No. 25-29

In The
Supreme Court of the United States

PRISCILLA VILLARREAL,

Petitioner,

v.

ISIDRO R. ALANIZ, ET AL.,

Respondents.

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

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes, Regulations, and Codes

Rules

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The Institute for Justice (IJ) is a nonprofit public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty. Central to that mission is promoting accountability for constitutional violations by government actors. IJ pursues these goals in part through its Project on Immunity and Accountability, which argues against the imposition of immunity and other doctrines that inhibit the vindication of constitutional rights. IJ has recently argued before this Court regarding issues of constitutional accountability in *Brownback* v. *King* (19-546), *Devillier* v. *Texas* (22-913), and *Martin* v. *United States* (24-362). In fact, IJ argued *Gonzalez* v. *Trevino* (22-1025), the case this Court instructed the Fifth Circuit to consider after granting certiorari, vacating, and remanding this case last year. *See* Pet. App. 22a.

SUMMARY OF ARGUMENT

After investigating and deliberating for six months, Respondents arrested Petitioner Priscilla Villarreal—a citizen-journalist and known critic of law enforcement—in 2017.

Her crime: Peacefully asking a police officer to corroborate information for two developing stories—a

[1] No counsel for a party authored this amicus brief in whole or in part. No person other than Amicus has made any monetary contributions intended to fund the preparation or submission of this brief. Amicus timely notified the parties that it intended to file this brief. See Sup. Ct. R. 37.6.

routine newsgathering practice used by journalists across the country.

Villarreal sued the officials who coordinated and executed her arrest in 2019. Despite the officials' obvious violation of the First and Fourth Amendments, in 2024 the Fifth Circuit, sitting en banc, granted those officials qualified immunity.

The officials' get out of jail free card: using an obscure, rarely-enforced Texas law that prohibits soliciting or receiving nonpublic information from a government official with the intent to receive a benefit—Texas Penal Code Section 39.06(c)—as a laundering mechanism for the violation of Villarreal's rights.

This Court then granted certiorari, vacated, and remanded the case for further consideration in light of *Gonzalez* v. *Trevino*, 602 U.S. 653 (2024) (per curiam). On remand in April 2025, a majority of the en banc Fifth Circuit *again* granted qualified immunity to the officials, "despite nearly six years of tenacious First Amendment litigation that culminated successfully in [this Court]." Pet. App. 19a (Higginson, J., dissenting). Almost all the reasoning of the majority's 2024 decision remains in full force: its previous opinion was superseded "only to th[e] extent" it addressed *Gonzalez*. *Id.* 4a. In other words, it simply "reinstate[d]" its first opinion, "just in different packaging." *Id.* 21a (Higginson, J., dissenting).

Just as it did the first time, the Fifth Circuit's reinstated decision warrants review and reversal for several reasons. First, it undermines the text and original meaning of Section 1983. The text plainly imposes liability for constitutional violations

perpetrated "under color of" state laws like Section 39.06(c). And the original meaning is manifested by both the 1871 Congressional debates and the original text of the Ku Klux Klan Act, which stated that its remedies apply "notwithstanding" any state laws or immunities to the contrary. Allowing government officials to flout the guarantees of the First and Fourth Amendments precisely *because* they dug up and dusted off a state law to do so subverts Section 1983's text and purpose.

Second, Villarreal's arrest obviously violated the Constitution. No reasonable official would think the First Amendment permits criminalizing plain speech or routine journalism. *See Hope* v. *Pelzer*, 536 U.S. 730, 741–42 (2002). Nor does qualified immunity permit officials to use a state law in an obviously unconstitutional manner, especially when they had months to consider the constitutionality of their plan.

And regarding Villarreal's retaliation claim, the violation of her First Amendment *right* is no less obvious because her *remedy* for that violation was unclear at the time of her arrest. The majority granted qualified immunity to the officials because they arrested Villarreal before this Court clarified the contours of the no-probable-cause rule for retaliatory-arrest claims in *Nieves* v. *Bartlett*, 587 U.S. 391 (2019). But it does not matter to the qualified immunity analysis whether the *remedy* is clearly established, so long as the constitutional *right* is.

Third, the Fifth Circuit's decision is inconsistent with the prudential rationale underlying qualified immunity: the carefully calibrated balancing of government and individual interests. *See Harlow* v.

Fitzgerald, 457 U.S. 800, 813–20 (1982). That balance was skewed heavily in favor of the government here in at least three ways:

1. The Fifth Circuit's decision allows the government to be gatekeeper and arbiter of newsworthy information, while preventing the press and everyone else from accessing information the government chooses not to share.

2. It places a heavier burden on citizens to know and follow the law than it does on government officials. While Villarreal was expected to know that routine journalistic practices violated a rarely-enforced provision of the Texas Penal Code, the officials sworn to uphold the Constitution were allowed to plead ignorance of basic First Amendment principles.

3. Finally, by granting qualified immunity to officials for using a statute in an obviously unconstitutional manner, the Fifth Circuit took away any possibility of a remedy in those circumstances. At the same time, it cemented officials' power to use an arsenal of statutes, ordinances, and regulations to punish their critics. That provides precisely the "license to lawless conduct" for government officials on one hand—with no recourse for victims on the other—that qualified immunity was meant to avoid. *Harlow*, 457 U.S. at 819.

ARGUMENT

I. The Fifth Circuit's decision is inconsistent with the plain text and original meaning of Section 1983, which abrogate reliance on state laws or immunities to evade liability.

Based on the Fifth Circuit's ruling, officials in Texas, Louisiana, and Mississippi who arrest someone based on 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." Pet. App. 94a (Ho, J., dissenting). That rule cannot be squared with the text or original meaning of 42 U.S.C. 1983.

A. Section 1983 creates a remedy for constitutional violations committed "under color of" state laws like Section 39.06(c).

A rule that officials cannot be liable for constitutional violations—if they were enforcing a law that had not yet been held unconstitutional—clashes with the plain text of Section 1983. When interpreting and applying a statute, courts must "begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citation omitted). And "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* (cleaned up).

Section 1983's language is clear: It imposes liability when officers violate the Constitution "under color

of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983.

But the Fifth Circuit's rule allows the officials who coordinated and executed Villarreal's arrest to escape liability precisely because they were acting "under color of" a Texas law. *See* Pet. App. 44a–50a. Never mind that enforcing that law meant arresting a journalist for simply asking questions—an obvious violation of the First Amendment. *See* Section II.A, *infra*. And never mind that the officers weaponized the law to "harass and intimidate" a known law enforcement critic. Pet. App. 26a. Permitting officials to launder their constitutional violations by acting "under color of" state law gets the plain text of Section 1983 exactly backwards.

B. Historical textual evidence shows that Section 1983 creates liability "notwithstanding" state statutes and common law immunities.

In fact, the original (and unchanged) meaning of Section 1983 confirms not just that the text meant what it said, but also that Congress abrogated reliance on state laws and immunities to commit or excuse federal constitutional violations.

1. The 42nd Congress enacted the Ku Klux Klan Act in 1871 to provide federal remedies for rampant abuses by southern states. Its familiar text now appears in the U.S. Code at 42 U.S.C. 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, suit in equity, or other proper proceeding for redress * * * .

This broad language creates a "mechanism for enforcing individual rights." *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 285 (2002); *see also Maine* v. *Thiboutot*, 448 U.S. 1, 5 (1980).

Importantly, the Act contained "additional significant text" "[i]n between the words 'shall' and 'be liable.'" Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 235 (2023). It directed that officials "shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable." Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 18 (1871) (emphases added).

This additional clause demonstrates that Congress never intended to enable State officials to escape liability under Section 1983 by hiding behind state laws, including positive statutory laws or common law immunities. "[A]ny law, statute, ordinance, [or] regulation" has the same meaning that it would today: any laws enacted by the State. And the 1871 Congress would have understood "custom[] or usage" to mean "common law," which was the source of "the vast majority of immunity doctrine available to state actors." Reinert, *supra*, at 235–36.

Finally, "notwithstanding" means "[w]ithout opposition, prevention, or obstruction from," or "in spite of." Webster's Complete Dictionary of the English Language 894 (1886); *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 301 (2017) (ordinary meaning of "notwithstanding" is "in spite of" or "without prevention or obstruction from or by"); Bryan A. Garner, Garner's Modern English Usage 635 (4th ed. 2016) ("This usage [of notwithstanding] has been constant from the 1300s to the present day.").

So the inclusion of the "Notwithstanding Clause" means the liability created by Section 1983 applied *despite* the operation of state laws, including state statutes and common law immunities.

2. And Congress intended to preserve the meaning of that text when it purposefully omitted the clause.

It was dropped three years later when Congress gathered federal laws in one place for the first time in compiling the Revised Statutes of 1874. Historical evidence shows Congress did not intend to make any substantive change to Section 1983—or any other statute—in the process of codification. *See* Patrick Jaicomo & Daniel Nelson, *Section 1983 (Still) Displaces Qualified Immunity*, 49 Harv. J.L. & Pub. Pol'y ___ (2026) (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5124275. Instead, because codification required condensing seventeen volumes into one while "preserv[ing] absolute identity of meaning in the law," 2 Cong. Rec. 4220 (1874) (Sen. Conkling), the Notwithstanding Clause was omitted merely for "[b]revity," Jaicomo & Nelson, *supra*, at 62.

Indeed, less than a decade after codification, this Court concluded that the decision to remove similar notwithstanding clauses in Reconstruction-era civil-rights statutes did not change their meaning. In the *Civil Rights Cases*, it explained that the purpose of this "very important clause" was to underscore the statute's "point and effect." 109 U.S. 3, 16 (1883). And it observed that although the Revised Statutes "omitted" the clause, they retained "the effective part of the law * * * thus preserving the corrective character of the legislation." *Id.* at 16–17.

3. The 1871 Congressional debates reinforce the conclusion that Congress never intended state statutes or immunities to shelter officials from the consequences of violating federal rights:

> [F]ar from being silent about immunities, the debates on [Section 1983] are replete with statements of the opponents of civil rights statutes that the legislation was overriding those immunities. Furthermore, nothing in the legislative history is said to assuage the fears of these opponents. Thus, Congress was not silent about immunities; it was only silent about *retaining* immunities.

Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 Ark. L. Rev. 741, 771 (1987).

That makes perfect sense, as "the central objective of the Reconstruction-Era civil rights statutes * * * is to ensure that individuals whose federal

constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Felder* v. *Casey*, 487 U.S. 131, 139 (1988) (citation omitted). Because Section 1983 "provides a uniquely federal remedy against incursions upon rights secured by the Constitution and laws of the Nation," *id.* (cleaned up), allowing the enforcement of state law to nullify that federal remedy subverts the statute's purpose.

4. In fact, since 1871, this Court has repeatedly held officials liable for violating constitutional rights, notwithstanding the use of state laws to do so.

In *Myers* v. *Anderson*, 238 U.S. 368 (1915), for example, this Court affirmed a Section 1983 judgment against Maryland election officials who prevented three Black men from voting pursuant to an unconstitutional statute. *Id.* at 377–78. The officials argued they should not be liable because they believed, in good faith, that the statute was constitutional. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 57 (2018) (citing officials' briefing). But the Court rejected that argument. *Myers*, 238 U.S. at 378. Instead, it affirmed the lower court's holding that anyone enforcing an unconstitutional law "does so at his own peril and is made liable to an action for damages." *Anderson* v. *Myers*, 182 F. 223, 230 (C.C.D. Md. 1910).

And in a trio of cases in the first half of the twentieth century, this Court reversed the dismissal of Section 1983 actions against state officials who enforced state laws to prevent Black citizens from voting, in violation of the Fourteenth and Fifteenth Amendments. In none of those three cases did this Court discuss whether the officials were immune from

suit, notwithstanding the fact they enforced state laws that abridged the plaintiffs' federal constitutional rights. *See Smith* v. *Allwright*, 321 U.S. 649, 650–52 (1944) (election officials denied petitioner permission to vote based on state party resolution); *Lane* v. *Wilson*, 307 U.S. 268, 269 (1939) (election officials prevented petitioner from registering to vote based on state legislation); *Nixon* v. *Herndon*, 273 U.S. 536, 539–41 (1927) (election officials prevented petitioner from voting based on state legislation).

II. The Fifth Circuit's decision warrants review and reversal because it breaks with this Court's conclusion that qualified immunity excuses neither obvious constitutional violations nor using a statute in an obviously unconstitutional manner.

Qualified immunity undermines Section 1983's purpose to hold officials accountable "notwithstanding" common-law immunities.

But even modern qualified-immunity doctrine has its limits. As this Court has recognized, qualified immunity does not allow government officials to escape liability for obvious constitutional violations. Nor does it allow officials to launder their obvious constitutional violations through state law, especially when those violations are premeditated.

A. Qualified immunity is not available for obvious constitutional violations.

1. In assessing government conduct, judges do not "exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted). For all its flaws,

qualified immunity is not a "license to lawless conduct." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982). "Where an official *could be expected* to know that certain conduct would violate * * * constitutional rights, he *should be made* to hesitate." *Id.* (emphases added). As this Court has recognized, then, the "salient question" is "fair warning," not "danger[ously] * * * rigid[] overreliance on factual similarity" to past cases. *Hope* v. *Pelzer*, 536 U.S. 730, 741–42 (2002).

So—even when no factually-identical caselaw exists—this Court "has made clear that public officials who commit obvious constitutional violations are not entitled to qualified immunity." Pet. App. 99a (Ho, J., dissenting). That is because "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question" without on-point caselaw. *Hope*, 536 U.S. at 741 (citations omitted).

In recent years, this Court has reinforced that principle by reversing grants of qualified immunity for obvious violations of constitutional rights. *See Hope*, 536 U.S. at 745–46 (defendants tied plaintiff to a painful "hitching post" as punishment); *Taylor* v. *Riojas*, 592 U.S. 7, 8–9 (2020) (defendants put plaintiff in "deplorably unsanitary conditions for * * * extended period"); *McCoy* v. *Alamu*, 141 S. Ct. 1364 (2021) (defendant pepper-sprayed plaintiff "for no reason," *see* 950 F.3d 226, 234-37 (5th Cir. 2020) (Costa, J., dissenting in part)).

And in *Sause* v. *Bauer*, 585 U.S. 957 (2018) this Court applied that "obviousness" standard in the First Amendment context. In that case, the Tenth Circuit granted two police officers qualified immunity

after they entered a woman's living room in response to a noise complaint, she knelt down to pray, and the officers ordered her to stop. *Sause* v. *Bauer*, 859 F.3d 1270, 1275 (10th Cir. 2017). The Tenth Circuit reasoned that Ms. Sause couldn't "identify a single case in which this court, or any other court for that matter, had found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." *Id.* But this Court reversed the grant of qualified immunity, despite "the absence of a prior case involving the unusual situation alleged," because "[t]here can be no doubt that the First Amendment protects the right to pray." *Sause*, 585 U.S. at 959.

2. The same obviousness standard applies here. As recounted by the Fifth Circuit: (1) Villarreal asked an officer to corroborate information about a suicide and a car accident; (2) the officer answered; (3) six months later, the defendants arrested and prosecuted Villarreal because she "solicited or received" that "nonpublic" information and "benefitted" (in the form of journalistic scoops, Facebook followers, and some free meals). Pet. App. 26a–30a.

In other words, Villarreal did what journalists do every day—uncover information from government sources to publish scoops and benefit from their efforts—and the defendants arrested and prosecuted her (and only her) for it, after ruminating for months.

Reasonable officials would have had fair warning that arresting Villarreal for asking questions of a public official would violate the First and Fourth Amendments. To reach that conclusion, passing familiarity with the phrase "abridging the freedom of speech, or of the press" (*see* Amendment I) and our national

culture should have sufficed. But "general constitutional rule[s] already identified in the decisional law" also made it obvious. *Hope*, 536 U.S. at 741. It is axiomatic that "there is 'an *undoubted right* to gather news *from any source* by means within the law.'" *Turner* v. *Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (emphases added) (quoting *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 11 (1978)).

Indeed, this Court "has made clear that the First Amendment protects the publication of information obtained via 'routine newspaper reporting techniques'—which include asking for the name of a crime victim from government workers not clearly authorized to share such information." Pet. App. 65a (Graves, J., dissenting) (citing *Smith* v. *Daily Mail Pub. Co.*, 443 U.S. 97, 99, 99–104 (1979)); *see also Fla. Star* v. *B.J.F.*, 491 U.S. 524, 534 (1989); *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 783 (1978); *Branzburg* v. *Hayes*, 408 U.S. 665, 681–82 (1972).

So, "[j]ust as it's obvious that Sause has the right to pray, it's equally obvious that Villarreal has the right to ask questions." Pet. App. 101a (Ho, J., dissenting). Any reasonable official would have had fair warning that the Constitution prohibits arresting a person for asking questions of a government employee.

B. Using a statute in an obviously unconstitutional manner is obviously unconstitutional.

Nor does the fact that Respondents wielded a state statute—Texas Penal Code § 39.06(c)—to violate

Villarreal's rights erase that fair warning or make her arrest less obviously unconstitutional.

1. This Court has explained (under the exclusionary rule) that officials cannot avoid the consequences of constitutional violations by asserting reliance on a statute "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Michigan* v. *DeFillippo*, 443 U.S. 31, 38 (1979).

The Fifth Circuit contends that *DeFillippo* provides, at most, "a *possible* exception" to immunity for officials who enforce "grossly and flagrantly unconstitutional" laws. Pet. App. 47a–48a.

But in doing so, it breaks with "[a] mountain of Supreme Court and circuit precedent." Pet. App. 105a (Ho, J., dissenting) (collecting cases); *see Myers*, 238 U.S. at 382 ("the new statute did not relieve the new officers of their duty, nor did it impose a shield to prevent the operation upon them of the provisions of the Constitution"). At least seven circuits agree that reliance on "a statute [that] authorizes conduct that is patently violative of fundamental constitutional principles * * * does not immunize" misconduct. *Lawrence* v. *Reed*, 406 F.3d 1224, 1232 (10th Cir. 2005) (cleaned up). *See Guillemard-Ginorio* v. *Contreras-Gómez*, 490 F.3d 31, 40–41 (1st Cir. 2007); *Vives* v. *City of New York*, 405 F.3d 115, 117–19 (2d Cir. 2005); *Leonard* v. *Robinson*, 477 F.3d 347, 359, 361 (6th Cir. 2007); *Carey* v. *Nev. Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002); *Cooper* v. *Dillon*, 403 F.3d 1208, 1220–21 (11th Cir. 2005); *Lederman* v. *United States*, 291 F.3d 36, 47 (D.C. Cir. 2002).

Stated differently: "[O]fficers are not always entitled to rely on the legislature's judgment that a statute is constitutional" because "some statutes are so obviously unconstitutional that we will require officials to second-guess the legislature and refuse to enforce an unconstitutional statute—or face a suit for damages." *Lawrence*, 406 F.3d at 1232–33.

2. It follows, then, 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." Pet. App. 85a (Willett, J., dissenting). If—as this Court and seven circuits agree—government officials should know that a statute is facially unconstitutional, they surely should know that its use in a particular circumstance is unconstitutional. *See Grossman* v. *City of Portland*, 33 F.3d 1200, 1210 (9th Cir. 1994) (no immunity for "egregious manner" of enforcement, or "exceed[ing] the bounds of the ordinance").

The question is not limited, as the Fifth Circuit would have it, to merely whether the officers had probable cause to arrest under the statute. *See, e.g.*, Pet. App. 3a, 44a. Instead, "the overarching inquiry is whether, in spite of the existence of the statute, a reasonable officer should have known that his conduct" violated the Constitution. *Lawrence*, 406 F.3d at 1232.

And here, any reasonable officer should have known that applying Section 39.06(c) to Villarreal's circumstances was an "egregious manner" of enforcement or "exceed[ed] the bounds of the [statute]" because it allowed them to jail her for asking a police officer for information. *Grossman*, 33 F.3d at 1210.

These are precisely the circumstances in which officers "could be expected to know that certain conduct would violate * * * constitutional rights" and therefore "be made to hesitate." *Harlow*, 457 U.S. at 819. "And that should be devastating to [Respondents'] claim of qualified immunity." Pet. App. 99a (Ho, J., dissenting).

3. This standard applies with equal force even when an obvious constitutional violation might not have an obvious remedy.

On remand from this Court, the Fifth Circuit again granted qualified immunity to the officials on Villarreal's First Amendment retaliation claim (without addressing her direct violation claim). *See* Pet. App. 2a–4a. Because Villarreal was arrested before this Court carved out an exception to the no-probable-cause rule for Section 1983 retaliatory-arrest claims in *Nieves*, the majority concluded that she had no clearly-established "'right to be free from a retaliatory arrest that is supported by probable cause[.]'" Pet. App. 3a (quoting *Reichle* v. *Howards*, 566 U.S. 658, 664–65 (2012)).

But whether and how the no-probable-cause rule applied at the time of Villarreal's arrest is a separate question from whether her underlying right was clearly established. Although *Reichle* concluded there was no "clearly established" "right to be free from retaliatory arrest" if the officers had probable cause, 566 U.S. at 664–65, this Court has since "clarified" that "the no-probable-cause rule concerns only remedies, not rights," Pet. App. 8a (Oldham, J., concurring). In other words, it is "an element of the cause of action [for a retaliatory-arrest claim], rather than part of the

underlying constitutional right[.]" *Id.* 11a; *see also O'Connor* v. *Eubanks*, 83 F.4th 1018, 1025 (6th Cir. 2023) (Thapar, J., concurring) ("We should first ask whether a cause of action exists against the official. Then, we should ask if that official's conduct violated clearly established law.") The United States took the same position in the amicus brief it submitted in *Gonzalez*, explaining that the no-probable-cause rule "is a requirement for a damages claim under Section 1983, not a limitation on the First Amendment itself[.]" Brief for the United States as Amicus Curiae Supporting Neither Party at 11, *Gonzalez* v. *Trevino*, 602 U.S. 653 (2024) (No. 22-1025).

Qualified immunity is concerned with the definition of the constitutional *right* at stake, not the definition of the *remedy* for violations of that right. Because the only question is whether an officer had "fair notice" that her conduct was unconstitutional, it is "irrelevant whether [she] should have known about the existence and nature of a cause of action to remedy that unlawful conduct." Pet. App. 11a (Oldham, J., concurring).

Here, the officers' violation of Villarreal's First Amendment rights is no less obvious because they happened to arrest her before this Court clarified *how* she could later sue them. "[W]hether the contours of the no-probable-cause rule have been clearly established" should not matter to the qualified-immunity analysis. *Id.* 13a.

C. The obviousness standard is easy to apply where, as here, government officials spent months concocting a plan.

The unlawfulness of the officers' conduct is underscored by the six months they spent planning Villarreal's arrest.

To be sure, courts sometimes justify granting qualified immunity in dangerous scenarios where officials might need "breathing room" to "make reasonable but mistaken judgments." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011); *see also* Pet. App. 14a–15a (Oldham, J., concurring).

But it makes no sense to provide "the same protection" to officials "who have time to make calculated choices about enacting or enforcing unconstitutional policies" as officials compelled to make "a split-second decision to use force in a dangerous setting." *Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement regarding denial of certiorari).[2]

The officials who arrested Villarreal certainly had time to examine the lawfulness of their actions, yet they chose to forge ahead anyway. This was no "snap decision or heat-of-the-moment gut call." Pet. App. 83a (Willett, J., dissenting). They had time to "read

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[2] Calculated retaliation is all too common. According to a recent study that analyzed over 5,500 federal qualified immunity appeals, nearly 1 in 5 cases included a First Amendment claim. And most of those alleged premeditated retaliation. *See* 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*, 23–24, Institute for Justice (Feb. 2024), https://ij.org/wp-content/uploads/2023/11/Unaccountable-qualified-immunity-web.pdf.

Supreme Court precedent, stud[y] the history of the First Amendment, or even consult[] counsel." *Id.* 16a (Oldham, J., concurring). But they didn't. Instead, the officers "dust[ed] off and weaponiz[ed] a dormant Texas statute never successfully wielded in the statute's near-quarter-century of existence. This * * * was the premeditated pursuit of a confirmed critic." *Id.* 83a (Willett, J., dissenting).

In such circumstances, qualified immunity does not serve even its ostensible purpose. Its purported goal is preventing litigation from "'dampen[ing]' the 'ardor'" of well-meaning officials, but "when it comes to at least some retaliatory-arrest defendants, perhaps that ardor *should* be dampened." *Id.* 16a. (Oldham, J., concurring) (quoting *Harlow*, 457 U.S. at 814 and citing *Gonzalez*, 602 U.S. at 658).

III. *Certiorari* is necessary because the Fifth Circuit's decision is dangerous to a free society and disserves qualified immunity's prudential considerations.

The Fifth Circuit's reasoning is not only inconsistent with history and precedent, it also undermines this Court's purported prudential justification for qualified immunity: balancing the need to avoid "excessive disruption of government" on the one hand with the need to ensure "deterrence of unlawful conduct and [] compensation of victims" on the other. *Harlow*, 457 U.S. at 813–20.

The en banc majority threw off that balance by placing a thumb on the government's side of the scale in three ways. First, by justifying Villarreal's arrest because she used a "backchannel" source to seek

information rather than the police department's official spokesperson, *see, e.g.*, Pet. App. 25a, the Fifth Circuit subverted citizens' and journalists' interest in discovering information while empowering the government to decide what is and is not newsworthy. Second, the grant of qualified immunity here tells government officials that they need not understand basic constitutional principles while burdening citizens like Villarreal with the responsibility to adhere to obscure, rarely enforced statutes. And third, the Fifth Circuit's decision takes away a citizen's remedy when an official enforces a law against them in an unconstitutional way, but allows motivated officials to use the innumerable laws, statutes, regulations, and ordinances on the books to find probable cause to arrest almost anyone.

A. The Fifth Circuit's decision hands the government power to decide what is and is not newsworthy, while preventing the press and citizens from learning information the government decides to conceal.

The Fifth Circuit justified the officers' decision to arrest Villarreal based on her choice to use an "illicit," "backchannel source"—a police officer she knew—to corroborate her information. *See* Pet. App. 2a, 25a, 40a, 43a, 62a. But that reasoning resulted in a dangerous conclusion: if a person asks for and receives information from a government official—outside official "information officer[s]" or the Public Information Act process—she can be arrested and prosecuted. *Id.* 26a. And because the Fifth Circuit declined to decide whether section 39.06(c) violates the First Amendment as applied to journalists who obtain "nonpublic

information through unofficial channels," *id.* 33a, officials across Texas are free to keep using Respondents' playbook with no accountability.

That decision comes with a huge "social cost[]." *Harlow*, 457 U.S. at 814. It allows the government to become the arbiter of newsworthiness, while "limit[ing] journalists who work the government beat to publicly disclosed documents and official press conferences, meaning they will only be able to report information the government chooses to share." Pet. App. 68a (Graves, J., dissenting). And it erodes the ability of the press—and everyone else—to learn facts that some government officials may not want us to know. *See Branzburg*, 408 U.S. at 681–82 ("The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news *from any source* by means within the law." (emphasis added)).

At a time when Americans are expressing increased skepticism and doubt about the credibility and reliability of official police accounts and reports, *see generally* Paul Farhi & Elahe Izadi, *Journalists Are Reexamining Their Reliance on a Longtime Source: The Police*, Wash. Post (June 30, 2020), https://wapo.st/2ECJ1la, the Fifth Circuit's decision threatens to make us all less knowledgeable.

Worse, it's unconstitutional. "There is simply no way [freedom of the press] can meaningfully exist unless journalists are allowed to seek non-public information from the government." Pet. App. 65a (Graves, J., dissenting).

B. By granting qualified immunity to the officials, the Fifth Circuit charges Villarreal with internalizing obscure statutory knowledge while permitting government officials to plead ignorance of the First Amendment.

Although qualified immunity was supposed to ensure that officers are only shielded from liability if they could not "be expected to know that [their] conduct would violate statutory or constitutional rights," *Harlow*, 457 U.S. at 819, the decision here places a much heavier burden on everyday citizens to know and follow the law than it does on government officials.

The Fifth Circuit insisted that none of this would have happened if Villarreal had "followed Texas law, or challenged that law in court, before reporting nonpublic information from [her] backchannel source." Pet. App. 25a. So Villarreal was required to know that (1) she was asking for information that obscure sections of the Texas Government Code and Transportation Code might have prohibited some officers from disclosing, and (2) that Officer Goodman, her source, was not one of the officials authorized to disclose that information. *See id.* 34a–39a.

On the other hand, under the Fifth Circuit's reasoning, the officers who arrested Villarreal—the ones charged with enforcement of the law and sworn to uphold the Constitution—were not expected to know that basic First Amendment law and decades of jurisprudence prohibited them from arresting a journalist for seeking information. *See, e.g.*, *id.* 24a, 44a, 47a (reasoning that the officers could not have

"predict[ed]" that arresting Villarreal was unconstitutional).

"In other words, encyclopedic jurisprudential knowledge is imputed to Villarreal, but the government agents targeting her are free to plead (or feign) ignorance of bedrock constitutional guarantees." *Id.* 84a (Willett, J., dissenting). The balance of interests underpinning qualified immunity is lopsided when "ignorance of the law *is* an excuse—for government officials." *Id.*

C. Allowing officials to duck accountability here is especially concerning because it removes a remedy while empowering officials to use the innumerable laws at their disposal to suppress speech.

Finally, granting Respondents qualified immunity because they enforced a state law also tips the scales in favor of the government. The decision below "categorically" denies a remedy to any Texan, Mississippian, or Louisianan whose rights are violated if the official "can recite some statute to justify" the violation, *id.* 94a (Ho, J., dissenting), making it all too easy for officials to find and use a law—any law—to punish their critics.

The public interest in ensuring accountability here is especially strong because "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something." *Nieves*, 587 U.S. at 412 (Gorsuch, J., concurring in part and dissenting in part). And "innumerable local ordinances carry the possibility of criminal consequences," including jailtime. Erik

Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 704 (2005).

Because "the police almost always will have probable cause to arrest someone for something," Paul J. Larkin, *Public Choice Theory and Overcriminalization*, 36 Harv. J. L. Pub. Pol'y 715, 720 (2013), granting immunity based on mechanic invocations of local or state laws would allow officials to "wield facially constitutional statutes as blunt cudgels to silence speech (and to punish speakers) they dislike," Pet. App. 86a (Willett, J., dissenting); *see also, e.g.*, *NRA* v. *Vullo*, --- F.4th ----, 2025 WL 1966596, at *8, *13–14 (2d Cir. July 17, 2025) (granting Vullo qualified immunity for coercive and retaliatory enforcement of state laws against NRA's business partners).

That carries real consequences. Even without a conviction, arrest or jailing is life-altering: it harms employment, housing, children, and health. *See* Rebecca Neusteter & Megan O'Toole, Vera Inst. of Justice, *Every Three Seconds* (Jan. 2019), https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/.

Allowing government officials to wield those "blunt cudgels" with impunity provides precisely the "license to lawless conduct"—without a remedy—that qualified immunity was designed to avoid. *Harlow*, 457 U.S. at 819.

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In short: the Fifth Circuit's decision turns the First Amendment on its head by permitting officials to spend months cooking up a plan to punish a

journalist by arresting her—for doing something journalists do every day—and then launder their misconduct by mechanically invoking a state law. Countenance what it may, the qualified immunity regime does not (and cannot) countenance that.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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