's First Amendment retaliation claim, the Second Circuit reasoned that "qualified immunity is proper here because the nexus between the alleged retaliation and the alleged eventual infringement of the NRA's First Amendment rights is too attenuated." Pet.App.35a. That is, "although the [Complaint] alleges that Vullo retaliated against the NRA for its speech activity, the reality is that the [Complaint] alleges only that Vullo punished the NRA's business associates to punish the NRA for its speech." Pet.App.35a. Because "[t]he route from alleged retaliation to eventual infringement is thus circuitous and indirect," it was "insufficient to have put Vullo on notice that her acts would violate First Amendment rights." Pet.App.35a. Existing precedent, according to the Second Circuit, had not established that "indirect retaliation" for protected speech is unconstitutional. Pet.App.35a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision defies this Court's prior ruling in this very case, which unequivocally held that it did not "break new ground" but instead "only reaffirmed" decades-old precedent. The *Bantam Books* rule has been clear for six decades: "A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." *Vullo*, 602 U.S. at 190. Period. The Second Circuit's holding that Vullo is nonetheless entitled to qualified immunity because she "only" targeted the NRA's insurance companies and financial institutions not only contradicts this Court's prior holding in this case, but also conflicts with precedents from this Court and other circuits on the limits of qualified immunity.

This Court should grant review to clarify that qualified immunity does not shield obvious violations like this one, where the only factual distinctions in play are irrelevant under the clear constitutional rule established by precedent. Alternatively, this Court should summarily reverse to enforce its prior decision.

I. THE SECOND CIRCUIT'S DECISION DEFIES THIS COURT'S PRIOR RULING IN THIS VERY CASE.

In its prior decision, this Court unanimously held that it has been settled for "[s]ix decades" that government officials may not "coerce private parties in order to punish or suppress views that the government disfavors," even through indirect means. *Vullo*, 602 U.S. at 180. Applying that rule in this case did not "break new ground." *Id*. at 197. It was thus baffling for the Second Circuit to say on remand that "a reasonable officer in Vullo's position likely would have

thought that her conduct . . . was permissible." Pet.App.32a.

If free speech means anything, it means that officials "cannot . . . use the power of the State to punish or suppress disfavored expression." *Vullo*, 602 U.S. at 188. Any such "attempts to suppress a particular point of view are presumptively unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995). Thus, officials cannot use the "threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression" of disfavored speech. *Bantam Books*, 372 U.S. at 67.

In *Bantam Books*, the Court clarified that this rule extends to attempts to *indirectly* suppress a viewpoint by using government power to coerce third parties into punishing or suppressing speech. *Id*. at 67–69. Indeed, that is literally what this Court said: "*Bantam Books* stands for the principle 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." *Vullo*, 602 U.S. at 190.

That understanding was not a surprise—lower courts have long applied it in cases involving a variety of different service providers. *See, e.g.*, *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam) (plaintiff stated First Amendment claim against official who threatened billboard company if it displayed plaintiff's speech); *Rattner v. Netburn*, 930 F.2d 204, 209 (2d Cir. 1991) (official violated First Amendment by threatening newspaper if it published speaker's statements); *Backpage.com, LLC v. Dart*,

807 F.3d 229, 231 (7th Cir. 2015) (sheriff violated First Amendment by threatening third-party credit-card companies if they continued facilitating payments for disfavored speaker).

And those lower courts, including the Second Circuit, had even adopted the "right analytical framework" for assessing claims under *Bantam Books*. *Vullo*, 602 U.S. at 191. Specifically, *Bantam Books* established that "[t]o state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that, viewed in context, could reasonably be understood to convey a threat of adverse government action in order to punish or suppress the plaintiff's speech." *Id.* (citing *Bantam Books*, 372 U.S. at 67–68).

Thus, as this Court already explained in this very case, there was no need to "break new ground" to determine from these precedents that Vullo's conduct violated the NRA's First Amendment rights. *Id.* at 197. The law was well-established that government officials cannot "wield [their] power . . . to threaten enforcement actions against []regulated entities in order to punish or suppress the NRA's gun-promotion advocacy." *Id.* at 187. "Because the complaint plausibly alleges that Vullo did just that, the Court h[e]ld[] that the NRA stated a First Amendment violation." *Id.*

Against this backdrop, the Court expressly rejected as "misplaced" the argument that Vullo's conduct was not covered by *Bantam Books* because her direct target was the insurers' "nonexpressive activity." *Id.* at 196. After all, the fact that "Vullo

'regulate[d]' business activities stemming from the NRA's 'relationships with insurers and banks' does not change the allegations that her actions were aimed at punishing or suppressing speech," particularly given that "Vullo knew . . . that the NRA relied on insurance and financing 'to disseminate its message.'" *Id*. at 196–97.

No more was required for *Bantam Books* to squarely apply. Indeed, in *Bantam Books* itself, "the commission interfered with the *business relationship* between the distributor and the publishers in order to suppress the publishers' disfavored speech." *Id*. at 196 (emphasis added) (citing *Bantam Books*, 372 U.S. at 66–71). And here, since Vullo was coercing third parties to cut off business ties with the NRA to punish and suppress *the NRA's* protected speech, it makes no difference whether she targeted the third parties for their "expressive" or "non-expressive" activity. As the Seventh Circuit explained in a strikingly similar case, where a sheriff attempted to suppress protected speech by targeting the speaker's third-party payment facilitator, "[t]he analogy is to killing a person by cutting off his oxygen supply rather than by shooting him." *Backpage.com*, 807 F.3d at 231. Regardless of Vullo's weapon of choice, the ultimate targeting of the NRA's speech is the same—and so is the constitutional violation.

Indeed, the implications of the Second Circuit's rule are astonishing. Speakers rely on all sorts of "non-expressive" services in order to engage in speech. Not just insurance and banking, but services as basic as healthcare, food, housing, and transportation. Under the Second Circuit's ruling, even after *Bantam Books* a reasonable official somehow could have

believed that the First Amendment allowed him to use government power to pressure hospitals, grocery stores, apartment buildings, and taxis to deny services to disfavored speakers for the very purpose of suppressing their speech. To state the proposition is to defeat it. It is, quite frankly, absurd.

Unsurprisingly, the Second Circuit's opinion on remand offered no explanation of how the factual distinction it raised could make any difference under the constitutional rule of *Bantam Books*. Nor could it. *Bantam Books* established that "a government official cannot do indirectly what she is barred from doing directly" under the First Amendment. *Vullo*, 602 U.S. at 190. That Vullo's attempts to suppress or punish the NRA's speech involved an indirect approach is therefore irrelevant. All that matters is that Vullo used government power to coerce a third party into punishing or suppressing the NRA's speech.

Nor can the Second Circuit save its opinion by pointing to its own prior holding that the NRA did not state a First Amendment claim. Pet.App.34a. The fact that it got the issue wrong the first time does not show that the law was not clearly established. To start, "the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if [the Supreme Court] ha[s] been clear." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378 (2009). The fact that the Second Circuit panel uniquely misunderstood longstanding Supreme Court precedent does not itself mean the law at issue was not clearly established.

More fundamentally, as this Court held, the Second Circuit's error the first time around was a

factual one, not a *legal* one. As this Court explained, the Second's Circuit's error was that it misread the *factual allegations* in the Complaint. *Vullo*, 602 U.S. at 194–95. Indeed, this Court expressly agreed with the First Amendment test the Second Circuit applied. *Id*. at 191. It just held that the Second Circuit read the Complaint too narrowly. *Id*.

More specifically, nothing in the Second Circuit's prior opinion suggested it would have been constitutionally permissible for Vullo to coerce the NRA's insurance companies into cutting ties with it to punish or suppress the NRA's speech, or even suggested any ambiguity on this point. Instead, the Second Circuit's original opinion simply maintained that the Complaint did not plausibly allege that Vullo had done anything of the sort. Pet.App.107a. That suggests confusion about pleading standards, not the First Amendment.

Finally, the supposed lack of clarity in the law the Second Circuit claimed to identify on remand had *nothing to do with* that court's reasoning in its initial opinion. Nothing in the Second Circuit's original reasoning turned on how "direct" or "indirect" the coercion at issue was, or on whether Vullo was targeting the "expressive" or "nonexpressive" conduct of the insurance companies. Instead, again, the opinion took for granted that Vullo would have violated the First Amendment had she coerced the insurance companies in order to suppress or punish the NRA's speech. Pet.App.99a–100a, 103a. The distinction the Second Circuit found dispositive in its decision on remand appeared for the first time in that decision—hardly a sign that judges, or reasonable

officials for that matter, were confused about this point prior to the Supreme Court's holding in this case.

* * *

In short, the Second Circuit's erroneous reading of *the Complaint* in its first go-round does not remotely justify its erroneous reading of *the law* in round two. And as this Court squarely held, the law here has been clear for over 60 years: "A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf." *Vullo*, 602 U.S. at 190. Or, stated another way, "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." *Id.* at 180. That, however, is exactly what this Court held the NRA alleged in its Complaint: "Vullo allegedly pressured regulated entities to help her stifle the NRA's pro-gun advocacy by threatening enforcement actions against those entities that refused to disassociate from the NRA." *Id.* at 180–81. The Second Circuit's contrary decision flies in the face of this Court's prior decision in this very case.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS HOLDING THAT QUALIFIED IMMUNITY DOES NOT APPLY TO "OBVIOUS" CONSTITUTIONAL VIOLATIONS.

a. "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). In other words, qualified immunity is designed to ensure that public officials have "fair

warning that their conduct violated the Constitution" before they are held liable for such violations. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

This Court has long made clear that factually identical precedent is not required to clearly establish that conduct violates the Constitution. After all, "general statements of the law are not inherently incapable of giving fair and clear warning." *United States v. Lanier*, 520 U.S. 259, 271 (1997). Thus, where "a general constitutional rule already identified in the decisional law [] appl[ies] with obvious clarity to the specific conduct in question," qualified immunity is unavailable "even though the very action in question has not previously been held unlawful." *Id*. (cleaned up). That is, some conduct is so "obvious[ly]" illegal that reasonable officials should be on notice regardless of whether another official has already been held liable for precisely the same conduct. *Brosseau*, 543 U.S. at 199; *see also Hope*, 536 U.S. at 753 (Thomas, J., dissenting) ("Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address 'materially similar' conduct.").

Were it otherwise, the most egregiously violative conduct might not lead to liability—after all, often "the easiest cases don't even arise." *Safford Unified Sch. Dist. No. 1*, 557 U.S. at 377–78. Indeed, "some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (Gorsuch, J.). If a government official engages in some conduct that is so obviously unlawful that no case has

had to say so on the precise same facts before, that is hardly a reason to *reward* the official with qualified immunity.

For all these reasons, this Court recently issued a summary reversal when the Fifth Circuit granted qualified immunity despite an obvious constitutional violation. *Taylor v. Riojas*, 592 U.S. 7, 7 (2020) (per curiam). There, a prisoner was held in "shockingly unsanitary" conditions for six days, with "no evidence" that these conditions "were compelled by necessity or exigency" and no reason they "could not have been mitigated." *Id*. at 9. The Fifth Circuit, though, concluded that the law was not clearly established that prisoners could not be housed in such conditions "for only six days," and thus granted qualified immunity. *Id*. at 8. This Court rejected that reasoning, despite the absence of any prior cases in which a constitutional violation had been found under similar facts. *Id*. Regardless of the lack of precisely on-point case law, the Court reasoned, "no reasonable correctional officer could have concluded" that the prisoner's treatment was "constitutionally permissible." *Id*.

In determining whether a reasonable officer could have thought that some course of conduct was lawful based on a factual distinction from earlier precedent, the question is whether the factual distinction might plausibly make a "constitutional difference." *Kerns v. Bader*, 663 F.3d 1173, 1186 (10th Cir. 2011) (Gorsuch, J.); *Cook v. City of Albuquerque*, 639 F. Supp. 3d 1185, 1196 (D.N.M. 2022) ("fact-to-fact comparison is not required when distinctions in the facts make no constitutional difference"). After all, if the factual distinction is plainly irrelevant under the logic of the

governing "constitutional rule"—if there is no possible *reason* to think it could matter—then no reasonable officer could rely on that distinction. *Lanier*, 520 U.S. at 271.

b. Here, no reasonable officer could have thought that Vullo's targeting of the NRA's speech was lawful under the constitutional rule of *Bantam Books*. As this Court explained in *Vullo,* the obvious "principle" established by *Bantam Books* is that the government cannot use its coercive power to indirectly punish or suppress a speaker's protected speech by coercing third-party business associates to cut off ties with the speaker. The only relevant fact under that rule is whether the government is using its coercive power against third parties to punish or suppress the speaker's protected speech. The specific type of services provided by the third party is obviously irrelevant. Neither *Bantam Books* nor any case applying it has ever suggested or purported to leave open whether that factual distinction could make a "meaningful constitutional difference," *Kerns*, 663 F.3d at 1186, under the governing "constitutional rule." *Lanier*, 520 U.S. at 271.

Taking the Second Circuit's alternative approach by looking for *any* factual distinction, no matter how constitutionally irrelevant, to justify applying qualified immunity is a recipe for allowing blatantly unconstitutional conduct to go unchecked. After all, a future official looking to abuse their regulatory power to suppress speech can surely find a "novel" way to do so even after this case. A Department of Health official could target a disfavored speaker's medical providers for regulatory action if they do not drop the speaker as a patient. A Department of Education

official could target the schools a disfavored speaker's children attend. A transportation official could target the airline on which a disfavored speaker travels to speaking engagements. All of this conduct would be plainly unconstitutional under the general rule established by *Bantam Books* and reaffirmed in this Court's prior decision in this case. Yet under the Second Circuit's approach to qualified immunity adopted below, the fact that these precedents *obviously* apply to these new factual scenarios would not be enough to defeat qualified immunity. Absent a factually *identical* precedent, the affected speakers would be out of luck.

Qualified immunity is not a game of constitutional Whack-a-Mole. When new cases pop up involving factual distinctions that are obviously irrelevant under the governing constitutional rule, there is no need to address each one individually to make the law clearly established. Such a requirement does nothing to promote fair "notice," and instead simply incentivizes creative lawbreaking by officials with the ingenuity to evade the First Amendment. *See Saucier v. Katz*, 533 U.S. 194, 206 (2001) (officials are not entitled to qualified immunity if the governing rule gives them "notice their conduct is unlawful").

III. THE CIRCUITS ARE DIVIDED ON THE DEGREE OF FACTUAL SIMILARITY REQUIRED TO FIND A VIOLATION CLEARLY ESTABLISHED.

This Court's review is also warranted because the Second Circuit's decision—granting qualified immunity based on irrelevant factual distinctions, even though the unlawfulness of Vullo's conduct was obvious under the relevant constitutional rule—

conflicts with decisions of other circuits. Indeed, the "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).

a. Most circuits respect the point that exact factual identity is not required to clearly establish that conduct is unconstitutional. As the Seventh Circuit has put it, "Every time the police employ a new weapon, officers do not get a free pass to use it in any manner until a case from the Supreme Court or from this circuit involving that particular weapon is decided." *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012). Or as the Tenth Circuit put it, "the qualified immunity analysis involves more than a scavenger hunt for prior cases with precisely the same facts." *Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016). "In other words, the rights as set forth in the holdings of existing cases are clearly established not only as to the facts of the prior cases, but also as applied in contexts that reasonable officers would understand to fall within the scope of those rights." *Williams v. Jackson*, 600 F.3d 1007, 1013 (8th Cir. 2010).

Courts have thus repeatedly rejected qualified immunity in First Amendment cases where the conduct at issue was obviously unconstitutional despite a lack of factually on-point precedent. Take, for example, *McBride v. Vill. of Michiana*, 100 F.3d 457 (6th Cir. 1996). There, the Sixth Circuit considered a case involving alleged official retaliation against a journalist who reported stories about mishandling of public funds and other alleged

misconduct. *Id*. at 458. As the Sixth Circuit explained, neither the Sixth Circuit nor the Supreme Court had decided a case regarding "a situation *specifically* involving governmental retaliation against a news reporter." *Id*. at 461. Nonetheless, the speech at issue was clearly protected, and "Supreme Court and Sixth Circuit precedent had clearly established that retaliation aimed at chilling fundamental rights was improper." *Id*. Those "time-honored First Amendment principles" rendered it obvious that government retaliation against a reporter was prohibited, and qualified immunity was therefore unavailable. *Id*.; *see also, e.g., McCloud v. Testa*, 97 F.3d 1536, 1556 (6th Cir. 1996) ("We reject the notion that there must be a separate [First Amendment political patronage] dismissal decision by the Supreme Court or the Sixth Circuit involving a particular position before qualified immunity can be denied in such a case.").

Or take *Bailey v. Wheeler*, 843 F.3d 473 (11th Cir. 2016). There, the defendant police chief had issued a be-on-the-lookout advisory ("BOLO") to law enforcement in his county describing the plaintiff as a "loose cannon" who presented a "danger" to law enforcement, in retaliation for the plaintiff "speaking up about alleged civil-rights abuses." *Id*. at 477, 485. Although the plaintiff did not identify any prior cases presenting similar fact patterns, the Eleventh Circuit determined that the First Amendment violation was "obvious" based on cases establishing the general proposition that government officials could not use law enforcement "to harass and retaliate against" plaintiffs for their speech. *Id*. at 484. As the court explained, "since there is no justification for harassing

people for exercising their constitutional rights," the violation should have been clear, and qualified immunity was unavailable. *Id.* at 485.

Other circuits have similarly rejected qualified immunity in First Amendment cases where the conduct was obviously unlawful despite factual distinctions from precedent. *See, e.g.*, *Kiddy-Brown v. Blagojevich*, 408 F.3d 346, 359 (7th Cir. 2005) (denying qualified immunity despite lack of case law addressing whether prison wardens, specifically, could be terminated for political speech because "a plaintiff is not required to produce a case that is 'directly on point'"); *Nat'l Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521, 1533 (10th Cir. 1994) (rejecting qualified immunity for First Amendment claim without identifying any factually analogous precedent because there was no way defendants' alleged "actions could reasonably have been thought consistent with the First Amendment") (cleaned up); *Zorn v. City of Marion*, 774 F. Supp. 3d 1279, 1324–25 (D. Kan. 2024) (rejecting qualified immunity where "[n]either the Tenth Circuit nor the Supreme Court has adjudicated a case that looks quite like this one" because "[a]ny reasonable official . . . would know" the conduct at issue violated the First Amendment).

b. The Second Circuit's decision below cannot be squared with those decisions. Although the court purported to acknowledge that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," Pet.App.27a, the court nonetheless latched onto the purportedly novel factual circumstances here as its entire basis for applying qualified immunity. That is, after concluding that prior precedents "do not address a sufficiently close

analogue to the current situation," the court went no further in analyzing the qualified immunity question. Pet.App.36a–37a. The admittedly "narrow" factual distinction it had identified, it found, was "determinative." Pet.App.37a.

The Second Circuit thus offered no analysis or explanation of how any factual distinction between this case and *Bantam Books* could have led any reasonable official to conclude that Vullo's conduct was permissible. Nor did it otherwise consider whether the rule announced in *Bantam Books* applied with sufficient clarity to Vullo's conduct that she should have been on notice despite the lack of factually identical precedents. Rather than treating the lack of precise factual analogs as simply the first step in evaluating whether the right at issue was clearly established, in other words, the Second Circuit treated that threshold question as the entire inquiry. That is directly contrary to the other circuits above, which properly ask whether the governing constitutional rule clearly applies due the lack of any *relevant* distinctions from earlier precedent.

The Fifth Circuit has taken a similarly narrow approach. Indeed, as discussed above, the Fifth Circuit was recently summarily reversed for granting qualified immunity based on a plainly constitutionally irrelevant factual distinction. *Taylor*, 592 U.S. at 9. But while *Taylor* may have been particularly egregious, it is emblematic of the Fifth Circuit's overall approach to qualified immunity. Consider, for example, *McCoy v. Alamu*, 950 F.3d 226 (5th Cir. 2020). There, the Fifth Circuit acknowledged that a prison guard violated the Fourth Amendment's prohibition on excessive force when he pepper sprayed

an inmate "for no reason at all." *Id.* at 231–32. And circuit precedent at the time clearly established that punching or tasing someone for no reason constitutes excessive force. *Id.* at 234–35 (Costa, J., dissenting in part). Nonetheless, the court granted qualified immunity because no case had held that that harming a prisoner for no reason at all by using pepper spray, specifically, was a violation. *Id.* at 233.

Or, in a context more similar to this one, consider *Villarreal v. City of Laredo*, 134 F.4th 273, 275 (5th Cir. 2025) (en banc). There, a "journalist-critic" was arrested in retaliation for her reporting based on her "routine newsgathering" (asking a police officer for information about a case, purportedly in violation of a state statute). That arrest "*obviously* violate[d] the First Amendment." *Id.* at 284 (Higginson, J., dissenting). But despite the obviousness of the First Amendment violation, the Fifth Circuit granted qualified immunity to the officials involved because precedents had not clearly established the violation in a case involving an arrest based on probable cause that the arrestee had violated a plainly unconstitutional state statute. *Id.* at 275–76.

Similarly, in *Wetherbe v. Texas Tech University System*, 138 F.4th 296 (5th Cir. 2025), the court granted qualified immunity even though a professor alleged that he was demoted in direct retaliation for publishing First Amendment–protected op-eds critical of the tenure system. *Id.* at 298. As the court acknowledged, "it was clearly established [at the relevant time] 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. Prior cases also made

clear that speech relates to "a matter of public concern" where it concerned systemic issues, particularly "against the backdrop of ongoing commentary and debate in the press." *Id*. at 309 (Dennis, J., dissenting). Nonetheless, the court granted qualified immunity to the dean, because regardless of how well-established the legal framework was, "none of our cases have held that speech *regarding tenure* is on a matter of public concern." *Id*. at 305 (emphasis added). That is exactly the type of irrelevant factual distinction at issue here.

In the Second and Fifth Circuits, the lack of identical fact patterns in earlier cases can be dispositive no matter how clearly the conduct at issue is governed by the constitutional rules established in those cases. That conflicts with the approaches of other circuits as well as with this Court's case law establishing that obvious constitutional violations fall outside the scope of qualified immunity regardless of irrelevant factual distinctions. This Court should grant certiorari to resolve these conflicts, which allow officials in some circuits to violate the Constitution with impunity, so long as they do so creatively.

IV. THIS CASE IS THE IDEAL VEHICLE TO RESOLVE THE QUESTIONS PRESENTED.

This is a strong vehicle to clarify when a constitutional violation is sufficiently obvious to preclude qualified immunity. The Court is already familiar with the factual context and has already determined how the allegations in the Complaint are properly construed. Beyond that, this Court has already held that the allegations violate the First Amendment under longstanding precedent; the sole

issue is whether those precedents rendered the constitutional violation sufficiently obvious to defeat qualified immunity. The issue is squarely presented and was the sole basis for the decision below.

Moreover, this case does not involve the type of split-second decision-making that is common in many qualified immunity cases—this is not a case where a government official making an urgent decision misjudged the law in the heat of the moment. Instead, Vullo pursued a deliberate, premeditated, and extended course of action seeking to leverage her regulatory power to suppress or punish political speech she disfavored, in obvious disregard for the First Amendment—then issued press releases trumpeting that conduct. Qualified immunity should have the least force in the context of such deliberate and premeditated violations. *See Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement regarding denial of certiorari) ("[W]hy should [officials] 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?"). Officials should not be incentivized to spend their time inventing new and creative methods to violate clearly established rights by looking for narrow, constitutionally irrelevant factual gaps in the case law. Instead, they should be held to account for obvious constitutional violations, regardless of how creative.

V. In the Alternative, Summary Reversal Is Warranted.

At minimum, this case cries out for summary reversal. Summary reversal is appropriate where a decision is "both incorrect and inconsistent with clear instruction in the precedents of this Court." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012) (per curiam); *see also, e.g., Shoop v. Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas, J., dissenting) (summary reversal is called for where "the Court of Appeals' decision was obviously wrong and squarely foreclosed by our precedent"); *Andrus v. Texas*, 142 S. Ct. 1866, 1879 (2022) (Sotomayor, J., dissenting) ("Summary correction is particularly necessary where, as here, a lower court clearly and directly contravenes this Court's settled precedent.").

This Court has thus often summarily reversed where a "lower court had conspicuously disregarded governing Supreme Court precedent." *Taylor*, 592 U.S. at 11 (Alito, J., concurring in the judgment). And it has been particularly careful to enforce its decisions when the lower court's rationale on remand "rests upon analysis too much of which too closely resembles what we previously found improper." *Moore v. Texas*, 586 U.S. 133, 142 (2019). Just so here. This Court expressly noted in its prior decision in this case that it was "not break[ing] new ground," *Vullo*, 602 U.S. at 197, but was simply "reaffirm[ing]" the law as it had been long established since *Bantam Books, id.*—yet the Second Circuit doubled down on its view that *Bantam Books* did not compel the conclusion that *Vullo*'s conduct was unlawful.

Of course, "[l]ower court judges may sometimes disagree with this Court's decisions, but they are never free to defy them." *Nat'l Institutes of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658, 2663 (2025) (Gorsuch, J., concurring in part and dissenting in part). "Such defiance of vertical stare decisis, if allowed to stand, substantially erodes confidence in the functioning of the legal system." *Andrus*, 142 S. Ct. at 1879 (Sotomayor, J., dissenting). And in following this Court's direction, lower courts must follow not just the Court's holding but also its "reasoning—its *ratio decidendi*" which also "carries precedential weight in future cases." *Am. Pub. Health*, 145 S. Ct. at 2663 (cleaned up).

Here, that means the Second Circuit was bound not just by this Court's bottom-line conclusion that the NRA had stated a claim for First Amendment violations, but also this Court's explanation that this result was directly compelled by *Bantam Books*, without any need to break new legal ground. By concluding that this Court had in fact covered legal ground not addressed by *Bantam Books*, the Second Circuit conspicuously disregarded this Court's binding precedent. That alone justifies summary reversal.

CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

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