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 USDC No. 5:19-CV-48

EN BANC BRIEF OF JAMES O'KEEFE AND PROJECT VERITAS, INC. AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF–APPELLANT AND REVERSAL ON REHEARING EN BANC

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December 12, 2022

CERTIFICATE OF INTERESTED PERSONS

Amici Curiae certify that, in addition to those persons listed in the Parties' certificates of interested persons, the following is a complete supplemental list of interested persons as required by Federal Rule of Appellate Procedure 29(a)(4) and Fifth Circuit Rule 29.2:

1. Mateer, Jeffrey C.
2. O'Keefe, James
3. Pratt, Jordan E.
4. Project Veritas, Inc.
5. Sasser, Hiram S.
6. Shackelford, Kelly J.

As required by Federal Rule of Appellate Procedure 26.1, *Amici Curiae* certify that no publicly traded company or corporation—aside from any that may be identified in the Parties' certificates of interested persons—has an interest in the outcome of this case or appeal.

Dated: December 12, 2022

Respectfully submitted,

/s/ Jordan E. Pratt
Jordan E. Pratt

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IDENTITY AND INTEREST OF *AMICI CURIAE* [1]

In 2011, James O'Keefe founded the non-profit Project Veritas, Inc. to pursue undercover journalism that holds the powerful accountable for what they attempt to conceal from the public. The mission of Project Veritas is to investigate and expose corruption, dishonesty, self-dealing, waste, fraud, and other misconduct in both public and private institutions to achieve a more ethical and transparent society. Project Veritas is responsible for breaking numerous shocking stories using undercover journalism techniques.

Project Veritas has a strong interest in protecting the First Amendment rights of citizen-journalists who ask government officials questions about information that may or may not be subject to public information requests. While reporters themselves, such as a reporter with ABC,[2] have been the subject of investigations

[1] Counsel for *Amici Curiae* authored this brief in its entirety. No party's counsel authored this brief, in whole or in part. No party or party's counsel contributed any money that was intended to fund the preparation or submission of this brief. No person—other than *Amici Curiae*, their members, or their counsel—contributed money that was intended to fund the preparation or submission of this brief.

Amici Curiae file this document as a proposed brief accompanying a motion for leave to file under Rule 27 of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 27.1.

[2] *See* Jane Coaston, *Leaked tape: ABC News Killed an interview with an accuser of Jeffrey Epstein*, VOX MEDIA, Nov. 5, 2019, https://www.vox.com/2019/11/5/20949839/jeffrey-epstein-abc-news-leaked-tape-project-veritas.

led by Project Veritas, Project Veritas realizes that all journalists must enjoy the First Amendment's full protections to preserve our free press. After all, even ABC reporters go undercover to expose the wrongdoing of powerful corporations.[3]

This appeal arises from an even more routine and widely accepted method of investigative journalism: a journalist asking a government official to confirm another source who shared information that the government would prefer that the public not know. This case presents an outrageous abuse of power that threatens the journalistic work that Project Veritas so diligently pursues. At the end of the day, Project Veritas is pursuing the truth, and the truth is found through questioning. That work cannot continue if government officials may, without consequence, arrest and jail journalists for asking questions.

[3] *Food Lion, Inc. v. ABC, Inc., et al.*, 194 F.3d 505 (4th Cir. 1999).

INTRODUCTION

Sometimes citizens believe government officials have not told the public the full story, and they are compelled to seek out the truth for themselves. This search for the truth is not the exclusive province of mainstream journalists, or even journalists in general. For example, imagine that a mother asks a school board member whether biological males are in the locker room with her daughter as she undresses at school, and she then posts what she learns on a blog that receives a few dollars per month in Google advertisements. Should any court grant immunity to the police if they arrest the mother for asking a question about, and publicizing, something that they consider non-public? How about arresting the daughter? This is not too far from reality. One Vermont school district recently opened an investigation against a teenage girl because she had the temerity to inquire whether the school intended to allow a boy to watch her undress in the locker room.[4]

The *en banc* Court should agree with the panel in this case and recognize that it is an obvious violation of the First Amendment to arrest a journalist (or a parent, a student, or any other citizen) simply for asking government officials a question to

[4] *See* Margaret Olohan, *Vermont High School Under Fire as Girls, Parents Push Back Against Biologically Male Trans Student Using Female Locker Room*, DAILY SIGNAL, Oct. 2, 2022, https://www.dailysignal.com/2022/10/02/vermont-high-school-under-fire-as-girls-parents-push-back-against-biologically-male-trans-student-using-female-locker-room/.

uncover the truth. Granting immunity here would send a harmful message to all citizens, but it would send a particularly harmful one to independent and undercover journalists like those working with Project Veritas. We expect the regular corporate media and its politically connected apparatus to come to the defense of journalists whom it likes, and its willingness to do so certainly provides them some level of protection. No one is going to arrest a *New York Times* reporter and survive his own cancellation. But for journalists who investigate other journalists, powerful political operatives, and high-ranking government officials, a ruling in this case condoning the defendants' actions will declare an open season against the Davids, like Project Veritas, who take on the Goliaths.

Qualified immunity protects government officials who make reasonable mistakes about unestablished—or unclearly established—federal rights. This is not such a case. There is perhaps nothing more clearly established in our First Amendment history and jurisprudence than the proposition that government officials may not arrest and jail journalists as retribution for seeking to hold them publicly accountable, much less for asking a question to uncover the truth. The American people have known—and made known—this First Amendment guarantee since at least the 1800 presidential election. The *en banc* Court should not shy away from holding the defendants responsible for violating it. Any other response would

threaten the work of those who, like Priscilla Villarreal and *Amici*, courageously seek out truths that powerful elites don't want them to know.

ARGUMENT

I. The District Court's Approach Threatens Investigative Journalism by Inviting State Officials to Manufacture Charges Against Journalists Who Hold Them Politically Accountable.

In the election of 1800, the American people and their newly elected President decisively rejected the notion that the First Amendment can countenance the arrest and imprisonment of journalists for publishing criticism of their public leaders.[5] One would think that, with over a century of judicial precedent built on that long-settled American consensus, the days of jailing journalists for gathering and reporting the news would be over. That is, until one reads Appellant Priscilla Villarreal's complaint.

Our country may no longer have statutes that directly criminalize vocal political journalism, but as this case clearly shows, government officials can manufacture their own Sedition Act if they have the will and the creativity to do so. As pled in and plausibly inferred from the complaint, the individual defendants—all City of Laredo officials—conspired to arrest and incarcerate Villarreal as retribution for her journalistic criticism. They scoured the Texas Penal Code, dusted off a

[5] *See* Jordan E. Pratt, *Disregard of Unconstitutional Laws in the Plural State Executive*, 86 MISS. L. J. 881, 890 (2017).

forgotten and never-before-enforced provision, and adopted a novel reading that would criminalize a basic and well-accepted facet of investigative journalism: asking public officials to confirm information learned from other sources.

By granting the defendants qualified immunity, the district court's approach invites police and prosecutors throughout the Fifth Circuit to follow Laredo's lead and begin making their own Sedition Acts to criminalize legitimate journalistic activities. It sends a message that police can overcome the First Amendment's clearly established protections for routine journalistic investigation—and even arrest and incarcerate journalists merely for asking government officials a question—so long as they can point to *any* state statute that they can creatively twist to suit their censorship and retribution goals. Jailed journalists will have no effective recourse against retaliation. Once litigation finally establishes that the First Amendment prohibits using statute *X* to criminalize asking questions, retributive police and prosecutors will turn to statute *Y*. And then statute *Z*. And so on. A grant of qualified immunity here will thus trigger a near-endless game of whack-a-mole, effectively depriving journalists of their clearly established First Amendment right to ask questions of those in power.

Lest this objection be dismissed as a parade of horribles, it's a parade that's already marching forward. During the last two years, those in power have grown increasingly willing to bring the full force of the criminal law against ordinary

citizens who seek to hold them accountable by exercising their First Amendment rights. Even the U.S. Department of Justice is not immune to the authoritarian impulse to chill the freedom of speech by giving criminal statutes novel, maximalist interpretations. Take, for example, the Attorney General's 2021 memo urging federal prosecutors and federal law enforcement to look for creative ways to lock up upset parents who demand answers and accountability at school board meetings.[6] The press announcement accompanying the memo suggested that the Justice Department's National Security Division would be involved in the effort.[7] The acting U.S. Attorney for the District of Montana even issued a how-to guide that listed a menu of federal criminal statutes that might be marshalled to suppress the speech of concerned parents.[8]

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[6] *See* Memorandum from the Attorney General to the FBI Director, *et al.*, "Partnership Among Federal, State, Local, Tribal, and Territorial Law Enforcement to Address Threats Against School Administrators, Board Members, Teachers, and Staff," Oct. 4, 2021, *available at* https://www.justice.gov/media/1170056/dl?inline=

[7] *See* Michael Balsamo, *Garland Defends School Board Memo Amid Republican Criticism*, AP NEWS, Oct. 27, 2021, https://apnews.com/article/education-violence-school-boards-merrick-garland-congress-6069cd1bf2286bcc57c62e679db6780f.

[8] *See* Memorandum from the Acting U.S. Attorney for the District of Montana to the Montana Attorney General, *et al.*, "Federal Action Regarding Threats Against School Boards, Administrators, Teachers, and School Staff Members," https://opi.mt.gov/Portals/182/Superintendent-Docs-Images/Homepage%20and%20Press%20Releases/10.14.21%20FederalAction.pdf?ver=2021-10-15-105923-780.

The Justice Department's push followed a high-visibility incident in which the father of a sexually assaulted female high-school student was charged with, and convicted of, disorderly conduct after expressing his anger toward school officials for promulgating risky policies and then covering up the incident.[9] Apparently his anger was on-target, and his suspicion that school officials had hidden the full truth was justified. Last week, following a grand jury investigation that the school district vigorously resisted,[10] the Superintendent was fired for his role in failing to transparently address the assault, as well as a second assault by the same offender.[11]

If this Court affirms, the result will be to embolden further strong-arm tactics that threaten the exercise of well-established First Amendment freedoms with creative criminal penalties. Most immediately, affirmance would stack the deck against newsgatherers who seek to hold government officials accountable. A grant

[9] Neal Augenstein, *School Board Scuffle Conviction Dismissed for Father of Loudon Co. High School Rape Victim*, WTOP NEWS, May 2, 2022, https://wtop.com/loudoun-county/2022/05/school-board-scuffle-conviction-dismissed-for-father-of-loudoun-co-high-school-rape-victim/.

[10] Jeremiah Poff, *Grand Jury Blasts Loudon County Public Schools' Lack of Cooperation in Rape Case*, WASHINGTON EXAMINER, December 5, 2022, https://www.washingtonexaminer.com/policy/education/loudoun-grand-jury-releases-report.

[11] Landon Mion, *Loudon County Superintendent Scott Ziegler Fired After Grand Jury Report on Handling of Sexual Assaults*, FOX NEWS, Dec. 7, 2022, https://www.foxnews.com/us/loudoun-county-superintendent-scott-ziegler-fired-after-grand-jury-report-handling-sexual-assaults.

of qualified immunity would particularly threaten independent journalists who—like Villarreal and Project Veritas—operate without the legal, financial, and political resources of traditional media outlets, and who aggressively pursue stories that embarrass the powerful. The *en banc* Court should instead follow the panel's lead, apply the *Hope v. Pelzer* standard, *see* 536 U.S. 730 (2002), deny qualified immunity, and remind public servants within the Fifth Circuit what the American people have known for over 200 years—that the First Amendment does not tolerate the criminalization of routine journalism.

II. Denying Immunity Here Is Consistent Not Only with *Hope v. Pelzer*, But Also with a Principled Textualist Interpretation of Section 1983.

The panel majority faithfully applied the *Hope v. Pelzer* standard, explaining why layers of well-established precedent gave the defendants ample notice that their alleged conduct violated the Constitution, and why neither the independent-intermediary doctrine nor the defendants' manufactured reliance on a dormant state statute can displace that notice. *Villarreal v. City of Laredo*, 44 F.4th 363, 370–73, 375–77 (5th Cir. 2022), *vacated*, *reh'g en banc granted*, 52 F.4th 265 (2022). The *en banc* Court should chart the same course for at least one additional reason: it is consistent with "a principled commitment to originalism." *Cole v. Hunter*, 935 F.3d 444, 477, 479 (5th Cir. 2019) (en banc) (Ho & Oldham, JJ., dissenting).

Few defend modern qualified-immunity doctrine as an historically faithful, textualist interpretation of section 1983, which "on its face does not provide for *any*

immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (emphasis in original). At most, statutory text and historical context provide only a "qualified defense" of the doctrine. *Compare* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853 (2018), *with* Will Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018). "Nothing in the text of § 1983—either as originally enacted in 1871 or as it is codified today—supports the imposition of a 'clearly established' requirement." *Horvath v. City of Leander*, 946 F.3d 787, 800 (5th Cir. 2020), *as revised* (Jan. 13, 2020) (Ho, J., concurring in the judgment in part and dissenting in part). As Justices Scalia and Thomas bluntly put it, "our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume." *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). In other words, qualified immunity is a "judge-invented . . . regime." *Cole* 935 F.3d at 470 (Willett, J., dissenting).

Even as the Supreme Court has increasingly made statutory text, structure, and historical context the focus of statutory interpretation, it has held fast to qualified immunity's judicial gloss on section 1983. This is so despite the "second prong [of qualified immunity analysis having] been widely criticized, and for good reason: Neither the text nor the original understanding of 42 U.S.C. § 1983 supports the 'clearly established' requirement." *Horvath*, 946 F.3d at 795 (5th Cir. 2020), *as*

revised (Jan. 13, 2020) (Ho, J., concurring in the judgment in part and dissenting in part) (citing *Wilson v. City of Southlake*, 936 F.3d 326, 333 (5th Cir. 2019) (Ho, J., concurring in the judgment)). Why the hesitancy among textualist jurists to reexamine qualified immunity? Because they may see it as a necessary counterbalance to the Supreme Court's modern expansion of section 1983 liability.

"Beginning with *Monroe v. Pape* in 1961, the Supreme Court unleashed federal courts to enforce constitutional commands against state actors pursuant to 42 U.S.C. § 1983." *Cole*, 935 F.3d at 461 (Jones, J., dissenting). Prior to *Monroe*, 365 U.S. 167 (1961), it was assumed that section 1983 made government officials liable only for federal-right deprivations that state law authorizes. *Monroe*'s holding—that section 1983 imposes liability even for deprivations not authorized by state law—indisputably gave way to "a deluge of litigation." *Cole*, 935 F.3d at 461 (Jones, J., dissenting).

Monroe has its share of textualist critics and its share of textualist proponents. *Compare, e.g.*, *Crawford-El*, 523 U.S. at 611–12 (Scalia, J., dissenting), *with* Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323 (1992). For many of its critics, who believe that "[t]he § 1983 that the Court created in 1961 bears scant resemblance to what Congress enacted almost a century earlier," it's "just as well" that the Court continue "the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather

than applying the common law embodied in the statute that Congress wrote." *Crawford-El*, 523 U.S. at 611–12 (Scalia, J., dissenting). On the other side of the coin, "[a] principled originalist would fairly review decisions that favor plaintiffs as well as police officers." *Cole*, 935 F.3d at 477 (Ho & Oldham, JJ., dissenting). Thus, for principled textualists who are critical of *Monroe*, reexamination of *Monroe* might naturally accompany any reexamination of qualified-immunity doctrine.

This case presents a circumstance in which denying qualified immunity is consistent not only with an historically moored approach to section 1983 *immunity*, but also with the pre-*Monroe* approach to section 1983 *liability*. Here, the defendant state officials have vociferously argued that Texas Penal Code § 39.06 authorized their conduct. *See* Brief of Appellees Alaniz and Jacaman, *Villarreal v. City of Laredo*, No. 20-40359, at 24–28 (5th Cir. filed Oct. 30, 2020). Unlike in *Monroe*, where the defendant officials argued that they had "no authority under state law . . . to do what [they] did," 365 U.S. at 172, here, the defendant officials expressly contend that state law authorized them to arrest and incarcerate Villarreal. In short, at least on the defendants' telling, this case comfortably fits the more circumscribed, pre-*Monroe* conception of section 1983 liability—that state officials answer for their conduct when "they act in accordance with their authority" rather than when they "misuse it." *Id.* Principled textualist judges therefore ought not shy away from applying the *Hope v. Pelzer* standard and denying qualified immunity in this case,

as the same result would obtain without the last six decades of judicial gloss on section 1983.

None of this is meant to suggest that this Court, as an "inferior" federal court, U.S. Const. art. III, § 1, may second-guess the Supreme Court's decisions. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (lower courts must leave to the Supreme Court "the prerogative of overruling its own decisions"); *but see Obergefell v. Hodges*, 576 U.S. 644, 663, 681–85 (2015) (citing with approval scores of lower-court decisions that disregarded *Baker v. Nelson*, 409 U.S. 810 (1972)); *id.* at 675 (acknowledging that *Baker* controlled the lower courts by declaring that *Baker* "*must be* and now is overruled" (emphasis added)). Rather, this case presents an occasion to honor and apply the clearly established Supreme Court precedent that the panel identified while reaching a result that simultaneously respects "a principled commitment to originalism." *Cole*, 935 F.3d at 477, 479 (Ho & Oldham, JJ., dissenting).

III. This Court Should Reevaluate Its Subjective Standard for First Amendment Retaliation Claims in Light of *Houston Community College System v. Wilson*.

The panel was bound to reject Villarreal's First Amendment retaliation claim under circuit precedent, which required her to allege that the defendants' conduct deterred her from continuing to engage in protected newsgathering. As the panel majority noted, this subjective test creates tension with one of the accepted elements

of a First Amendment retaliation claim, and it differs from the approach of other courts. *Villarreal*, 44 F.4th at 373–74. Several other courts of appeals require only an objective showing that the defendants' retaliatory conduct would deter "a person of ordinary firmness" from continuing to exercise his First Amendment freedoms, without a subjective showing that the retaliation curtailed the plaintiff's exercise of constitutionally protected activity. *Id.* at 374.

The *en banc* Court should reevaluate its subjective approach to First Amendment retaliation in light of the Supreme Court's unanimous decision in *Houston Community College System v. Wilson*, 142 S. Ct. 1253 (2022). While the *Wilson* Court did not explicitly endorse any of the lower courts' retaliation tests, it framed the issue in expressly objective terms—whether the defendant's retaliatory conduct "*could have* materially deterred *an elected official like* Mr. Wilson from exercising his own right to speak." *Id.* (emphases added). Only after answering this objective question did the Court then turn to the plaintiff's own post-retaliation conduct, and only then as supporting evidence to confirm the answer it had already given. *Id.* at 1262.

Wilson's objective material-deterrence test should govern the *en banc* Court's resolution of Villarreal's First Amendment retaliation claim. In addition to being the Supreme Court's most recent guidance on the issue, the material-deterrence test has two distinct advantages over this Court's pre-*Wilson* subjective approach. First,

it avoids penalizing plaintiffs who—in line with the best of our free-speech and free-press traditions—courageously resist retaliation. Second, it better coheres with the goal of qualified immunity doctrine: fair notice to defendants. It's one thing to expect government officials to assess whether, under the circumstances, their actions could materially deter an ordinary journalist from continuing to gather the news. It's quite another to expect them to predict whether the plaintiff herself will continue newsgathering.

Villarreal's retaliation claim clearly survives a motion to dismiss under *Wilson*'s material-deterrence test. Indeed, it is difficult to imagine a more material deterrence to constitutionally protected newsgathering than what Villarreal alleges. As pled in and plausibly inferred from the complaint, the defendants arrested and incarcerated a vocal journalist in retribution for her criticism, under a maximalist reading of a dormant state law that would criminalize simply asking public officials a question to confirm the journalist's other sources.

Americans have known since at least the 1800 election that, if the freedoms of speech and press mean anything, they mean that public officials cannot arrest and incarcerate journalists for their public criticism. The *en banc* Court should revisit its First Amendment retaliation jurisprudence to ensure that all journalists—ordinary and extraordinarily courageous alike—may avail themselves of this basic First Amendment guarantee.

CONCLUSION

This Court should reverse the judgment of the district court dismissing Villareal's claims under the First, Fourth, and Fourteenth Amendments, as well as her civil conspiracy claims.

Dated: December 12, 2022

Respectfully submitted,

/s/ Jordan E. Pratt

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because this brief contains 3,445 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f).

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 proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: December 12, 2022

/s/ Jordan E. Pratt

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Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on December 12, 2022. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 12, 2022

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