No. 25-

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

PETITION FOR 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, the Fifth Circuit held the officials have qualified immunity, concluding 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. This Court granted certiorari, vacated, and remanded for further consideration in light of *Gonzalez v. Trevino*, 602 U.S. 653 (2024) (per curiam).

But on remand, a splintered Fifth Circuit again held the officials have qualified immunity and largely restored "our previous en banc majority." In dissent, Judge Higginson remarked, "I do not think it is a proper answer to the High Court to reinstate what we mistakenly said before, just in different packaging."

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, the appellant in the Fifth Circuit, and petitioner on the previous petition for a writ of certiorari.

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, appellees in the Fifth Circuit, and respondents to Villarreal's previous petition for a writ of certiorari.

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 and filed a response to Villarreal's previous petition for a writ of certiorari.

RELATED PROCEEDINGS

This case arises from these proceedings:

- *Villarreal v. City of Laredo et al.*, No. 20-40359, 5th Cir. (Apr. 8, 2025) (en banc) (affirming dismissal of First Amendment retaliation claim);

- *Villarreal v. Alaniz et al.*, No. 23-1155, U.S. (Oct. 15, 2024) (granting certiorari, vacating the January 23, 2024 en banc judgment, and remanding for further consideration in light of *Gonzalez v. Trevino*);

- *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 motions to dismiss).

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PETITION FOR WRIT OF CERTIORARI

For months, police and prosecutors in Laredo, Texas, sought any excuse to arrest Priscilla Villarreal, a local journalist who often shines a light on those officials. They decided to jail her for basic journalism: asking a police officer for facts while reporting on two news stories, facts the officer freely shared. So Villarreal sued under Section 1983. But a fractured en banc Fifth Circuit not only granted those officials qualified immunity, it "claim[ed] that Defendants don't have to comply with the First Amendment *at all*." App. 101a (Ho, J., dissenting).

Last fall, this Court granted certiorari, vacated, and remanded for further consideration in light of *Gonzalez v. Trevino*, 602 U.S. 653 (2024) (per curiam). App. 22a. Yet remand proved futile for Villarreal and the First Amendment. Rather than reconsidering its prior holding as this Court instructed, the Fifth Circuit en banc majority "summarily decide[d] that Ms. Villarreal loses again, despite nearly six years of tenacious First Amendment litigation that culminated successfully in the High Court." App. 19a (Higginson, J., dissenting). The majority effectively reinstated the decision this Court vacated, stating, "our previous en banc majority opinion is superseded only to th[e] extent" the majority addressed *Gonzalez*. App. 4a. Going further, the majority dismissed *Gonzalez* as immaterial to its qualified immunity holding. App. 4a.

At bottom, the Fifth Circuit has doubled down on granting officials free rein to turn routine news reporting into a felony. Little could clash more with

our founding principles, this Court's precedent, and the role of federal courts as First Amendment guardians.

Rather than affirm that arresting someone for peaceably asking the government a question obviously violates the First Amendment, the Fifth Circuit has erased the line "distinguish[ing] a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 463 (1987). It has imperiled 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 despite this Court's warning that "[t]he Bill of Rights was fashioned 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*, 367 U.S. 717, 729 (1961), the Fifth Circuit has converted the Fourth Amendment from a 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 ruling that Laredo officials acted reasonably by turning everyday journalism into a crime under a 23-year-old Texas statute local officials had never enforced. App. 34a–50a. If "under color of any statute" means anything, officials must face liability when they launder obvious First Amendment violations through state statutes. 42 U.S.C. § 1983. In the Sixth, Eighth, and Tenth Circuits, that principle governs. Each has held

qualified immunity does not shield officials who enforce state penal codes 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 sub nom. Donnellon v. Jordan*, 144 S. Ct. 1343 (2024).

The Fifth Circuit stands alone, creating a free pass for any official who unearths an obscure statute to criminalize protected expression. But the Constitution and this Court's qualified immunity framework demand more. As Judge Willett warned in dissenting from the now-restored en banc decision, 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. 85–86a.

Though *Gonzalez* underscores the unconstitutionality of singling out speakers for arrest, its narrow holding does not resolve the questions here—questions vital to preserving free expression, as state and local officials increasingly criminalize familiar First Amendment freedoms. This Court should grant review to ensure the Constitution and Section 1983 remain unshakable against those attacks on protected speech.

OPINIONS BELOW

The April 2025 Fifth Circuit en banc opinion, concurrence, and dissent are reported at 134 F.4th 273. App. 1a–21a. The January 2024 Fifth Circuit en banc opinion and dissenting opinions are reported at 94 F.4th 374. App. 23a–122a. The Fifth Circuit order for en banc rehearing and vacating the panel decision is reported at 52 F.4th 265. App. 211a–212a. 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. 123a–210a.

JURISDICTION

On April 8, 2025, the Fifth Circuit issued its en banc opinion on remand. 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 superseded panel opinion "no longer calls into question the facial constitutionality of section 39.06(c)." Letter filed by Intervenor State of Texas at 1, Aug 15, 2022, ECF 117. Still, out of an abundance of caution, Villarreal states under Rule 29.4(c) 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 § 1.07(7) are reproduced at App. 213a–214a.

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," Villarreal publishes a wealth of information, livestreams, and commentary about local crime, traffic, and other news. Her candid reporting has garnered more than 200,000 followers on her Facebook page, "Lagordiloca News."

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. 228a. She has shined light on respondents, too. Take the time she reported about animal abuse at a local property, soon learning the landowner was a close relative of Marisela Jacaman, the local chief assistant district attorney. App. 228a. After District Attorney Isidro Alaniz's office withdrew

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.

an arrest warrant for the abuse, Villarreal reported on and sharply criticized the decision. App. 228a.

Alaniz did not react lightly. Instead, he took Villarreal behind closed doors and chastised her for publicly criticizing his office. App. 231a. Villarreal also faced regular harassment from the Laredo police at the encouragement of police chief Claudio Treviño. App. 229a–233a, 245a–246a. But Villarreal persisted with reporting the news.

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. 234a–236a, 244a. Laredo police officers Juan Ruiz and Deyanira Villarreal (no relation to petitioner) joined in. App. 234a–236a, 244a. These prosecutors and police officers focused on two news reports Villarreal published months earlier. App. 234a–236a. One report named a border agent who had committed suicide by jumping off a Laredo overpass. App. 234a–235a. The second report relayed information about a fatal traffic accident and a Houston family harmed in the crash. App. 234a–235a. For both reports, private citizens provided Villarreal with leads. App. 234a–235a.

Any good journalist verifies facts before publishing. And like other local reporters, Villarreal routinely asks Laredo police questions while reporting the news. App. 235a, 245a, 263a–264a. So she contacted Laredo police officer Barbara Goodman, who confirmed the information for Villarreal's stories

about the suicide and car accident. App. 234a–235a, 240a–241a. Villarreal then published her stories to "Lagordiloca News."

Advancing their plan to silence 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. 236a, 245–247a. And they plucked one from the Texas Penal Code's "Abuse of Office" chapter—Section 39.06(c). The statute 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. 213a. 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. App. 213a. The Texas Penal Code defines "benefit" as "anything reasonably regarded as economic gain or advantage." App. 213a.

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. 245a, 255a, 263a–264a.

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. 239a–242a, 245a–248a. Each played a part. Assistant District Attorney Jacaman approved investigatory

subpoenas targeting Villarreal's reporting, with District Attorney Alaniz's endorsement. App. 247a–248a. 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. 240a, 244a, 248a.

In the arrest warrant affidavits, Ruiz claimed an unnamed source told Officer Deyanira Villarreal that Officer Goodman was communicating with Priscilla Villarreal. App. 240a. Ruiz claimed Villarreal had asked for or received information from Goodman about the public suicide and fatal car accident which "had not been made public." App. 240a–241a. He specified no "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. 241a–242a.

After Jacaman approved Officer Ruiz's affidavits (with Alaniz's encouragement), a local magistrate issued two arrest warrants against Villarreal. App. 242a, 247a–248a. When Villarreal turned herself in, Laredo police officers took cell phone pictures of the reporter in handcuffs while mocking and laughing at her. App. 243a.

After posting bond, Villarreal sought a writ of habeas corpus, arguing Section 39.06(c) was facially invalid. App. 251a. A Webb County district court judge made a bench ruling granting the writ, finding the statute unconstitutionally vague. App. 252a.

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. Her First Amendment claim alleged both a direct First Amendment violation and a retaliatory one. App. 252a–253a. The officials moved for dismissal, which the district court granted based on qualified immunity. App. 123–124a, 150a, 159a, 167a.

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. *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. Then-Chief Judge Richman dissented from the reversal, agreeing with the district court "that the defendants were entitled to qualified immunity." *Id.* at 382–93 (Richman, C.J., concurring in part and dissenting in part).

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. 212a. In 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. 24a–25a. The 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 minor advertising revenue and occasional "free meals from appreciative readers." App. 39a–43a (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. 44a.

Seven judges dissented across four opinions. Judges Douglas, Elrod, Graves, Higginson, Ho, and Willett joined in all four. App. 64a, 69a, 83a, 89a. Judge Oldham joined Judge Higginson's dissent. App. 69a.

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. 96a. 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. 93a.

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. 64a, 66a. 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." App. 66a.

Judge Higginson highlighted 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. 73a. Likewise, he emphasized Villarreal's allegations about respondents enforcing Section 39.06(c), "despite knowing that [local authorities] had never arrested, detained, or prosecuted any person before under the statute." App. 79a–80a. In his view, "there could be no better example of a crime never enforced than this one." App. 77a.

Judge Willett 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. 85a. And he explained how the decision breaks from "the plain text of § 1983." App. 86a.

Despite this Court's remand, the en banc Fifth Circuit again holds the Laredo officials have qualified immunity.

Villarreal petitioned for a writ of certiorari. Pet. for Writ of Cert., *Villarreal v. Alaniz*, 145 S. Ct. 368 (2024) (No. 23-1155). In October, this Court granted certiorari, vacated the Fifth Circuit's judgment, and remanded for further consideration in light of *Gonzalez*. App. 22a

On remand, the en banc Fifth Circuit voted ten-to-five[2] that the Laredo officials have qualified immunity from Villarreal's First Amendment retaliation claim, considering no other issues. App. 2a–4a. Because respondents arrested Villarreal before this Court's decisions in *Gonzalez* and *Nieves v. Bartlett*, 587 U.S. 391 (2019), the majority reasoned that *Reichle v. Howard*, 566 U.S. 658 (2012), controlled on qualified immunity. *Id.* The majority also revived "our previous en banc majority opinion … superseded only to th[e] extent" the majority addressed *Gonzalez*. App. 4a.

Though Judge Oldham concurred, he wrote separately to question granting qualified immunity in cases like this one. First, he explained how *Nieves*'s "probable cause bar" bears only on Section 1983 remedies—not whether officials violated a plaintiff's First Amendment rights. App. 6a–13a. Second, Judge Oldham doubted "whether the rationale for qualified immunity makes sense" where officials, like those here, did not face a split-second decision. App. 5a–6a, 13a–18a.

Judge Higginson dissented, joined by Chief Judge Elrod and Judges Douglas, Graves, and Willett. "No probable cause and bad probable cause are inextricable," Judge Higginson observed while chiding the majority for "summarily" denying Villarreal's right to pursue her claims. App. 19a, 21a. At the very least, the dissent reasoned, the Fifth Circuit should have remanded for the district court to consider both *Gonzalez* and the prior dissents

2. On remand, Judge Ho was recused. App. 2a

"elaborat[ing] that police arrests of journalist-critics for routine newsgathering *obviously* violate the First Amendment." App. 19a.

REASONS FOR GRANTING THE PETITION

Because the Fifth Circuit did little more on remand than "reinstate what [it] mistakenly said before, just in different packaging," App. 21a (Higginson, J., dissenting), this Court's review remains imperative. To start, the Fifth Circuit's sharp conflict with this Court's precedents and enduring First Amendment principles merits the Court's review.[3] Those long-settled precedents and principles leave 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 affirmed that the First Amendment bars the government from punishing those who receive and publish information that a government official shares. If the First Amendment protects publishing sensitive information reporters

3. Those enduring principles stand in stark contrast to recent targeting of reporters in authoritarian nations, like "Vladimir Putin's Russia," where "the pursuit of independent journalism and the gathering of trustworthy facts … 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; *see also* Matthew Dalton & 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.

"lawfully obtain[]" by asking police, then the First Amendment surely protected Villarreal from arrest for using the same "routine newspaper reporting techniques." *Smith v. Daily Mail Publ'g Co.,* 443 U.S. 97, 99, 103–04 (1979).

The Court's review is also warranted to settle that government officials are not entitled to qualified immunity when they launder obvious First Amendment violations, like the one here, through state statutes. Not only does the Fifth Circuit's contrary rule 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 force the speech into some penal code section. Without reversal, the chill from the Fifth Circuit's ruling will only spread, as ever-growing criminal codes provide a grab bag of statutes that officials can—and too often do—wield against disfavored speech.

I. The Fifth Circuit's Ruling Squarely Conflicts with the Court's Precedents and Bedrock Constitutional Guarantees.

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

From the colonial 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. 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).[5] 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.

The fundamental "right of citizens to inquire" includes asking the government questions. If the First Amendment guarantees the right "verbally to oppose or challenge police action without thereby risking arrest," 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 jail them for posing

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.

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

questions to public institutions. *Bridges v. California*, 314 U.S. 252, 270 (1941).

Those same principles have long-established that "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)); *see also* App. 65–66a (Graves, J., dissenting).

Decades ago, the Court confirmed this "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"). And while the government sometimes has an interest in protecting sensitive information, this Court's cases affirm the First Amendment prohibits the government from punishing the press when officials share that information, even inadvertently or without authorization. *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 using the same constitutionally protected "routine newspaper

reporting techniques" as the reporters in *Daily Mail*. 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. 240a–242a. 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. 65a (Graves, J. dissenting). Just as troubling, it has twice suggested that Villarreal deserved no First Amendment protection for "her 'speech'" because she asked "backchannel police sources" for facts. App. 2a, 25a, 41a–42a. Yet the majority cited 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. *Daily Mail*, 443 U.S. at 99, 103–04 (juvenile murder suspect's name); *Florida Star*, 491 U.S. at 534 (rape victim's name); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (deceased rape victim's name); *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 fell well within these precedents. And if Officer Goodman shared 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 reasoned that Villarreal's reporting lacked First Amendment protection because she "sought to capitalize on others' tragedies to propel her reputation and career." App. 25a. But this Court has repeatedly confirmed public officials have no legitimate business policing publications for "good taste." *Bridges*, 314 U.S. at 270; *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). One might have recoiled at *The Florida Star*'s choice to publish a rape victim's name the police made available, yet the First Amendment protected it. *Florida Star*, 491 U.S. at 534–35. 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 found it distasteful.

The First Amendment, not the government, sets the bounds of protected expression. And that includes independently protected activity like newsgathering. *See Branzburg*, 408 U.S. at 681–82. By concluding otherwise, the Fifth Circuit has strayed far from first

principles and this Court's time-honored decisions, meriting this Court's review.

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

Not only has the Fifth Circuit twice overlooked Villarreal's undoubted First Amendment rights, it also concluded "that Defendants don't have to comply with the First Amendment *at all*." App. 101a (Ho, J., dissenting). Instead of first evaluating Villarreal's First Amendment rights against respondents' arrest decision, the Fifth Circuit majority decided "to evaluate Villarreal's conduct against the standards of Texas law." App. 33a. The majority reasoned that so long as police, prosecutors, and judges can mechanically squeeze speech into a penal statute, First Amendment scrutiny is unnecessary—even when the police base an arrest decision entirely on protected expression.

But First and Fourth Amendment concerns are not so distinct. This Court 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 19 How. St. Tr. 1029) (C.P. 1765)).

Thus, the Founders fashioned the First and Fourth Amendments as harmonizing checks on government power, "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. So when the press is involved, police and courts must justify search and seizure decisions with "scrupulous exactitude," *Stanford v. Texas*, 379 U.S. 476, 485 (1965), and "examine what is 'unreasonable' in the light of the values of freedom of expression." *Roaden v. Kentucky*, 413 U.S. 496, 501, 504 (1973). True enough, longstanding 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 deep-rooted 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 police officers who harassed someone kneeling in prayer. 585 U.S. 957 (2018) (per curiam). The Fifth Circuit majority took *Sause* to mean courts can resolve First Amendment claims solely through a Fourth Amendment lens because "First and Fourth Amendment issues may be inextricable." App. 32a (quoting 585 U.S. at 959). But

that gets *Sause* backwards. In fact, *Sause* reaffirms courts *cannot* insulate police action from First Amendment scrutiny, especially when confronting a right the First Amendment "no doubt" protects, like the right to pray. *Sause*, 585 U.S. at 959. And here, the Fifth Circuit wrongly insulated respondents' action from Villarreal's undoubted First Amendment right to use routine reporting techniques.

"The *First* Amendment … seeks not to ensure lawful authority to arrest but to protect the freedom of speech." *Nieves*, 587 U.S. at 414 (2019) (Gorsuch, J., concurring in part and dissenting in part). In turn, arresting someone for exercising an undoubted 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 turn probable cause from a check on government power into a weapon to silence speech and the press—a result especially dangerous for government critics like Villarreal. This Court's review is needed to avert that dangerous outcome.

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). 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 may apply 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, Laredo officials plotted Villarreal's arrest despite "obvious clarity" from settled precedent and basic constitutional principles that arresting Villarreal would violate the First Amendment. *See supra* Section I.A. Attacking a strawman, the Fifth Circuit majority focused on the lack of "a constitutional right of special access to information," App. 57a–58a, 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—an obvious First Amendment violation for which qualified immunity provides no shield. *See supra* Section I.A; *Hope*, 536 U.S. at 741 (citation omitted); *Berge v. Sch. Comm.,* 107 F.4th 33, 44 (1st Cir. 2024) (reversing qualified immunity for school officials who threatened a citizen journalist because "the unlawfulness of what occurred is apparent").

That violation was all the more obvious because a reasonable official also would have known he could not base probable cause solely on Villarreal's exercise of First Amendment rights. *See supra* Section I.B; *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 a 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). And so the 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. 34a–43a, those provisions do not lessen the certainty of the constitutional violation. *Daily Mail* alone clearly established that using routine reporting techniques to deliver the news quickly and accurately is basic journalism the First Amendment protects. 443 U.S. at 99, 103–04. Thus, no reasonable official would have believed Villarreal using those same techniques to reach a growing audience was a criminal "benefit." *See* App. 241a–242a. And anyone watching 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." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

Reasonable officials also 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; *Florida Star*, 491 U.S. at 534. Otherwise, White House, State Department, and police press briefings would be active crime scenes. What's more, Villarreal alleged in detail how the Laredo officials presented no facts or circumstances showing why information about two public incidents was "non-public." App. 70a–73a.

For all that, the Fifth Circuit majority still held on remand that a reasonable official "could have believed what he or she was doing was perfectly legal." App. 3a (citations omitted). That is wrong.

The majority on remand focused on Villarreal's arrest occurring before *Nieves* and *Gonzales*, concluding that *Reichle* controls qualified immunity on Villarreal's First Amendment retaliation claim (without addressing her direct violation claim). App. 2a–4a. But the majority again missed the key point. Reasonable officials do not arrest Americans merely for exercising an undoubted First Amendment right—nor does qualified immunity shield officials who do. *See Sause*, 585 U.S. at 959; App. 99a–100a (Ho, J., dissenting) (citing cases from nine circuits denying qualified immunity for obvious First Amendment violations). And that rule must stand firm no matter how a plaintiff styles her resulting First Amendment claim.

To that end, this case presents distinct questions from those in *Reichle, Nieves*, and *Gonzalez*. All three involved retaliatory arrests centered on *conduct*, triggering causation questions, in contrast with respondents' arrest decision based entirely on protected expression. For instance, in *Reichle*, Secret Service agents arrested a government critic for assault after an agent saw him physically contact Vice President Cheney. 566 U.S. at 660–61. But suppose agents arrested a critic merely for telling the Vice President his "policies in Iraq are disgusting." *See id.* That would be an undeniable First Amendment violation for which qualified immunity should not shield the agents. So too here—especially because the

"officials had sufficient 'time to make calculated choices,'" cementing the obviousness of respondents' constitutional violation. App. 16a (Oldham, J., concurring) (quoting *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of certiorari)).

If the freedoms of speech and of the press are the "bulwark of liberty,"[6] 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); *see also Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (denying qualified immunity without extended discussion given the "fundamental and virtually self-evident nature of the First Amendment's protections in this area"). Villarreal's arrest fits that bill.

This Court has corrected the Fifth Circuit before for granting qualified immunity to officials who undeniably violated the Constitution. *Taylor*, 592 U.S. at 9. It should do so again.

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6. 1 J. Trenchard & T. Gordon, *Cato's Letters: Essays on Liberty, Civil and Religious* 96, 100 (1733); *see also* 3 *The Complete Anti-Federalist* 124 (Herbert J. Storing ed., 1981).

II. In Holding Laredo Officials Could Invoke a State Statute to Excuse an Obvious First Amendment Violation, the Fifth Circuit Is in Conflict with the Constitution, Section 1983's Text, and Its Sister Circuits.

In the Fifth Circuit, public officials who base arrests on clearly protected speech are now "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). 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, reject the Fifth Circuit's untethered standard, and affirm that state statutes are not cover for public officials who violate the First Amendment in obvious ways.

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.

No state statute trumps the Constitution, as every reasonable official knows. U.S. Const. art. VI, cl. 2. So when officials deploy a state statute to arrest someone merely for exercising an undoubted First Amendment right, they are "enforcing a [state] statute in an obviously unconstitutional way," App. 85a (Willett, J., dissenting), and "shall be liable." 42 U.S.C. § 1983. But as Judge Ho explained, the Fifth Circuit's contrary 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." App. 102a. That warning echoes the Founders' concerns over officials abusing the seizure power to silence free expression. *See supra* Section I.B.

The Fifth Circuit's reasoning is even more troubling because it 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. 44a. So now, First Amendment plaintiffs in the Fifth Circuit must first mount a pre-enforcement challenge to a penal statute—and self-censor until victory—or risk losing their ability to sue officials who arrest them for their speech under that statute. 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 Fifth Circuit's rule ignores both the Constitution and Section 1983's text.

Public officials cannot use a state statute to convert the exercise of familiar First Amendment rights into probable cause. The First Amendment limits state statutes—not, as the Fifth Circuit majority proposed, the other way around. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment against the States); U.S. Const. art. VI, cl. 2 (Supremacy Clause). Reasonable officials understand and follow that basic rule. *See, e.g.*, *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," App. 47a, the Fifth Circuit majority clashes with the Constitution.

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." And of course, "under color of any statute" includes constitutional violations under *cover* of an authorizing state statute, no matter if a court has yet to invalidate it. *See, e.g.*, *Myers v. Anderson*, 238 U.S. 368, 377–78 (1915). The Fifth Circuit ignored that text, just as it brushed off *Gonzalez*, which recognized First Amendment retaliatory arrest claims even where a state statute authorized the arrest. 602 U.S. at 658.

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. In *Hope*, a department regulation authorized limited use of hitching posts to control unruly inmates, but handcuffing an inmate to a hitching post for hours in the June sun was still an undeniable Eighth Amendment violation, authorizing regulation or not. 536 U.S. at 741–744. Swap the regulation for a state statute, and the violation remains undeniable. Imagine the officers in *Sause* employed a state 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) provides.

The Fifth Circuit has 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. 47a–48a (citing *DeFillippo*, 443 U.S. at 38; *Heien*, 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 arrest 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 don't enforce it. After all, "[a] faithful public official does not violate the clear commands of the Constitution." App. 12a (Oldham, J., concurring).

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 defended 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. 48a–49a. It distinguished those cases on immaterial factual differences, while overlooking 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). Indeed, "a mountain of Supreme Court and circuit precedent reinforces this principle." App. 105a (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 arrest a man for saying "God damn" at a township board meeting. *Leonard*, 477 F.3d at 351. 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 358–360. Unlike the Fifth Circuit here, the Sixth Circuit did not focus on whether 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.

More recently, 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 Tenth Circuit decision, 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).

While the plaintiffs in *Jenkins* 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 their arrest decision 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 a state statute 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, Jenkins*, 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* explains 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. As Judge Higginson pointed out in dissent, "no probable cause and bad probable cause are inextricable." App. 21a (Higginson, J., dissenting); *see also* App. 73a (Higginson, J., dissenting).

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 proceeded. That reasoning makes perfect sense through the lens of *Hope* and its "fair warning" standard. 536 U.S. at 740. If an official enforces a criminal statute 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 Fifth Circuit's contrary rule, conflicting with its sister circuits, warrants this Court's review.

III. This Case Presents Exceptionally Important and Recurring Issues, and It 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 Americans' access to the congressionally mandated remedy for those obvious constitutional violations. Just six 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*, 587 U.S. at 412 (Gorsuch, J., concurring in part and dissenting in part). Along with this case, other recent First Amendment abuses show that warning is worryingly prophetic:

- In Marion, Kansas, after a local newspaper began investigating the incoming police chief for misconduct, 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 claimed a reporter who accessed public records on a public website violated Kansas's identity theft law.[7]

- An Arizona woman attended a city council meeting and peacefully criticized the city attorney's pay raise. So the mayor ordered her arrest, and police charged her with trespass after dragging her out of the meeting in front of her ten-year-old daughter.[8]

- Police arrested and charged a Pennsylvania man with disorderly

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7. 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. In the ensuing Section 1983 lawsuits, the district court had little trouble denying qualified immunity, applying the "obvious clarity" standard because "defendants' conduct was so egregious." *E.g.*, *Meyer v. City of Marion*, No. 24-2122-DDC-GEB, 2025 WL 949122, at *28 (D. Kan. Mar. 28, 2025)

8. Praveena Somasundaram, *She Was Arrested after Speaking at a City Meeting. Now She's Suing*, Wash. Post (Sept. 4, 2024), https://www.washingtonpost.com/nation/2024/09/04/arizona-city- council-meeting-arrest.

> 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."[9]

The Fifth Circuit's ruling thwarts Section 1983's remedy for undeniable First Amendment violations cloaked in a state statute. At the same time, it provides would-be authoritarians a roadmap for trampling the First Amendment if they comb through the depths of state penal codes to find derelict statutes, like the Texas one here. Or take 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 in Massachusetts, a fine awaits those who perform the Star Spangled Banner with improper "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. And without this Court's intervention, the more penal codes grow, the more officials will dodge accountability when they violate the First Amendment.

This Court's review will also provide much needed guidance for the lower courts as they continue to

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9. Michelle Lynch, *Reading 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.

grapple with cases where the First Amendment collides with qualified immunity. 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.[10]

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, upon which respondents based an arrest decision they concocted over months. And nothing in the arrest warrant affidavits hinted at Villarreal making threats, bribing officers, or doing anything else approaching unprotected speech or independently illegal conduct.

Rather than allow the Fifth Circuit's ruling 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.

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10. 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.

CONCLUSION

For all these reasons, the Court should grant certiorari.

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July 7, 2025