No. 22-842

IN THE

Supreme Court of the United States

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Petitioner,

v.

MARIA T. VULLO, BOTH INDIVIDUALLY AND IN HER FORMER OFFICIAL CAPACITY,

Respondent.

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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER

DARPANA SHETH
ABIGAIL E. SMITH
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut Street
Suite 1250
Philadelphia, PA 19106
(215) 717-3473
darpana.sheth@thefire.org
abby.smith@thefire.org

JOHN F. BASH
Counsel of Record
ISABEL PERAZA
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 I St. NW, Suite 900
Washington, D.C. 20005
(202) 538-8000
johnbash@quinnemanuel.com
isabelperaza@quinnemanuel.com

Counsel for Amicus Curiae

[Additional Counsel Listed On Inside Cover]

April 5, 2023

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

DAN SCHWARTZ
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
191 N. Wacker Dr.
Suite 2700
Chicago, IL 60606
(312) 705-7400
danielschwartz@
quinnemanuel.com

BEN CARROLL
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, New York 10010
(212) 849-7000
benjamincarroll@
quinnemanuel.com

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INTEREST OF *AMICUS CURIAE*

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Because colleges and universities play an essential role in preserving free thought, FIRE places a special emphasis on defending these rights on our nation's campuses. Since 1999, FIRE has successfully defended the rights of individuals through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, Brief of FIRE as *Amicus Curiae* in Support of Petitioner, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); Brief of FIRE as *Amicus Curiae* in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021). It currently represents plaintiffs in lawsuits seeking compensation for First Amendment violations under 42 U.S.C. § 1983.

Given its decades of experience defending freedom of expression, FIRE is keenly aware that public officials too often misuse their power through threats and other informal mechanisms of coercion to stifle controversial speakers and impose ideological conformity. FIRE submits this brief to urge this Court to reverse the alarming decision of the Second Circuit, which held that petitioner had failed to state a viable claim despite detailed allegations that a powerful New York state official threatened action against regulated entities that associated with petitioner because she opposed petitioner's political advocacy. That holding will embolden other officials—including college and

university administrators—to establish and maintain informal censorship regimes that target disfavored points of view.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Second Circuit held that a complaint alleging that a New York state official made a series of thinly veiled threats to regulated financial entities to pressure them to sever ties with a politically disfavored group could not proceed past the pleadings stage. For reasons persuasively stated in the petition for a writ of certiorari, that holding conflicts with this Court's decision in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), and the Seventh Circuit's decision in *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015), *cert. denied*, 137 S. Ct. 46 (2016). The decision below is irreconcilable with the basic purpose of the First Amendment: to prevent governmental officials from wielding their powers to stifle free discourse. On those grounds alone, the decision warrants further review.

The decision also warrants review for two other reasons. First, what is alleged to have occurred in New York is not limited to political interest groups like petitioner. Throughout the country, university students and faculty find themselves subject to "system[s] of informal censorship," *Bantam Books*, 372

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[1] FIRE affirms that no counsel for a party authored this brief in whole or in part, and that no person other than FIRE or its counsel contributed money intended to fund the preparation or submission of this brief. FIRE provided timely notice to counsel for all parties under Rule 37.2.

U.S. at 71, which discourage open debate and impose ideological conformity, even when couched in neutral-sounding language.

Second, the decision below held that even if the New York official had "engaged in unconstitutional[ly] threatening or coercive conduct," she would be protected by qualified immunity. Pet. App. 34. But as Justice Thomas has explained, qualified immunity should not shield public officials from liability for considered policy decisions and regulatory actions. This case presents a good opportunity for the Court to clarify that qualified immunity does not reach such deliberate action.

ARGUMENT

I. Systems Of Informal Censorship Are Proliferating On University Campuses

Perhaps nowhere is free speech under a more sustained attack than on public university campuses—forums where free discourse and open debate should be cultivated, not stifled. Through vague, neutral-sounding terms like "bias" and "harassment," university policies give administrators, government officials, and even students themselves wide authority to investigate, threaten, and sanction students and faculty that hold disfavored viewpoints. As a consequence, young Americans are being educated in an environment of fear and conformity that is irreconcilable with our vibrant, pluralistic democracy.

These abuses of power call out for this Court to reaffirm that courts must "look through forms to the substance and recognize that informal censorship" violates the rights of free speech and expressive

association just as much as formal prohibitions. *Bantam Books*, 372 U.S. at 67. In *Bantam Books*, the Court considered a state commission that would notify booksellers that they were selling "objectionable" books and then circulate copies of the objectionable books to police departments. *Id.* at 61-63. The Court held that the Commission was violating the First Amendment through "informal censorship." *Id.* at 71. Although the books had "not been seized or banned by the State" and "no one ha[d] been prosecuted for their possession or sale," the Commission's "informal sanctions"—*i.e.*, "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation"—amounted to "a system of prior administrative restraints." *Id.* at 67, 70.

Despite this Court's holding in *Bantom Books*, university administrators now employ numerous means of "coercion, persuasion, and intimidation" to suppress speech that they deem objectionable:

Speech codes. Six decades after progressive students launched the Free Speech Movement at the University of California at Berkeley, a large majority of university students are subject to restrictive speech codes, a trend that began in the 1980s and 1990s. A FIRE study in 2022 found that 86% of colleges and universities surveyed have put in place speech policies that hinder free discourse compared to what is permissible in society at large. FIRE, *Spotlight on Speech Codes 2023*.[2]

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[2] Available at https://www.thefire.org/research-learn/spotlight-speech-codes-2023.

Many of these codes are exceptionally broad. For example, until successful litigation forced it to narrow its speech code, the University of Michigan threatened students with sanctions and expulsion for "harassment," and it defined that term to include creating an "unpleasant" situation for another person. *See, e.g.*, *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 761-62 (6th Cir. 2019) (University of Michigan); Rick Fitzgerald, *University Clarifies Definitions of Harassment, Bullying*, UNIVERSITY RECORD (June 11, 2018).[3] Similarly, the Vermont State Colleges System defines "harassment" as conduct that has the "the purpose or effect" of objectively and substantially interfering with a student's educational performance and states that harassment includes "negative references to customs related to . . . protected categories." Vermont State Colleges System, *Non-Discrimination and Prevention of Harassment and Related Unprofessional Conduct* 3-4 (Aug. 12, 2020).[4]

Such vague and capacious restrictions on speech naturally invite administrators to punish students who advance views that are disfavored by the administration or fall outside of the mainstream of the university community. For example, in November 2021, school administrators at Clovis Community College, a public institution, tore down anti-communist flyers posted by the college's Young Americans for Freedom chapter (a conservative student group) because they made students "uncomfortable," and restricted the

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[3] Available at https://record.umich.edu/articles/u-m-clarifies-definitions-harassment-bullying/.

[4] Available at www.vsc.edu/wp-content/uploads/2020/08/Policy-311-Revised-for-08-12-20-1-1.pdf.

group's ability to post pro-life flyers. *Flores v. Bennett*, 2022 WL 9459604, at *2 (E.D. Cal. Oct. 14, 2022) (granting a preliminary injunction to the students, represented by FIRE). And earlier this year, Tulane University opened an investigation into a student for arguing in an op-ed that the controversial rapper Kanye West (now known as Ye) was right to wear a jacket reading "White Lives Matter" and should not have been "canceled" for making comments that were widely condemned as anti-Semitic. FIRE, *Tulane University: Student Investigated for Op-Ed Supporting Kanye West*.[5] While Tulane is a private university, it makes numerous commitments to free expression for its students that it violated by investigating a student for "caus[ing] much distress" on campus with an op-ed. *Id.*

Likewise, late last year, the University of California at Irvine prevented student governments from using a university email platform to support striking graduate students, claiming that it violated a policy against "political" speech on the platform. FIRE, *University of California at Irvine: Administrators Suppress Speech in Support of Graduate Student Strike with Vague Policy*.[6] Such vague, undefined speech restrictions enable administrators to advance their own interests by silencing student expression.

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[5] Available at https://www.thefire.org/cases/tulane-university-student-investigated-op-ed-supporting-kanye-west.

[6] Available at https://www.thefire.org/cases/university-california-irvine-administrators-suppress-speech-support-graduate-student-strike.

Bias Response Teams. Universities across the country now employ so-called "Bias Response Teams" to encourage students to formally report fellow students or faculty members whenever they perceive that their speech is "biased." The inevitable result is to chill expressive activity and candid conversations not only in the classroom and other public forums, but also in private interactions on campus—a state of affairs more reminiscent of Soviet police states than an American university.

The actual operation of Bias Response Teams in practice makes distressingly clear how administrators can use them to squelch disfavored views on, for example, race-conscious admissions, transgender rights, or immigration policy. *See generally* Greg Lukianoff & Adam Goldstein, *Catching Up with 'Coddling' Part Eleven: The Special Problem of 'Bias Response Teams'*, FIRE (Mar. 11, 2021).[7] As the Sixth Circuit explained in describing the University of Michigan's Bias Response Team, when a student reports a fellow student for bias, the Bias Response Team will (at the complainant's request) invite the offending party to "voluntarily meet" with a member of the Bias Response Team. *Speech First*, 939 F.3d at 762. Although the target is not formally required to meet with the Bias Response Team, the Team has authority to refer that student to the police or to university administrators. *Id.* at 762-763. The Bias Response Team also "maintains a log of reported bias incidents." *Id.* at 762.

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[7] Available at https://www.thefire.org/news/blogs/eternally-radical-idea/catching-coddling-part-eleven-special-problem-bias-response-teams.

The chilling effect of this arrangement—in which students report each other for disfavored or offensive speech—cannot be understated. A college sophomore called in for a meeting with administrators for advocating for aggressive enforcement of immigration laws will almost inevitably be deterred from expressing those views again, particularly given the implicit threat of expulsion or other sanctions. The request to meet with administrators is a barely concealed form of intimidation and coercion. As the Sixth Circuit has put it, "[b]oth the referral power and the invitation to meet with students objectively chill speech" because "a student who knows that reported conduct might be referred to police or [the school administration] could understand the invitation to carry the threat: 'meet or we will refer your case.'" *Speech First,* 939 F.3d at 765. Indeed, "the very name 'Bias Response Team' suggests that the accused student's actions have been prejudged to be biased." *Id.* at 765. *Bantam Books* made crystal clear that these sorts of "informal sanctions" for protected activity violate the First Amendment. 372 U.S. at 67.

Bias Response Teams are alarmingly common at American colleges. In a 2017 survey of 232 institutions, 167 identified officials or offices that receive and review reports of offensive speech. FIRE, *First National Survey of 'Bias Response Teams' Reveals Growing Threat to Campus Free Speech* (Feb. 7, 2017).[8] And a remarkable 42% of survey respondents listed law-enforcement personnel among the members of Bias

[8] Available at https://www.thefire.org/news/first-national-survey-bias-response-teams-reveals-growing-threat-campus-free-speech.

Response Teams, even though offensive or biased speech is not a criminal offense, but rather constitutionally protected activity. Universities are quite literally employing speech police. *Id.*

The threat that Bias Response Teams will suppress disfavored speech is far from theoretical. In 2016, a Bias Response Team at the University of Northern Colorado, a public institution, investigated a professor who engaged students in a discussion about opposing viewpoints on various topics, including transgender rights. Adam Steinbaugh & Alex Morey, *Professor Investigated for Discussing Conflicting Viewpoints, 'The Coddling of The American Mind'*, FIRE (June 20, 2016).[9] Another professor at the same university was investigated by the Bias Response Team for encouraging students to debate LGBTQ rights in the classroom, after a student objected that "other students are required to watch the in-class debate and hear both arguments presented." *Id.*

The mere existence of Bias Response Teams—and the implicit threat of condemnation and punishment that they inevitably engender—erodes free discourse. Earlier this year, two students at Stanford University[10] were reported for reading *Mein Kampf*. FIRE,

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[9] Available at https://www.thefire.org/news/professor-investigated-discussing-conflicting-viewpoints-coddling-american-mind.

[10] Stanford University, a private university, is bound to extend First Amendment and California Constitution free speech protections to its students under California's Leonard Law. *See* FIRE, *Enacted Free Speech Statutes – California*, available at https://www.thefire.org/research-learn/enacted-campus-free-speech-statutes-california.

Stanford University: Student Reported for Reading Adolf Hitler's Autobiography, "Mein Kampf."[11] And back in 2019, several students at the University of Maryland were questioned by police and referred to the Office of Student Conduct for writing offensive-to-some responses to the fill-in-the-blank video game "Quiplash," a game designed to elicit off-color and often satirical answers. FIRE, *Resident Assistants Called the Cops on Students Playing an 'Offensive' Video Game at University of Maryland*.[12] Even if these students ultimately faced no formal sanctions, the reporting itself (encouraged by university policies) is a raw act of intimidation: Their experiences will undoubtedly deter other students from reading condemned books or playing controversial games on campus in the future.

Restrictions on student groups. Public universities have also put in place vague or general restrictions on student groups and activities that allow administrators and others to punish ideological opponents or protect their own interests.

Under the guise of anti-discrimination policies, for example, universities have eroded students' right to expressive association. The administration at Central Michigan University told a conservative political student group that under the university's nondiscrimination policy, the group could not exclude from

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[11] Available at https://www.thefire.org/cases/stanford-university-student-reported-reading-adolf-hilters-autobiography-mein-kampf.

[12] Available at https://www.thefire.org/news/resident-assistants-called-cops-students-playing-offensive-video-game-university-maryland.

membership students who regarded the organization as a "hate group" and were explicitly plotting to join the group in order to dissolve it. FIRE, Letter to Central Michigan University President Michael Rao (Mar. 16, 2007).[13] Similarly, at Louisiana State University, the Muslim Students Association was told by the administration that in order to re-register, it would have to revise its constitution to prohibit discrimination based on, among other things, religion. FIRE, Letter to LSU Interim Chancellor William Jenkins (Nov. 11, 2004).[14] The organization contacted other religious student organizations who stated that they were not asked to make the same change. *Id.* When the group refused to adopt the clause, the university immediately derecognized it and revoked all its privileges. *Id.*

Universities also regularly permit student leaders themselves to compel ideological speech from their fellow students. The student government president at the University of North Carolina at Chapel Hill cut off funding "to any individual, business, or organization" that advocates for pro-life causes. FIRE, *Repressive Executive Order from UNC Chapel Hill Student Government Cuts Off Funding for Pro-life Individuals, Causes* (July 28, 2022).[15] The Student Bar Association

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[13] Available at https://www.thefire.org/research-learn/fire-letter-central-michigan-university-president-michael-rao-march-16-2007.

[14] Available at https://www.thefire.org/research-learn/fire-letter-lsu-interim-chancellor-william-jenkins-november-11-2004.

[15] Available at https://www.thefire.org/news/repressive-executive-order-unc-chapel-hill-student-government-cuts-funding-pro-life.

of Rutgers Law School amended its constitution to require that any group applying for more than $250 in university funding "plan at least one . . . event that addresses their chosen topics through the lens of Critical Race Theory, diversity and inclusion, or cultural competency," forcing groups to promote messages with which they may disagree. FIRE, *Rutgers Law Student Government to Student Groups: Promote Critical Race Theory or Lose Funding* (May 17, 2021).[16]

In other instances, public university administrators have threatened student groups or faculty to advance the administrators' own interests or idiosyncratic views. For example, at Central Washington University, a university committee proposed defunding the student newspaper after the editors criticized university departments for requiring prior review of questions posed to department employees. FIRE, *Central Washington University: Student Media Face Defunding Threat, Onerous Interview Practices*.[17] Last year, the president of Bluefield State University threatened to retaliate against any faculty member who cast a vote of no confidence in his leadership. FIRE, *Bluefield State University: President Warns Faculty He Will Retaliate Against Them for*

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[16] Available at https://www.thefire.org/news/rutgers-law-student-government-student-groups-promote-critical-race-theory-or-lose-funding.

[17] Available at https://www.thefire.org/cases/central-washington-university-student-media-face-defunding-threat-onerous-interview-practices.

Criticizing Him.[18] Recently, at West Texas A&M University, the president announced that he would cancel a student drag show based on his view of natural law, "even when the law of the land appears to require" him to allow the show to go forward. FIRE, *LAWSUIT: FIRE Sues Texas University President Illegally Blocking Charity Drag Show* (Mar. 24, 2023).[19]

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For the foregoing reasons, the question raised in the petition for a writ of certiorari is vitally important in the university setting. Granting review and reinforcing the principle of *Bantam Books* would begin the process of rebuilding the Nation's academic institutions as forums where students and faculty can challenge deeply held beliefs and debate the most pressing national problems in an environment of open discourse and freedom of thought.

II. Qualified Immunity Should Be Unavailable For Calculated First Amendment Violations

This case presents the opportunity for the Court to clarify that qualified immunity is not available for constitutional violations that are the product of deliberation and considered choice—as opposed to, for example, split-second decisions that police officers make in the field.

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[18] Available at https://www.thefire.org/cases/bluefield-state-university-president-warns-faculty-he-will-retaliate-against-them-criticizing.

[19] Available at https://www.thefire.org/news/lawsuit-fire-sues-texas-university-president-illegally-blocking-charity-drag-show.

Qualified immunity generally protects a government official from monetary liability for violating constitutional rights when the relevant legal principle was not "clearly established" at the time the violation occurred. *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021). Its basic purpose is to avoid "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). It is easy to see how that concern applies to rapid decision-making by law-enforcement officers: An officer faced with a dangerous situation cannot reasonably be expected to analyze whether a recent precedent of the regional circuit would be extended to a materially different factual scenario.

But the concern has substantially less force for calculated policy decisions or enforcement actions like those alleged in the complaint in this case. When an official has time to consider the effects of the proposed course of action, evaluate alternative approaches, and take steps to minimize any impact on private liberties, there is little justification to bar victims from seeking compensation for violations of their constitutional rights. After all, business and individuals routinely face civil liability for violations of common-law rules or constructions of statutes that were not clearly established at the time the conduct took place. There is no apparent reason why government officials should receive more lenient treatment.

In light of that disconnect between the purpose of qualified immunity and its application to calculated choices and policies, federal judges have recently begun to question the application of qualified immunity

in this context, particularly for violations of First Amendment rights.

For example, in *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021), the plaintiff "allege[d] that university officials violated her First Amendment rights by prohibiting her from placing a small table on campus near the student union building to promote a student organization," instead confining her activity to a "Free Expression Area," and then only with prior permission. *Id.* at 2421 (Thomas, J., respecting the denial of certiorari). The court of appeals had held that the policy was unconstitutional but that the officials who implemented it were entitled to qualified immunity. *Id.* at 2421-22.

In a statement respecting the denial of certiorari, Justice Thomas pointedly asked "why should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?" 141 S. Ct. at 2422. He noted that the Court had "never offered a satisfactory explanation to this question." *Id.*

Similarly, in *Intervarsity Christian Fellowship/ USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021), the Eighth Circuit considered the application of qualified immunity to a university that had deregistered a Christian student group for requiring its officers to affirm certain religious beliefs. *Id.* at 861. While specifically "acknowledg[ing] that the intersection of the First Amendment and anti-discrimination principles can present challenging questions," the Eighth Circuit denied qualified

immunity. *Id.* at 867. In so holding, it invoked Justice Thomas's rhetorical question about why officials who make "'calculated choices'" should receive the same protections as those who make split-second decisions. *Id.* (quoting *Hoggard*, 141 S. Ct. at 2422).

In much the same vein, a panel of the Fifth Circuit recently sought to apply a more context-based approach to qualified immunity. In *Villarreal v. City of Laredo*, 44 F.4th 363 (5th Cir. 2022), *vacated*, 52 F.4th 265, the court held that public officials who had allegedly conspired to arrest a journalist (now represented by FIRE) in retaliation for her reporting were not entitled to qualified immunity. 44 F.4th at 369.[20] Though acknowledging a lack of governing precedent involving materially identical facts, the court reasoned that "[t]here is a big difference between split second decisions by police officers and premeditated plans to arrest a person for her journalism . . . ." *Id.* at 371 (internal quotation marks omitted).

This case presents an ideal vehicle for this Court to clarify that qualified immunity does not extend to considered choices and policies. As alleged in petitioner's complaint, the former superintendent of the New York State Department of Financial Services used her regulatory power over insurance companies that partnered with petitioner to "coerce them into disassociating with [petitioner], in violation of its rights." Pet. App. 3. She sent "Guidance Letters" to those companies, described "'reputational risks'" if those companies did business with petitioner or

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[20] The opinion in *Villarreal* was vacated after the Fifth Circuit granted en banc review, which remains pending.

"similar gun promotion organizations," *id.* at 10, and otherwise encouraged the companies to discontinue any association with petitioner. *Id.* She allegedly acted out of her "'desire to leverage [her] powers to combat the availability of firearms.'" *Id.* at 9 (quoting complaint). These actions were planned and carried out over the course of many months as part of a sustained campaign against petitioner. The superintendent therefore had ample time and opportunity to consider the legality of her conduct and calibrate her statements to constitutional requirements. In these circumstances, whatever interest is served by qualified immunity is outweighed by the constitutional imperative to deter policies and actions that chill free speech and association.

CONCLUSION

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

Respectfully submitted,

JOHN F. BASH
Counsel of Record
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
1300 I Street NW, Suite 900
Washington, D.C. 20005
(202) 538-8000
johnbash@quinnemanuel.com

April 5, 2023