No. 25-29

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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Colin P. McDonell
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut St.
Suite 900
Philadelphia, PA 19106

Robert Corn-Revere
JT Morris
Counsel of Record
Conor T. Fitzpatrick
David W. Rubin
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Ave. SE
Suite 340
Washington, DC 20003
215-717-3473
jt.morris@thefire.org

Counsel for Petitioner

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Table of Authorities

Page

Table of Authorities

Page

Statutes and Constitutional Provisions

INTRODUCTION

As this Court's decisions and first principles make clear, Americans have an undoubted First Amendment right to ask government officials questions and publish what they volunteer. Respondents, police and prosecutors in Laredo, Texas, jailed Priscilla Villarreal for exercising that freedom. Their trampling of the First Amendment demands accountability under our Constitution and Section 1983.

But Respondents and the State of Texas insist on a bleaker vision for free expression and a free press, allowing the government to criminalize asking officials for information. Today, that chilling vision is the law in the Fifth Circuit. Despite this Court granting, vacating, and remanding the Fifth Circuit's sharply split decision excusing Respondents for turning routine journalism into a felony, a divided court has essentially restored that decision, again granting Respondents qualified immunity. Such a grave threat to the First Amendment, let alone summarily restoring it in the face of this Court's remand, warrants this Court's review.

Respondents and Texas have no answer to this Court's decisions from which the Fifth Circuit starkly departed. Instead, Respondents invite this Court to rewrite its decisions as holding "the First Amendment poses no barrier to the state's ability to restrict the way in which information may be obtained." Resp'ts BIO.18. That may serve their desire for an "effective way" to stop people from asking the government for information. *Id.* at 20. But it spurns this Court's many

decisions cementing the First Amendment right to question officials and publish what they freely share, which is essential to our tradition of self-government. Pet. 16–21.

Respondents and Texas miscast this case as one about "access" to government information. It is not. If it were, neither would scramble to mislabel Villarreal's polite questions to a police officer with scare-words like "soliciting" and "inciting." No matter the government label, the First Amendment protects obtaining information from officials "simply by asking." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99, 103–04 (1979).

Nor are "duly enacted" statutes and warrants unassailable armor against Section 1983 damages claims, as Respondents and Texas suggest. If "under color of any statute…of any State" means anything, officials must face liability when they try to launder obvious First Amendment violations through state penal codes. 42 U.S.C. § 1983. As Texas conceded below, this case is not a statutory challenge.[1] Rather, it centers on Respondents misusing Texas Penal Code § 39.06(c) to jail Villarreal for basic news reporting.

In the Sixth, Eighth, and Tenth Circuits, qualified immunity would not shield them. The Fifth Circuit stands alone, assuring near-blanket immunity for officials who manipulate state laws to criminalize

---

1. *Villarreal v. City of Laredo*, No. 20-40359 (5th Cir. Aug. 15, 2022), Dkt. No. 117.

exercises of First Amendment rights. This conflict warrants the Court's review.

The questions presented are vitally important. By swooping in to support local officials despite no statutory challenge or parties to defend, Texas's involvement only underscores the constitutional stakes here. Several dissenting Fifth Circuit judges and a broad array of *amici* also confirm why this Court's intervention is imperative.

This case provides the Court an opportunity to affirm that officials do not get a free pass when they infringe undoubted First Amendment freedoms. The Court should grant certiorari and reverse.

I. The Fifth Circuit's Decision Sharply Conflicts With This Court's Decisions.

A. Respondents violated Villarreal's undoubted First Amendment rights to ask officials questions and to publish what they volunteer.

The Fifth Circuit's decision clashes with this Court's precedent and bedrock constitutional principles. At every turn, Respondents and Texas fail to overcome this Court's decisions leaving no question whether Respondents violated the First Amendment when they arrested Villarreal for everyday journalism.

Respondents and Texas admit this Court affirmed 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)); Texas BIO.16; Resp'ts BIO.18. Yet their chief argument boils down to this: Government officials, not the First Amendment, set the bounds of lawful newsgathering. Nothing could stray further from the Constitution and this Court's decisions. In fact, this Court rejected the government's view over 45 years ago, explaining that because of the First Amendment, "[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.

Respondents and Texas distort *Daily Mail* and the rest of this Court's long line of decisions cementing First Amendment protections for those, like Villarreal, who receive and publish even sensitive information government officials volunteer. *E.g.*, *Daily Mail*, 443 U.S. at 99, 103–04 (juvenile murder suspect's name); *Fla. Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (rape victim's name); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (deceased rape victim's name); *Okla. Publ'g Co. v. Dist. Ct.*, 430 U.S. 308, 311 (1977) (juvenile suspect's name); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 831, 838 (1978) (information about state's judicial investigation). Take Respondents' answer to *Daily Mail*. There, the Court concluded lawful newsgathering includes what Villarreal did—using "routine newspaper reporting techniques," like asking police questions to gather and report the news. *Daily Mail*, 443 U.S. at 99, 103–04. Even so, Respondents contend *Daily Mail* "suggests that the First Amendment poses no barrier to the state's ability to

restrict the way in which information may be obtained." Resp'ts BIO.17–18.

They misread *Daily Mail*. Neither it nor any of this Court's precedents "suggests" the government has free rein to criminalize asking public servants for information. Not only does Respondents' view clash with *Daily Mail* and the Court's other controlling decisions, it mocks the historic American tradition of refusing to punish those who seek and publish information from government sources. Reporters Comm. Amicus Br. 6–8.

Texas takes a different path, relabeling asking police for facts with criminal buzzwords like "solicitation," "incitement," and "leaks." *E.g.*, Texas BIO.I, 1, 13. But "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). Nor does Texas explain what Villarreal "incited" here—the voluntary release of newsworthy information? Labels aside, this Court's decisions foreclosed making Villarreal's questions a crime.

Respondents and Texas also repeat the Fifth Circuit's strawman that this case turns on "access" to government information. Pet.24; Texas BIO.1, 12, 15; Resp'ts. BIO.16. Villarreal never claimed a right to "access" information. Officer Goodman could have responded to Villarreal with, "File a public records request," or, "No." Instead, Goodman freely shared facts when Villarreal simply *asked*. If Goodman lacked that authority, the consequences were hers alone to bear. *Fla. Star*, 491 U.S. at 534–35. Arresting

Villarreal for something reporters do every day obviously violated the Constitution.

Respondents' and Texas's efforts to sever First Amendment protections for publishing from those for newsgathering cannot obscure the violation. *See* Texas BIO.12–13; Resp'ts BIO.15–17. If the First Amendment safeguards "[t]he right of citizens to inquire, to hear, to speak, and to use information," *Citizens United v. FEC*, 558 U.S. 310, 339 (2010), then it protects newsgathering, expenditures, and other expressive activity preceding pure speech, *see id.* at 351–53.

This Court's decisions in *Daily Mail*, *Florida Star*, and *Oklahoma Publishing* show that principle in action. While each involved the government punishing publication, the predicate newsgathering from officials sharing information was central to the Court upholding First Amendment protections in each case. *Daily Mail*, 443 U.S. at 99–100, 103–04; *Fla. Star*, 491 U.S. at 525, 534; *Okla. Publ'g Co.*, 430 U.S. at 308, 311. Just as the First Amendment protected Villarreal's freedom to publish newsworthy facts Officer Goodman shared, it undeniably protected her freedom to ask for those facts.

B. No reasonable official would have arrested Villarreal.

The Court's precedent and basic constitutional principles provided "obvious clarity" that arresting someone for basic journalism violates the First Amendment. Pet.16–27; *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (citation omitted). Because Respondents

acted as no reasonable officer would, qualified immunity does not shield them. *E.g.*, *Hope*, 536 U.S. at 741; *Taylor v. Riojas*, 592 U.S. 7, 8–9 (2020) (per curiam).

Texas argues that under *Hope*, "the obviousness of the application must be determined based on 'the specific conduct in question.'" Texas BIO.26 (quoting *Hope*, 536 U.S. at 741). True enough. Yet Texas goes even further, suggesting that Villarreal must point to "factually analogous" precedent. *Id.* at 19. The Court rejected that "rigid gloss" on the "clearly established" standard in *Hope*. 536 U.S. at 739. Even more to the point, *Daily Mail* and this Court's similar decisions clearly established that Respondents' "specific conduct" would violate the Constitution. In fact, Respondents engineered Villarreal's arrest for using the same protected "routine newspaper reporting techniques" reporters used in *Daily Mail*, like getting facts "simply by asking" the police. *Daily Mail*, 443 U.S. at 99, 104.

Respondents, on the other hand, propose that First Amendment law is too "complicated" for police to understand they are violating it. Resp'ts BIO.13–14. Sometimes, police may encounter novel First Amendment questions. Whether they can arrest someone for seeking facts from officials "simply by asking" is not one of them. *Daily Mail*, 443 U.S. at 99, 103–104. Under Respondents' view, officials have no duty to know that arresting someone for criticizing the police or peacefully worshipping violates the First Amendment. The Constitution demands more.

So while Respondents—including two experienced prosecutors—argue a lack of First Amendment training merits qualified immunity, Resp'ts BIO.14, their argument is irrelevant. Reasonable officials need no special training to know jailing reporters for doing their job violates the First Amendment. Their argument is also wrong. Police "are explicitly trained to handle press inquiries and are encouraged to develop cooperative relationships with journalists." Reporters (Barstow et al.) Amicus Br. 7–11.

Here, Respondents concocted warrant affidavits describing no more than routine news reporting. App.240a–242a. And so they have no answer for the constitutional mainstay that they violated and the Fifth Circuit ignored: Probable cause cannot rest merely on protected expression. Pet.21–23 (explaining the principle's historical roots). Texas even concedes the criminal law meaning of "solicits" *excludes* "asking for information that ultimately cannot be released," highlighting why no reasonable officer would have enforced the statute here. Texas BIO.13–14.

To this end, Texas misses the mark by echoing the Fifth Circuit's misplaced focus on *Reichle v. Howard* in response to Villarreal's retaliatory arrest claim. *Id.* at 27 (citing 566 U.S. 658, 664–65 (2012)); *see also* Resp'ts BIO.13. *Reichle* involved an arrest for assault, a far cry from retaliatory arrests built solely on protected expression, like Villarreal's. Pet. 26–27. Nor do Texas or Respondents have an answer to Villarreal's *direct* First Amendment violation claim, to which *Reichle* poses no hurdle. *See ibid.*

Respondents and Texas are left parroting the Fifth Circuit's reinstated—and dangerous—holding, insisting qualified immunity shields officials who squeeze time-honored exercises of First Amendment rights into a "duly enacted" criminal statute no court has yet invalidated. Resp'ts BIO.2, 10; Texas BIO.16–17; App.33a, 44a–47a. That reasoning defies Section 1983's plain text—something neither Texas nor Respondents seriously address—which provides a cause of action for constitutional violations "under color of any statute…of any State." 42 U.S.C. § 1983. It also flouts the historical rule that officials executing a search or seizure must "examine what is 'unreasonable' in the light of the values of freedom of expression." *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973); Pet.21–23.

At bottom, the Fifth Circuit's reasoning is backwards, warranting this Court's review. "[T]he 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); *see also* App.105a (Ho, J., dissenting) ("A mountain of Supreme Court and circuit precedent reinforces this principle.").

That principle extends to arrest warrants, as this Court explained in *Malley v. Briggs*, 475 U.S. 335, 344–345 (1986). The issue is not, as Texas maintains, whether Respondents could *rely* on arrest warrants from a neutral magistrate. Texas BIO.I, 32. Rather, Respondents never should have *sought* the warrants, because any "reasonably well-trained officer in [Respondents'] position would have known that his

affidavit failed to establish probable cause." *Malley*, 475 U.S. at 345; *see also id.* at 346 n.9 ("[The magistrate's] action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate.").

This Court should grant certiorari to undo the Fifth Circuit's glaring departure from this Court's precedent and confirm that qualified immunity does not shield officials who violate the First Amendment in obvious ways.

II. The Fifth Circuit's Decision Conflicts With Decisions From Other Circuits.

The Fifth Circuit accepted that decisions from other circuits have "denied qualified immunity where the courts held the underlying statutes or ordinances were 'obviously unconstitutional,'" including for First Amendment claims. App.48a n.20. Still, it split from those decisions, making officials "categorically immune from § 1983 liability, no matter how obvious the depredation, so long as they can recite some statute to justify it." App.94a (Ho, J., dissenting). The Court should also grant certiorari to resolve this conflict.

Respondents and Texas confuse the issue. Both try to distinguish the conflicting cases, arguing that the constitutional rights in those cases, like criticizing police and using mild profanity at a public meeting, differ from the rights to ask officials questions and publish what they volunteer. Texas BIO.30

(discussing *Jordan v. Jenkins*, 73 F.4th 1162 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 1343 (2024) (mem.)); Resp'ts BIO.21 (discussing *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007)). Those are not material distinctions. What matter are two things. First, in those decisions and here, officials enforced state statutes against exercises of undoubted First Amendment rights. Pet. 32–36. Second, those decisions rightly denied qualified immunity despite the statute, while the Fifth Circuit did not. *Id.*

Respondents and Texas repeat this mistake with the Eighth Circuit's decision in *Snider v. City of Cape Girardeau*, which denied qualified immunity to an officer who obtained an arrest warrant for flag desecration. 752 F.3d 1149, 1154 (8th Cir. 2014). Both fixate on *Snider* involving a different First Amendment right. Texas BIO.29; Resp'ts BIO.22. But just as this Court's precedent confirms political flag burning is no basis for an arrest warrant, so too for Villarreal's routine journalism. By contrast, the Fifth Circuit's decision means near-blanket immunity for officials who contrive an arrest warrant based solely on protected speech just because "a neutral magistrate issued the warrants." App.51a; *see also* Texas BIO.32 (discussing the Fifth Circuit's "independent-intermediary doctrine"). That reasoning conflicts with both *Snider* and this Court's decision in *Malley*.

Like the Fifth Circuit, Texas and Respondents lean on *Michigan v. DeFillippo*, 443 U.S. 31 (1979), arguing it insulates officials from liability for obvious First Amendment violations if they invoke an authorizing state statute. App.50a; Texas BIO.18;

Resp'ts BIO.10–11. But *DeFillippo*, an exclusionary rule decision, does not go so far. Pet. 32. The Sixth Circuit had little trouble reconciling *DeFillippo* when denying qualified immunity to officials who enforced state statutes against familiar First Amendment rights. *Leonard*, 477 F.3d at 359. This division over *DeFillippo*'s fit with qualified immunity underscores the broader conflict warranting this Court's review.

III. This Case Is An Excellent Vehicle To Resolve Especially Important Questions.

The questions presented are vitally important. Recent examples abound of officials targeting journalists who report on police and citizens who seek public records. *E.g.,* Indep. Journalists Amicus Br. 1 & n.2; Muckrock Found. Amicus Br. 21. Ever-expanding penal codes provide a cornucopia of state statutes to deploy against protected speech. Pet.36–38. And lower courts struggle to reconcile core First Amendment freedoms of speech and of the press with qualified immunity doctrine. Reporters Comm. Amicus Br. 12–17. A string of recent petitions for certiorari reflect that struggle. *E.g., Novak v. Parma*, No. 22-293 (U.S. 2022); *Frasier v. Evans*, No. 21-57 (U.S. 2021); *Hoggard v. Rhodes*, No. 20-1066 (U.S. 2020).

Thus, the questions presented stand on recurring real-world experiences, bedrock First Amendment freedoms, and the grave threat the Fifth Circuit's holdings pose to those freedoms and Section 1983's power to check government abuse. Left in place, the Fifth Circuit's decision will chill Americans from asking officials questions, and at the same time,

embolden officials to punish critics, dissenters, and anyone else who asks the wrong question. This Court should intervene to reverse that decision, and settle that qualified immunity does not shield officials who violate undoubted First Amendment rights, even if they launder the violation through the penal code.

Texas insists that the Court should deny certiorari because Americans in Villarreal's shoes need not seek damages, as injunctions and declaratory judgments suffice to remedy First Amendment violations. Texas BIO.33. That's wrong three times over. First, it ignores Congress's mandate that Americans can sue state and local officials for damages when officials violate the First Amendment. 42 U.S.C. § 1983. Second, it overlooks that injunctions and declaratory judgments are prospective relief and cannot remedy an unlawful arrest, leaving damages as the only civil remedy Americans have for an arrest based on protected speech. And third, Texas's view would force speakers to either bring a pre-enforcement challenge and self-censor until a court rules, or risk arrest without remedy.

Respondents' vehicle arguments also lack substance. Despite their hand-wringing, granting certiorari will not affect the government's interests in keeping certain information from disclosure. *See* Resp'ts BIO.2, 23. It can discipline employees who mishandle sensitive information. That is the constitutionally permissible path—punishing the inquiring citizen is not. Despite Respondents' pleas to withhold judgment on the First Amendment violation, this Court should never hesitate to rule where the infringement of expressive liberties is clear

and the liability for doing so has divided the circuits.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

Colin P. McDonell
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut St.
Suite 900
Philadelphia, PA 19106

Robert Corn-Revere
JT Morris
Counsel of Record
Conor T. Fitzpatrick
David W. Rubin
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
700 Pennsylvania Ave. SE
Suite 340
Washington, DC 20003
215-717-3473
jt.morris@thefire.org

Counsel for Petitioner

November 20, 2025