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 CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The questions presented are:

1. Whether it obviously violates the First Amendment to arrest someone for asking government officials questions and publishing the information they volunteer.

2. Whether qualified immunity is unavailable to public officials who use a state statute in a way that obviously violates the First Amendment, as decisions from the Sixth, Eighth, and Tenth Circuits have held, or whether qualified immunity shields those officials, as the Fifth Circuit held below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests Cato because freedom of speech and of the press is critical to liberty and government accountability, and the Fifth Circuit's grant of qualified immunity to officers who engaged in a retaliatory arrest on the basis of an obviously unconstitutional law threatens that right.

[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Police officers in this case enforced, for the first time, a Texas law that makes it a felony to engage in a routine journalistic practice—corroborating non-public information with a public official. They obtained a warrant and arrested Priscilla Villarreal, a citizen-journalist, who promptly petitioned a judge for a writ of habeas corpus, which was granted. However, when Villarreal sought damages from the officials involved for the violation of her constitutional rights, the Fifth Circuit deemed that law "facially valid" and extended qualified immunity to the police and prosecutors. Pet. App. at 24a.

This Court granted certiorari, vacating the Fifth Circuit's decision and remanding the case for reconsideration. On remand, despite being instructed by this Court to reassess its earlier decision in this case, the Fifth Circuit opted to simply "reinstate what [it] mistakenly said before, just in different packaging," Pet. App. at 21a (Higginson, J., dissenting).

Qualified immunity is meant to be qualified, not absolute. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Officials can be held liable if they violate clearly established law. *See City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021). The officers did so here.

Ms. Villarreal is a popular citizen-journalist in Laredo who posts frequently about local police activity, including content viewed unfavorably by the Laredo Police Department, the district attorney, and other local officials. *See* Pet. App. at 25a–26a. The district attorney personally made his displeasure known to Villarreal. Pet. at 7. The Laredo police, at the

encouragement of the police chief, regularly harassed her. *Id.* In retaliation for her reporting, the police chief, district attorney, and other Laredo officials searched for months for an excuse to arrest Villarreal. *Id.* at 1.

These officials eventually found a justification for their pretextual investigation and arrest of Villarreal. They relied on Texas Penal Code section 39.06(c), which says that:

> A person commits an offense if, with intent to obtain a benefit . . ., 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.

TEX. PENAL CODE ANN. § 39.06(c).[2] Since the statute plainly prohibits common journalistic practices like corroborating nonpublic information and passively receiving tips from government officials, it was only a matter of time before Villarreal ran afoul of this law. Relying on this statute, the Laredo officials obtained arrest warrants for Villarreal after she asked an officer, via text message, to confirm the identities of a suicide victim and car accident victim. *See* Pet. App. at 28a–29a.

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[2] Section 39.06(d) defines "information that has not been made public" as "any information to which the public does not generally have access, and that is prohibited from disclosure under Chapter 552, Government Code." *Id.* § 39.06(d).

Section 39.06(c) had never previously been enforced. *See* Pet. at 8; Pet. App. at 77a (Higginson, J., dissenting) ("[T]here could be no better example of a crime never enforced than this one."). It certainly had never been used to prosecute a journalist for merely asking a government official to corroborate a tip. And no wonder. This Court has upheld the First Amendment right of journalists to engage in routine news gathering techniques to find nonpublic information, including talking to government officials. *See Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103–04 (1979); *Fla. Star v. B. J. F.*, 491 U.S. 524, 531, 534, 538 (1989). Asking government officials for information is a "routine newspaper reporting technique," and therefore protected under the First Amendment. *Smith*, 443 U.S. at 103.

After her arrest, a grant of a writ of habeas corpus, and the dropping of all charges, Villarreal sought damages under a federal civil rights law. *See* Pet. at 9–10. Yet the district court granted qualified immunity to the officers, and the en banc Fifth Circuit eventually affirmed (reversing a panel decision that had itself reversed the district court). The Fifth Circuit held that because no *controlling* precedent had ruled section 39.06(c) unconstitutional at the time of the arrest, section 39.06(c) was "not grossly and flagrantly unconstitutional as applied" to Villarreal. Pet. App. at 47a. The Fifth Circuit thus held that the officials could treat the statute as presumptively valid law and rely on this assumption to shield themselves from liability. *See id.* at 44a.

The Fifth Circuit's holding "is less qualified immunity than unqualified impunity." *Id.* at 84a (Willett, J., dissenting). Clearly established law is an

objective inquiry of reasonableness, not a blind reliance on a lack of judicial precedent. No reasonable officer could think that merely asking a government official to corroborate a tip can constitutionally be criminalized. Freedom of the press cannot meaningfully exist if journalists are not allowed to seek information from government officials. *See id.* at 65a (Graves, J., dissenting).

As the Fifth Circuit's disregard for this Court's previous instructions in this case makes clear, qualified immunity has become a convenient bastion of plausible deniability for government officials who blatantly violate the fundamental rights of the very citizens they are tasked to protect. Indeed, the majority described Respondents' actions as "plainly objectively reasonable" on remand, dismissing concerns about rampant misapplications of qualified immunity in a mere three pages. Pet. App. at 3a. This case presents this Court with a renewed opportunity to clarify and limit lower courts' expansive interpretations of qualified immunity.

Therefore, this Court should grant certiorari.

ARGUMENT

I. THE FIFTH CIRCUIT IMPROPERLY APPLIED THE CLEARLY ESTABLISHED LAW STANDARD.

Government officials are ineligible for the protections of qualified immunity if they violate clearly established law. *See Bond*, 142 S. Ct. at 11 (quoting *Pearson v. Callahan*, 555 U. S. 223, 231 (2009)) ("The doctrine of qualified immunity shields officers from civil liability so long as their conduct 'does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known.'").

While courts have long had trouble determining when a legal right has been clearly established, the rule is that "in the light of pre-existing law the unlawfulness [of the official's conduct] must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In this case, the Fifth Circuit misapplied the "clearly established law" standard. The Fifth Circuit majority held that, "because no final decision of a state court had held the law unconstitutional at the time of the arrest . . . probable cause would continue to shield the officers from liability." Pet. App. at 44a. The Fifth Circuit thus simply rejected the possibility that an arrest pursuant to any statute could clearly violate the First Amendment without controlling precedent holding that statute unconstitutional. *See id.* at 47a–48a (claiming that "grossly and flagrantly unconstitutional" statutes are only a "*possible* exception" to the rule that officers cannot be held liable for enforcing statutes, and then implicitly suggesting that a statute cannot be grossly and flagrantly unconstitutional if no court has yet struck it down) (emphasis in original).[3]

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[3] The Fifth Circuit noted that the Sixth, Ninth, and Tenth Circuits have denied qualified immunity to officers acting under laws that were "obviously unconstitutional." Pet. App. at 26a & n.20. But the Fifth Circuit wrongly rejected those precedents as contrary to this Court's "grossly and flagrantly unconstitutional" standard as set out in *Heien v. North Carolina*, 574 U.S. 54, 65 (2014), and *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979). *See* Pet. App. at 48a & n.20. It is dubious that "grossly and flagrantly unconstitutional" and "obviously unconstitutional" are separate and distinct standards. Both stem from application of the "clearly

But the conduct of officers is judged by an objective standard of reasonableness, which takes account of everything a reasonable officer *should* have known (not what a particular officer actually did know or think). *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1724–25 (2019). What matters is whether "a reasonable person would have known" that the arrest under the statute violated clearly established rights. *Bond*, 142 S. Ct. at 11 (quoting *Pearson*, 555 U. S. at 231).

Controlling precedent holding that a particular statute is unconstitutional would obviously make an arrest under that statute unreasonable. But controlling precedent is not inherently *required*. This Court has stated that "[a] robust 'consensus of cases of persuasive authority'" can provide clearly established law. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). More fundamentally, there are circumstances where no precedent at all is necessary:

> [T]he 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 [or criminal] liability.

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established law" standard; plus, "flagrant" is synonymous with "obvious," and "grossly" is synonymous with "flagrantly." *See Flagrant*, DICTIONARY.COM (last visited May 10, 2024), https://tinyurl.com/yc89scwc; *Grossly*, DICTIONARY.COM (last visited May 10, 2024), https://tinyurl.com/bddutr8m.

United States v. Lanier, 520 U.S. 259, 271 (1997) (quoting *United States v. Lanier*, 73 F.3d 1380, 1410 (6th Cir. 1996) (Daughtrey, J., dissenting)).

This Court has previously held that suits involving such obviously unconstitutional actions do not require a precedent directly on point in every factual respect to overcome qualified immunity. *See Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam); *Hope v. Pelzer*, 536 U.S. 730 (2002). While those cases were about Eighth Amendment violations, nothing in their reasoning prevents the principle's application to First Amendment claims, and nine circuits have applied this principle in the First Amendment context. *See* Pet. App. at 99a–100a (Ho, J., dissenting).

Furthermore, the Fifth Circuit's holding renders much of Section 1983—the statute under which Villarreal seeks damages—inoperable. Section 1983 allows individuals to sue those "who, *under color of any statute*," violate the individual's federal statutory or constitutional rights. 42 U.S.C. § 1983 (emphasis added). The law by its plain text specifically anticipates that government officers will be liable for enforcing a codified state law. *Cf. Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (Section 1983 "impos[es] liability on any person who, under color of state law, deprived another of a constitutional right."). If every codified state law were treated as irrefutably constitutional until directly struck down by a controlling court, Section 1983's scope would be vastly curtailed.

Similarly, Section 1983's purpose supports holding officers liable when they violate federal rights while acting pursuant to state law. The Fourteenth Amendment was passed in the wake of the Civil War

to protect "federal rights against state power." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). Section 1983 "was intended to enforce the provisions of the Fourteenth Amendment 'against State action, . . . whether that action be executive, *legislative*, or judicial.'" *Id.* at 240 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)) (emphasis added). While this Court has interpreted Section 1983 as incorporating common law government immunities, including qualified immunity for police officers, *see Pierson v. Ray*, 386 U.S. 547, 557 (1967), this cannot mean that officers receive immunity merely "*because* they were acting pursuant to a state statute." Pet. App. at 86a (Willett, J., dissenting) (emphasis in original).

For these reasons, several other circuits have held that some statutes, though not yet held to be unconstitutional by a judicial opinion, nonetheless violated clearly established constitutional law. *See Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007); *Lawrence v. Reed*, 406 F.3d 1224 (10th Cir. 2005); *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873 (9th Cir. 2002). The Fifth Circuit itself previously did the same. *See Davidson v. City of Stafford*, 848 F.3d 384 (5th Cir. 2017). Even the parties do not dispute that qualified immunity is unavailable for government officials acting pursuant to obviously unconstitutional statutes. *See* Pet. App. at 94a (Ho, J., dissenting). The Fifth Circuit stands alone in giving blanket immunity to officials for acting pursuant to a state statute.

The Fifth Circuit erred in relying so heavily on a general presumption that codified laws are constitutional. Its decision ignores other relevant standards from this Court, persuasive holdings from

its sister circuits, and the text of Section 1983. Regardless of whether the events in this case occurred in 2017 or 2025, Respondents' actions were far from "plainly objectively reasonable." Further, the fact that this underhanded attempt to cherry-pick an unenforced statute with the express purpose of punishing a journalist for her protected speech has been thus far successful despite years of litigation exposes the dangerous repercussions of unmitigated qualified immunity. Pet. App. at 3a.

II. SECTION 39.06(C) IS OBVIOUSLY UNCONSTITUTIONAL.

Texas Penal Code section 39.06(c) is obviously unconstitutional, and thus the officers should not receive qualified immunity for arresting Villarreal pursuant to it.

Section 39.06(c) makes it illegal to solicit or receive nonpublic information with the intent to obtain a benefit. Texas law defines a "benefit" as "anything reasonably regarded as economic gain or advantage." Pet. App. at 39a (majority opinion) (quoting TEX. PENAL CODE § 1.07(a)(7)). According to the Fifth Circuit, Villarreal obtained a benefit when asking for and receiving nonpublic information because publishing such a "scoop" enhanced her reputation as a journalist. *See id.* at 39a–40a. Under this rationale, it is hard to see how any journalist who receives nonpublic information does not obtain a benefit—every journalist's career relies on their reputation for publishing stories and scoops.

Put simply, the statute criminalizes basic journalism and receiving information from government whistleblowers. One cannot publish

information without first obtaining it. As this Court has stated: "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Smith*, 443 U.S. at 104.

The First Amendment therefore protects not just publishing news, but news gathering. *See Branzburg v. Hayes*, 408 U.S. 665 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."). Under the First Amendment, the government may not "limit[] the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). Even when the government does not itself provide information to the press, the press can rely upon "routine newspaper reporting techniques" to gather information. *Smith*, 443 U.S. at 103. Such techniques include asking government officials for the information. *See Fla. Star*, 491 U.S. at 531 (discussing *Smith*). Using such techniques, journalists are "free to seek out sources of information not available to members of the general public." *Pell v. Procunier*, 417 U.S. 817, 834 (1974). Overall, the First Amendment protects "the right of citizens *to inquire, to hear*, to speak, and to use information." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (emphasis added).

This broad view of the First Amendment has its support in history and this Court's precedent. This Court has held that "First Amendment protection reaches beyond prior restraints." *Smith*, 443 U.S. at 101. Instead, "[t]he First and Fourteenth Amendments bar government from interfering in any way with a free press." *Pell*, 417 U.S. at 834. Thomas Cooley, in his famous treatise on constitutional law, stated that the First Amendment was meant to guard against "not

the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 421–22 (1868).

Section (c) of the statute on its face makes it a felony for a journalist to corroborate nonpublic information. In theory, government officials could even "make" a journalist a felon merely by sending nonpublic information to any journalist who has put out an open-ended request for tips, which is a common practice in media. *See*, *e.g.*, *NBC News Tips*, NBC NEWS (last visited Aug. 1, 2025).[4] Common sense tells a reasonable person that such a law is unconstitutional.

Consider the major leaks and whistleblower stories that would have been criminalized, had the Texas law applied to the reporters involved: "Americans only learned about the horrific My Lai Massacre, during the Vietnam War, because a journalist asked a backchannel Pentagon source about it." Pet. App. at 67a (Graves, J., dissenting). The famous case of the Pentagon Papers, the publication of which this Court upheld,[5] stemmed from an unauthorized leak by a government source to journalists. *See id.* at 67a–68a. Many stories on police abuses and prisoner mistreatment, like those at Abu Ghraib, stem from government leaks. *See id.* at 67a. Unauthorized leaks are so important to public discourse and government

[4] Available at https://tinyurl.com/98f45pac.

[5] *See New York Times Co. v. United States*, 403 U.S. 713 (1971).

accountability that Congress has given government whistleblowers statutory protections for their actions despite the disruption and insubordination involved in whistleblowing. *See, e.g.*, The Whistleblower Protection Act, 5 U.S.C. §§ 2302(8) & (9).

Even the infamous Alien and Sedition Acts did not go as far as to criminalize the *request* for information; they criminalized only the publication of information. Today, those Acts are seen as the ultimate infringement on freedom of speech and the press. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273–76 (1964). Yet even they did not go as far as the law at issue here.

This is not to say that the press's ability to gather information is unlimited. *See Zemel v. Rusk*, 381 U.S. 1 (1965) (holding that the government can constitutionally limit travel to foreign nations for national security reasons, even for journalists). The government does not have an affirmative duty to provide the press nonpublic information. *See Pell*, 417 U.S. at 834. Furthermore, the First Amendment does not give the press more rights to access information than it gives the public generally. *See Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). Because of this, "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* Labor laws, copyright laws, antitrust laws, tax laws, and the duty to obey a subpoena to testify all apply to the press equally as members of the general public. *See id.*

But that does not mean that the government can lawfully criminalize journalists' requests for—or receipt of—information. This Court has never

endorsed the constitutionality of laws "proscrib[ing] the receipt of information." *Fla. Star*, 491 U.S. at 536.[6] In fact, this Court defined information as "obtained lawfully" even when there was a statute prohibiting the conveyor from disclosing that information. *Bartnicki v. Vopper*, 532 U.S. 514, 524, 525 (2001). Similarly, this Court held that even when a journalist receives information "meant by state law to be withheld from public release," the journalist has a constitutional right to publish the information. *Fla. Star*, 491 U.S. at 543 (White, J., dissenting). "[T]he fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them when furnished by the government." *Id.* at 536 (majority opinion). If journalists are not supposed to be told certain information but are told it anyway, this Court has held that the journalists have a constitutional right to publish that information. The right to publish information necessitates the ability to receive and possess that information, if it is voluntarily provided.

The Fifth Circuit majority deemed probable cause reasonable here "because Texas law protects the privacy of the bereaved family." Pet. App. at 38a (majority opinion). However, this Court has held that the government's interest in protecting privacy in this context is very limited. Even protecting the privacy of crime victims (including rape victims) is outweighed by First Amendment rights. *See Fla. Star*, 491 U.S. at

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[6] Indeed, this Court in *Thomas v. Collins* contrasted "urging a course of action" with "merely giving and acquiring information," suggesting that the latter is more obviously protected even as the decision upheld a First Amendment right to the former. 323 U.S. 516, 537 (1945).

532. Specifically, "when a state attempts to punish publication after the event it must nevertheless demonstrate that its punitive action was necessary to further the state interests asserted." *Smith*, 443 U.S. at 102. When the information was obtained from the government, that necessity is not met, as "it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech." *Fla. Star*, 491 U.S. at 538. When "the government has failed to police itself in disseminating information, it is clear . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity." *Id.* at 538.

The reasoning that this Court has used to uphold the right of the press to *publish* nonpublic but voluntarily disclosed information applies equally to the right to *receive* such information. Texas could have protected the information at issue here and established procedures ensuring its redaction. And Texas did provide a damages remedy against government officials who disseminate the information. *See* TEX. PENAL CODE ANN. § 39.06(b). It cannot be said that criminalizing Villarreal's actions is a narrowly tailored means of protecting the victims' privacy when the government could have protected the privacy by controlling its own officials.

On every occasion that courts have previously considered the constitutionality of section 39.06(c), they have deemed it unconstitutional. *See State v. Ford*, 179 S.W.3d 117, 120 (Tex. App. 2005); *State v. Newton*, 179 S.W.3d 104, 107 (Tex. App. 2005). While

those were not final decisions, as the appellate court in both cases affirmed entirely on statutory grounds and did not address the constitutional issue, the unanimity of these court rulings against the statute's constitutionality bolsters the argument that it is obviously unconstitutional.[7]

Section 39.06(c) criminalizes journalists' mere receipt or corroboration of nonpublic information from a public official. It is obviously unconstitutional and, thus, the respondents should not have been granted qualified immunity.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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[7] *See Ford*, 179 S.W.3d at 125; *Newton*, 179 S.W.3d at 111.