**CASE NO. 20-40359**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

PRISCILLA VILLARREAL,
*Plaintiff-Appellant*,
v.
THE CITY OF LAREDO, TEXAS; WEBB COUNTY, TEXAS; ISIDRO R. ALANIZ; MARISELA JACAMAN; CLAUDIO TREVIÑO, JR.; JUAN L. RUIZ; DEYANIRA VILLARREAL; ENEDINA MARTINEZ; ALFREDO GUERRERO; LAURA MONTEMAYOR; DOES 1–2,
*Defendants-Appellees.*

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Appeal from an Order of the United States District Court for the Southern District of Texas, Laredo Division, The Hon. George P. Kazen, (Dist. Ct. No. 5:19-CV-48)

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# MOTION OF THE CATO INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S SUPPLEMENTAL *EN BANC* BRIEF

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December 12, 2022

# CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

CASE NO. 20-40359

*Villarreal v. City of Laredo*

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

| Person or Entity | Connection to Case |
|---|---|
| Jay Schweikert | Counsel to *Amicus* |
| Nicholas DeBenedetto | Counsel to *Amicus* |
| Cato Institute | *Amicus curiae* |

*Amicus* Cato Institute is a Kansas nonprofit corporation that has no parent companies, subsidiaries, or affiliates, and does not issue shares to the public.

/s/ Jay R. Schweikert

## MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS*

Pursuant to Fed. R. App. P. 29(b), *amicus* respectfully moves for leave to file a brief as *amicus curiae* in support of Appellant's supplemental *en banc* brief. All parties were provided with notice of *amicus's* intent to file as required under Rule 39(2) and do not object to this motion for leave to file.

*Amicus* has a fundamental interest in ensuring accountability for public officials, and as part of its mission, the Cato Institute regularly files *amicus* briefs in courts around the country. The Cato Institute has special expertise on defenses arising under Section 1983 and has filed multiple *amicus* briefs on this subject, both in the Supreme Court and in the U.S. Courts of Appeals. Recent cases in which Cato was granted leave to file *amicus* briefs in this Court include *Ramirez v. Guadarrama*, No. 20-10055 (5th Cir. Mar. 24, 2021); *Taylor v. Stevens*, 946 F.3d 211 (5th Cir. 2019), and *Cole v. Carson*, 935 F.3d 444 (5th Cir. 2019) (en banc).

The proposed brief in this case will provide the Court with a unique perspective that will assist in the resolution of this matter. The brief does not merely duplicate arguments made in the petition, but rather elaborates on the extent to which the independent intermediary doctrine is inconsistent with both Supreme Court precedent and the history of Section 1983.

For the foregoing reasons, *amicus* respectfully requests that the Court grant this motion for leave to file an *amicus* brief in support of Appellant's supplemental *en banc* brief.

Respectfully submitted,

December 12, 2022

*/s/ Jay R. Schweikert*
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## CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2059 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman typeface.

/s/ *Jay R. Schweikert*

December 12, 2022

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Jay R. Schweikert*

December 12, 2022

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/s/ Jay R. Schweikert

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## INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and issues the annual *Cato Supreme Court Review*.

*Amicus*'s interest in this case arises from the lack of legal justification for the independent intermediary doctrine, the deleterious effect it has on the ability of people to vindicate their constitutional rights, and the subsequent erosion of accountability among police officers that the doctrine encourages.

## SUMMARY OF THE ARGUMENT

In October 2017, Priscilla Villarreal was arrested for making a routine journalistic inquiry. Villarreal is a citizen journalist in Laredo, Texas who has gained a large internet following on her Facebook page where she disseminates information about local news, including video and livestreams of local crime and traffic conditions. She has been dubbed one of Laredo's most popular news sources, and

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. No parties object to the filing of this brief.

her reputation and style have earned her the nickname "La Gordiloca." Villarreal has used her platform to criticize the Laredo Police Department (LPD) and local law enforcement, and her livestreaming video coverage has also captured LPD officers in unflattering and controversial situations. Unsurprisingly, local law enforcement were not fans of Villarreal, and both the district attorney and LPD officers eventually engaged in unconstitutional misconduct intended to quell her ongoing criticism.

In the spring of 2017, Villarreal made two posts covering tragic local news stories and, as would be routine for any thorough journalist, reached out to a contact in the LPD to verify the information. Six months later, the police obtained two arrest warrants for Villarreal for violating Texas Penal Code § 39.06(c), which states that "[a] person commits an offense if, with intent to obtain a benefit . . . , he solicits or receives from a public servant information that: (1) the public servant has access to by means of his office or employment; and (2) has not been made public." According to the affidavit in support of the warrants, Villarreal solicited or received "nonpublic information" in the form of the names of victims from her LPD contact and that she benefitted from publishing this information before other news outlets, which helped her gain additional followers on her Facebook page. Once Villarreal learned of the warrants, she turned herself in. During the booking process, LPD officers took pictures of Villarreal in handcuffs and mocked and laughed at her.

After filed a habeas corpus petition to secure her release, she sued various LPD officers, Webb County Prosecutors, Webb County, and the City of Laredo under 42 U.S.C. § 1983. The officials sought to dismiss the claims based on qualified immunity, which was granted by the district court, but a panel of this Court reversed, finding that the officers violated Villarreal's clearly established First and Fourth Amendment rights and therefore were not entitled to qualified immunity. Villarreal's supplemental en banc brief explains in detail why that decision was correct—specifically, that the First Amendment clearly protects the right of people to peaceably ask public officials for information, Br. at 17–21, that the Defendants had fair warning they were violating this right in arresting Villarreal, *id.* at 21–30, and that defendants are not entitled to qualified immunity because arresting Villarreal was obviously unconstitutional, *id.* at 30–40. *Amicus* will not retread those arguments here.

Instead, *amicus* writes separately to elaborate on an aspect of the case that Chief Judge Richman discussed in his dissent—the "independent intermediary doctrine." As Villarreal explains, that doctrine is inapplicable in this case because the Defendants had no basis to seek a warrant in the first place; thus, the mere fact that a magistrate issued a warrant does not preclude liability. Br. at 40–42. More broadly, however, the en banc Court should reconsider the independent intermediary doctrine at a fundamental level, as it is a judge-made immunity that originated in this

Circuit and inconsistent with the text and history of Section 1983. The doctrine also unnecessarily imported concepts from tort law governing private citizens, and it was explicitly rejected by the Supreme Court in *Malley v. Briggs*, 475 U.S. 335 (1986).

As a practical matter, the independent intermediary doctrine places nearly insurmountable obstacles in the way of plaintiffs seeking to vindicate their rights. When combined with qualified immunity, the doctrine offers police officers de facto *absolute* immunity—even if officers violate clearly established rights, they may nonetheless be immune from suit so long as they presented all of the facts to an intermediary that also acted upon them. This creates perverse incentives for law enforcement and prosecutors alike.

Furthermore, plaintiffs seeking to overcome the doctrine and proceed with their claims face uncertain and even impossible to satisfy evidentiary burdens. The doctrine has not consistently allocated the burden to plaintiffs or defendants. Worse yet, the doctrine has at times required plaintiffs to prove that the intermediary actually relied on tainted evidence—an impossible feat when only a judge knows what they relied on when approving a warrant, and when civil rights plaintiffs are legally precluded from obtaining grand jury material.

To the extent that this Court considers the independent intermediary doctrine as relevant to this case, it should modify or abandon it to bring this Court's

precedents in line with the Supreme Court and give plaintiff's a fair chance to vindicate their rights.

## ARGUMENT

### I. This Court's Articulation and Development of the Independent Intermediary Doctrine Is at Odds with Supreme Court Precedent.

The panel was right not to decide this case based on the independent intermediary doctrine.[2] The majority correctly concluded that a reasonable officer would recognize that Villarreal's inquiry to the LPD was journalistic conduct protected by the First Amendment and, therefore, not a valid basis for probable cause. This Court should likewise avoid relying on the doctrine, in part because it conflicts with the Supreme Court's decision in *Malley v. Briggs*, 475 U.S. 335 (1986), as well as the Court's broader approach to governmental immunity in litigation under 42 U.S.C. § 1983.

In determining whether police officers sued under Section 1983 are entitled to qualified immunity, the Supreme Court has held that "[w]here [an] alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, . . . the fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective

[2] Unless otherwise specified, we use term "independent intermediary doctrine" to refer to the Fifth Circuit's line of cases developing this doctrine. *See e.g.*, *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988).

reasonableness." *Messerschmidt v. Millender*, 565 U.S. 535, 546–47 (2012). Though the issuance of a warrant will often "indicat[e] that the officers acted in an objectively reasonable manner," the Court has nevertheless made clear that "'the shield of immunity' otherwise conferred by a warrant" will be lost if "it is obvious that no reasonably competent officer would have concluded that a warrant should issue" based on the lack of probable cause. *Id.* (quoting *Malley*, 475 U.S. at 341, 345).

Notwithstanding this clear directive, the Fifth Circuit has developed an additional form of immunity for police officers in Section 1983 suits alleging Fourth Amendment violations due to insufficient probable cause. This so-called "independent intermediary doctrine" provides that "unless [police] officers lied or omitted facts when they submitted the case for review to an intermediary—a magistrate, judge, prosecutor, or grand jury—that intermediary's independent review insulates the officer from liability even if that officer violated constitutional rights." Amanda Peters, *The Case for Replacing the Independent Intermediary Doctrine with Proximate Cause and Fourth Amendment Review in Sec. 1983 Civil Rights Cases*, 48 PEPP. L. REV. 1, 5 (2021). "Essentially, courts using the doctrine hold that the intermediary's decision to move forward with the case acts as a superseding cause, which breaks the chain of causation from the officer's illegal act to the plaintiff's injuries that flowed as a consequence from that act." *Id.*; *see also*

*Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 553–54 (5th Cir. 2016); *Hand*, 838 F.2d at 1427–28.

This Court first established the doctrine in *Rodriguez v. Ritchey*, 556 F.2d 1185, 1194–1209 (5th Cir. 1977); Peters, *supra*, at 15. In *Rodriguez*, the plaintiff sued after she was wrongly arrested by the FBI in a case of mistaken identity. 556 F.2d at 1188. The government moved for summary judgment arguing that the agents arrested the plaintiff under a good faith belief that she was the true suspect, and the district judge granted the motion. *Id.*

After hearing the case en banc, this Court explained that "if the facts supporting an arrest are put before an intermediate such as a magistrate or a grand jury, the intermediate's decision breaks the causal chain and insulates an initiating party." *Id.* at 1193. This Court affirmed the grant of summary judgment because the plaintiff had been indicted by a grand jury and further concluded that her constitutional rights had not been violated because her innocence did not invalidate the lawfulness of the arrest. *Id.* at 1194; Peters, *supra*, at 16.

"Because the concept of insulation by an intermediate in a civil rights case was borrowed from tort law," the *Rodriguez* Court "cited to an American Law Report (A.L.R.) article written in 1952 about private citizen liability for false arrest as support." Peters, *supra*, at 16; *Rodriguez*, 556 F.2d. at 1194. The court also cited a section of the Restatement (Second) of Torts that "references tort cases with private

citizens who were not civilly liable because they did not persuade or influence the arrest decision." Peters, *supra*, at 16; *Rodriguez*, 556 F.2d at 1190–91, 1192 n.24.

After *Rodriguez*, this Court further applied the doctrine in *Smith v. Gonzalez*, 670 F.2d 522 (5th Cir. 1982), and *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (5th Cir. 1984). Then, in *Malley v. Briggs*, a Rhode Island district court relied on *Rodriguez* and *Smith* when it decided that a police officer was immune from liability after obtaining arrest warrants for twenty-two people based solely on vague references to marijuana use that were overheard on a wiretap. *Briggs v. Malley*, 748 F.2d 715, 715–16 (1st Cir. 1984). The district court "found that the approval of the arrest warrant by the judge removed any causal connection between the acts of the police officer and the damage suffered by the plaintiffs due to their improper arrest" and dismissed the case. *Id.*

On appeal, the First Circuit reversed and rejected the superseding cause rationale imported from *Rodriguez* and *Smith*. The court explained that the "judicial approval of a warrant cannot serve as an absolute bar to the § 1983 liability of the officer who obtained the warrant" and concluded that the objective reasonableness test from *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), was the appropriate test to use. *Briggs*, 748 F.2d at 721 ("Applying the standard of official immunity enunciated in *Harlow*, we hold that only where an officer is 'constitutionally

negligent,' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause, will liability attach.").

On appeal to the Supreme Court, the officer argued that he was absolutely immune from liability from damages and, alternatively, that he was entitled to qualified immunity under the facts of that case. *Malley*, 475 U.S. at 339. The Court rejected both arguments and concluded that "the same standard of objective reasonableness that we applied in the context of a suppression hearing in [*United States v. Leon*, 468 U.S. 897 (1984)] defines the qualified immunity accorded an officer whose request for a warrant caused an unconstitutional arrest." *Id.* at 345. Even though the officer did not pursue the superseding cause argument before the Court, it observed that "[i]t should be clear, however, that the [d]istrict [c]ourt's 'no causation' rationale in this case is inconsistent with our interpretation of § 1983 . . . [because] § 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" *Id.* at 344 n.7 (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *see also* Peters, *supra*, at 21–22.

Significantly, just one year after *Malley*, this Court acknowledged the Supreme Court's rejection of the "no causation" rationale in *United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1308–11 (5th Cir. 1987). In *Burzynski*, the government "seized a doctor's patient-treatment records during an

investigation to determine whether the doctor had violated criminal fraud statutes and a criminal statute forbidding the interstate shipment of drugs that had not been approved by the Food and Drug Administration." *Id.* at 1304. In response, the doctor raised a number of claims including a constitutional tort claim that the government violated the Fourth Amendment when it obtained a criminal search warrant for the premises of his business "for the apparent ulterior purpose of forcing him out of business." *Id.* at 1309.

This Court opened its analysis of the alleged constitutional tort by acknowledging the *Harlow* objective reasonableness standard for qualified immunity that was endorsed in *Malley*. *Id.*; Peters, *supra*, at 22. The opinion then turned to the government's argument that, under the "no causation" rule, it could not be liable for the alleged violation. This Court observed that "Dr. Burzynski counters by *correctly* pointing out that the Supreme Court *rejected* the rationale underlying that broadly-stated rule in *Malley v. Briggs*." *Burzynski*, 819 F.2d at 1309 (emphasis added). This Court concluded that Dr. Burzynski did not allege any misstatements or omissions in the underlying affidavit "that would have obviated probable cause if corrected" and, therefore, he did not demonstrate that the federal agents who obtained the search warrant violated his Fourth Amendment rights. *Id.*

One year after *Burzynski*, this Court decided *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988). "*Hand* involved a stolen truck, a plaintiff who tried to extort money

from the truck's owner, and a state and federal criminal investigation into the plaintiff's act." Peters, *supra*, at 23. "State prosecutors dismissed indictments obtained against Hand, the plaintiff, who then sued the truck's owner and law enforcement agents under § 1983." *Id.* During the pendency of Hand's civil complaint, he was tried and indicted by a federal prosecutor, but was acquitted by the jury. *Id.*; *Hand*, 838 F.2d at 1423. Hand prevailed in his Section 1983 suit which was then appealed by Gary, the original investigating officer for the state. *Hand*, 838 F.2d at 1423. Analyzing Hand's claim for false arrest, this Court explained that "the chain of causation is broken only where all the facts are presented to the grand jury, or other independent intermediary where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information from the independent intermediary." *Id.* at 1428. Notably, the *Hand* opinion "never referenced *Malley* or the *Harlow* standard *Malley* endorsed" nor did it attempt to distinguish *Malley* on its facts. Peters, *supra*, at 24.

Finally, in *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005), a panel of this Court took notice of the tension between *Malley* and *Burzynski* and the rule established in *Hand*. The decision asserted that *Malley*'s language rejecting the "no causation" rule was dicta, and described the holding in *Hand* as "qualified" and emphasized that it was consistent with circuit precedent. *Id.* at 292.

There are at least three problems with this defense of the "no causation" rule. First, the precedents with which *Hand* purported to align included *Smith* and *Rodriguez*, which were decided prior to the Supreme Court's decision in *Malley*, and thus undermined when the Supreme Court stated that it wanted to make "clear" that the district court's no causation rationale was inconsistent with its interpretation of Section 1983. *Malley*, 475 U.S. at 344 n.7. The "no causation" rationale the district court adopted was taken from *Smith* and *Rodriguez* and criticized explicitly by the First Circuit before being rejected by the Supreme Court. Peters, *supra*, at 25.

Second, this Court explicitly acknowledged in *Burzynski* that the Supreme Court "rejected" the "no causation" approach in *Malley*. 819 F.2d at 1309. And finally, "[s]ixteen years before *Rodriguez* was decided, the Supreme Court in *Monroe v. Pape* sought to resolve conflicts among circuits interpreting Section 1983 by holding the Civil Rights Act subjected government agents who acted under color of law to liability for violations of the Fourth Amendment." Peters, *supra*, at 16. This made the creation of a new rule unnecessary. Furthermore, a doctrine that does not read Section 1983 "against the background of tort liability that makes a man responsible for the natural consequences of his actions," *Monroe*, 365 U.S. at 187, conflicts with prior Supreme Court precedent and runs counter to the Court's approaches in *Harlow*, *Leon*, and *Malley*.

In this case, this Court should not rely on the independent intermediary doctrine to reverse the panel's decision. The panel was correct in its conclusion that "a reasonably well-trained officer would have understood that arresting a journalist for merely asking a question clearly violates the First Amendment," and therefore, there was no probable cause for Villarreal's arrest. *Villarreal v. City of Laredo*, 44 F.4th 363, 375 (5th Cir. 2022). Because there was no probable cause, Judge Ho was correct to point out that under *Malley*, the officers are not entitled to qualified immunity nor are they shielded from liability under the independent intermediary doctrine. *Id.* at 380–81 (Ho, J., concurring). To the extent that this Court reexamines this issue more broadly, it should reject the "no causation" rule at a fundamental level because it conflicts with straightforward Supreme Court precedent.

## II. The Independent Intermediary Doctrine Seriously Impairs Plaintiffs' Ability to Vindicate Their Rights.

The independent intermediary doctrine erects a number of roadblocks that stand in the way of plaintiffs seeking a remedy for violations of their constitutional rights. The doctrine has the practical effects of denying de novo appellate review of probable cause and preventing Section 1983 plaintiffs from proceeding to trial. When paired with qualified immunity, the doctrine creates a nearly impenetrable shield for police officers against liability. The doctrine also asks plaintiffs to satisfy impossible evidentiary burdens if they have any hope of overcoming the doctrine.

For these reasons, along with its lack of a textual or historical basis in Section 1983, this Court should not hesitate to modify or abandon this doctrine.

### A. The combination of qualified immunity and the independent intermediary doctrine can create near-absolute immunity for police officers.

When combined with qualified immunity, the independent intermediary doctrine makes the already difficult task of holding government officials accountable for violations of constitutional rights a herculean feat.

Qualified immunity shields government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Over time, the Supreme Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), and stated that "clearly established law must be 'particularized' to the facts of the case," *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In practice, this standard can be incredibly difficult for plaintiffs to meet. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814 (2018).

Adding to the mighty challenge of overcoming qualified immunity is the fact that even if a plaintiff can defeat qualified immunity, the independent intermediary

doctrine "creates added protection for officers by cutting off all future reviews of probable cause after the intermediary becomes involved in the case." Peters, *supra*, at 5, 9. This has the effect of granting police officers a de facto absolute immunity if they can be shielded from liability in all but the rare circumstances where the officers act with demonstrable malice or deliberately mislead the intermediary.

The Eighth Circuit case of *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014), illustrates this point well. In *Snider*, it was undisputed that the defendant police officer clearly violated the plaintiff's First Amendment rights by arresting him for violating a Missouri statute prohibiting flag desecration. Despite not receiving qualified immunity, the officer argued that he should nonetheless be insulated from liability because he was acting pursuant to a warrant. *Id.* at 1154. The district court rejected that argument and the Eighth Circuit affirmed. *Id.* at 1154–57. The Eighth Circuit identified no malice or misdirection of the intermediary by the officer, but had the officer prevailed based solely on the fact that he presented his probable cause to a judge who issued a warrant, there would have been no way to hold him accountable for violating the plaintiff's First Amendment rights. *See also Kugle v. Shields*, No. 93-5567, 1995 LEXIS 42899, at *10–13 (5th Cir. July 7, 1995) (recognizing the implication that immunity based purely on grand jury indictment which breaks the causal chain is akin to absolute immunity). The Supreme Court has already decided that police officers are not entitled to absolute immunity. *See*

*Malley*, 475 U.S. at 341. If this Court were to adopt Chief Judge Richman's dissenting view—that, because this is not a case in which the defendants tainted the intermediary's decision-making process, the court should therefore find that the independent intermediary doctrine applies, *Villarreal*, 44 F.4th at 390–91 (Richman, C.J., dissenting)—it would create precisely the outcome that *Snider* avoided.

The Supreme Court has recognized that "ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should." *Malley*, 475 U.S. at 345–46. In this case, as in *Snider*, the police approached an intermediary seeking to arrest Villarreal for conduct that is clearly protected under the First Amendment. The fact that the magistrate also incorrectly found probable cause should not confer absolute immunity to the officers. "De novo probable cause determinations require independent review by appellate courts 'to maintain control of, and to clarify, the legal principles' because an appellate court's primary function is to be 'an expositor of [the] law." Peters, *supra*, at 55 (quoting *Ornelas v. United States*, 517 U.S. 690, 697–98 (1996)). By hewing to *Malley*'s objective reasonableness standard, this Court would better safeguard constitutional rights, maintain doctrinal clarity, and not grant police officers near-total immunity for violations of constitutional rights.

### B. The independent intermediary doctrine requires plaintiffs to satisfy impossible evidentiary burdens in order to vindicate their rights.

The independent intermediary doctrine's unclear burden-shifting framework places plaintiffs in positions where it becomes impossible to satisfy their burden. In *Hand v. Gary*, this Court articulated a clear standard for malicious prosecution cases: "when plaintiff raises a prima facie case of malicious prosecution, the burden shifts to defendant to show that his actions were not the product of improper motivation." 838 F.2d at 1426; *see also* Peters, *supra*, at 29. But *Hand* left the burden of proof for false-arrest claims much less clear, and cases within this Circuit have articulated and assigned the burden of proof inconsistently. *See* Peters, *supra*, at 29.[3]

Generally speaking, however, the plaintiff carries the burden of evidence in false arrest cases, which is then subject to subtle variations across cases. *See id.* at 30–33. In its most onerous form, the burden of evidence requires that plaintiffs prove that the intermediary actually relied upon false information.[4] Many cases require plaintiffs offer evidence of taint,[5] or that the tainted evidence was presented to the intermediary.[6] Yet other cases have held that plaintiffs must "allege facts that raise

[3] Compare *Shields v. Twiss*, 389 F.3d 142, 147–48 (5th Cir. 2004) (suggesting that, in false arrest cases, the burden of evidence is first placed on the defendant), *with Taylor v. Gregg*, 36 F.3d 453, 457 (5th Cir. 1994) (holding that, to meet their burden in false arrest cases, the plaintiff must show that an intermediary actually relied on false information).

[4] *See, e.g.*, *Taylor*, 36 F.3d at 457; Peters, *supra*, at 31 & n.229 (citing cases).

[5] *See, e.g.*, *Buehler*, 824 F.3d at 554–55; Peters, *supra*, at 31 & n.230 (citing cases).

[6] *See, e.g.*, *Jennings v. Patton*, 644 F.3d 297, 301 (5th Cir. 2011); Peters, *supra*, at 31 & n.231 (citing cases).

a plausible claim or reasonable inference that there was no probable cause or that the intermediary's decision was tainted." Peters, *supra*, at 32.[7]

Simply put, the practical reality of this doctrine is that plaintiffs find themselves expected to produce evidence they cannot access or that has no record. Peters, *supra*, at 33. The Supreme Court has observed that it is "unrealistic" to expect a prosecutor to admit that he merely acted as a rubber stamp or disclose retaliatory thinking or intentions when seeking an indictment. *Hartman v. Moore*, 547 U.S. 250, 264 (2006). Nevertheless, plaintiffs are expected to identify the prosecutor's malfeasance and prove that the intermediary relied upon tainted evidence. It is equally difficult to prove what an intermediary relied upon, because, for example, "[w]hen [a] magistrate makes her decision, there is no court reporter present or notes kept as to what the magistrate heard or knew, aside from the facts presented in the warrant affidavit." Peters, *supra*, at 34. Additionally, it is unlikely that the magistrate will explain to the officer seeking the warrant what she relied upon in making her decision and instead just opt to sign or not sign the warrant. *Id.*

The proceedings of grand juries are also inaccessible to civil rights plaintiffs. Grand jury proceedings are secret and the members of the jury are sworn to secrecy. *Id.* at 35. Additionally, if grand jury proceedings are recorded in some manner, the

[7]*See also Shaw v. Villanueva*, 918 F.3d 414, 416 (5th Cir. 2019) (describing standard to survive motion to dismiss).

law imposes an onerous burden on the party seeking the records, and the need for evidence in civil rights cases generally will not satisfy the burden. *Id.*; *see also Shields*, 389 F.3d at 147–48 (rejecting a plaintiff's attempt to depose grand jurors in order prove that information was withheld from the grand jury, noting that "[w]hile a party can in limited circumstances obtain grand jury material by showing a particularized need, the need for protection of the workings, integrity, and secrecy of grand jury proceedings is a well-established, long-standing public policy.").

Plaintiffs seeking to hold government officials accountable for their constitutional wrongs already must thread the needle of qualified immunity by identifying circuit precedent with similar factual circumstances in order to claim that their rights were clearly established. This court should not also require them to adduce evidence that in most cases will be impossible to acquire.

## CONCLUSION

The panel in this case correctly determined that Villarreal's First and Fourth Amendment rights were so obviously violated that the officers were not entitled to qualified immunity. This Court does not need to consider the independent intermediary doctrine en banc, but if it chooses to do so, the doctrine should be modified or rejected to accord with both Supreme Court precedent and the text and history of Section 1983, and to leave the courthouse doors open for citizens whose rights have been violated.

Respectfully submitted,

DATED: December 12, 2022

*/s/ Jay R. Schweikert*

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 4,632 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ *Jay R. Schweikert*

December 12, 2022

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Jay R. Schweikert*

December 12, 2022