

No. 25-479

In the
Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,

v.

MARIA T. VULLO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

**AMICUS CURIAE BRIEF OF
THE BUCKEYE INSTITUTE
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 CURIAE¹

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. Section 501(c)(3).

SUMMARY OF THE ARGUMENTS

Secretary Vullo’s premeditated bad-faith attack on First Amendment-protected speech should not get the same protection as a police officer’s split-second decision to save a life in the heat of the moment. Yet the current qualified immunity doctrine makes no distinction between the two. The Court should change that.

The court-made doctrine of qualified immunity to a Section 1983 claim immunizes public officials from suit unless “a reasonable official” in the offending official’s place would have been on notice that his or

¹ Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

her action violated a “clearly established” constitutional right. See *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The doctrine as applied to Section 1983 was born of the need to protect law enforcement officers’ good faith efforts to enforce the law while still protecting individuals’ right to seek compensation for government officials’ unconstitutional actions. The doctrine has evolved into an attempt to objectively balance government officials’ ability to perform their jobs without having to predict future court decisions and protection of the public fisc against Section 1983’s right to obtain money damages for constitutional torts. In theory, there is a bright line that delineates between “clearly established” rights and other presumably less established rights that guides public officials performing their duties. In practice, however, courts’ narrow and often hyper-technical interpretations of what rights are “clearly established” have allowed government officials to ignore common sense, feign ignorance, and rely on distinctions without a difference to avoid suit for conduct that, while often egregious, has the virtue of originality. While police officers making split-second decisions merit some degree of deference, policy makers making considered decisions should not—like the proverbial dog of first-year torts—get “one free bite” simply because there is no “settled law” specifically prohibiting their constitutionally dubious action. Sometimes, like in cases involving easily understandable First Amendment principles, the well-understood purpose of the law ought to be enough to put a public official on notice.

This case presents the Court the opportunity to hold—as Petitioner asserts—that Superintendent Vullo’s actions violated clearly established constitutional rights. But Vullo’s actions raise two other important qualified immunity issues. Her premeditated First Amendment retaliation and her bad faith actions present the Court with an opportunity to determine that these cases should be considered differently than protecting police officers’ heat-of-the-moment reactions to active threats. Further, officials acting in bad faith should not be protected when they violate constitutional rights. This case presents a vehicle for the Court to address those issues as well.

ARGUMENTS

I. Introduction

Superintendent Maria Vullo does not want the NRA doing business in the State of New York. But the business of the NRA is—in large part—speech. More specifically, its business involves engaging in core political speech on issues where it often serves as a critic of the state’s policies. While the decisions of state financial regulators do not evoke the visceral outrage of a police brutality case, they nevertheless call upon the Court to re-examine what may be “the most important doctrine in the law of constitutional torts.” John C. Jeffries, Jr., *What’s Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 852 (2010). The engrossing questions threaded through this case are whether considered policies that violate constitutional rights should be protected in the same way as spur-of-the-moment, life or death decisions, and whether the First Amendment deserves special protection to pierce

qualified immunity. The Court should grant the petition and answer those questions: The First Amendment does deserve special protection from qualified immunity, and considered decisions that violate constitutional rights are not the same as police officers' split-second decisions.

II. The current qualified immunity test is foreign to our Constitution.

As Justice Thomas has noted on several occasions, the current “qualified immunity jurisprudence stands on shaky ground.” *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (Thomas, J., respecting the denial of certiorari) (citations omitted). Whether qualified immunity will apply as a defense to a Section 1983 civil rights claim “depends on the answers to two questions: (1) Did the officer’s conduct violate a constitutional or statutory right? If so, (2) was that right clearly established at the time of the violation?” *Daugherty v. Sheer*, 891 F.3d 386, 390 (D.C. Cir. 2018). The burden of proof falls on the plaintiff to make a showing as to each inquiry. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). A court can choose to analyze these two prongs in any order. *Pearson v. Callahan*, 555 U.S. 223, 234 (2009). Evaluation of a clearly established right hinges on whether a reasonable official in the defendant’s position could have been on notice that their conduct violated existing law at the time of the events giving rise to the claim. *Hope*, 536 U.S. at 741. If the facts do not support affirmative answers to both central questions, the official will be entitled to qualified immunity. See *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 877–78 (10th Cir. 2014). But this standard does not stem from the Constitution or any statutory

directive. See, *e.g.*, Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023) (attacking the flawed statutory interpretation used to create qualified immunity for Section 1983 claims); see also *id.* at 203 n.3–4 (citing scholarly works on qualified immunity's inconsistency with Section 1983 and the Constitution).

III. The Court's abandonment of the good faith standard enables bad faith actions.

1. Good faith is the foundational justification for qualified immunity. The history of qualified immunity for those acting under the color of state law dates back over fifty years. In *Pierson v. Ray*, three policemen arrested fifteen white and black clergymen who engaged in peaceful civil disobedience by trying to use segregated facilities at a bus terminal in Jackson, Mississippi. 386 U.S. 547, 549 (1967). After a municipal justice convicted the clergymen for disturbing the peace, they sued the policemen under 42 U.S.C. § 1983. *Id.* The Court acknowledged that under the common law, the defendant officers lacked “absolute immunity,” but allowed a defense of “*good faith and probable cause*.” *Id.* at 557 (emphasis added). So the policemen would not be liable if they “acted in good faith and with probable cause in making an arrest under a statute they believed to be valid.” *Id.* The test for liability examined the *subjective* intent of a defendant in and the constitutionality of the challenged conduct.

In *Pierson*, the Court focused on the difficulty faced by law enforcement officers called upon to enforce an unjust and potentially unconstitutional statute. The Court explained its good faith test in terms of allowing

police officers to do their job without having to anticipate future court decisions:

A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied.

Id. at 555. Importantly, the *Pierson* Court's good-faith test was still rigorous enough to prevent police from abusing the exception. The Court explained that while "a police officer is not charged with predicting the future course of constitutional law," the police in *Pierson* did not merely argue that they were enforcing a Jim Crowe statute that was valid at the time. Instead, the police argued that they arrested the ministers solely for the purpose of preventing violence. *Id.* at 557. This Court noted that the petitioners' complaint alleged that no crowd was present, and there was no threat of violence or other public disturbance. Thus, while the good faith test does not require police officers to guess at what a court might hold, it still required actual good faith. Simply put, the original version of qualified immunity did not allow police to arrest peaceful protesters under the pretense of disturbing the peace without evidence that there

was at least probable cause to believe that the peace had been disturbed.

Some states adopted, and unlike federal courts have kept, the original good faith requirement. Under Wyoming common law, courts ask whether the officer was acting in good faith and whether the officer's acts were reasonable under the circumstances. *Kanzler v. Renner*, 937 P.2d 1337, 1344 (Wyo. 1997). Iowa requires a defendant to prove that they exercised "all due care to conform with the requirements of the law." *Baldwin v. City of Estherville*, 915 N.W.2d 259, 260 (Iowa 2018). The Iowa Supreme Court noted that it ordinarily regards "due care or objective good faith as more nuanced" than whether a law is clearly established because due care or objective good faith reflect several considerations. *Id.* at 279. "Factual good faith may compensate for a legal error, and factual bad faith may override some lack of clarity in the law." *Id.* Ohio law provides no immunity for government employees whose "acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner." Ohio Rev. Code 2744.03(A)(6)(b). See *Cook v. Cincinnati*, 103 Ohio App.3d 80, 90 (1st Dist. 1995).

2. The end of good faith—a failed attempt at objectivity. In *Harlow v. Fitzgerald*, the Court reevaluated the "good faith" defense. 457 U.S. 800, 815 (1982). The Court found that the consequences of exposing such defendants to trial would add financial cost and distract the officials. *Id.* at 816. And the defendants' "malicious intention" could not be determined without discovery. *Id.* The Court determined that the time and expense of discovery and

removing legal officers from their law enforcement duties created “excessive disruption of government” and did not facilitate the expeditious resolution of “insubstantial claims.” *Id.* at 818. Accordingly, the Court removed subjective intent from the conditions for qualified immunity. *Id.* at 818. The modified doctrine would protect officials performing discretionary functions from civil damages, provided their conduct did not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.*

3. The evolution of a current convoluted and confusing rule. Lower courts used the new two-part evaluation to determine whether qualified immunity applied: (1) whether the defendant’s conduct reflected a constitutional violation and (2) whether the plaintiff’s constitutional right in question was clearly established. *See, e.g., Sheth v. Webster*, 145 F.3d 1231, 1238 (11th Cir. 1998). However, depending on the facts on each individual case, the latter of these requirements provides a simpler case resolution, incentivizing courts to unravel it first. *See Katz v. United States*, 194 F.3d 962, 970 (9th Cir. 1999), *rev’d Saucier v. Katz*, 533 U.S. 194 (2001) (assessing the clearly established prong first before answering whether a Fourth Amendment violation occurred).

In *Saucier v. Katz*, the Court attempted to remove this incentive by mandating courts analyze the constitutionality of conduct first and then move to the clearly established inquiry. *See Saucier*, 533 U.S. 194. Since a finding that the plaintiff failed to prove either of these prongs would result in qualified immunity, the Court argued that “skip[ping] ahead to the

question whether the law clearly established that an officer's conduct was unlawful" risked constitutional stagnation. *Id.* at 201. Additionally, the Court suggested it would prove difficult to conclude whether the current state of the law clearly established a particular right without first determining the constitutional right in question. *Id.* After *Saucier*, any court examining qualified immunity would need to undertake the analysis in this prescribed order.

However, the Court stepped back from this stance eight years later in *Pearson*, 555 U.S. at 227. Criticism of the rigidity of the *Saucier* rule had prompted a reevaluation of the procedure for handling qualified immunity claims. See *Morse v. Frederick*, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in judgment in part and dissenting in part) ("I would end the failed *Saucier* experiment now."). In *Pearson*, the Court reiterated the value of tackling the constitutional right question first but then turned to the costs of its previous holding. *Pearson* 555 U.S. at 236. For instance, forcing courts to engage in this analysis when the clearly established prong suggested a plaintiff would fail to overcome qualified immunity could cause "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." *Id.* at 236–237. Similarly, a thorough reading of the constitutional issues at play often required more than the facts available at the early procedural stages of a lawsuit. *Id.* at 239. Perhaps most problematically, the *Saucier* rule supposedly cut against a central purpose of qualified immunity—limiting the "additional burdens of suits" for government officials. *Id.* at 237. This held true because litigating constitutional questions when the

“suit could otherwise be disposed more readily” delayed resolution of such claims unnecessarily. *Id.* For these reasons, the Court overruled *Saucier* and deferred to the lower courts to address either prong first. *Id.* at 242.

Qualified immunity has evolved through a crooked path, landing far from the original justification of protecting government officials from liability for good faith actions, grounded in the law, but not protecting bad faith actions. While the current two-part test may have been an effort to objectively measure good faith, it has not met that objective. The supposed objective test has resulted in a rule that “even the official who acts in bad faith is entitled to the defense if a different official could have reasonably made the mistake.” William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 60–61 (2018) (generally discussing the evolution and elimination of the good faith defense). Arguably, qualified immunity allows officials to act in bad faith if the official can colorably claim: “No court has said I can’t do this exact thing.” Indeed, that is what at least some lower courts have decreed: “In deciding whether a reasonable corrections officer in a defendant’s situation would have known that his or her conduct violated a federal right, it is impermissible to consider the defendant’s subjective state of mind—regardless of whether the defendant was acting in good faith, *or was actually intending to harm the plaintiff.*” *Henry v. Dinelle*, 929 F. Supp. 2d 107, 122 (N.D.N.Y. 2013), *aff’d*, 557 F. App’x 20 (2d Cir. 2014). It seems unlikely that this Court wants to countenance blatant bad faith or intentional harm, but the current qualified immunity doctrine does just that.

Partly because of the abandonment of the good faith requirement, “qualified immunity doctrine has been roundly criticized as incoherent, illogical, and overly protective of government officials who act unconstitutionally and in bad faith.” Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 11 (2017). And the current doctrine has not met its objective of reducing discovery and minimizing interference with governmental duties.

Qualified immunity has faced increased scrutiny, given the leeway it appears to provide officers conducting arrests and the possibility that it exacerbates police brutality.

IV. The reasons offered for abandoning the good faith standard have not withstood the test of time.

The Court’s qualified immunity decisions “have relied on the assumptions that discovery and trial impose substantial burdens on government officials, and that qualified immunity can shield government officials from these burdens.” *Id.* at 18. Those interests also motivated the Court “to allow interlocutory appeals of qualified immunity denials.” *Id.* at 17 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985)).

If qualified immunity protected only against the financial burdens of liability, there would be no need for interlocutory appeal; defendants denied qualified immunity could appeal after a final judgment and before the payment of any award to a plaintiff. Instead, the Court

concluded, qualified immunity “is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial.

Id. at 18 (citing *Mitchell*, 472 U.S. at 526–27).

While the purported government interest in efficiency and avoiding unnecessary cost seems sound on its face, it finds little empirical support. “Plaintiffs, defendants, and trial courts are likely to expend substantial resources simply litigating the qualified immunity defense—an elaborate sideshow, independent of the merits, that in many cases will do little to advance or accelerate resolution of the legal claims.” Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U. L. Rev. 1, 99 (1997). And Professor Schwartz’s data tends to show that qualified immunity as it is practiced today offers little public benefit to offset the risk that citizens who have suffered a constitutional tort may lose their right to sue if their facts do not precisely match an earlier case.

Schwartz’s study analyzed 1,183 Section 1983 cases and found that “qualified immunity rarely functions as expected.” Schwartz, *supra*, at 26.

Professor Schwartz found:

- “Qualified immunity could not be raised in more than 17% of the cases in [the] dataset, either because the cases did not name individual defendants or seek monetary damages, or because the cases were dismissed sua sponte by the court before the defendants had an opportunity to answer or otherwise respond.
- Defendants raised qualified immunity in 37.6% of the cases in [the] dataset in which the defense could be raised.
- Defendants were particularly disinclined to raise qualified immunity in motions to dismiss: they did so in only 13.9% of the cases in which they could raise the defense at that stage.
- Courts granted (in whole or part) less than 18% of the motions that raised a qualified immunity defense. Qualified immunity was the reason for dismissal in just 3.9% of the cases in [the] dataset in which the defense could be raised, and just 3.2% of all cases in [the] dataset.”

Id. at 26–27. Further, qualified immunity was more often raised at the summary judgment stage—after discovery, which current qualified immunity requires to determine if there is a fact pattern that triggers qualified immunity. *See id.* at 48–49. Moreover,

grants of qualified immunity at summary judgment relatively rarely achieved their

goal of protecting government officials from trial--such decisions by the district courts or courts of appeals disposed of plaintiffs' cases just thirty-one times across the five districts in [the] study, amounting to just 2.6% of the 1,183 cases in [Schwartz's] dataset.

Id. at 49.

Given the above analysis, the argument that interlocutory appeals save time and money is unpersuasive. If qualified immunity is denied—usually after time-consuming discovery and motion practice—the subsequent appeal is likely to last another year. Similarly, if qualified immunity is granted after the discovery and motion practice, the appeal is of a final judgment.

But if qualified immunity is so rarely granted, according to Schwartz, then is there a need to tinker with the doctrine? Yes. Under the current test, the risk that a worthy Section 1983 claim will be dismissed outweighs the purported but often unrealized benefits of government savings and judicial economy.

V. The current qualified immunity doctrine chills the exercise of First Amendment rights.

The Court's current qualified immunity rule is a particularly bad fit in First Amendment cases like this, where the official action does not involve police officers called upon to make split-second decisions, but bureaucrats pushing paper and making considered decisions formulating or implementing government policy.

Criminal law generally considers premeditated wrongdoing as more serious than spur-of-the-moment wrongdoing. The same rationale should apply when excusing public officials for bad acts. As Justice Thomas pointed out, “the one-size-fits-all doctrine is also an odd fit for many cases because the same test applies to officers who exercise a wide range of responsibilities and functions.” *Hoggard*, 141 S. Ct. at 2421 (Thomas, J., respecting the denial of certiorari) (citation omitted).

This case illustrates that oddity in that it treats cabinet-level policy makers, with a staff and legal counsel—and above all, time for considered thought on policy direction—exactly as it treats first-responders in emergency situations. As Justice Thomas pointed out, this Court has “never offered a satisfactory explanation to this question.” *Id.* at 2422 (citation omitted).

Based on the policy rationale that originally informed qualified immunity—enabling the government line officers to do their job without fear of litigation and avoiding unnecessary legal expense for the taxpayers—there is no satisfactory explanation to treat the cop on the beat the same as the cabinet official who is pushing paper, not wielding a gun. The policymaker/ policy implementer taking premeditated actions ought to be held to a higher standard.

It is hard to justify this equality of review in the context of qualified immunity when we don’t do so elsewhere. Indeed, “[i]t is not immediately obvious what purpose qualified immunity should serve in such circumstances. These officials had sufficient “time to make calculated choices.” *Villarreal v. City of Laredo*,

Texas, 134 F.4th 273, 283 (5th Cir. 2025). This is an understatement. More pointedly, “[o]fficers who deliberately target citizens who hold disfavored political views face no accountability—but officers who make split-second, life-and-death decisions to stop violent criminals must put their careers on the line for their heroism.” *Gonzalez v. Trevino*, 60 F.4th 906, 912–13 (5th Cir. 2023) (Ho, J, dissenting from denial of rehearing en banc).

The facts in the pivotal cases, such as *Pierson*, *Saucier*, and *Pearson*, all involved excessive use of force in rapidly evolving police encounters. Compared with the facts in *Hope*, which involved a considered decision to excessively punish a prisoner and denied immunity. The two types of actions deserve different consideration. Further, the type of right at issue makes the current qualified immunity test a poor fit.

Expression of dissenting views is fundamental to a functioning liberal democracy, and this Court has recognized that the First Amendment’s purpose is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.” *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (citations omitted).

For decades, the Court has repeatedly decried government actions that might chill speech, whether intentional or incidental. “The very essence of a chilling effect is an act of deterrence.” Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. REV. 685, 689 (1978).

Deterred by the fear of punishment, some individuals refrain from saying or publishing that which they lawfully could, and indeed, should. This is to be feared not only because of the harm that flows from the non-exercise of a constitutional right, but also because of general societal loss which results when the freedoms guaranteed by the first amendment are not exercised.

Id. at 693. While chilling often results from government rules, regulations, or laws, executive actions have the same impact and are just as despicable. “[T]he threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation’ may cause self-censorship in violation of the First Amendment just as acutely as a direct bar on speech.” *Speech First, Inc. v. Sands*, 144 S. Ct. 675, 676 (2024) (Thomas, J., dissenting) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)).

This Court has protected free speech against government rules, regulations, and laws that encroach upon free speech. See, e.g., *303 Creative LLC v. Elenis*, 600 U.S. 570, 584–85 (2023) (“[I]f there is any fixed star in our constitutional constellation, it is the principle that the government may not interfere with ‘an uninhibited marketplace of ideas.’”) (internal citations omitted). Rarely does the considered decision to adopt a policy violating the First Amendment implicate or require immediate law enforcement action. Moreover, when an individual official violates one’s free speech, the victim often cannot vindicate his or her speech rights because of the current qualified

immunity doctrine. This case illustrates the problem exactly.

Superintendent Vullo claims this situation is not like any other. And in some ways, she is right. Her action in seeking to exclude an organization from access to banking and insurance services based on its political views is unprecedented—and thus she would argue that its novelty exempts her from suit under section 1983. Her version of the doctrine thus would be, “may all your constitutional sins be original ones.” Under that rationale, the limit to what an official can do to violate the Constitution is bounded only by the official’s imagination. This is a perverse incentive for public officials making considered judgments.

Moreover, the current approach allows government officials multiple bites at the constitutional apple. If a regulation is found to offend, the official need only vary the approach slightly. Like Monty Python’s knights who said “Ni,” only to later change their name to the Knights who say “Ekke Ekke Ekke Ekke Ptang Zoo Boing!”—the offense lay not in the specific words used but in waylaying travelers in the first place. Under current qualified immunity jurisprudence, “the knights until so recently said Ni”—if found liable for “Ni” intimidation of travelers—would not be liable for their intimidation after their name change.

Our indispensable right of free speech² should not be so flimsy as to allow government abuse with no consequence. If the Court retains the current qualified immunity test overall, it should clarify that officials’

² Jonathan Turley, *The Indispensable Right: Free Speech in the Age of Rage 2* (Simon & Schuster 2024).

immunity is not so strong as to preclude their premeditated encroachments on speech—especially when the official acts in bad faith. Allowing abusive government officials to continue their abuse without consequences denigrates our claimed valuation of free speech. Legal punishment is designed to deter further bad behavior. See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (“[P]unitive damages are imposed for purposes of retribution and deterrence.”); See also *Dardinger v. Anthem Blue Cross & Blue Shield*, 2002-Ohio-7113, ¶ 178 (“The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct.”). Similarly, allowing harmful behavior to go unpunished encourages more of the same. Under the current qualified immunity doctrine, a government official claims there is no exact match to his actions. The court says that is correct and never determines that the bad acts are legally impermissible. So the bad acts continue. See, e.g., *Camreta v. Greene*, 563 U.S. 692, 706 (2011) (noting that without resolving the constitutional claim, the government official will persist in the challenged actions).

CONCLUSION

“Supreme executive power derives from a mandate from the masses,” Monty Python and the Holy Grail, Plex, at 0:11:30 (Python (Monty) Pictures 1975), not from a government official’s self-imposed, extraconstitutional bad faith. The Court should grant the petition and instruct the lower courts that officials engaging in bad faith, considered violations of constitutional rights, especially in the First Amendment category, are not entitled to immunity.

Respectfully submitted,

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