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 TREVINO, JR.; JUAN L. RUIZ; DEYANRIA VILLARREAL; ENEDINA MARTINEZ; ALFREDO GUERRERO; LAURA MONTEMAYOR; DOES 1-2,

***Defendants-Appellees*.**

On Appeal from the United States District Court for the Southern District of Texas, Laredo Division, Civil Action No. 5:19-CV-48

BRIEF OF *AMICI CURIAE* OF THE TEXAS PRESS ASSOCIATION, TEXAS ASSOCIATION OF BROADCASTERS, FREEDOM OF INFORMATION FOUNDATION OF TEXAS, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE TEXAS TRIBUNE, THE DALLAS MORNING NEWS, THE NATIONAL ASSOCIATION OF HISPANIC JOURNALISTS, AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF APPELLANT PRISCILLA VILLARREAL

Paul Watler
Maggie Burreson
Jackson Walker LLP
2323 Ross Avenue, Suite 600
Dallas, Texas 75201

Telephone: (214) 953-6000
pwatler@jw.com
mburreson@jw.com

Counsel for Amici Curiae

SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

1. No. 20-40359, *Priscilla Villarreal v. The City of Laredo, Texas et al.*

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

Amici Curiae

The Texas Press Association,
Texas Association of Broadcasters,
Freedom of Information Foundation of Texas,
Reporters Committee for Freedom of the Press,
The Texas Tribune,
The Dallas Morning News,
National Association of Hispanic Journalists, and
Society of Professional Journalists

Counsel for *Amici Curiae*

Paul Watler (Jackson Walker LLP)
Maggie Burreson (Jackson Walker LLP)

Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that The Dallas Morning News is a wholly-owned subsidiary of The Dallas News Company, Inc., which is publicly traded. All other amici curiae are not publicly held corporations and do not have any parent corporation, and no publicly held corporation owns 10 percent or more of any corporation's stock.

Amici's Motion for Leave to File Brief of Amici Curiae is being filed in conjunction with this brief.[1]

/s/ Paul Watler
Paul Watler

[1] Pursuant to Fed. R. App. P. 29(a)(4), Amici certify that counsel for Amici authored this brief in whole; that no counsel for a party authored this brief in any respect; and that no person or entity, other than amici and their counsel, contributed monetarily to this brief's preparation or submission.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

This brief is filed on behalf of the Texas Press Association, the Texas Association of Broadcasters, the Freedom of Information Foundation of Texas, the Reporters Committee for Freedom of the Press, the Texas Tribune, the Dallas Morning News, the National Association of Hispanic Journalists, and Society of Professional Journalists. As set forth more fully in the accompanying Motion for Leave to File Brief of Amici Curiae, Amici are eight organizations that represent the interests of journalists and other citizens who rely on access to information from government agencies to fulfill their professional and civic responsibilities. They share a concern for the ability to gather information from public employees without fear of retaliatory arrest and prosecution, which the District Court decision put at risk. On appeal to the Fifth Circuit, the panel majority distilled what should be obvious—that it is a violation of the First Amendment to imprison journalists for simply asking questions of their government. Amici have a shared interest in seeing the panel opinion's reasoning, which protects the constitutionally-envisioned role of the press, adopted by the entirety of the Fifth Circuit sitting *en banc*.

I. INTRODUCTION

"It is not a crime to be a journalist." *Villarreal v. City of Laredo, Tex.*, 44 F.4th 363, 367 (5th Cir. 2022), *reh'g en banc granted, opinion vacated*, 52 F.4th 265 (5th Cir. 2022). Or, at least, it should not be. The troubling facts of this case and the district court's alarming application of qualified immunity to them call the legality of basic journalism into question.

The grave risks posed here require amici to petition this Court, in its entirety, to reaffirm what the panel majority importantly held: "it should be patently obvious to any reasonable police officer that [arresting a journalist for asking the police questions] constitutes a blatant violation of Villarreal's constitutional rights. And that should be enough to defeat qualified immunity." *Id*. at 371. If the First Amendment stands for anything, it is the fundamental truth that the people, and the press on behalf of the people, must be able to ask questions of government officials without fear of harassment, prosecution, or imprisonment. The long-standing experiment in American democracy is premised on the right to both participate in, and critique, the government. The ability to both be a participant in and a critic of one's government presupposes a right to ask questions of it. Because each individual person does not have the means, time, and resources for holding the government accountable, the press—whether formal institutions or citizen journalists—take the baton to serve as a voice for the people. The actions of the police department in this

case, and the sanctioning of their conduct by the district court, put at risk this democratic scheme of free speech and free press envisioned by the Founders. Tea did not end up in the Boston harbor, Madison did not pen radical notions of free liberty into the Bill of Rights, and Hamilton did not write like he was running out of time[2] in order to convince the public to reformulate American democracy with the understanding that citizens would face jail time for simply asking questions of the government.

The arrest of press members, no matter their institutional affiliations (or lack thereof), for routine acts of newsgathering stands so starkly in contrast with the tenets of freedom of speech and of the press that no prior case of the same ilk need have been decided for police officers to be put on notice of the illegality of such an arrest. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002). To hold otherwise leaves journalists dangerously exposed to harassment, arrest, and prosecution by officers intent on suppressing unfavorable coverage, and risks leaving the American people without a voice. Such a result cannot stand. Amici implore this Court to uphold the robust free speech and free press protections enshrined in the Bill of Rights and reaffirmed over centuries in case law.

[2] Lin-Manuel Miranda, *Non-Stop*, *on* HAMILTON: AN AMERICAN MUSICAL [ORIGINAL BROADWAY CAST RECORDING] (Atlantic Recording Corp. 2015).

II. BACKGROUND

Amici will not reiterate in detail the facts extensively set forth in the District Court's opinion, the panel majority opinion, and the parties' briefs. In short, this case involves a campaign of harassing behavior by representatives of the City of Laredo Police Department directed toward a citizen journalist/blogger, Priscilla Villarreal, whose aggressive coverage of crime news in Laredo gained her nationwide recognition[3] but earned her the enmity of some within the Department. ROA.158-162. The Complaint sets forth a pattern of retaliation against Villarreal culminating in her arrest on spurious charges of violating Texas Penal Code Section 39.06(c). ROA.163-167. That statute was intended to penalize corrupt behavior like bid-rigging and cannot plausibly be applied to routine acts of journalistic fact-gathering.[4] Because this arrest portends the greatest danger for other journalists, watchdogs, and commentators, Amici will focus on the erroneous dismissal, on qualified immunity grounds, of Villarreal's First Amendment claim arising out of the unfounded arrest.

The (since-dismissed) indictment alleged that Villarreal violated § 39.06(c) because she asked a police officer, Barbara Goodman, to confirm the name of a U.S.

---

[3] *See* Derek Hawkins, *Popular Texas blogger scooped police on a story. They charged her with 2 felonies, searched her phone records*, THE WASH. POST (Dec. 22, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/12/22/popular-texas-blogger-scooped-police-on-a-story-so-they-charged-her-with-2-felonies/.

[4] Texas Penal Code § 39.06(c) provides that a person commits the offense of "misuse of official information" if, "with intent to obtain a benefit or with intent to

Border Patrol agent who committed suicide and the name of a family involved in a fatal car crash without going through the formalities of filing a Texas Public Information Act ("TPIA") request. ROA.166 [¶¶ 65-66]. The indictment alleges Villarreal made these inquiries to Goodman for purposes of obtaining the "benefit" of notoriety and popularity for her Facebook page, which she uses as an informal news-blogging platform. The sum total of Villarreal's alleged "wrongdoing" was asking a government official about matters of undeniable public concern that inevitably were soon to be publicly announced and which Villarreal already had obtained through other sources. The purportedly wrongfully obtained information was newsworthy information that the First Amendment entitled Villarreal to gather and publish. The District Court erred in finding that a reasonable officer could have been confused about the illegality of arresting a journalist for simply asking a government official for information.

The Fifth Circuit panel, in a decision authored by Judge Ho, corrected the District Court's error. The panel majority succinctly stated the ultimate holding that Amici ask this Court to avow: "If the First Amendment means anything, it surely

---

harm or defraud another, 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." In a March 28, 2018, bench ruling, a Webb County District Court judge found the statute unconstitutionally vague. *See Villarreal v. City of Laredo, Tex.*, No. 5:19-CV-48, 2020 WL 13517246, at *4 (S.D. Tex. May 8, 2020) (hereinafter, "Dist. Ct. Op.").

means that a citizen journalist has the right to ask a public official a question, without fear of being imprisoned." *Villarreal*, 44 F.4th at 367.

III. DISCUSSION AND CITATION TO AUTHORITY

A. The "Misuse of Official Information" Statute Plainly Does Not and Constitutionally Cannot Apply to a Journalist Gathering News

The press's ability to seek information—even non-public information—from government officials without fear of imprisonment lays squarely within the freedom of the press protected by the First Amendment. As the panel opinion pointed out, "If [putting a journalist in jail for asking a police officer a question] is not an obvious violation of the Constitution, it's hard to imagine what would be." *Villarreal*, 44 F.4th at 367.

For more than the past half-century, the U.S. Supreme Court has firmly established the First Amendment right to seek and publish information obtained from government sources, even if those sources themselves breached a duty or even broke the law. The typical qualified immunity requirement of a case with "factually similar circumstances" does not apply where the constitutional violation is "obvious" even in "novel" factual circumstances. *Id*. at 370 (cleaned up). The District Court erred in concluding otherwise. Dist. Ct. Op. at 13-14.

1. The Right to Gather and Report on Issues of Public Concern Is Obvious and Well-Established

One of the most famous cases in all of First Amendment jurisprudence, *New York Times Co. v. United States*, 403 U.S. 713 (1971), stands for the clear proposition that a news organization has a right to publish newsworthy information furnished by a government source -- in that case, a Defense Department contractor who authored the "Pentagon Papers" history of the Vietnam war -- even when the source breached confidentiality to share the information. The panel majority insightfully posits: "If the government cannot punish someone for *publishing* the Pentagon Papers, how can it punish someone for simply *asking* for them?" *Villarreal*, 44 F.4th at 371 (emphasis in original). The answer is simple: it cannot.

The "Pentagon Papers" case is just one of the many recognizing the right of the press to obtain information from an official, albeit unauthorized, source in order to serve as a check on abuse of governmental power or lack of transparency. Seymour Hersh used confidential Pentagon sources in exposing the cover-up of the Mai Lai Massacre committed by American soldiers during the Vietnam war.[5] Bob Woodward and Carl Bernstein famously relied on a confidential informant within

[5] Ian Shapira, *'It Was Insanity': At Mai Lai, U.S. Soldiers Slaughtered Hundreds of Vietnamese Women and Kids*, THE WASH. POST (Mar. 16, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/03/16/it-was-insanity-at-my-lai-u-s-soldiers-slaughtered-hundreds-of-vietnamese-women-and-kids/.

the FBI, "Deep Throat," to break the Watergate scandal.[6] In 2004, the press reported on internal memos written by Department of Justice officials exposing interrogation tactics by the CIA and Department of Defense largely regarded as torture.[7] All of these examples stress the importance of the press's ability to ask for and publish information of public concern about the government, regardless of the source.

The officers cannot feign ignorance of the foundational constitutional principle to seek and publish newsworthy information from a government source, which the Supreme Court has reaffirmed repeatedly, striking down statutes similar to § 39.06 when used to criminalize routine acts of gathering and publishing news. *See Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 106 (1979) (First Amendment prohibits a state from criminalizing journalistic publication of a minor's name obtained in the course of a legal proceeding); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (First Amendment precludes state from imposing even civil remedies for the truthful publication of name of rape victim obtained from police records). The

---

[6] David Von Drehle, *FBI's No. 2 Was 'Deep Throat': Mark Felt Ends 30-Year Mystery of The Post's Watergate Source*, THE WASH. POST (June 1, 2005), https://www.washingtonpost.com/politics/fbis-no-2-was-deep-throat-mark-felt-ends-30-year-mystery-of-the-posts-watergate-source/2012/06/04/gJQAwseRIV_story.html.

[7] *See* Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, THE WASH. POST (June 8, 2004), https://www.washingtonpost.com/archive/politics/2004/06/08/memo-offered-justification-for-use-of-torture/17910584-e7c3-4c8c-b2d1-c986959ebc6a/; Jess Bravin, *Pentagon Report Set Framework For Use of Torture*, WALL ST. J. (June 7, 2004), https://www.wsj.com/articles/SB108655737612529969.

Florida Star case expressly recognizes the First Amendment right of journalists to use information gathered from police even if the police made a mistake and violated their own policies in releasing the information. *See id*. ("That appellant gained access to the information in question through a government news release makes it especially likely that, if liability were to be imposed, self-censorship would result."). This is, at worst, what happened in this case. Villarreal obtained and published the identity of a suicide victim and the victims of a fatal car crash that (Appellees contend) Villarreal's police source erred in confirming to her.

Even if the officer who disclosed information to Villarreal was releasing that information outside of her authority, that still cannot plausibly convert the act of *asking* for the information for purposes of publishing news into a crime.

In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Supreme Court affirmed that journalists have a First Amendment right to publish information about matters of public concern, even if the information was obtained by a source who broke the law. In that case, a source intercepted and recorded a phone call in which a labor-union leader suggested violence might be used against an opponent. Indeed, as the Court affirmed, the journalist's right to publish is protected even if the journalist knows that the information was unlawfully obtained by the source, such as, in *Bartnicki*, in violation of federal wiretapping law. *Id.* at 525; *see also Jean v. Mass. State Police*, 492 F.3d 24, 31-33 (1st Cir. 2007).

As the panel majority aptly observed, "if freedom of the press guarantees the right to publish information from the government, then it surely guarantees the right to ask the government for that information in the first place." *Villarreal*, 44 F.4th at 371. Other cases affirm that, alongside the right to publish newsworthy information, the right to gather and receive that information is similarly well established. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Court reaffirmed the right to receive information as a necessary adjunct of the right to distribute it: "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Id*. at 756. Thus, it is of no consequence whether the officer had a right to share the information; what matters is that, beyond question, Villarreal had a constitutional right to request it.

This Circuit has strongly affirmed journalists' right to ask for important information. "The First Amendment's broad shield for freedom of speech and of the press is not limited to the right to talk and to print. The value of these rights would be circumscribed were those who wish to disseminate information denied access to it, for freedom to speak is of little value if there is nothing to say." *In re Express-News Corp*., 695 F.2d 807, 808 (5th Cir. 1982) (holding it was unconstitutional for district court to prohibit interviewing jurors). "News-gathering is entitled to First Amendment protection, for 'without some protection for seeking out the news,

freedom of the press could be eviscerated.'" *Id*. (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)) (cleaned up); *see also Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 64 (Cal. Ct. App. 1986) ("The news gathering component of the freedom of the press—the right to seek out information—is privileged at least to the extent it involves 'routine reporting techniques.' . . . Such techniques, of course, include asking persons questions, including those with confidential or restricted information.").

Villarreal's conduct "is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (quoting *Wood v. Georgia*, 370 U.S. 375, 388 (1962)) (the First Amendment does not allow criminal punishment of a publisher for divulging truthful information regarding confidential proceedings of a judicial review commission investigating a judge's conduct). Villarreal is a citizen journalist whose Facebook page provides a valued source of information for over 120,000 followers on local news and events, at a time when mainstream news organizations are increasingly stretched thin to cover community news. An essential part of all journalistic inquiry is the ability to ask public officials relevant questions on the news they report. It would represent a gross infringement on the freedom of the press and stymie accurate newsgathering if journalists were chilled by fear of prosecution from even approaching public officials with questions.

Yet, that was the exact goal of the Laredo Police Department, whose officers ridiculed and recorded Villarreal—an ardent critic of that same police force—as they booked her. ROA.172 [¶ 97]. "If that is not an obvious violation of the Constitution, it's hard to imagine what would be." *Villarreal*, 44 F.4th at 367.

2. Because Villarreal's Right Is Obvious, Qualified Immunity Cannot Shield the Government Actors

"It should be patently obvious to any reasonable police officer that the conduct alleged in the complaint constitutes a blatant violation of Villarreal's constitutional rights. And that should be enough to defeat qualified immunity." *Villarreal*, 44 F.4th at 371. Even if no "identical twin" factual situation appears in the casebooks, the result remains the same. *See Hope*, 536 U.S. at 741. To allow the officers to evade consequences for such an outlandish misapplication of the statute would, perversely, "reward" government officials who invent outrageous ways of misusing their authority that no sensible person would ever have tried before.

Some violations are so palpable that courts hold that common sense alone is enough to put the defendants on notice that they were acting unlawfully. *See Keating v. City of Miami*, 598 F.3d 753, 766–67 (11th Cir. 2010) (despite lack of factually identical case law, police officers violated clearly established First Amendment law when they directed subordinate officers to disperse peaceful protest by herding demonstrators, beating them with batons, and pepper spraying and tear-gassing them); *Hope*, 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct

violates established law even in novel factual circumstances"); *Casteel v. Piesche*k, 3 F.3d 1050, 1053 (7th Cir. 1993) (qualified immunity may be overcome either by on-point legal precedent or by "evidence that the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts"); *Saltz v. City of Frederick, MD*, 538 F. Supp. 3d 510, 551-52 (D. Md. 2021) (despite lack of identical prior case law, court denied qualified immunity to officers who engaged in obviously unconstitutional content discrimination against demonstrators). This is such a case.

Granting qualified immunity here is also at odds with the premise for applying qualified immunity to police officer conduct: allowing officers in dangerous situations to make split-second decisions. *See Villarreal*, 44 F.4th at 371. In stark contrast, the Laredo police officers' conduct was a well-orchestrated, pre-planned decision to arrest a citizen journalist—and, not coincidentally, police critic—that those same officers disliked. *See Hoggard v. Rhodes*, —— U.S. ——, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting denial of cert.) ("But 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?").

The Laredo officers' conduct was "objectively unreasonable" and "a reasonable official would understand that what he is doing violates a constitutional

right." *Villarreal*, 44 F.4th at 367 (cleaned up). That the Laredo officers were relying on § 39.06 – before it was declared invalid – does not shield them from liability, because the statute was "so obviously unconstitutional" when applied to a journalist that the Court can "require officials to second-guess the legislature and refuse to enforce an unconstitutional statute—or face a suit for damages if they don't." *Lawrence v. Reed*, 406 F.3d 1224, 1232 (10th Cir. 2005) (denying qualified immunity to police officers who seized vehicles from landowner's property without the notice or hearing, in reliance on a facially flawed ordinance authorizing the impoundment of derelict vehicles: "[O]fficers can rely on statutes that authorize their conduct—but not if the statute is obviously unconstitutional."). The panel majority cited *Lawrence* for this exact proposition. *See Villarreal*, 44 F.4th at 372.

The panel majority correctly explained that qualified immunity does not apply "where the official attempts to hide behind a statute that is 'so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.'" *Id*. (quoting *Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979))). Indeed, while officers can generally rely on statutes and be presumed to act reasonably, "an official may nevertheless be liable for enforcing a statute that is 'patently violative of fundamental constitutional principles.'" *Carey*, 279 F.3d at 881 (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994)). Based on the robust case

law established above, this is one such statute, and qualified immunity should not shield the officers.

3. Qualified Immunity Is Especially Inappropriate Given the Unique First Amendment Protection to Gather Information About the Police

The First Amendment right to gather news applies with special force to police activity. This Circuit has recognized that the activities of police are of such unique public importance that the First Amendment clearly protects the right to record police conducting official business in public. *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017). The ruling turned on the Court's recognition that the First Amendment must necessarily constrain police from limiting the universe of information about policing available to the public. *Id*. at 688.

The Court in *Turner* emphasized the singular value of freedom to gather and share information that, as in this case, informs the public about the activities of police: "Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs." *Id*. at 689 (internal quotes and citation omitted); *see also Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 837 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (2021) (statute criminalizing secretly recording police violates First Amendment); *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) ("[R]ecording police activity in

public falls squarely within the First Amendment right of access to information."); *City of Houston, Tex. v. Hill*, 482 U.S. 451, 462-63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.").

If recording the police is a protected method of newsgathering, then Villarreal's action of asking the police officer a question should raise even less concern. This point is especially prescient given the actual facts of this case. Laredo officials had never brought a Section 39.06 enforcement in its nearly three-decade history. ROA.181–82 [¶ 141], ROA.187 [¶¶ 177–78]. "So make no mistake: There's no way the police officers here would have ever enforced § 39.06(c) against a citizen whose views they agreed with, and whose questions they welcomed." *Villarreal*, 44 F.4th at 382 (Ho, J., concurring). The district court's holding and the dissent's position open the door to allow police to selectively jail, pursuant to a clearly unconstitutional statute, only those with whom they disagree. That is an authoritarian reality the First Amendment is meant to guard against:

> It's bad enough when private citizens mistreat others because of their political views. It's beyond the pale when law enforcement officials weaponize the justice system to punish their political opponents. One is terrible. But the other is totalitarian.

Id.

4. The District Court and Dissent's Reasoning Should Not Prevail

The district court granted qualified immunity to the officers, finding that "39.06(c) was not so patently or obviously unconstitutional that no reasonable law enforcement officer could have believed that their enforcement of the statute against the Plaintiff was constitutional." Dist. Ct. Op. at *14. The dissent agreed. *See Villarreal*, 44 F.4th at 383-84 (Richman, J., dissenting in part). The dissent emphasized that "[i]t would be reasonable for a law enforcement officer to think that there was an economic benefit to attracting readers or viewers." *Villarreal*, 44 F.4th at 383-84 (Richman, J., dissenting in part). Even if we assume so, the analysis does not end there – nor could it.

Even if a journalist, whether a citizen journalist or a traditionally employed journalist, "receives an economic benefit" from their reporting, the ample case law laid out above forecloses any reasonable officer from concluding that they can arrest a journalist for engaging in newsgathering activities, even where that newsgathering involved the distribution of nonpublic information or the journalist is compensated generally for her journalistic endeavors. The district court cited—and evaluated—that ample case law, but determined that the cases were not factually similar enough to overcome qualified immunity. Dist. Ct. Op. at *13-14. But, as established above, when a constitutional violation is patently obvious, an identical twin case is not required.

The dissent says it "is asking a lot of law enforcement officers" to avoid applying a statute in a way that violates the Constitution. *Id*. at 389. But that is exactly what the Constitution requires. *See Villarreal*, 44 F.4th at 381 (Ho, J., concurring) ("We don't just ask—we require—every member of law enforcement to avoid violations of our Constitution. As well we should, given the considerable coercive powers that we vest in police officers."). The Constitution's undeniable and well-established precedents both render the Laredo officers' conduct improper and foreclose the application of qualified immunity.

B. Journalists Do Not Engage in Illicit "Gain" Proscribable by State Law by Accepting Sponsorships or Advertisements

Police could not have reasonably believed that § 39.06 applies to Villarreal for the additional reason that the statute penalizes exploiting ill-gotten government information for profit. The affidavit in support of the arrest warrant alleged that the "benefit" Villarreal received in exchange for this allegedly ill-gotten information was gaining additional followers on her Facebook page. ROA.171–72. The First Amendment does not permit treating a news blog, like Villarreal's Facebook page, as an exchange of information for illicit financial gain. Nor could the authors of this statute—enacted nearly three decades ago—have possibly intended for the "benefit"

to encompass someone who obtains more followers on Facebook, which was not even invented until 2004.[8]

Yet, even if Villarreal were employed by a traditional news organization, the "profit" made by that news organization—or the salary paid to its employed journalist—could not constitute a "benefit" sufficient to allow prosecution under the statute. The Texas courts have already dealt with this issue in an analogous context, rejecting as groundless an argument that newspapers do not qualify for protection against nuisance suits under the state's anti-SLAPP statute, Tex. Civ. Prac. & Rem. Code § 27.001 *et seq.*,[9] because newspapers are sold for a profit. The First District Court of Appeals readily discounted the claim that, just because newspaper publishers make money, their speech arises out of a commercial sale or lease, so as to be unprotected by the statute: "To read news content to constitute statements 'arising out of the sale or lease' of newspapers would swallow the protections the statute intended to afford; such a construction does not match the statute's dual purpose of safeguarding the right to speak, associate, and to petition the

[8] *See* Mythili Devarakonda, *'The Social Network' When was Facebook created? How long did it take to create Facebook?*, USA TODAY (July 25, 2022, 12:00 PM), https://www.usatoday.com/story/tech/2022/07/25/when-was-facebook-created/10040883002/.

[9] "SLAPP" is a common shorthand for Strategic Lawsuit Against Public Participation, meaning a suit brought for the purpose of harassing or intimidating a speaker from refraining from constitutionally protected speech.

government(.)" *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 89 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) *disagreed with on other grounds by Castleman v. Internet Money Ltd*., 546 S.W.3d 684 (Tex. 2018). *See also Virginia State Bd. of Pharmacy*, 425 U.S. at 761 ("It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it …Speech likewise is protected even though it is carried in a form that is 'sold' for profit."). So, too, would it be inconsistent to allow for the punishment of journalists under a statute meant to target corruption within government, when journalists are often those responsible for exposing that very same corruption to the public.

The historical use of § 39.06 demonstrates that it exists not to penalize the incidental gain of notoriety, sponsorships, donations or other benefits that might incidentally result from being a good reporter, but the actual exchange of ill-gotten information for an undeserved benefit. In *Reyna v. State*, No. 13-02-00499-CR, 2006 WL 20772 (Tex. App.—Corpus Christi Jan. 5, 2006, pet. ref'd, untimely filed) (mem. op.) (not designated for publication), the Court of Appeals affirmed the conviction under § 39.06(a) of a city administrator who used his position to forge competing bids for city projects, to give the appearance of rewarding the lowest bid to a contractor while pocketing some of the funds for the project. In *Tidwell v. State*, No. 08-11-00322-CR, 2013 WL 6405498 (Tex. App.—El Paso Dec. 4, 2013, pet.

ref'd) (not designated for publication), the court affirmed the conviction of a former county attorney who abused his position to obtain access to confidential complaints submitted to the Texas Medical Board about a county hospital, for the illicit purpose of taking retaliatory action against the nurses who filed the complaints.

These cases demonstrate the legitimate scope and purpose of § 39.06, which is to prosecute corrupt government officials, and those who work hand-in-glove with them, who abuse their access to information for illegitimate ends. None of this remotely applies to Villarreal or to any blogger or journalist. Unlike a person who misuses confidential information to obtain kickbacks or to prosecute a whistleblower, Villarreal's objective (sharing newsworthy information on Facebook) was entirely lawful and legitimate. As she maintains, "she acted not to obtain economic gain, but to be a good journalist [by seeking] 'corroborating information' to confirm what she" already knew. *Villarreal*, 44 F.4th at 372. "She only wanted further confirmation before publication—what a purely economically motivated actor wouldn't need, but precisely what a good journalist would require." *Id*.

Punishing Villarreal for asking a public official for corroborating information on newsworthy events of public concern does not serve the statute's purpose of discouraging government officials from taking advantage of their position. It instead discourages journalists from seeking information needed to properly inform the

public. This poses two risks: first, a risk of chilling speech altogether because a journalist does not want to try to confirm information with the government for fear of prosecution; second, a risk that journalists will publish inaccurate information because, again, they fear prosecution for asking the government to confirm other sources. Neither risk is one this Court should be willing to sanction.

While Villarreal's activity may seem to differ from traditional forms of news media, the reality is that the established industry of disseminating news is changing. As of September 2022, not one of the 10 most-visited websites in the United States is a traditional news site, but four of the top 10 are platforms for user-generated social sharing of information and ideas: YouTube, Reddit, Facebook, and Twitter.[10] Nonprofit news websites, which (like Villarreal's Facebook page) depend on donations and sponsorships, represent a rapidly growing sector of the information economy.[11] The fact that Villarreal presents and distributes the information she gathers in a nontraditional way does not deprive her of the full benefit of the First

---

[10] *Top 100: The Most Visited Websites in the US*, SEMRUSH, https://www.semrush.com/blog/most-visited-websites/ (last visited Nov. 22, 2022).

[11] Christine Schmidt, *This is the state of nonprofit news in 2018*, NIEMAN LAB (Oct. 2, 2018), https://www.niemanlab.org/2018/10/this-is-the-state-of-nonprofit-news-in-2018/ (last visited Sept. 8, 2020); *see also* Chris O'Donnell, *A decade in, the Texas Tribune pursues the rest of its audience*, COLUMBIA JOURNALISM REVIEW (Sept. 5, 2018), https://www.cjr.org/united_states_project/texas-tribune-strategic-plan.php (last visited Sept. 8, 2020) (reporting that, a decade after the Austin-based nonprofit news site's launch, "a monthly average of 1.9 million people read reporting that originates in the Tribune newsroom").

Amendment. Nor is the intimidating shadow cast by the district court's decision limited to social-media denizens like Villarreal; a rule that allows police to make "good-faith-mistaken" arrests for seeking and publishing information from government sources will chill newsgathering across the field of reporting, no matter the platform.

The dissent's recitation of Villarreal's receipt of the occasional free meal, small donations,[12] and an increased Facebook following as "benefits" covered by the statute reinforces the risk to not only citizen journalists like Villarreal but traditional news organizations that operate as for-profit corporations, have advertisers, and pay salaries to their journalists. The logical conclusion from the dissent's reasoning is that a journalist employed by a traditional news organization would also risk jail time for asking questions of her governmental institutions because of the mere fact that she receives a salary for working as a reporter. The dissent even acknowledges this. "[T]he statute does not exclude journalists [who] generally gather information 'with intent to benefit,' for example, to sell newspapers or magazines, or to attract viewers on television, computer, iPad or smart-phone screens." *Villarreal*, 44 F.4th at 383-84 (Richman, J., dissenting in part).

[12] Notably, the affidavit supporting the arrest only addressed her increased Facebook following.

Judge Ho, in his concurrence at the panel level, succinctly identifies this disturbing possibility:

> It's not clear why the dissent finds those free meals fatal. Other journalists are paid full salaries by their media outlets. And they talk to government sources about non-public information, too. Should they be arrested, too? Surely not.
>
> Yet that's precisely (if alarmingly) what the dissent seems to have in mind.

Villarreal, 44 F.4th at 380 (Ho, J., concurring). Accepting the dissent's reasoning would make it "a crime to be a journalist in Texas." *Id*. This Court should not make it so.

C. No Enforceable "Prohibition" Against Disclosing Information That Has Not Been Subject to a Formal Freedom-of-Information Request Exists

The district court fundamentally misapplied the TPIA in concluding that the Defendants could have reasonably believed that, because Villarreal did not go through the formal process of filing a TPIA request for records, the information she sought was "prohibited from disclosure under the TPIA." (Dist. Ct. Op. at *10-11); *see also* Tex. Gov't Code Ann. § 552.001, *et seq*. This holding, which was decisive to the outcome at the district court level, misapprehends the TPIA in two fundamental respects.

The statute under which Villarreal was charged requires proof that the defendant solicited or received "information that has not been made public," which is defined as "any information to which the public does not generally have access, and that is prohibited from disclosure under" the TPIA. (Tex. Penal Code § 39.06(c))). In other words, the charge could be proper only if both conditions were satisfied. The information was both inaccessible to the public *and* statutorily prohibited from disclosure. Even assuming that the first condition could be met, there was no reasonable basis to believe that the second was.

First, the TPIA is about access to *records* and not to *facts*. The TPIA says nothing at all about a *conversation* between a journalist and a government employee. The TPIA cannot have "prohibited" the disclosure of information *verbally* furnished to Villarreal. Hence, the TPIA simply does not come into play at all.[13]

Second, the fact that the police department might have, if presented with a formal TPIA request, discretionarily invoked statutory exemptions to withhold some of the information furnished to Villarreal conflates the concept of "exempt"

[13] In fact, this was the holding of the only case that the District Court relied on, erroneously, to find that a reasonable officer could have believed that the information was prohibited from disclosure. In *State v. Ford*, 179 SW 3d 117, 125 (Tex. App.—San Antonio 2005, no pet.), the court held that, because grand jury information is not within the scope of the TPIA, release of information about grand jury proceedings necessarily cannot be information that the TPIA "prohibits" disclosing. The same is true here: A verbal response to a question is not the release of a record, and the TPIA applies only to records.

information with the concept of information "prohibited from disclosure." These are not at all the same thing.

An "exempt" document can be discretionarily disclosed by the custodian. Thus, an exempt document is, by definition, not a document "*prohibited* from disclosure." That the police department might have taken advantage of TPIA exemptions to redact information if presented with a records request is simply irrelevant; all that matters is that nothing in the TPIA "prohibited" Officer Goodman from sharing information about a newsworthy suicide with Villarreal.[14]

Government employees – including clerks employed by this Court – answer questions for citizens every day without being compelled by a public records law to do so. The public's entitlement to seek information is in no way confined to what can be obtained by way of a formal records request. Had a reporter filed a TPIA request with the Laredo Police Department to inspect a police officer's medical

[14] In an instructive recent ruling, the Kentucky Court of Appeals rejected the claim that the existence of a discretionary exemption in the state public-records law means that a publisher who discloses the contents of the document can be penalized – which is the argument advanced by the Police Department in this case. *See City of Taylorsville Ethics Commission v. Trageser*, No. 2019-CA-000152-MR, 2020 WL 3400764 (Ky. Ct. App. June 19, 2020) (municipality could not seek damages against a blogger who published a previously unreleased memo from the city clerk to members of the city council). Even though the memo concerned an ongoing ethics investigation and could discretionarily have been withheld had the blogger requested it through the Open Records Act ("ORA"), the blogger in fact obtained it through other means, so the ORA exemption was immaterial. *See id.* at *5.

records, the department could properly refuse to honor the request – but it plainly could not be a crime for the same reporter to ask the officer about her recent hospital stay, or for the officer to answer the question. To be clear, the crime with which Villarreal was charged was not just *receiving* forbidden information but *requesting* it, as § 39.06 makes it a crime merely to "solicit," even if the solicitation is unsuccessful. It is a daily occurrence for news reporters to file TPIA requests with government agencies that end up being denied on the basis of a statutory exemption. If that mere act – *asking* for information that the agency determines to be exempt from disclosure – could be grounds for arrest, then a key tenet of journalism—requesting access to government records—would literally become illegal.

IV. CONCLUSION

The district court erred in allowing the police Appellees to evade responsibility on qualified immunity grounds. The panel majority corrected the district court's error, articulating in no uncertain terms the position Amici ask this Court to take:

> If the First Amendment means anything, it surely means that a citizen journalist has the right to ask a public official a question, without fear of being imprisoned.
>
> * * *
>
> If that is not an obvious violation of the Constitution, it's hard to imagine what would be. And as the Supreme Court has repeatedly held, public officials are not entitled to qualified immunity for obvious violations of the Constitution.

Villarreal, 44 F.4th at 367. This Court should affirm that the American press can do the simple, and fundamentally important, democratic task for which Villarreal was arrested: ask questions of the government.

DATED: December 12, 2022.

Respectfully submitted,

JACKSON WALKER LLP

By: /s/ *Paul Watler*

Paul Watler
State Bar No. 20931600
pwatler@jw.com
Maggie Burreson
State Bar No. 24116150
mburreson@jw.com
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
Telephone: (214) 953-6000

ATTORNEYS FOR AMICI CURIAE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the typeface and volume limits of Fed. R. App. P. 32(a) and Local Rule 32.1.

1. This brief contains 6,496 words, excluding the sections exempted by Fed. R. App. P. 32(f) and Local Rule 32.2, which is less than 50 percent of that allotted for the Appellant's brief pursuant to Fed. R. App. P. 29.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font for text and footnotes.

/s/ Paul Watler
Paul Watler

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2022, a copy of the foregoing has been served upon counsel for all parties to this proceeding as identified below through the court's electronic filing system as follows:

JT Morris
jt.morris@thefire.org
Foundation for Individual Rights and Expression
700 Pennsylvania Ave. S.E., Ste. 430
Washington, D.C. 20003

Darpana Sheth
darpana.sheth@thefire.org
Conor T. Fitzpatrick
conor.fitzpatrick@thefire.org
Foundation for Individual Rights and Expression
510 Walnut Street, Ste. 1250
Philadelphia, PA 19106
Attorneys for Plaintiff/Appellant

J. Eric Magee
e.magee@allison-bass.com
Allison, Bass & Magee, LLP
A.O. Watson House
402 W. 12th Street
Austin, Texas 78701
Attorneys for Defendants-Appellees Webb County, Texas; Isidro R. Alaniz, and Marisela Jacaman

William M. McKamie
mmckamie@toase.com
Alicia K. Kreh
akreh@toase.com
Taylor Olson Adkins Sralla & Elam LLP
13750 San Pedro Ave., Suite 555
San Antonio, Texas 78232
Telephone: (210) 546-2122
Attorneys for Defendants-Appellees the City of Laredo, Texas; Claudio Trevino, Jr.; Juan L. Ruiz; Deyanria Villarreal; Enedina Martinez; Alfredo Guerrero; Laura Montemayor; and Does 1-2

Lanora C. Pettit
lanora.pettit@oag.texas.gov
Kathryn Cherry
kathryn.cherry@oag.texas.gov
Office of the Solicitor General
Office of the Attorney General of Texas
P.O. Box 12548 (MC-059)
Austin, TX 78711
Attorneys for Intervenor The State of Texas

/s/ Paul Watler
Paul Watler