No. 23-

In the
Supreme Court of the United States

PRISCILLA VILLARREAL,

Petitioner,

v.

ISIDRO R. ALANIZ, SUED IN HIS INDIVIDUAL CAPACITY, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents are police officers and prosecutors who sent Petitioner Priscilla Villarreal to jail for asking a police officer for facts and then reporting what the officer volunteered. Those officials plotted the local journalist's arrest not for any legitimate purpose, but to silence a vocal critic.

In a nine-to-seven en banc decision with four dissenting opinions, the Fifth Circuit held the officials have qualified immunity. The Fifth Circuit concluded it was reasonable to arrest Villarreal for routine news reporting under a Texas felony statute no local official had enforced in its 23-year history. In dissent, Judge Ho explained that the majority "treat[s] the First Amendment as a second-class right" and "contradicts" this Court's holdings that "subject arrests to First Amendment scrutiny." App. 77a, 80a. The Fifth Circuit's decision also conflicts with multiple circuits that have held officials are not entitled to qualified immunity when they use state statutes in ways that criminalize undoubted First Amendment rights.

The questions presented are:

1. Whether it obviously violates the First Amendment to arrest someone for asking government officials questions and publishing the information they volunteer.

2. Whether qualified immunity is unavailable to public officials who use a state statute in a way that obviously violates the First Amendment, as decisions from the Sixth, Eighth, and Tenth Circuits have held, or whether qualified immunity shields those officials, as the Fifth Circuit held below.

PARTIES TO THE PROCEEEDING

Petitioner Priscilla Villarreal was the plaintiff in the district court and the appellant in the Fifth Circuit.

Respondents Isidro R. Alaniz, Marisela Jacaman, Claudio Treviño Jr., Juan L. Ruiz, Deyanira Villarreal, and Does 1–2 were individual defendants in the district court and appellees in the Fifth Circuit.

Defendant City of Laredo was a municipal entity defendant in the district court and appellee in the Fifth Circuit at the panel stage. Villarreal's dismissed claim against the City was not part of the rehearing en banc.

Defendants Enedina Martinez, Alfredo Guerrero, Laura Montemayor, and Webb County, Texas were defendants in the district court. Villarreal did not appeal the district court's dismissal of her claims against those Defendants.

The State of Texas was an intervening party in the Fifth Circuit.

RELATED PROCEEDINGS

This case arises from these proceedings:

- *Villarreal v. City of Laredo et al.*, No. 20-40359, 5th. Cir. (Jan. 23, 2024) (en banc) (affirming dismissal);
- *Villarreal v. City of Laredo et al.*, No. 20-40359, 5th Cir. (Oct. 28, 2022) (ordering rehearing en banc and vacating the August 12, 2022 panel decision);
- *Villarreal v. City of Laredo et al.*, No. 20-40359, 5th Cir. (Aug. 12, 2022) (withdrawing the November 1, 2021 panel decision, still reversing dismissal in part);
- *Villarreal v. City of Laredo et al.*, No. 20-40359, 5th Cir. (Nov. 1, 2021) (reversing dismissal in part); and
- *Villarreal v. City of Laredo et al.*, Civil Action No. 5:19-CV-48, S.D. Tex (May 8, 2020) (granting motion to dismiss).

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PETITION FOR WRIT OF CERTIORARI

For months, the police chief, district attorney, and other officials of Laredo, Texas looked for any excuse to arrest Petitioner Priscilla Villarreal, a local journalist who often shines a light on government affairs. They settled on arresting Villarreal because she asked a police officer for facts while reporting on two news stories—facts the officer freely shared. In short, Villarreal went to jail for basic journalism.

When Villarreal sued the Laredo officials under Section 1983, it "should've been an easy case for denying qualified immunity." App. 75a (Ho, J., dissenting). But not according to the Fifth Circuit. The decision below goes far beyond granting the Laredo officials qualified immunity: It "opens by claiming that Defendants don't have to comply with the First Amendment *at all*." *Id.* at 79a. Little could clash more with founding principles and this Court's precedent.

Rather than affirm that arresting someone for peaceably asking the government a question obviously violates the First Amendment, the Fifth Circuit majority erases the line "distinguish[ing] a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 463 (1987). It imperils journalists who routinely request nonpublic information from public officials as part of "a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). And it ignores this Court's warnings that when a search or seizure decision involves a person's speech, police, prosecutors, and judges must take strict

care not to trample First Amendment rights—a founding principle born "against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus v. Search Warrants of Prop.*, 367 U.S. 717, 729 (1961). The Fifth Circuit's decision excuses officials from having to consider whether probable cause rests on protected expression, converting the Fourth Amendment from a fundamental check on government power into a license to violate the First Amendment. This stark departure from basic constitutional guarantees merits the Court's review.

So too does the Fifth Circuit's conclusion that Laredo officials acted reasonably when arresting Villarreal for routine journalism under a 23-year-old Texas statute local officials had never enforced. App. 12a–28a. That approach, dissenting Judge Ho warned, "spells the end of the First Amendment," creating a free pass for any official who unearths an obscure statute to make protected expression a crime. App. 80a. It also conflicts with Section 1983's text, which provides a remedy for constitutional violations "under color of any statute . . . of any State." 42 U.S.C. § 1983.

Unlike the Fifth Circuit, several circuits have held qualified immunity does not shield officials who enforce state statutes in ways that unmistakably violate the First Amendment. *E.g.*, *Leonard v. Robinson*, 477 F.3d 347, 361 (6th Cir. 2007); *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1156–57 (8th Cir. 2014); *Jordan v. Jenkins*, 73 F.4th 1162, 1171 (10th Cir. 2023), *cert. denied*, No. 23-541, 2024 WL 1607750 (Apr. 15, 2024). Those cases illustrate how "the overarching inquiry is whether, *in spite of the existence of the statute*, a reasonable officer should have known that his conduct" violated the Constitution.

Lawrence v. Reed, 406 F.3d 1224, 1232 (10th Cir. 2005) (emphasis added). While law enforcement officials are not expected to be legal scholars, the Constitution demands more than blindly enforcing state laws against expression the First Amendment no doubt protects. So does this Court's qualified immunity framework.

In dissent, Judge Willett warned that extending qualified immunity to officials who "enforc[e] a statute in an obviously unconstitutional way" ignores "the possibility—indeed, the real-world certainty—that government officials can wield facially constitutional statutes as blunt cudgels to silence speech (and to punish speakers) they dislike." App. 64a. The Court should grant review to ensure that the First Amendment and Section 1983 remain unshakable against government officials wielding those "blunt cudgels."

OPINIONS BELOW

The Fifth Circuit en banc opinion and dissenting opinions are reported at 94 F.4th 374. App. 1a–100a. The Fifth Circuit order for en banc rehearing and vacating the panel decision is reported at 52 F.4th 265. App. 189a–190a. The Fifth Circuit substituted panel decision is reported at 44 F.4th 363, and the withdrawn panel decision is reported at 17 F.4th 532. The district court's memorandum and order on dismissal is unreported but available at 2020 WL 13517246. App. 101a–188a.

JURISDICTION

The Fifth Circuit issued its en banc opinion on January 23, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

In the withdrawn panel opinion, the Fifth Circuit ordered the clerk to certify to the Texas Attorney General that the constitutionality of Texas Penal Code § 39.06(c) was drawn into question. *Villarreal v. City of Laredo*, 17 F.4th 532, 546–47 (5th Cir. 2021), *withdrawn and superseded*, 44 F.4th 363 (5th Cir. 2022). Before the Fifth Circuit ordered rehearing en banc, Texas acknowledged that the superseding panel opinion "no longer calls into question the facial constitutionality of section 39.06(c)." *Villarreal v. City of Laredo*, No. 20-40359, ECF 117 (5th Cir. Aug. 15, 2022). Texas still intervened during rehearing en banc. Thus, Villarreal states under Rule 29.4(c), out of an abundance of caution, that 28 U.S.C. § 2403(b) may apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. § 1983 provides, as relevant here:

"Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

Texas Penal Code § 39.06(c) and § 1.04(7) are reproduced at App. 191a–192a.

STATEMENT OF THE CASE

Villarreal's influential journalism draws the ire of Laredo officials.

Priscilla Villarreal is "arguably the most influential journalist in Laredo, Texas."[1] Known to her readers as "Lagordiloca," she publishes a wealth of information, livestreams, and commentary about local crime, traffic, and other news. Her candid news reporting has earned Villarreal more than 200,000 followers on her Facebook page, "Lagordiloca News."

1. Simon Romero, *La Gordiloca: The Swearing Muckraker Upending Border Journalism*, N.Y. Times (Mar. 10, 2019), https://www.nytimes.com/2019/03/10/us/gordiloca-laredo-priscilla-villarreal.html.

Villarreal's unfiltered style is not popular with everyone—including the Laredo government. Villarreal sometimes praises the Laredo Police Department, but she does not shy away from criticizing it. App. 206a. And she shines light on other officials, too, like respondents. For example, Villarreal reported about animal abuse at a local property, soon learning the land belonged to a close relative of Marisela Jacaman, the local chief assistant district attorney. *Id.* After District Attorney Isidro Alaniz's office withdrew an arrest warrant for the abuse, Villarreal reported on and sharply criticized the decision. *Id.*

Alaniz did not respond lightly. Instead, he took Villarreal behind closed doors with other local officials and chastised her for publicly criticizing his office. App. 209a. Villarreal also faced regular harassment from the Laredo police at the encouragement of Laredo's police chief, Claudio Treviño. App. 207a–211a, 223a–224a. But Villarreal persisted with her reporting.

Laredo police and prosecutors contrive Villarreal's arrest.

In late 2017, Treviño, Alaniz, and Jacaman set out to arrest Villarreal and bully her into silence. App. 212a–214a, 222a. Laredo police officers Juan Ruiz and Deyanira Villarreal (no relation to petitioner) joined in. *Id.* These prosecutors and police officers focused on two news reports Villarreal published months earlier, in spring of 2017. App. 212a–213a. One report named a border agent who had committed suicide by jumping off a Laredo overpass. *Id.* The second report relayed information about a fatal traffic accident and a Houston family harmed in

the crash. App. 213a. For both reports, private citizens provided Villarreal with leads. App. 212a–213a.

Any good journalist verifies facts before publishing. And like other local reporters, Villarreal routinely asks Laredo police questions while reporting the news. App. 213a, 223a, 241a–242a. So she contacted Laredo police officer Barbara Goodman, who confirmed the information for Villarreal's stories about the suicide and car accident. App. 212a–213a, 218a–219a. With the facts Officer Goodman verified, Villarreal published her stories to "Lagordiloca News."

To further their plan to rein in Villarreal, District Attorney Alaniz, Assistant District Attorney Jacaman, and the Laredo police officers searched for a criminal statute to ensnare Villarreal's routine newsgathering and reporting. App. 214a, 223–225a. And they found one—Texas Penal Code § 39.06(c), which makes it a felony if, "with intent to obtain a benefit," a person "solicits or receives from a public servant information that . . . has not been made public." App. 191a. The law defines "information that has not been made public" as "information to which the public does not generally have access, and that is prohibited from disclosure" under the Texas Public Information Act. *Id.* The Texas Penal Code defines "benefit" as "anything reasonably regarded as economic gain or advantage." *Id.*

Relying on Section 39.06(c) was unprecedented. No local official had enforced the statute in its 23 years of existence, let alone against local journalists who routinely asked for and received information from Laredo police officers. App. 223a, 233a, 241a–242a.

But months after Villarreal published her news reports about the public suicide and the car accident, the Laredo prosecutors and police officers engineered Villarreal's arrest under Section 39.06(c). App. 216a–220a, 223a–226a. Each played a part. Assistant District Attorney Jacaman approved investigatory subpoenas targeting Villarreal's reporting, with District Attorney Alaniz's endorsement. App. 225a–226a. And Officer Ruiz assembled two arrest warrant affidavits with direction and approval from Chief Treviño, Alaniz, and Jacaman, each of whom wanted to silence Villarreal's candid reporting about their performance. App. 218a, 222a, 226a.

In the arrest warrant affidavits, Officer Ruiz claimed an unnamed source told Officer Deyanira Villarreal that Officer Goodman was communicating with Priscilla Villarreal. App. 218a. Ruiz asserted that Villarreal asked for or received information from Goodman about the public suicide and fatal car accident which "had not been made public." App. 218a–219a. He did not specify any "economic" "benefit" Villarreal intended to obtain from asking for or receiving the information except to assert Villarreal's release of the information before other news outlets "gained her popularity in Facebook." App. 219a–220a.

After Assistant District Attorney Jacaman approved Officer Ruiz's affidavits (with District Attorney Alaniz's encouragement), a local magistrate issued two arrest warrants against Villarreal. App. 220a, 225a–226a. When Villarreal turned herself in, Laredo police officers took cell phone pictures of the reporter in handcuffs while mocking and laughing at her. App. 221a.

After posting bond, Villarreal filed for a writ of habeas corpus, arguing Section 39.06(c) was facially invalid. App. 229a. A Webb County district court judge made a bench ruling granting the writ, finding the statute unconstitutionally vague. App. 230a.

Villarreal sues, and a Fifth Circuit panel vindicates her constitutional rights.

In 2019, Villarreal sued the police and prosecutors responsible for her arrest under 42 U.S.C. § 1983 for violating her First, Fourth, and Fourteenth Amendment rights. Those officials moved for dismissal, asserting qualified immunity. App. 101a–102a. Alaniz and Jacaman also asserted absolute prosecutorial immunity, which the district court denied. App. 118a. But the court granted the motions to dismiss based on qualified immunity. App. 102a, 128a, 137a, 145a.

On appeal to the Fifth Circuit, a panel majority reversed the dismissal of Villarreal's First, Fourth, and Fourteenth Amendment claims and her civil conspiracy claim against respondents. *Villarreal v. City of Laredo*, 17 F.4th 532 (5th Cir. 2021). Ten months later, the panel majority issued a substitute opinion resulting in the same reversal. *Villarreal v. City of Laredo*, 44 F.4th 363 (5th Cir.), *reh'g en banc granted and opinion vacated*, 52 F.4th 265 (5th Cir. 2022). Denying qualified immunity, the panel majority explained the heart of the case:

> 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. Yet that is exactly

> what happened here: Priscilla Villarreal was put in jail for asking a police officer a question.
>
> If that is not an obvious violation of the Constitution, it's hard to imagine what would be.

Id. at 367. The panel majority also held the magistrate-issued arrest warrants did not bar Villarreal's wrongful arrest claim because police cannot base probable cause on protected speech. *Id.* at 375. Chief Judge Richman dissented from the reversal, agreeing with the district court "that the defendants were entitled to qualified immunity." *Id.* at 382–93.

A nine-to-seven Fifth Circuit holds the Laredo officials have qualified immunity for arresting Villarreal.

The Fifth Circuit vacated the panel opinion and ordered rehearing en banc. App. 190a. In late January 2024, the en banc Fifth Circuit voted nine-to-seven to affirm dismissal, holding the Laredo prosecutors and police have qualified immunity for orchestrating Villarreal's arrest. App. 3a. The en banc majority concluded those officials reasonably believed Villarreal violated Section 39.06(c) because (1) Villarreal asked an "unofficial" government source for information rather than wait for "an official LPD report" and (2) she obtained "benefits" for "her first-to-report reputation," like advertising revenue "for promoting a local business" and occasional "free meals from appreciative readers." App. 17a–21a (cleaned up).

The majority rejected the panel's conclusion that Villarreal's arrest obviously violated the First Amendment.

Instead, it held qualified immunity shields the Laredo officials because (1) "no final decision of a state court had held [Section 39.06(c)] unconstitutional at the time of the arrest," (2) the "Supreme Court and lower courts have not relevantly defined the contours of an 'obviously unconstitutional' statute," and (3) "a neutral magistrate issued warrants for Villarreal's arrest." App. 22a.

Seven judges dissented across four opinions. Judges Douglas, Elrod, Graves, Higginson, Ho, and Willett joined in all four. App. 42a, 47a, 61a, 67a. Judge Oldham joined Judge Higginson's dissent. App. 47a.

Judge Ho wrote to explain why Villarreal's arrest obviously violated the First Amendment, stressing "[i]f any principle of constitutional law ought to unite all of us as Americans, it's that the government has no business imprisoning citizens for the views they hold or the questions they ask." App. 74a. He also criticized the majority's reliance on Section 39.06(c), observing that "no one has been able to identify a single successful prosecution" under the law, "and certainly never against a citizen for asking a government official for basic information of public interest so that she can accurately report to her fellow citizens." App. 71a. And Judge Ho called the majority's reasoning "a recipe for public officials to combine forces with state or local legislators to do—whatever they want to do. It's a level of blind deference and trust in government power our Founders would not recognize." App. 72a.

Writing "to emphasize the importance of gathering and reporting news," Judge Graves explained Villarreal's arrest "is also obviously unconstitutional in light of the related and equally well-established right of journalists

to engage in routine newsgathering." App. 44a. And he criticized the majority for "conflat[ing]" the government's "power to protect certain information" with "a person's right to ask for it." *Id.*

Judge Higginson wrote to highlight how "the district court failed to address, much less credit," Villarreal's "detailed" allegations, including her allegations that "Defendants misled the magistrate" to secure Villarreal's arrest warrants. App. 51a. Judge Higginson also pointed out how the district court ignored Villarreal's allegations about Laredo officials enforcing Section 39.06(c) against Villarreal "despite knowing that [local authorities] had never arrested, detained, or prosecuted any person before under the statute." App. 57a–58a. In his view, "this conduct falls squarely within the *Nieves* exception. In fact, there could be no better example of a crime never enforced than this one." App. 55a.

Judge Willett underscored that Villarreal's arrest was not a "fast-moving, high-pressure, life-and-death situation." App. 61a. He criticized the majority for ignoring that "just as officers can be liable for enforcing an obviously unconstitutional statute, they can also be liable for enforcing a statute in an obviously unconstitutional way." App. 63a. Finally, he explained how the decision breaks from "the plain text of § 1983," which "declares that government officials 'shall be liable' for violating the Constitution if they were acting 'under color of any state statute.'" App. 64a (quoting 42 U.S.C. § 1983).

REASONS FOR GRANTING THE PETITION

This Court's long-settled precedent leaves no doubt that arresting Villarreal for asking the government for information and publishing the response violated the First Amendment—and every reasonable official would have known that. Time and again, this Court has upheld the right to publish when government officials shared information only for the government to turn around and try to punish those who gathered and published the information. If the First Amendment protects publishing sensitive information reporters "lawfully obtain[]" by asking police, then the First Amendment surely protected Villarreal from arrest for using the same "routine newspaper reporting techniques." *See Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99, 103–04 (1979). Because the Fifth Circuit's decision sharply conflicts with this Court's precedent and enduring First Amendment principles,[2] it warrants the Court's review.

The Fifth Circuit's decision also warrants review because it entitles law enforcement to qualified immunity when they launder obvious First Amendment violations, like the one here, through state statutes. Not only does

2. Those enduring principles stand in stark contrast to recent targeting of reporters in authoritarian nations, like *Wall Street Journal* reporter Evan Gershkovich's ongoing detention in a Russian jail. "But in Vladimir Putin's Russia, the pursuit of independent journalism and the gathering of trustworthy facts—the hallmarks of what we stand for at the [Wall Street] Journal—are considered a crime." Emma Tucker, *Evan Gershkovich | A Letter From the Wall Street Journal's Editor in Chief*, Wall St. J. (Mar. 29, 2024), https://www.wsj.com/world/evan-gershkovich-a-letter-from-the-wall-street-journals-editor-in-chief-b643ae0f.

that decision defy the Constitution and the text of Section 1983, but it also conflicts with rulings in the Sixth, Eighth, and Tenth Circuits. Those circuits framed the question as whether a reasonable official could believe turning plainly protected speech into a crime was constitutional, not whether the official could squeeze the speech into some provision of the penal code. Without reversal, the chill from the decision below will only spread wider, as ever-growing criminal codes provide a grab bag of statutes officials can wield against disfavored speech.

I. The Decision Below Squarely Conflicts with the Court's Precedents and Bedrock Constitutional Guarantees.

A. Laredo officials arrested Villarreal for merely exercising well-understood First Amendment rights.

The Founders knew that "a people who mean to be their own Governours, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822).[3] Thus, they ensured the Constitution protects "the right of citizens to inquire," as "a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Citizens and public officials alike see that right in action every day, from well-trod podiums at local school board meetings to the White House Press Briefing Room.

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3. https://founders.archives.gov/documents/Madison/04-02-02-0480.

If the First Amendment guarantees the right to "verbally oppose or challenge police action without thereby risking arrest" as "one of the principal characteristics by which we distinguish a free nation from a police state," then it guarantees the right to peaceably ask an officer questions without risking arrest. *Hill*, 482 U.S. at 462–63. Likewise, if the government cannot hold Americans in contempt for "speak[ing] one's mind, although not always with perfect good taste, on all public institutions," it cannot throw them in jail for asking questions of those institutions. *Bridges v. California*, 314 U.S. 252, 270 (1941).

Those principles secure "a vigilant and courageous press" vital to checking government "malfeasance and corruption" and "unfaithful officials." *Near v. Minnesota*, 283 U.S. 697, 719–20 (1931); *see also* App. 44–46a (Graves, J., dissenting). From the pre-founding free press case of John Peter Zenger[4] to the Court refusing a prior restraint on the Pentagon Papers in *New York Times Co. v. United States*, 403 U.S. 713 (1971), our Nation's free speech and free press traditions embrace an informed public and the freedom to criticize officials. After all, "a free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Daily Mail,* 443 U.S. at 104. That is why the First Amendment protects an "undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972)).

4. *See, e.g., The Tryal of John Peter Zenger* (1738), https://history.nycourts.gov/wp-content/uploads/2018/11/History_Tryal-John-Peter-Zenger.pdf.

Decades ago, the Court confirmed that "undoubted right" protects using "routine newspaper reporting techniques," like asking police officers for information about crimes and publishing what they share, against criminal sanction. *Daily Mail*, 443 U.S. at 99, 103–04 (concluding reporters "lawfully obtained" the name of a juvenile murder suspect "simply by asking various witnesses, the police, and an assistant prosecuting attorney"). That is exactly what Villarreal did here. It makes no constitutional difference if officials lack authorization to volunteer information when responding to those questions. While the government sometimes has an interest in protecting sensitive information, the First Amendment prohibits the government from punishing the press when officials share that information, even inadvertently. *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989); *see also Bartnicki v. Vopper*, 532 U.S. 514, 534–35 (2001) ("[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.").

Laredo officials arrested Villarreal for doing only what the First Amendment plainly guarantees. Villarreal made no threat, offered no bribe, and stole nothing. Rather, the arrest warrant affidavits confirmed that Villarreal asked Officer Goodman for facts, Goodman freely answered, and Villarreal published those facts as a matter of routine. App. 218a–220a. Any reasonable official would have known the First Amendment forbid arresting Villarreal because she "lawfully obtained" those facts. *Daily Mail*, 443 U.S. at 103–04.

But the Fifth Circuit majority "overlook[ed] that protection all too cavalierly." App. 43a (Graves, J.

dissenting). Just as troubling, the decision below suggests that Villarreal deserved no First Amendment protection because she used a "backchannel source." App. 3a, 19a-20a. But it cites no precedent from this Court in support—because none exists.

In every case where a government official or government body made even sensitive information available without coercion or subterfuge, this Court has held the First Amendment protects the recipient and the publisher. *See Daily Mail*, 443 U.S. at 99, 103–04 (name of juvenile murder suspect); *Florida Star*, 491 U.S. at 534 (name of rape victim); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (name of deceased rape victim); *Oklahoma Publ'g Co. v. Dist. Ct.*, 430 U.S. 308, 311 (1977) (name of minor involved in juvenile hearing); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (information about the state's investigation of a judge); *see also New York Times Co.*, 403 U.S. at 714 (rejecting the government's efforts to suppress a classified Vietnam War study's publication after an unauthorized source provided it to newspaper reporters). Villarreal's routine journalism falls well within these precedents. And if Officer Goodman gave out information without the government's blessing, any consequences were hers alone to bear. *Florida Star*, 491 U.S. at 534–35; *see also Bartnicki*, 532 U.S. at 534–35. The government may not have to answer a reporter's questions, but it cannot jail her for asking them.

The majority also suggested Villarreal's reporting lacked First Amendment protection because she "sought to capitalize on others' tragedies to propel her reputation and career." App. 3a. But whatever one may make of Villarreal's journalistic ethics, they are of no constitutional

significance. Public officials have no legitimate business policing newspapers or other speech for "good taste." *Bridges*, 314 U.S. at 270; *see also Cohen v. California*, 403 U.S. 15, 25 (1971). One might have recoiled at *The Florida Star*'s choice to publish a rape victim's name the police made available, but the First Amendment protected it. *Florida Star*, 491 U.S. at 534–35; *see also Hustler Mag. Inc. v. Falwell*, 485 U.S. 46, 48, 55–56 (1988) (First Amendment protected *Hustler Magazine*'s decision to mock a religious leader by painting him as an incestuous drunk). If the First Amendment protected *The Florida Star*'s and *Hustler Magazine*'s speech, it protected Villarreal reporting truthful facts about two public tragedies, even if some find it distasteful.

Not only did the Fifth Circuit "cavalierly" overlook Villarreal's unquestionable First Amendment rights, App. 43a (Graves, J., dissenting), it reasoned Laredo law enforcement *did not need to consider them at all*. That holding alone warrants the Court's review.

B. The Fifth Circuit's majority opinion prioritizes the government's seizure power, clashing with historical First Amendment guarantees.

Instead of first evaluating Villarreal's First Amendment rights against the arrest decision, the Fifth Circuit decided "to evaluate Villarreal's conduct against the standards of Texas law," isolating the probable cause question from the First Amendment one. App. 11a. The majority reasoned that so long as police, prosecutors, and judges can tick off the probable cause box, it is unnecessary to reconcile the "crime" with free speech and press guarantees—even when the police base probable

cause entirely on protected expression. As Judge Ho observed, the majority concluded "that Defendants don't have to comply with the First Amendment *at all*." *Id.* at 79a.

But First and Fourth Amendment concerns are not so distinct. This Court has detailed how "[h]istorically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." *Marcus*, 367 U.S. at 724 (citing Fred. S. Siebert, *Freedom of the Press in England, 1476–1776* (1952); Laurence Hanson, *Government and the Press, 1695–1763* (1936)); *see also Boyd v. United States,* 116 U.S. 616, 625–27 (1886). That struggle resulted in major victories for the press over general warrants targeting government critics, including *Entick v. Carrington*, a case this Court branded "one of the landmarks of English liberty." *Boyd*, 116 U.S. at 625–27 (citing 1765 19 How. St. Tr. 1029).

Thus, the Founders fashioned the First and Fourth Amendments "against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus*, 367 U.S. at 729. This means law enforcement must apply the Fourth Amendment with "scrupulous exactitude" when speech is involved. *Stanford v. Texas*, 379 U.S. 476, 485 (1965). When the First and Fourth Amendments meet, police and courts cannot mechanically squeeze speech into a penal statute. Instead, they must "examine what is 'unreasonable' in the light of the values of freedom of expression." *Roaden v. Kentucky*, 413 U.S. 496, 501, 504 (1973) ("The Fourth Amendment . . . must not be read in a vacuum."). True enough, decisions like *Marcus, Stanford*,

and *Roaden* involve the unconstitutional seizure of papers. But if officials know they must exercise "scrupulous exactitude" when seizing writings, they know they must exercise the same when seizing a *person* based on her expression. *See Stanford*, 379 U.S. at 485.

The Fifth Circuit absolved Laredo officials of that duty, relegating the First Amendment to the background. It did so by misreading this Court's ruling in *Sause v. Bauer*, which reversed a grant of qualified immunity to officers who harassed someone kneeling in prayer. The majority cited *Sause* to propose that courts can resolve First Amendment claims solely through a Fourth Amendment lens because "First and Fourth Amendment issues may be inextricable. " App. 10a (quoting 575 U.S. 957, 959 (2018)). But *Sause* suggests no such thing. Rather, *Sause* reaffirms courts cannot insulate police action from First Amendment scrutiny. *Sause*, 575 U.S. at 959. If police had arrested Mary Anne Sause simply for kneeling in prayer, no Fourth Amendment analysis could purge such an intolerable Free Exercise Clause violation. So too here, with the Laredo officials arresting Villarreal simply for using routine reporting techniques to publish the news.

Arresting someone for exercising a long-settled First Amendment right is "'unreasonable' in the light of the values of freedom of expression." *Roaden*, 413 U.S. at 504. Any other rule would swallow the First Amendment, leaving Americans' expressive freedom at the mercy of overzealous law enforcement officials. That's a dangerous outcome by any measure, and especially so for government critics like Villarreal. Nothing in this Court's precedent supports the Fifth Circuit's contrary view.

"The First Amendment . . . seeks not to ensure lawful authority to arrest but to protect the freedom of speech." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1731 (2019) (Gorusch, J., concurring in part and dissenting in part). The Fifth Circuit spurned that principle, turning probable cause from a check on government power into a weapon to silence speech and the press. That alone makes this Court's review imperative.

C. Arresting Villarreal obviously violated the First Amendment.

The Court has held that when public officials violate the Constitution in obvious ways, they do not get qualified immunity. *Hope v. Pelzer,* 536 U.S. 730, 741 (2002); *Taylor v. Riojas,* 592 U.S. 7, 9 (2020). In these cases, the obvious violation may be "inherent" in the act. *Hope*, 536 U.S. at 745. Or, "a general constitutional rule already identified in the decisional law appl[ies] with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.'" *Id.* at 741 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

Here, a reasonable officer would have known throwing Americans in jail for basic journalism violates the First Amendment. *See* Section I.A, *supra*. Yet Laredo officials plotted Villarreal's arrest despite "obvious clarity" from settled precedent and basic constitutional principles that arresting Villarreal would violate the Constitution. *See Hope*, 536 U.S. at 741 (citation omitted). Attacking a strawman, the Fifth Circuit majority focused on the lack of "a constitutional right of special access to information," App. 35a–36a, a claim Villarreal never made. Rather,

she sued because Laredo officials sent her to jail for asking a police officer questions and sharing facts the officer volunteered—something the First Amendment undeniably protects. *See* Section I.A, *supra*.

A reasonable official would have known he could not base probable cause solely on Villarreal's exercise of First Amendment rights. *See* Section I.B, *supra*; *see also Mink v. Knox,* 613 F.3d 995, 1003–04 (10th Cir. 2010) (affirming an official "may not base her probable cause determination on an 'unjustifiable standard,' such as speech protected by the First Amendment") (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)). Nor would the reasonable official have pursued arrest warrants under affidavits describing routine journalistic acts, because it "created the unnecessary danger of an unlawful arrest." *Malley v. Briggs*, 475 U.S. 335, 345 (1986). To that end, Laredo officials obviously violated the Fourth Amendment's bar against false arrest, too. *Id.* at 340–41, 345–46.

Though the Fifth Circuit fixated on shoehorning Villarreal's protected speech into the elements of Texas Penal Code § 39.06(c), App. 12a–21a, the statute's provisions do not make the arrest any less of a constitutional violation. Reasonable officials know that using routine reporting techniques to deliver the news quickly and accurately is basic journalism the First Amendment protects. *E.g.*, *Daily Mail*, 443 U.S. at 99, 103–04. Thus, no reasonable official would have believed Villarreal using those techniques to reach a growing audience was a criminal "benefit." *See* App. 219a–220a. And anyone watching the stream of commercials during the nightly news understands that "[s]peech likewise is protected even though it is carried in a form that is 'sold' for profit." *See,*

e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

Likewise, reasonable officials know they cannot target reporters and other citizens who ask for "nonpublic" information, even when loose-lipped public officials reveal it. *E.g.*, *Daily Mail*, 443 U.S. at 103–04; *Fla. Star*, 491 U.S. at 534. Otherwise, many White House, State Department, and police press briefings would be an active crime scene. And as Judge Higginson noted in dissent, Villarreal alleged in detail how the Laredo officials offered no facts or circumstances showing why information about two public incidents was "non-public." App. 48a–51a.

The Laredo officials committed obvious constitutional violations. Still, the Fifth Circuit reasoned that fact cannot defeat qualified immunity because decisions like *Hope and Taylor* are "Eighth Amendment cases where the Supreme Court denied qualified immunity for deliberate indifference to unconstitutional prison conditions . . . ." App. 33a. But this Court has never limited obvious violations to Eighth Amendment claims—*Sause* proves that. And just as tying a prisoner to a hitching post in the midday sun is obviously unlawful under the Eighth Amendment, *Hope*, 536 U.S. at 745–46, throwing an American in jail because she asked public officials for facts is obviously unlawful under the First Amendment. Underscoring how isolated the Fifth Circuit is, at least nine circuits have readily denied qualified immunity for obvious First Amendment violations. App. 77a–78a (Ho, J., dissenting) (citing cases).

If the freedoms of speech and of the press are the bulwark of liberty, then Americans must have a remedy

when officials plainly violate the First Amendment. "After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) (Gorsuch, J., for the majority). Villarreal's arrest fits that bill.

This Court has corrected the Fifth Circuit more than once for granting qualified immunity to officials who obviously violated the Constitution. *Hope*, 536 U.S. at 741; *Taylor*, 592 U.S. at 9. It should do so again here.

II. In Holding Laredo Officials Could Invoke a State Statute to Excuse an Obvious First Amendment Violation, the Decision Below Conflicts with the Constitution, Section 1983's Text, and a Consensus of Circuits.

No state statute trumps the Constitution, as every reasonable official knows. U.S. Const. art. VI, cl. 2. Thus, public officials are "liable for enforcing a [state] statute in an obviously unconstitutional way." App. 63a (Willett, J., dissenting). So when officials arrest someone for exercising an undoubted First Amendment right, they "shall be liable," no matter the state statute they use to justify the arrest. 42 U.S.C. § 1983.

But in the Fifth Circuit, public officials who base arrests on clearly protected speech are "categorically immune from § 1983 liability, no matter how obvious the depredation, so long as they can recite some statute to justify it." App. 72a (Ho, J., dissenting). That impossible

qualified immunity standard puts the Fifth Circuit on the wrong side of the Constitution, Section 1983's text, and its sister circuits. This Court should intervene to reject the Fifth Circuit's untethered standard.

A. The Fifth Circuit now shields officials from liability for even the most clear-cut First Amendment violations, so long as a state statute authorizes it.

The Fifth Circuit imposes two new barriers for Section 1983 plaintiffs suing officials who turn exercises of First Amendment rights into a crime. First, plaintiffs must show a Fourth Amendment violation to sue an officer for the First Amendment violation. App. 10a. Judge Ho explained the rule "spells the end of the First Amendment," because "[a]ll the government would have to do is to enact some state statute or local ordinance forbidding some disfavored viewpoint—and then wait for a citizen to engage in that protected-yet-prohibited speech." *Id.* at 80a. Judge Ho's warning echoes the Founders' concerns over officials abusing the seizure power to silence free expression. *See* Section I.B, *supra*.

The second barrier the Fifth Circuit has erected to First Amendment arrest claims is just as troubling. Its decision absolves officials who arrest a person based on their protected speech if "no final decision of a state court had held the [arresting statute] unconstitutional." App. 22a. In effect, then, First Amendment plaintiffs in the Fifth Circuit must now win a pre-enforcement challenge to a penal law (and self-censor until victory), or risk losing their ability to sue after an official arrests them for their speech under that law. In fact, that is what the Fifth

Circuit suggested Villarreal should have done (App. 3a), instead of count on well-settled First Amendment rights to protect her. No American should face such an unjust standard.

B. The decision below ignores both the Constitution and Section 1983's text.

Public officials cannot use a state statute to turn exercises of familiar First Amendment rights into probable cause. Under the Supremacy Clause, federal constitutional rights trump state statutes. U.S. Const. art. VI, cl. 2. Reasonable officials understand the Supremacy Clause's basic rule. *See, e.g.*, *id.*; *Poindexter v. Greenhow*, 114 U.S. 270, 292 (1885). But by concluding that "officers are almost always entitled to qualified immunity when enforcing even an unconstitutional law, so long as they have probable cause," the decision below clashes with the Constitution. App. 25a.

It also clashes with the text of Section 1983, which enables Americans to sue for constitutional violations made "under color of any statute . . . of any State." "Under color of any statute" plainly covers constitutional violations that result from an authorizing state statute. *See, e.g.*, *Myers v. Anderson*, 238 U.S. 368, 377–78 (1915). And of course, Section 1983's text provides no safe harbor for officials who violate the Constitution under *cover* of a state statute. In holding otherwise, the Fifth Circuit ignored the plain text of Section 1983, getting a crucial remedy for constitutional violations backwards.

The point is not that police and other public officials must be constitutional scholars to avoid liability. *Cf.*

Michigan v. DeFillippo, 443 U.S. 31, 38 (1979). Rather, when officials enforce statutes in obviously unconstitutional ways, qualified immunity is no shield. This principle tracks the historical availability of damages when officials wielded state statutes against clear constitutional rights. *E.g.*, *Myers*, 238 U.S. at 377–78; *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927) (reversing dismissal of damages claim based on state officials relying on an authorizing Texas statute to deny voting rights, "because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth [Amendment].").

It also tracks the Court's qualified immunity precedent. Imagine if the prison guards in *Hope* invoked a state statute permitting "appropriate restraint measures" for unruly prisoners. The outcome should be the same: Handcuffing someone to a hitching post in the midday sun undeniably violates the Eighth Amendment, authorizing statute or not. Or suppose the officers in *Sause* employed a statute authorizing police to impede "offensive, intimidating, or belligerent conduct" during an investigation. Mary Anne Sause's undoubted right to pray should still have prevailed. The same holds for obvious Free Speech and Press Clause violations, like throwing Villarreal in jail for asking the police questions, no matter what Section 39.06(c) provided.

The Fifth Circuit sidestepped that principle, instead claiming the Court's decisions in *DeFillippo* and *Heien v. North Carolina* entitle officials to "qualified immunity when enforcing *even an unconstitutional law*, so long as they have probable cause." App. 25a (citing *DeFillippo*, 443 U.S. at 38; *Heien v. North Carolina*, 574 U.S. 54, 64 (2014)) (emphasis added). But neither *DeFillippo* nor

Heien address First Amendment rights or qualified immunity, let alone the obvious unconstitutionality of a months-long operation to jail a local reporter for asking police questions. If "[t]he Fourth Amendment tolerates only *reasonable* mistakes," *Heien*, 574 U.S. at 66, then it does not tolerate arrests where the sole basis for probable cause is the exercise of a familiar First Amendment right. The Fifth Circuit's contrary standard upends the constitutional duty of officials to "examine what is 'unreasonable' in the light of the values of freedom of expression." *Roaden*, 413 U.S. at 504.

More broadly, *DeFillippo* confirms that state statutes do not give law enforcement free rein to violate clearly established constitutional rights. By contrast, it explains officials cannot rely on a "law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." 443 U.S. at 38. *DeFillippo* aligns with the guiding principle here: When reasonable officials would know that enforcing a criminal law would violate the Constitution, they uphold their oath and don't enforce it. Thus, *DeFillippo* does not support the Fifth Circuit's impossible standard, especially because law enforcement officials know they must make arrest decisions with "scrupulous exactitude" when targeting expression. *Stanford*, 379 U.S. 485.

C. The Fifth Circuit stands alone from its sister circuits in allowing officials to shroud obvious First Amendment violations in state statutes.

The Fifth Circuit stood by its near-impossible qualified immunity standard despite acknowledging its sister circuits have "denied qualified immunity where the courts

held the underlying statutes or ordinances were 'obviously unconstitutional,'" including in the First Amendment context. App. 26a–27a. It distinguished those cases based on immaterial factual differences, but overlooked how "the overarching inquiry is whether, in spite of the existence of the statute, a reasonable officer should have known that his conduct" violated the Constitution. *Lawrence*, 406 F.3d at 1232. Indeed, "a mountain of Supreme Court and circuit precedent reinforces this principle." App. 83a (Ho, J., dissenting) (citing cases). And in the First Amendment context, several circuits have denied qualified immunity to officials who enforced statutes in ways that unmistakably violated the First Amendment.

For example, the Sixth Circuit denied qualified immunity to a police officer who invoked three Michigan statutes to justify arresting a man for saying "God damn" at a township board meeting. *Leonard v. Robinson*, 477 F.3d 347, 351 (6th Cir. 2007). The Sixth Circuit acknowledged that no court had commented "clearly and directly upon the constitutionality of" the three statutes at issue, but held *DeFillippo*'s standard for "flagrantly unconstitutional" laws applied to all three because they are "radically limited by the First Amendment." *Id.* at 359, 360. Unlike the Fifth Circuit here, the Sixth Circuit did not focus on if a reasonable official could have believed the speech—"mild profanity while peacefully advocating a political position"—met the elements of Michigan's bygone blasphemy and swearing laws. *See id.* at 361. Instead, it considered whether a reasonable official could believe the speech "could constitute a criminal act" given "First Amendment jurisprudence that is decades old" and "the prominent position that free political speech has in our jurisprudence and in our society." *Id.* at 359–61.

Just last year, the Tenth Circuit denied qualified immunity to police officers who arrested a police critic under a state obstruction of justice statute. *Jordan*, 73 F.4th at 1171. Looking to *Houston v. Hill*, the court concluded "no reasonable officer could have believed they had arguable probable cause for arrest" because the First Amendment protects the freedom to disagree with the police. *Id.* In another decision from the Tenth Circuit, the court denied qualified immunity to officials who invoked a criminal libel statute to arrest a student blogger for what every reasonable officer would know is protected satire. *Mink*, 613 F.3d at 1009–10. At the decision's core was a longstanding First Amendment principle: An official "may not base her probable cause determination on an 'unjustifiable standard,' such as speech protected by the First Amendment." *Id.* at 1003–04 (citing *Wayte*, 470 U.S. at 608). Justice Gorsuch, then sitting on the Tenth Circuit, wrote separately to stress that because "the First Amendment precludes defamation actions aimed at parody," probable cause was lacking. *Id.* at 1012 (Gorsuch, J., concurring).

While the plaintiffs in *Jordan* and *Mink* rested on Fourth Amendment claims, that makes no meaningful difference. *See Roaden*, 413 U.S. at 501–04 (explaining that where free expression is involved, "[t]he Fourth Amendment . . . must not be read in a vacuum."). The Tenth Circuit denied qualified immunity in both decisions because officials based a search or seizure under a state statute on the exercise of a long-settled First Amendment right.

The Eighth Circuit explained why not even an arrest warrant can shield an official who enforces state statutes

to criminalize undoubted First Amendment rights. *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014). In *Snider*, the Eighth Circuit denied qualified immunity to an officer who arrested a citizen for trying to burn the American flag and shredding it with a knife because "he hated the United States." *Id.* at 1154. The officer, like the Laredo officials, invoked an authorizing statute (one "prohibiting flag desecration") and convinced a neutral magistrate to issue an arrest warrant. *Id.* Applying this Court's decision in *Malley v. Briggs*, the Eighth Circuit explained, "[a] reasonably competent officer in [the officer's] position would have concluded no arrest warrant should issue for the expressive conduct . . . Although it is unfortunate and fairly inexplicable that the error was not corrected by the county prosecutor or the magistrate judge, no warrant should have been sought in the first place." *Id.* at 1157.

Not only does *Snider* harmonize with its sister circuits' decisions in *Leonard, Jordan*, and *Mink*, but it also shows how the Fifth Circuit's rule granting near-total immunity if officers obtain an arrest warrant squarely conflicts with this Court's decision in *Malley. Malley* explained that if "a reasonably well-trained officer in [Defendants'] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant . . . the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest." 475 U.S. at 345. That "unnecessary danger" is especially high when an officer applies for a warrant based on the exercise of clearly established First Amendment rights, no matter the authorizing statute under which he feigns probable cause. Villarreal's allegations highlight that

danger even more. *See* App. 51a (Higginson, J., dissenting) (explaining how the Fifth Circuit majority overlooked Villarreal's allegations about the Laredo officials' deficient and misleading arrest warrant affidavits).

Had the reasoning of the Sixth, Eighth, and Tenth Circuits applied here, the Laredo officials would not be entitled to qualified immunity and Villarreal's suit would have gone forward to discovery. That reasoning makes perfect sense through the lens of *Hope* and its "fair warning" standard. 536 U.S. at 740 (explaining the "fair warning" qualified immunity standard). If an official enforces a criminal law against the exercise of a First Amendment right of which a reasonable official would have "fair warning," qualified immunity is no shield to liability.

The Constitution limits the reach of state statues—not, as the Fifth Circuit held, the other way around. This Court should grant certiorari and confirm that public officials are not entitled to qualified immunity when they employ state statutes to violate the First Amendment in obvious ways.

III. This Case Presents Exceptionally Important and Recurring Issues, and Is an Ideal Vehicle to Resolve Them.

This case centers on the exceptionally important and recurring issues of officials criminalizing undoubted First Amendment rights and the power of Americans to remedy those obvious constitutional violations. Just a few years ago, Justice Gorsuch warned, "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can

be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties . . . ." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part). This case puts a face on that danger to the First Amendment. So do other recent First Amendment abuses:

- In Kansas, after a local newspaper began investigating misconduct by the incoming police chief, the chief instigated a raid on the newspaper's office. The pretense for the raid echoed the faux excuse for Villarreal's arrest: Law enforcement said that a reporter who accessed public records on a public website violated Kansas's identity theft law.[5]

- An Iowa man attended a city council meeting where he peacefully criticized his mayor and police department. The government responded by arresting the man and charging him for disrupting a lawful assembly.[6]

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5. Rachel Mipro, *Marion Police Chief Resigns after Footage Shows Him Rifling Through Records about Himself*, Kansas Reflector (Oct. 3, 2023), https://kansasreflector.com/2023/10/03/marion-police-chief-resigns-after-body-cam-footage-shows-him-rifling-through-records-about-himself.

6. Clark Kauffman, *City Sued for Arresting Man Who Criticized Newton Mayor and Police*, Iowa Capital Dispatch (Oct. 12, 2023), https://iowacapitaldispatch.com/2023/10/12/city-sued-for-arresting-man-who-criticized-newton-mayor-and-police.

- In Pennsylvania, police arrested and charged a man with disorderly conduct for peacefully quoting Bible verses on a public sidewalk across from a Pride Month event at city hall. The arresting officer claimed the man was making "derogatory comments to people at the event."[7]

All of this comes at a time where, as the Wall Street Journal front page put it, "Authoritarians Threaten Journalists Around the Globe."[8] Our nation's free press traditions and the First Amendment separate us from the world's autocratic regimes.

But if the Fifth Circuit's decision remains standing, it offers would-be-authoritarians "a roadmap for destroying the First Amendment." App. 80a (Ho, J., dissenting). The decision subjects the First Amendment to the least-explored crevices of state penal codes. And those crevices run deep, as the derelict Texas statute here shows. So too does Michigan's criminal code, which prohibits "swear[ing] by the name of God, Jesus Christ, or the Holy Ghost" (Mich. Comp. Laws § 750.103) and "advocat[ing]" the concept of polygamy (*id.* § 750.441). And in Massachusetts,

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7. Michelle Lynch, *Police Department Suffering Fallout from Arrest of Preacher at Pride Event*, Reading Eagle (June 13, 2023), https://www.readingeagle.com/2023/06/13/reading-police-department-suffering-fallout-from-arrest-of-preacher-at-pride-event.

8. Matthew Dalton and Jack Gillum, *Authoritarians Threaten Journalists Around the Globe*, Wall St. J. (Mar. 29, 2024), https://www.wsj.com/world/authoritarians-threaten-journalists-around-the-globe-38cda1d7.

a fine awaits those who perform the Star Spangled Banner with an improper amount of "embellishment" or "as dance music." Mass. Gen. Laws ch. 264, § 9. In short, when public officials want to target a critic, they have a bottomless well of statutes from which to draw.

Americans have their own weapon to deploy against those abuses of power: Section 1983. But the Fifth Circuit's decision thwarts Section 1983's remedy for undeniable First Amendment violations cloaked in a state statute. If this Court does not act, the more penal codes grow, the more officials will be able to dodge accountability when they violate the First Amendment.

Making the Court's review even more imperative is how often lower courts increasingly grapple with cases, like this one, where qualified immunity meets the First Amendment. A recent study of circuit court cases involving qualified immunity found 18 percent involved First Amendment claims—the largest category after excessive force and false arrest claims.[9] This Court's review will provide much needed guidance and clarity for the lower courts on a recurring issue.

Finally, this case is an ideal vehicle to resolve the questions presented. It comes on a motion to dismiss, with no thorny factual disputes. Villarreal's allegations show a clear-cut exercise of First Amendment rights. Nothing in

9. Jason Tiezzi et al., *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises*, 4, 18, Institute for Justice (Feb. 2024), https://ij.org/wp-content/uploads/2023/11/Unaccountable-qualified-immunity-web.pdf.

the arrest warrant affidavits hinted at Villarreal making threats, bribing officers, or doing anything else close to unprotected speech or independently illegal conduct. Nor does this case involve difficult split-second policing decisions; it involves officers "sitting at their desks drafting affidavits." App. 99a (Ho, J., dissenting).

Rather than allow the Fifth Circuit's decision to erode founding principles, this Court's First Amendment jurisprudence, and Section 1983 all at once, the Court should grant certiorari and make clear that Americans have a cause of action when officials abuse state penal codes to trample First Amendment rights.

CONCLUSION

For all these reasons, the Court should grant certiorari.[10]

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10. While this case warrants review given the importance and recurrence of the issues involved, the Court at the very least should grant, vacate, and remand on Villarreal's First Amendment retaliation claim (which she pleaded alongside her direct First Amendment violation claim, App. 230a–237a), particularly if the Court reverses in *Gonzalez v. Trevino*, No. 22-1025 (argued Mar. 20, 2024). Reversal in *Gonzalez* would bear on some of the issues here, as Villarreal alleged objective evidence of retaliation making probable cause irrelevant. *See Nieves*, 139 S. Ct. at 1727. For instance, she alleged how local officials had never enforced Section 39.06(c) in the law's 23-year history, including against local journalists and many others who ask Laredo officials for information and publish what those officials share. App. 223a, 233a, 241a–242a. As Judge Higginson explained, "there could be no better example of a crime never enforced than this one." App. 55a.

Respectfully submitted,

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