No. 25-29

IN THE

Supreme Court of the United States

PRISCILLA VILLARREAL,
Petitioner,
v.
ISIDRO R. ALANIZ, ET AL.,
Respondents.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because protection of the freedoms of expression and association, guaranteed by the First Amendment, is essential for an open and diverse society.

SUMMARY OF ARGUMENT

The use of qualified immunity to shield government employees from liability for intentional and slow-moving infringement of First Amendment rights creates a moral hazard that is at odds with the Constitution and The Civil Rights Act. The First Amendment prohibits the government from making laws that abridge speech and the press. Section 1983 creates a cause of action for violations of civil rights under color of state law. But these protections are weakened where state actors may infringe First Amendment rights and then rely on prolix state law to trigger qualified immunity, claiming they did not know any better. The more obscure the state law, the less likely it is that a prior case was decided on a similar set of facts. The result is that clear and

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief. AFPF timely notified all counsel of its intent to file.

generally applicable protections are supplanted by idiosyncratic state law.

This is just such a case, involving a citizen journalist who asked a government employee to confirm independently sourced information and then published it. Six months later, local officials arrested her under a previously-unused anti-corruption statute.[2] But the First Amendment protects each step in this journalist's saga. No step presents even a borderline question. Indeed, that sequence of events is so squarely within the bounds of the First Amendment that it is protected by two clauses: Speech and Press.

One would be justified in thinking the legal standard for silencing a journalist and arresting her for reporting double-sourced facts would be high and that she could vindicate the violation of her civil rights. Not here. Instead, she was burdened with navigating various state-law exceptions to First Amendment protection just to keep her complaint from being dismissed. She succeeded in her first visit to the Fifth Circuit. But after *en banc* review, the court accepted state-law limits on the press as the basis for qualified immunity.

Granting Villarreal's first petition for *certiorari*, this Court vacated the *en banc* decision and remanded for consideration in light of *Gonzalez v. Trevino*, 602 U.S. 653 (2024), which held a plaintiff who claims

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[2] *Villarreal v. City of Laredo, Texas*, 44 F.4th 363, 368 (5th Cir. 2022) ("*Villarreal I*")., reh'g *en banc* granted, opinion vacated, 52 F.4th 265 (5th Cir. 2022), and superseded on reh'g *en banc*, 94 F.4th 374 (5th Cir. 2024) ("*Villarreal II*").

retaliatory arrest for exercising First Amendment free speech rights is not required to present evidence of identifiable people who were not arrested under similar circumstances to overcome the general rule that the plaintiff must plead and prove the absence of probable cause for the arrest. On remand, the Fifth Circuit held that "whether or not Appellant Villarreal stated a plausible claim for unconstitutional retaliation based on her 'speech' . . . Defendants-Appellees properly claim qualified immunity from liability," thus bypassing *Gonzalez* entirely. *Villarreal v. City of Laredo*, 134 F.4th 273, 275–76 (5th Cir. 2025) ("*Villarreal III*") ("we are not called upon to consider the constitutional implications of Villarreal's claim for *Gonzalez*'s applying the *Nieves* exception to her."). This case now returns to this Court on the same issue presented on its first trip: whether qualified immunity shields government actors from slow-moving and obvious infringement of First Amendment rights.

Here, unmistakable speech and press rights were forced to give way to obscure and overbroad application of state laws addressing fraud and corruption. Doing so narrowed First Amendment protections for journalists and frustrated the purpose of § 1983.

To the extent qualified immunity serves any purpose, this is not it. The Court should grant *certiorari* to quash application of precedent that creates moral hazards undermining First Amendment protections wherever a criminal law may be unearthed that could criminalize speech.

ARGUMENT

I. QUALIFIED IMMUNITY SHOULD NOT SHIELD CONSTITUTIONAL INFRINGEMENT IN SLOW-MOVING FIRST AMENDMENT CASES.

In cases of alleged infringement of First Amendment rights, particularly where, as here, a slow-moving chain of events unfurls over a multi-month period, qualified immunity should be applied rarely, if at all. This is because, as the panel opinion correctly stated, "[t]he crucial question . . . is whether 'a reasonable official would understand that what he is doing violates [a constitutional] right.'" *Villarreal I*, 44 F.4th at 369 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In cases implicating bedrock First Amendment activity, a legal doctrine that excuses—even incentivizes—ignorance is a poor fit.

Qualified immunity serves two purposes: to ensure fair notice for government employees before personal liability can be imposed—consistent with the constitutional due process requirement of fair notice;[3] and to promote official action recognized under the common law as necessary to society by protecting government employees from lawsuits that may discourage them from doing their jobs or accepting employment that would create legal exposure.[4] The

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[3] "Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful" *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (cleaned up).

[4] *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.").

societal justification for promoting action was explained by Cooley's Treatise on Torts:

> It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so doing, it is the established rule, that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. This rule is founded upon grounds of public policy, in order to encourage the exposure of crime[.]

1 Thomas M. Cooley, *A Treatise on The Law of Torts or The Wrongs Which Arise Independently of Contract 326* (John Lewis ed., 3d ed. 1906) (citation omitted).

In the area of policing, the Court long ago "concluded that police officers could assert 'the defense of good faith and probable cause' against the claim for an unconstitutional arrest because that defense was available against the analogous torts of 'false arrest and imprisonment' at common law." *Id.* at 1871 (Thomas, J. concurring in part and concurring in the judgment) (citing *Pierson*, 386 U.S. at 557). Thus, the Court has recognized police "under § 1983 [have] a 'good faith and probable cause' defense coextensive with their defense to false arrest actions at common law." *Imbler v. Pachtman*, 424 U.S. 409, 418–19 (1976). While the Court has largely

abandoned this approach in favor of the *Harlow* "objective," "clearly established" test, *see Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Ziglar*, 137 S. Ct. at 1866–67 (applying the objective test in § 1983 cases), it is instructive to understand the goals qualified immunity has traditionally served.

With the near elimination of the good-faith defense, fair notice has become largely dispositive.

Regarding due process and clarity in settled law, there is a distinction between unclear or erroneous laws for which a government actor could not reasonably be deemed to have fair notice and acts that are so clearly unconstitutional or otherwise unlawful that a government actor should be expected to know better. On the one hand, "imagine an officer engages in conduct that has been explicitly blessed by the Supreme Court but nonetheless is sued for it, and in the course of that litigation, the Supreme Court overrules its prior decision. Presumably imposing liability on that officer would offend principles of fair notice." Aaron L. Neilson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, n.57 (2018) (cleaned up). In that case, it would be unreasonable to hold the officer to a higher standard of knowledge than the Court itself. Notably, this standard is more lenient on government officials than the standard applied to private litigants who are granted no "good faith" exception from liability when the Court recognizes a novel application of a statute. *E.g.*, *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 662 (2020).

On the other hand, when the law is clear, the government actor is bound by it and may be liable even in the face of contrary commands from a

superior. For example, in a case from the early days of the Republic, the Court held a ship captain responsible for the unlawful seizure of another ship even though he relied on the President's interpretation of statutory authority, because the President's order could not change the underlying law. *Little v. Barreme*, 6 U.S. 170, 170 (1804). The captain of the ship was responsible for complying with the law regardless of the President's command. *See id.* at 179 (holding "instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass"). This approach, refusing to shield reliance on a patently invalid law has stood the test of time. *See, e.g.*, *Illinois v. Krull*, 480 U.S. 340, 355 (1987) ("A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws. Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.").

Fair notice that speech and the press are protected is readily satisfied because claims of First Amendment infringement are among the most frequently discussed and hotly asserted constitutional rights. It is thus reasonable to expect a public official with even the most rudimentary understanding of our constitutional system to be aware that government attempts to punish speech and the press should be met with a jaundiced eye and—at a minimum—pause and seek guidance about whether a course of action is lawful. As the Court held in *Harlow*, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he

should be made to hesitate." 457 U.S. at 815–19. The alternative would be to promote ignorance of the Constitution as a shield against liability.

Moreover, in cases like this one, in which six months elapsed between a journalist's questioning of the police officer and law enforcement's finding a reason to arrest her, fair notice that they were heading down an unconstitutional path would be easy to satisfy. This holds particularly true where, as here, the action taken was extreme: "It should be obvious to any reasonable police officer that locking up a journalist for asking a question violates the First Amendment," *Villarreal I*, 44 F.4th at 373. Six months would be more than enough time to eliminate any lingering doubt that arresting her raises constitutional concerns. But even in more subtle cases, the slow-moving nature of many First Amendment conflicts raises doubt whether qualified immunity should ever apply. *Villarreal III*, 134 F.4th at 277 (Oldham, J. concurring) ("When an officer has the time to make such plans, to consult counsel, and to investigate all the facts, it is unclear whether and to what extent qualified immunity should apply."). Even if it does apply, it should be the rarity not the rule.

This issue has relevance well beyond policing and is particularly acute in settings where an unconstitutional policy can be changed to moot a plaintiff's case either through narrow modifications that elude the plaintiff's specific fact pattern or through flip-flopping policies to wriggle past plaintiffs with standing based on temporary status. This type of gamesmanship is familiar, for example, on university campuses where college administrators set policies

that infringe speech rights of students and faculty despite involving a slow-moving policy-making process that is amenable to legal consultation. Justice Thomas acknowledged the issue in the denial of certiorari in *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of cert.) ("But why should university officers, who have 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?").

Accordingly, if this Court retains the qualified immunity doctrine in the First Amendment context, then it should severely limit its use and such application should be informed by the amount of time available to the state actor to consider whether the proposed course of action is constitutional.

II. THE FIRST AMENDMENT IS THE FIRST MOVER BEFORE EXCEPTIONS ARE APPLIED.

The First Amendment interests in this case are straightforward and should have been vindicated easily. Prior restraints, like those applied here, are inherently suspect and any content-based exceptions to broad First Amendment protection must satisfy strict scrutiny.

Although the U.S. Constitution is superior to state law, here state law prevailed. The rationalization for elevating state law over speech and press rights was the novel idea that "perks available to citizen journalists" arising from publication are a "benefit" that can displace constitutional exercise. *Villarreal II*, 94 F.4th at 388. But the blessings of liberty cannot be stripped away by labeling them "benefits". Nor can the established expectation that exercising constitutional

rights could be a profitable activity be deemed notice that criminal liability could result unless the exercise has been pre-cleared by the state.

This case takes the opposite approach, reading a law that sounds in fraud and self-dealing to prohibit constitutionally protected activity unless the accused proves she received no "benefit"[5,6] from the exercise. The Texas law, which prohibits obtaining and using protected information for personal gain, could have constitutional applications that do not implicate speech. For example, prohibiting backdoor access to public employees' banking information to protect against identity theft or blackmail would likely pass constitutional muster. But here, broadly reading the statute to reach millrun speech and press activity gets the Constitution-to-state law relationship backward.

First Amendment protection must be the default unless the government can satisfy (usually) strict scrutiny. Moreover, even with lawful restraints, due process requires criminal law to provide notice that a person of ordinary intelligence could understand.[7]

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[5] Texas Penal Code § 39.06(c) ("(c) A person commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he solicits or receives from a public servant information that: (1) the public servant has access to by means of his office or employment; and (2) has not been made public.").

[6] Tex. Penal Code § 39.06(b) ("A public servant commits an offense if with intent to obtain a benefit or with intent to harm or defraud another, he discloses or uses information for a nongovernmental purpose that: (1) he has access to by means of his office or employment; and (2) has not been made public.").

[7] "A criminal statute is therefore invalid if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (cleaned up).

Neither requirement is satisfied when law enforcement officers invoke prolix interpretations of law—or invent self-serving interpretations—that contravene black letter First Amendment law in ways that could not be anticipated by a person of ordinary intelligence—and would chill speech and press rights.

Moreover, applying qualified immunity to encourage narrow application of the First Amendment and broad imposition of criminal liability on speech and press activity creates a moral hazard in which complexity and ambiguity create greater leeway for law enforcement to violate civil rights.

A. Private Individuals Do Not Bear the Burden of Proving They Are Not Criminals for Speaking.

Applying a criminal statute to First Amendment activity and claiming speakers can avoid criminal liability by simply complying, gets the law backwards. The court below asserted that Ms. Villarreal "could have followed Texas law." *Villarreal II*, 94 F.4th at 381. This contention misunderstands the relationship between a speaker and the state. It may be true that speakers could avoid criminal liability for statutory speech violations if they simply stopped speaking; but that is not how the First Amendment works. Instead, the burden falls on the government to rebut the presumption that discrimination against speech due to its message is unconstitutional. *See Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 828–29 (1995).

Moreover, the notion that Ms. Villarreal "could have" followed Texas law requires a leap of faith that the minefield of presumptions at play here could be navigated without special knowledge. To comply, she

would, for example, have had to recognize a legally significant difference between an "LPD Officer" and an "LPD information officer" before asking for confirmation of basic facts[8]—assuming she was even aware of the existence of two distinct titles. She would also have had to recognize that: 1) age, name, and employment information of a deceased person are protected despite a statutory presumption in favor of broad public disclosure;[9] 2) independently-sourced information could become secret "official information"[10] if law enforcement *also* knows it; 3) there is such a thing as "official news media;"[11] 4) public interest in her reporting could be an illicit

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[8] *Villarreal II*, 94 F.4th at 382.

[9] *See generally* Tex. Gov't Code §552.001(a) ("Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. . . . The provisions of this chapter shall be liberally construed to implement this policy.). *See also* Tex. Gov't Code § 552.108 (c) ("This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime. A governmental body shall promptly release basic information responsive to a request made under this chapter unless the governmental body seeks to withhold the information as provided by another provision of this chapter, and regardless of whether the governmental body requests an attorney general decision under Subchapter G regarding other information subject to the request.").

[10] 94 F.4th at 382.

[11] 94 F.4th at 383.

"benefit;"[12] 5) a statutory definition could limit the blessings lawfully flowing from constitutional rights;[13] and 6) information about real world events could be redefined as "information about the affairs of government" at the discretion of government.[14]

Even assuming, against the backdrop of near-ubiquitous First Amendment protection of speech and the press, a person must self-censor to resolve a conflict between the Constitution and state law, the idea that anyone could be expected to understand and comply with eccentric applications of fraud law to attempts to confirm basic information prior to publication is fanciful. "The First Amendment does not permit laws that force speakers to . . . seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 324 (2010) (cleaned up). Application of criminal law from a chapter titled "Abuse of Office"[15] against a private speaker with no "office" and without any associated non-speech-based offense is so far outside the norm of constitutional expectations it could not reasonably be anticipated.

The baseline understanding for journalists and for law enforcement must be that the First Amendment

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[12] *Id*. at 384.

[13] *Id*. at 386.

[14] *Id*. at 386.

[15] Texas Penal Code Ch. 39 Abuse of Office

protects journalistic endeavors such as investigation and publication.

B. Prior Restraints Are Presumed To Be Unconstitutional.

The prohibition against prior restraints on publishing is neither new nor obscure. It "has been generally, if not universally, considered that it is the chief purpose of the guaranty [of liberty of the press] to prevent previous restraints upon publication." *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). The elimination of such restraints was one of the rationales motivating broad press freedom at the founding. As James Madison explained, "This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also." *Id.* at 14 (quoting *Report on the Virginia Resolutions*, Madison's Works, vol. IV, p. 543.). *See also Commonwealth v. Blanding*, 20 Mass. 304, 313–14 (1825) ("it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such previous restraints upon publications as had been practised [sic] by other governments").

"As early as 1644, John Milton, in an 'Appeal for the Liberty of Unlicensed Printing,' assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views 'without previous censure'; and declared the impossibility of finding any man base enough to accept the office of censor and at the same time good enough to be allowed to perform its duties." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245–

46 (1936). This interpretation is as valid now as it was then. *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022).

As applied here, the Texas law is an unconstitutional prior restraint by: 1) preventing a reporter from confirming her information—thus chilling the publication of independently discovered information due to uncertainty; or 2) preventing a reporter from publishing information that has been corroborated by the government by putting the label "official information" on it even if already known to the reporter. Nevertheless, on appeal, the court found no established law holding that "it is unconstitutional to arrest a person, even a journalist, upon probable cause for violating a statute that prohibits solicitation and receipt of nonpublic information from the government for personal benefit." *Villarreal II*, 94 F.4th at 395.

Of course, as the opinion explains, it is not simply the "solicitation and receipt" of the information that makes the law applicable to Ms. Villarreal, but rather the so-called "personal benefit" of publishing it—another unconstitutional precept that has been repudiated by this Court. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curium) ("Pentagon Papers"). In the *Pentagon Papers*, the government sought to prevent the New York Times and the Washington Post from publishing the contents of a classified study entitled *History of U.S. Decision-Making Process on Viet Nam Policy*. 403 U.S. at 713–14. The Court's opinion was succinct. "'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" 403 U.S. at 714 (citing

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); *see Near*, 283 U.S. at 713. The "Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" 403 U.S. at 714 (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). Accordingly, the Court held the attempt to prevent publication unconstitutional. *Id*. at 713.

Justice Black, in his concurrence, went a step further, admonishing the administration:

> Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

Id. at 715.

The simplicity of the analysis, coupled with decades of precedent demonstrating the presumption against prior restraints, and the vehemence of the concurrences make clear that taking action against a publisher—even in cases of confidential government information—is not a close call. It is, in fact, well established.

C. Publishing Is a Right, Not a Benefit To Be Bestowed by the State.

All fifty states guarantee freedom of the press, writing, and/or publishing.[16] Most include a caveat that the individual may be responsible for abuse of that right or even limitations for libel or obscenity.[17] But none weaken the right to publish if the publisher is successful in developing an audience.[18]

These rights do not turn on whether the publisher benefits from publication. It is commonplace, for example, for publishing activity to be for-profit.[19] For-profit endeavors enjoy the same constitutional protection as publication for free. Nor can a change of labels be used to evade the First Amendment. Attempts to do so are sadly not uncommon, but this Court has steadfastly resisted the attempt. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 429 (1963) ("a State cannot foreclose the exercise of constitutional rights by mere labels."). Indeed, the Pilgrims themselves were both a for-profit enterprise and aiming to

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[16] Steven Gow Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore & Sarah E. Agudo, *Individual Rights Under State Constitutions In 2018: What Rights Are Deeply Rooted In A Modern-Day Consensus Of The States?*, Notre Dame Law Review, Vol. 94:1 p. 73 (2018)

[17] *Id*. at 74–75.

[18] Indeed, the greater the audience interest, the greater the magnitude of listeners' rights. *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (The freedoms of speech and press "embraces the right to distribute literature, . . . and necessarily protects the right to receive it.").

[19] The New York Times, for example, is a for profit entity. *See,* New York Times Corporate Governance information, available at: https://www.nytco.com/investors/corporate-governance/

exercise what would later become First Amendment freedoms.[20] And recently, the Court rebuffed Colorado's attempt to use public accommodations law to compel speech. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). Thus, the protection of expressive works provided by the First Amendment does not turn on whether the speaker or publisher receives a commercial benefit.

Rather, for sold speech, like "books, newspapers, and magazines," being "published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). *See also Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (collecting cases illustrating that "speech does not lose its First Amendment protection because money is spent to project it"). Time and again, the Court has focused on the speech element and turned aside attempts to evade the First Amendment. Thus, whether "Villarreal sought to capitalize on others' tragedies to propel her reputation and career," *Villarreal II*, 94 F.4th at 381, has no legal significance. Indeed, traditional journalists do this every day at for-profit news outlets.

Moreover, like the other provisions of the First Amendment, it should come as no surprise and make no legal difference that Villarreal may have enjoyed a psychic benefit from exercising her First Amendment rights. Like exercising any right of conscience, the

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[20] *See generally* Peggy M. Baker, *The Plymouth Colony Patent: setting the stage*, Pilgrim Society & Pilgrim Hall Museum (2007), available at: https://pilgrimhall.org/pdf/The_Plymouth_Colony_Patent.pdf.

rights of speech and the press may be assumed to generate satisfaction, vindication, or joy—among other psychic benefits.

Finally, expansive receipt of information by the public is wholly consistent with the purpose of the Press Clause—to inform the people of information necessary to self-government. "The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government." 403 U.S. at 717 (Black, J. concurring). It thus has no legal consequence that a publisher's audience has grown as a result of her reporting; and Freedom of the Press cannot be abridged on the basis that only unsuccessful reporters are protected.

D. Section 1983 Does Not Provide a Bypass Option for Violating Constitutional Rights.

By its text, Section 1983 provides no escape valves. 42 U.S. Code § 1983. A plain reading would allow no bypass for qualified immunity or for charging a speaker with a crime to justify arrest—especially where, as here, the peculiar application of the criminal statute would itself be unconstitutional. But at a minimum the moral hazard of allowing long lead times to develop a theory of probable cause or to grant qualified immunity in the face of the vast array of cases protecting the press,[21] should be avoided.

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[21] *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 517 (2001) (publication of communication illegally intercepted by third party); *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (publishing, or broadcasting the name of the victim of a sexual

Moreover, as Judge Oldham explained, there is a difference between rights and remedies, and thus whether a plaintiff may satisfy the elements of § 1983 does not determine whether she has alleged a clear constitutional violation for purposes of qualified immunity. *Villarreal III*, 134 F.4th at 280 (Oldham, J. concurring). "The point of qualified immunity is to shield officials from liability unless '[t]he contours of the right' are "sufficiently clear" such that 'a reasonable official would understand that what he is doing violates that right;'" by contrast, "the no-probable-cause rule is an element of the [Section 1983] cause of action, rather than part of the underlying constitutional right". *Villarreal III*, 134 F.4th at 280 (Oldham, J. concurring) (citing *Anderson*, 483 U.S. at 640). It is thus "irrelevant [to the qualified immunity inquiry] whether an officer should have known about the existence and nature of a cause of action to remedy that unlawful conduct." *Id*. In other words, whether a remedy may be had under § 1983 is different from whether rights were violated. The illogic of conflating

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offense); *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983) (imposing tax that targets the press); *Smith v. Daily Mail Publishing Co*., 443 U.S. 97, 99 (1979) (criminally forbidding newspapers to publish, without written juvenile court approval, the name of any youth charged); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978) (imposing criminal punishment of news media, for publishing truthful information regarding confidential commission proceedings); *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308 (1977) (enjoining the media from publishing the name or photograph of an 11-year-old boy involved in juvenile proceeding that reporters had attended); *Lovell v. City of Griffin, Ga*., 303 U.S. 444, 450 (1938) (distributing 'circulars, handbooks, advertising, or literature of any kind.').

these concepts is demonstrated here where the rights of Freedom of Speech and of the Press are relevant to the question of qualified immunity, but the availability of a § 1983 remedy could turn on application of a criminal law.

Treating these discrete inquiries as interchangeable creates two moral hazards. First, in cases involving slow-moving violations of First Amendment rights, if finding a criminal basis for arresting the speaker would create a bridge to immunity based on probable cause, the very lapse of time would incentivize post-hoc research into crimes that could plausibly justify arrest. Second, if liability under § 1983 may be bypassed by arresting the speaker for a crime that depends on the speech, that link creates an incentive to criminalize the speech itself and thus create probable cause. But, the case on which the Fifth Circuit relied, *Reichle v. Howards*, involved arrest for an alleged crime arising from acts separate from the protected speech. 566 U.S. 658 (2012). In *Reichle*, the plaintiff was arrested for harassment based on allegations that he, 1) touched the Vice President, and then, 2) lied about it to the Secret Service. 566 U.S. 658, 662 (2012). These were stand-alone allegations, separate from the speech for which plaintiff claimed he was subject to retaliation. *Id*. at 660 (officer overhearing plaintiff on the telephone saying, "I'm going to ask [the Vice President] how many kids he's killed today."), *i.e.*, the protected speech was not necessary to satisfy the elements of the alleged crime. *See also Nieves v. Barlett*, 587 U.S. 391, 396 (2019) (charge of disorderly conduct and resisting arrest arising from interfering with an investigation and initiating a physical confrontation with an officer). That is very different

from using protected speech and press activity as the elements of the alleged crime.

Take for example a protestor who calls a police officer "fascist" and then hits the officer's car with a bat. The protestor may allege retaliation if arrested for hitting the car with the bat—and may be correct in asserting he would not have been arrested but for the initial insult. But, regardless of retaliatory motive, hitting the car gives rise to a charge that is distinct from the speech. Compare that to a protestor calling a police officer a fascist (no bat involved) and then being arrested several months later for a crime that criminalizes alleging a public employee is associated with a political movement. The elements of that crime may be satisfied by yelling "fascist," thus creating probable cause for arresting the protester. But in that case the speech and the crime would be the same—and the underlying "crime" would be based wholly on protected speech.

A multi-month time period in which to research whether any crime may be applied to the offensive speech creates a moral hazard while also demonstrating the distinction Judge Oldham identified. It is well established that saying "fascist" would be protected by the First Amendment and thus qualified immunity should not apply to an arrest in retaliation for saying it. But if the remedy provided by § 1983 could be nullified by arresting the speaker for the "crime" of saying the word, then the speech protections of the First Amendment come to naught.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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