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

BRIEF OF THE LAW ENFORCEMENT ACTION PARTNERSHIP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The Law Enforcement Action Partnership ("LEAP") is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, LEAP's speaker's bureau today numbers more than 300 criminal justice professionals advising on police-community relations, incarceration, harm reduction, drug policy, and global issues. Through speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

This case presents an important opportunity to ensure that officers who abuse their power to engage in premeditated retaliatory arrests are held accountable. That accountability is essential to maintaining the integrity of law enforcement, building trust in the police, and ultimately keeping the public safe. LEAP and its members thus have an interest in ensuring that remedies are available to victims of police misconduct and that individuals enjoy robust protections against retaliation for exercising their constitutional rights.

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[1] Pursuant to Supreme Court Rule 37.2, *Amicus* provided timely notice to all parties of its intent to file this *amicus* brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* or its counsel made a monetary contribution to this brief's preparation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Priscilla Villarreal, a well-known citizen-journalist, has critically examined local affairs in the border city of Laredo, Texas. Like any good journalist, she developed sources in local government and published information they provided. But her journalistic activities embarrassed local prosecutors and police officers. To punish her, those officials conspired to arrest and jail her under a public-disclosure statute never before enforced in its twenty-three-year history—a statute they used to criminalize a citizen-journalist's mere request of a police officer for information. That blatantly violated the First Amendment. Yet a majority of the en banc Fifth Circuit—over five dissenting votes—held that the local officials were entitled to qualified immunity and dismissed Villarreal's complaint at the threshold.

This Court has consistently held that qualified immunity does not shield *obvious* violations of bedrock constitutional guarantees. And it "should have been obvious to Defendants … that they were violating Villarreal's First Amendment rights when they arrested and jailed her for asking a police officer for information." Pet. App. 99a (Ho, J., dissenting). The Fifth Circuit nonetheless granted the defendants here qualified immunity the first time it took up this case because Villarreal had failed to cite a judicial precedent identifying the First Amendment violation on "materially identical facts." *Id.* at 55a. As Petitioner explains, that holding—reinstated on remand—flouts this Court's precedent and conflicts with the decisions of other federal courts of appeals.

The Fifth Circuit's reinstatement of its prior decision is particularly perplexing under the circumstances here. Qualified immunity gives officers breathing room to make "split-second judgments" free from fear of liability, *Plumhoff* v. *Rickard*, 572 U.S. 765, 775 (2014)—a justification that disappears when government officials act under a plainly "premeditated plan to intimidate" a plaintiff in retaliation for her First Amendment activities, *Lozman* v. *City of Riviera Beach*, 585 U.S. 87, 100 (2018). Here, Laredo officials engaged in a months-long campaign to find a way to arrest Villarreal and send her to jail—simply for asking her sources to provide information. "This was not the hot pursuit of a presumed criminal" or any similar scenario of officials presented with split-second judgments. Pet. App. 83a (Willett, J., dissenting). Instead, officials deliberately targeted Villarreal for punishment, all for engaging in activities obviously protected by the First Amendment. There is no justification for granting qualified immunity in these circumstances.[2]

Finally, that ruling's implications are stark. Thanks to an ever-growing list of criminal offenses, government officials have great flexibility to arrest those engaged in First Amendment activities. That arresting discretion is particularly dangerous to disfavored speakers, who are especially likely to face official retaliation. Because two cases will rarely involve pretextual enforcement of similar state statutes,

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[2] This brief focuses on the second question presented: whether qualified immunity is available for *obvious* First Amendment violations, regardless of whether there exists a state statute purporting to authorize the violation or a Supreme Court precedent identifying the First Amendment violation on materially identical facts.

the Fifth Circuit's requirement of a materially identical case will routinely immunize defendants from liability, leaving victims of First Amendment retaliation without a remedy. See Pet. App. 55a (demanding that Villarreal identify a case finding a First Amendment violation where officers were enforcing "a statute that prohibits solicitation and receipt of nonpublic information from the government for personal benefit"); *id.* at 4a (affirming prior judgment). Depriving victims of a valuable tool to hold bad actors accountable will, in turn, decrease public trust in law enforcement, undercut police-community relationships, and harm public safety. And it will chill First Amendment activity, making individuals think twice before exercising their rights for fear that vindictive government officials will throw them in jail.

These dangers underscore why the judiciary must prevent government actors from using moribund statutes "as blunt cudgels to silence speech (and to punish speakers) they dislike." Pet. App. 86a (Willett, J., dissenting). This Court should grant certiorari and reverse.

ARGUMENT

I. QUALIFIED IMMUNITY IS UNAVAILABLE FOR OBVIOUS CONSTITUTIONAL VIOLATIONS.

In its initial en banc decision, the Fifth Circuit held that Villarreal could defeat qualified immunity only by citing a case that has found a First Amendment violation "on materially identical facts"—meaning one that has held it unconstitutional "to arrest a person … upon probable cause for violating a statute that prohibits solicitation and receipt of nonpublic information from the government for personal benefit." Pet. App. 55a. The Fifth Circuit brushed aside this

Court's cases holding that qualified immunity does not apply to "obvious" constitutional violations, calling them only a "narrow … exception" for "Eighth Amendment cases" involving "deliberate indifference to unconstitutional prison conditions." *Ibid.* (distinguishing *Hope* v. *Pelzer*, 536 U.S. 730 (2002), and *Taylor* v. *Riojas*, 592 U.S. 7 (2020) (per curiam)).

On remand, the Fifth Circuit saw fit "sole[ly] … to reconsider" Petitioner's First Amendment retaliation claim, otherwise leaving its earlier opinion in place. Pet. App. 2a. The Fifth Circuit's qualified immunity holding directly flouts this Court's precedents, creates an open conflict in the courts of appeals, and relegates the First Amendment to second-class status by substantially diminishing the constitutional protections properly afforded journalists and other concerned citizens.

1. State actors are entitled to qualified immunity if the allegedly violated right was not "'clearly established' at the time of the [violation]." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 735 (2011). Such immunity does not lie, however, if the law gives the defendants "fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope*, 536 U.S. at 741. Thus, qualified immunity does not protect officials who commit "obvious" constitutional violations. *Ibid.* And constitutional violations can be obvious even without any "case directly on point." *al-Kidd*, 563 U.S. at 741.

This Court settled that issue almost three decades ago in *United States* v. *Lanier*, 520 U.S. 259 (1997). There, a state judge sexually assaulted five women, some of whose cases were before him. *Id.* at 261-262. The Sixth Circuit reversed the judge's convictions under 18 U.S.C. § 242 "on the ground that the constitutional right in issue had not previously been identified

by [the Supreme Court] in a case with fundamentally similar facts." *Id.* at 261.

This Court reversed, holding that the proper "standard of notice" under § 242 is the same as "the 'clearly established [law]' immunity standard" for § 1983 liability—a standard that can be met without any "case with fundamentally similar facts." 520 U.S. at 261, 270–271. The Court underscored that "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 271.

The Court applied that same standard in *Hope*, a § 1983 case in which prison guards handcuffed an inmate shirtless to a hitching post in the sweltering Alabama sun for eight hours. 536 U.S. at 733-735. The guards provided no bathroom breaks and offered water only once or twice. *Ibid*. The Eleventh Circuit granted the guards qualified immunity because the inmate could not adduce "earlier cases with 'materially similar' facts." *Id.* at 733.

This Court reversed, because the "Eighth Amendment violation is obvious," and the "cruelty inherent in this practice should have provided respondents with some notice" of the constitutional violation. 536 U.S. at 738, 745. The Court explained that *Lanier* "makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741. Neither "fundamentally similar" nor "materially similar" facts are "necessary." *Ibid.*

Most recently, in *Taylor*, 592 U.S. at 7, a prison inmate had been confined to an unsanitary cell with fe-

cal matter, no place to sleep, no toilets, and no insulation for six days. The Fifth Circuit found qualified immunity because no case had "held that a time period so short [six days] violated the Constitution." *Taylor* v. *Stevens*, 946 F.3d 211, 222 (5th Cir. 2019). This Court summarily reversed despite no on-point precedent, reasoning that "[c]onfronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution." 592 U.S. at 9.

This Court has applied the same standard in the First Amendment context. See *Sause* v. *Bauer*, 585 U.S. 957, 959 (2018) (reversing grant of qualified immunity on First Amendment claim in absence of comparable case because "[t]here can be no doubt that the First Amendment protects the right to pray"). And until the decision below, the courts of appeals had uniformly done the same. In *Bennett* v. *Hendrix*, for example, plaintiffs sued officers for a campaign of police harassment and retaliation after plaintiffs supported a county referendum opposed by the sheriff. 423 F.3d 1247, 1248 (11th Cir. 2005), *cert. denied*, 549 U.S. 809 (2006). Denying qualified immunity, the Eleventh Circuit noted that the principle that "state officials may not retaliate against private citizens because of the exercise of their First Amendment rights" provided "obvious clarity." *Id*. at 1255-1256.

Similarly, in *Irizarry* v. *Yehia*, the Tenth Circuit held that a police officer violated a clearly established First Amendment right by driving his car at a person for "filming police conduct in public." 38 F.4th 1282, 1297 (10th Cir. 2022). The court reasoned that it is "*obvious* to a reasonable officer" that "driving a police car at [the plaintiff] in response to that filming would

infringe First Amendment protected activity and chill its exercise." *Ibid.* (emphasis added); see also Pet. App. 99a–100a (Ho, J., dissenting) (collecting cases and noting that "nine circuits have indicated that the standards articulated in *Hope* apply specifically in the First Amendment context").

At bottom, qualified immunity does not shield conduct so patently unconstitutional that no court has yet had an opportunity to address it. *Lanier*, 520 U.S. at 271 ("The easiest cases don't even arise. There has never been ... a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages … liability."); see also *Browder* v. *City of Albuquerque*, 787 F.3d 1076, 1082–1083 (10th Cir. 2015) (Gorsuch, J.) ("[I]t would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.").

2. The Fifth Circuit's qualified immunity holding disregards these precedents and makes no sense on its own terms.

The court below treated the Court's reference to *Gonzalez* in its vacatur order to mean that "First Amendment retaliation … is the sole claim" for consideration on remand. Pet. App. 2a. It then quickly concluded that because the events in this case took place before *Nieves* and *Gonzalez*, the qualified immunity analysis for the retaliation claim was directly controlled by *Reichle* v. *Howards*, 566 U.S. 658 (2012). Pet. App. 2a. The majority then stated that under *Reichle*, Defendants' entitlement to qualified immunity in this case "is easily shown." *Id.* at 3a. But the

Fifth Circuit's cursory two-paragraph analysis sidesteps critical differences in *Reichle* that bring this case well within the obviousness exception established by *Lanier*, *Hope*, and *Taylor*.

In *Reichle*, the plaintiff alleged a retaliatory arrest for views he had expressed when speaking to the Vice President. But the basis for the plaintiff's arrest was separate non-speech conduct: unlawfully touching the Vice President's shoulder and later lying to a federal official as to whether he had done so, in violation of 18 U.S.C. § 1001. 566 U.S. at 660–662.

The Court in *Reichle* stated only that there was no clearly established right not to be subject to an otherwise valid arrest in retaliation for separate First Amendment activity. Here, by contrast, Villarreal's protected First Amendment activity—seeking information from a government official—was the very basis for her arrest under a never-before-enforced Texas statute. Whereas the plaintiff's conduct in *Reichle*—touching the Vice President and lying about it to an official afterward—*was* unlawful under a legitimate federal statute, the Constitution expressly protects Villarreal's conduct. See *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 99, 103 (1979) (a reporter engaged in protected conduct when using "routine newspaper reporting techniques" such as "obtain[ing] the name of the alleged assailant simply by asking various witnesses, the police, and an assistant prosecuting attorney"). The constitutional violation here was thus obvious.

These differences also distinguish this case from every other case the Fifth Circuit cited on remand as its basis for breezing past this Court's directive to reconsider the grant of qualified immunity in light of *Gonzalez*. See *Degenhardt* v. *Bintliff*, 117 F.4th 747,

759 (5th Cir. 2024) (arrest for reckless driving and possessing alcohol as a minor); *Guerra* v. *Castillo*, 82 F.4th 278, 289 (5th Cir. 2023) (plaintiff failed to allege that retaliation was directed at First Amendment-protected speech); *Roy* v. *City of Monroe*, 950 F.3d 245, 248–249, 253–254 (5th Cir. 2020) (issuance of disturbing-the-peace summons to man alleged to have followed and harassed woman outside of nightclub); *Trevino* v. *Iden*, 79 F.4th 524, 533 (5th Cir. 2023) (signing application for Texas Title without proper authorization); *Lund* v. *City of Rockford*, 956 F.3d 938, 947 (7th Cir. 2020) (obstruction of justice); *Novak* v. *City of Parma*, 33 F.4th 296, 303 (6th Cir. 2022) (disrupting or impairing police functions by creating fake Department web page).

In its original analysis, the Fifth Circuit reasoned that this Court's decisions in *Hope* and *Taylor* established only a "decidedly narrow, obviousness exception" for "Eighth Amendment cases … for deliberate indifference to unconstitutional prison conditions." Pet. App. 55a. "[I]n this context"—*i.e.*, cases involving "First Amendment free exercise rights"—the Fifth Circuit asserted that *Hope* is an "inappropriate templat[e]," and the plaintiff *must* "offer … similar cases to prove that an officer should have been on notice that his conduct violated the Constitution." *Id.* at 55a–56a.

That rationale revives the very rule that *Hope* and its progeny laid to rest. By requiring Villarreal to show a case with "materially identical facts," the Fifth Circuit repeated the exact same error *Hope* condemned: "requir[ing] that the facts of previous cases be ' "materially similar" to [the plaintiff's] situation.' "

536 U.S. at 739. And "[n]othing in *Hope* or *Taylor* indicates that those decisions apply only to prison conditions." Pet. App. 99a (Ho, J., dissenting).[3]

The Fifth Circuit's rationale also fails under first principles and common sense. *First,* as Judge Ho persuasively explained in this very case, limiting the *Hope* standard to the Eighth Amendment context "would treat the First Amendment as a second-class right." Pet. App. 99a. And "[n]othing in § 1983 suggests that courts should favor the Eighth Amendment rights of convicted criminals over the First Amendment rights of law-abiding citizens." *Ibid*; see also *McMurry* v. *Weaver*, 142 F.4th 292, 305 (5th Cir. 2025) (Ho, J., concurring) ("Why the en banc majority [in *Villarreal*] chose to disfavor the First Amendment in contrast to the Eighth Amendment—or law-abiding citizens in favor of incarcerated criminals—it did not explain."); Bailey D. Barnes, *The Obvious Violation Exception to Qualified Immunity: An Empirical Study*, 99 Wash. L. Rev. 725, 750 (2024) (finding that Courts of Appeals have applied the obviousness exception following *Taylor* "to seven distinct constitutional or statutory rights").

Second, the logic underlying the obviousness exception applies equally outside the Eight Amendment. Without an exception for obvious and egregious constitutional violations, the qualified immunity analysis would lead to "perverse results," *McCoy* v. *Alamu*, 950 F.3d 226, 236 (5th Cir. 2020) (Costa, J., dissenting in part), *vacated*, 141 S. Ct. 1364 (2021), because "[t]he

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[3] The Fifth Circuit also misread this Court's decision in *Kisela* v. *Hughes* to require "[p]recedent involving similar facts," when *Kisela* instead reinforces the point that such a showing is necessary only "*outside* an obvious case." 584 U.S. 100, 105 (2018) (per curiam) (emphasis added) (cleaned up).

easiest cases don't even arise," so it will be difficult if not impossible for a Section 1983 plaintiff to point to a case with closely analogous facts, *K.H. ex rel. Murphy* v. *Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (Posner, J.). See also *McMurry*, 142 F.4th at 304 (Ho, J., concurring) ("It seems absurd to suggest that the most egregious constitutional violations imaginable are somehow immune from liability precisely because they're so egregious.").

Recognizing that logic, numerous circuits have found that the obviousness standard makes as much good sense when applied to rights other than those protected by the Eighth Amendment. See *supra* 7-8; see also Pet. 31-36; Pet. App. 99a-100a (Ho, J., dissenting) (explaining that court's ruling conflicts with holdings of "nine circuits").

For the reasons Petitioner and the dissenting opinions below explain, that error was dispositive in this case because Laredo officials blatantly violated Villarreal's First Amendment rights. Pet. 23-27; Pet. App. 65a-67a (Graves, J., dissenting) (right to newsgathering); *id.* at 79a-81a (Higginson, J., dissenting) (focusing on First Amendment retaliation claim); *id.* at 97a-99a (Ho, J., dissenting). The analysis does not change merely because a state statute purports to authorize the unconstitutional conduct. Pet. 32–36 (collecting cases in First Amendment context); Pet. App. 105a (Ho, J., dissenting) (collecting "[a] mountain of Supreme Court and circuit precedent" for this principle).

Ultimately, "while we may not impute to officers the foreknowledge of what a federal court may later say, neither should we impute to officers the ignorance of what the First Amendment already says." Pet. App. 86a (Willett, J., dissenting). The Fifth Cir-

cuit's error in expanding the scope of qualified immunity is reason enough to grant certiorari or summarily reverse.

II. THE POLICY CONSIDERATIONS USED TO JUSTIFY QUALIFIED IMMUNITY DO NOT APPLY HERE.

The Fifth Circuit's renewed grant of qualified immunity—and its requirement, undisturbed on remand, of a "materially identical" case—is especially improper for officials who undertook a deliberate, months-long campaign to violate the First Amendment rights of a journalist.

The policy behind qualified immunity is to protect officers who must make judgments "in circumstances that are tense, uncertain, and rapidly evolving" from liability for reasonable mistakes. *Kingsley* v. *Hendrickson*, 576 U.S. 389, 399 (2015) (cleaned up). So qualified immunity offers "officials breathing room" to make "split-second judgments." *al-Kidd*, 563 U.S. at 743 ("breathing room"); *Plumhoff* v. *Rickard*, 572 U.S. 765, 775 (2014) ("split-second judgments"); *Pasco ex rel. Pasco* v. *Knoblauch*, 566 F.3d 572, 582 (5th Cir. 2009) (on-the-spot judgments "without clear guidance from legal rulings"); see also, *e.g.*, *Stanton* v. *Sims*, 571 U.S. 3, 10 (2013) (per curiam) (granting qualified immunity to an officer who "made his split-second decision" when the law was not clearly established).

That rationale evaporates when a defendant undertakes a "premeditated plan to intimidate [the plaintiff] in retaliation for his criticisms of city officials." *Lozman* v. *City of Riviera Beach*, 585 U.S. at 100. When officers "make the deliberate and considered decision to trample on a citizen's constitutional rights, they deserve to be held accountable." *Wearry*

v. *Foster*, 52 F.4th 258, 259 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc). Qualified immunity is meant to protect only officials who make "mistaken judgments," *Messerschmidt* v. *Millender*, 565 U.S. 535, 553 (2012), not officials "who knowingly violate the law," *City of Tahlequah* v. *Bond*, 595 U.S. 9, 12 (2021) (per curiam).

Courts therefore routinely deny qualified immunity when "no 'split-second' decisions [were] made." *Reedy* v. *Evanson*, 615 F.3d 197, 224 n.37 (3d Cir. 2010); *e.g.*, *Intervarsity Christian Fellowship/USA* v. *Univ. of Iowa*, 5 F.4th 855, 867 (8th Cir. 2021) (refusing to extend qualified immunity because university officers had time to make calculated choices about infringing on the First Amendment rights of religious student organizations). As Justice Thomas recently asked, "why should … officers, who [had] time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?" *Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2421-2422 (2021) (Thomas, J., respecting the denial of certiorari). There is no logic to that "one-size-fits-all" approach. *Ibid.*

Here, Villarreal's arrest was a result of deliberate planning, "cooked up with legal advice from the Webb County District Attorney's Office." Pet. App. 84a (Willett, J., dissenting). For months, the Laredo officials looked for an excuse to arrest Villarreal because of her journalism criticizing local government. And they found one: arresting Villarreal under a Texas statute that had never been used once in the 23 years of its existence, because she asked a Laredo officer to verify one of her stories, and the officer provided her with information. The underlying retaliatory purpose was

clear, as Villarreal was arrested for routine newsgathering months after she had published the articles at issue. This was not an arrest that required "quick decisions in circumstances that are tense, uncertain, and rapidly evolving." *Nieves* v. *Bartlett*, 587 U.S. 391, 403 (2019) (internal quotation marks omitted).

Judge Oldham made these very points after this Court vacated the Fifth Circuit's original judgment. See Pet. App. 13a–18a (Oldham, J., concurring). He observed that courts typically "use qualified immunity to provide some breathing room for mistakes … that are made in the fog of darkness and danger." *Id.* at 15a. But he questioned "what purpose qualified immunity should serve in" cases—like "this case"—that do not involve a "'fast-moving, high-pressure, life-and-death situation.'" *Id.* at 15a–16a. In such cases—where "officials could have read Supreme Court precedent, studied the history of the First Amendment, or even consulted counsel"—qualified immunity is inappropriate because the officials "had or should have had ample 'fair notice' of the lawfulness *vel non* of their conduct." *Id.* at 16a.[4]

This Court, Judge Oldham noted, applies a "granularity requirement"—showing the particular conduct at issue is clearly unlawful—to overcome qualified immunity in "cases involving … split-second decision-making." Pet. App. 17a (citing, *e.g.*, *Mullenix* v. *Luna*,

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[4] Judge Oldham joined the en banc majority on remand in reaffirming dismissal of Petitioner's First Amendment claims only because he believed that "*Reichle v. Howards*, 566 U.S. 658 (2012), controls this case." Pet. App. 4a. Even were *Reichle* controlling—but see *supra* at 9—it does not foreclose the direct-violation claim based on the obvious First Amendment rights infringement. The Fifth Circuit majority erred in uncritically reinstating that aspect of its vacated judgment.

577 U.S. 7 (2015)). But in "other cases" where no such pressure existed, "the standard has been more lenient." *Ibid.* (citing *Taylor*, 592 U.S. 7). Specifically, where officials have time to contemplate the legality of their choices, "[i]t d[oes] not matter that no factually similar case c[an] be found." *Ibid.* The law may still be "sufficiently clear" to defeat qualified immunity. *Ibid.*

Such was the case here. Given the ample time Respondents had to reflect on whether to engage in conduct that obviously violated the First Amendment, qualified immunity is unwarranted. This case is an ideal vehicle for the Court to formally renounce the one-size-fits-all approach to qualified immunity.

III. THE FIFTH CIRCUIT'S RULE WOULD NEGATIVELY AFFECT LAW ENFORCEMENT AND THE PUBLIC.

The dramatic expansion of criminal codes across the country has made it easier than ever for a law enforcement officer who wishes to punish a person for engaging in protected First Amendment activity to find probable cause for *some* criminal violation on which to base an arrest. Civil lawsuits against officers who are engaged in premeditated, retaliatory arrests serve as a critical check on this kind of misconduct.

Unless this Court intervenes, however, the Fifth Circuit's decision will insulate officers from accountability in many cases of deliberate, premeditated retaliation. Allowing that shield to stand will in turn undermine public trust in law enforcement, making it harder for the vast majority of honest officers to do their job and keep their communities safe. It will also chill First Amendment-protected speech and activity, especially among journalists and those who hold

views disfavored by government actors. These dangers underscore why the decision below cannot stand.

A. Barring Civil Liability Will Deprive The Public Of A Key Deterrent Against The Growing Threat Of Retaliatory Arrests.

Retaliatory arrests have become increasingly common. See Amanda D'Souza et al., *Federal Investigations of Police Misconduct: A Multi-City Comparison*, 71 Crime, L., & Soc. Change 461, 474 (2019) ("[a] troublesome finding in all [federal investigations over the past two decades] was officers' retaliatory actions against citizens"). This trend is a byproduct of the ever-growing size of modern criminal codes. See GianCarlo Canaparo et al., Heritage Found., *Count the Code: Quantifying Federalization of Criminal Statutes* 3 (2022), bit.ly/3Lcpve2 (showing that the number of statutory provisions creating a federal crime increased by 36% between 1994 and 2019); James R. Copland & Rafael A. Mangual, Manhattan Inst., *Overcriminalizing America* 4 (2018), bit.ly/41CLNfT ("common problems in state criminal law" include "[t]oo many crimes on the books").

An officer who may be inclined to punish a disfavored speaker—such as a journalist—can therefore readily find a minor offense they committed and use that to justify an arrest. See *Lozman*, 585 U.S. at 99 ("[T]here is a risk that some police officers may exploit the arrest power as a means of suppressing speech."). For instance, this Court recently observed that jaywalking is "endemic but rarely results in arrest." *Nieves*, 587 U.S. at 407. But an officer seeking to punish, for example, "an individual who has been vocally complaining about police conduct" can exercise his discretion and arrest that person if they jaywalk. *Ibid.*

Broad arresting powers in the wrong hands can be used to disproportionately burden disfavored groups. Public officials acting in bad faith can use their law-enforcement discretion to arrest a journalist because "her newsgathering and reporting activities annoyed them," Pet. App. 69a (Higginson, J., dissenting), or a citizen who merely "ask[s] for a person's name," *id.* at 111a (Ho, J., dissenting)—even though "informed public opinion is the most potent of all restraints upon misgovernment," *Grosjean* v. *Am. Press Co.*, 297 U.S. 233, 250 (1936). And the ill effects of retaliatory arrests are especially likely to fall on poor and disadvantaged communities. See Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 Am. Univ. L. Rev. 1061, 1065 (2021).

Civil lawsuits are a vital check against police officers engaging in premeditated retaliatory arrests because they help "to hold public officials accountable when they exercise power irresponsibly." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009); accord *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982) (acknowledging "the importance of a damages remedy to protect the rights of citizens"). This element of accountability ensures that the "government will respond to the will of the people." *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 301 (1964) (Goldberg, J., concurring in the result); cf. *Harris* v. *Pittman*, 927 F.3d 266, 282-283 (4th Cir. 2019) (Wilkinson, J., dissenting) ("Police officers do overreach. And when they do, the law must hold them to account.").

The Fifth Circuit's rule would close the courthouse doors on many deserving plaintiffs who are deliberately punished for exercising their First Amendment rights by officers who—despite having probable cause for an arrest—clearly acted on retaliatory animus. By

requiring that the plaintiff show a prior case where enforcement of a similar *state law* violated constitutional rights, Pet. App. 55a, the Fifth Circuit effectively makes qualified immunity "unqualified impunity," *id.* at 84a (Willett, J., dissenting). Given the variety of state criminal codes, rarely will different plaintiffs be subject to retaliatory enforcement under similar laws.

That result will only further contribute "to the deep deficit in police accountability throughout our country." Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 312 n.8, 313 (2020). And the lack of accountability would harm police departments, too: Exposure to civil liability provides incentives to improve police performance and reduce constitutional violations; allows departments to gather information about misconduct and illegal uses of force; and helps gather data that fills gaps in internal reporting systems, such as unearthing more conclusive evidence in excessive-force lawsuits. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841, 845-846 (2012).

Other consequences for rogue officers—such as internal discipline—are inadequate alone to stamp out bad-faith, unconstitutional behavior. See Schwartz, 33 Cardozo L. Rev. at 862-874; *Crouse* v. *Town of Moncks Corner*, 848 F.3d 576, 589 (4th Cir. 2017) (Motz, J., concurring in the judgment) ("Serious allegations of misconduct sometimes go unanswered, and officers who abuse their power sometimes go undisciplined."). Allowing the Fifth Circuit's ruling to stand would deprive many individuals of a crucial way to hold accountable officers who retaliate against them for engaging in constitutionally protected behavior.

B. The Fifth Circuit's Decision Will Undermine Trust In The Police And Interfere With Public Safety.

Allowing officers who carry out deliberate, premeditated retaliatory arrests to avoid liability will diminish the public's trust in, and cooperation with, good-faith law enforcement efforts. Trust in the police has declined over the past two decades, reaching its lowest level in recent years, especially in minority communities. See Emily Washburn, *America Less Confident in Police Than Ever Before: A Look at the Numbers*, Forbes (Feb. 3, 2023), bit.ly/3UJci1j. But police officers are supposed to "occupy positions of great public trust and high public visibility." *Gilbert* v. *Homar*, 520 U.S. 924, 932 (1997). If officers violating that trust are not held responsible, it will only exacerbate existing tensions between law-abiding police officers and their communities and undermine law enforcement's ability to maintain public safety.

"Effective police work, including the detection and apprehension of criminals, requires that the police have the trust of [their] community," *Reynolds* v. *City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002) (Posner, J.), and that the public believes that police departments "will use [their] powers responsibly and adequately discipline officers who do not." *Crouse*, 848 F.3d at 589 (Motz, J., concurring). Members of the public need to believe in the good faith of officers so they feel comfortable calling on law enforcement to help in emergencies and aiding police investigations. See *Duncan* v. *Becerra*, 970 F.3d 1133, 1161 (9th Cir. 2020) (noting that "some people, especially in communities of color, do not trust law enforcement and are less likely ... to call 911 even during emergencies"). And to do their job effectively, police officers need to

feel trusted by the people they serve. See *Hernandez* v. *City of Phoenix*, 43 F.4th 966, 981 (9th Cir. 2022) ("Police departments also have a strong interest in maintaining a relationship of trust and confidence with the communities they serve").

Those police-community relations fray, and the public's trust is diminished, when officers engage in misconduct without facing any consequences. Even the bad acts of a small number of officers will hinder community trust in the police, the vast majority of whom carry out their jobs with dignity and honor. U.S. Dep't of Just., *Building Trust Between the Police and the Citizens They Serve* 17 (2009), bit.ly/3LwqCGS. By shielding from liability officers who "exploit the arrest power as a means of suppressing" First Amendment conduct, *Lozman*, 585 U.S. at 99, the Fifth Circuit's rule will further undermine trust in the police and officers' ability to fulfill their duties to the public.

This loss of trust will have major downstream effects. If people do not feel comfortable calling on the police in a crisis, public safety will be threatened. Andrew Goldsmith, *Police Reform and the Problem of Trust*, 9 Theoretical Criminology 443, 443 (2005) ("Without public trust in police, 'policing by consent' is difficult or impossible and public safety suffers."). And if community members are less likely to cooperate in police investigations, officers will find it harder to conduct their duties in the future. See, *e.g.*, David S. Kirk et al., *The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety?*, 641 Annals of Am. Acad. of Pol. & Soc. Sci. 79, 79 (2012). These costs are likely to be significant: A lack of trust in the police is correlated with an increase in gun violence, which

in turn fuels a cycle of over-enforcement of minor misdemeanors, further eroding trust in the police and fueling violence. See *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence*, Giffords L. Ctr. to Prevent Gun Violence (Sept. 9, 2021), bit.ly/4bFbD80. A qualified immunity rule that promotes accountability for the minority of bad-faith actors in law enforcement, by contrast, promotes public confidence in the integrity of the criminal justice system.

C. Failing To Prohibit Premeditated Retaliatory Arrests Will Chill First Amendment-Protected Activity.

The Fifth Circuit's holding is likely to chill activity protected by the First Amendment. Individuals may choose to abstain from newsgathering activities—or speaking, petitioning the government, or engaging in religious exercise—if they fear that law enforcement may punish them with impunity for exercising their constitutional rights.

When the government takes adverse action based on an individual's First Amendment activity, the "exercise of [protected] freedoms" is "in effect ... penalized and inhibited." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). And "to state that arresting someone in retaliation for their exercise of free speech rights is sufficient to chill speech is an understatement." *Lacey* v. *Maricopa Cnty.*, 693 F.3d 896, 917 (9th Cir. 2012) (en banc) (cleaned up) (citations omitted); see also Pet. App. 122a (Ho, J., dissenting) ("[T]he American Constitution also guarantees freedom *after* the speech.").

The free exchange of ideas will also be hampered unless individuals know they can exercise their First Amendment rights free from government penalty—

and that if they are punished, they will have legal recourse against it. Open and active discussion of matters of public import is "a fundamental principle of our constitutional system," *Stromberg* v. *California*, 283 U.S. 359, 369 (1931), but it cannot flourish if government actors can stomp out disfavored voices, see *Matal* v. *Tam*, 582 U.S. 218, 253-254 (2017) (Kennedy, J., concurring in part and concurring in the judgment) ("A law that ... can be turned against minority and dissenting views" works "to the detriment of all.").

It therefore "falls on the judiciary" to "make certain that law enforcement officials exercise their significant coercive powers to combat crime—not to police political discourse." *Gonzalez* v. *Trevino*, 60 F.4th 906, 907-908 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc). The First Amendment demands nothing less.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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