No. 25-29

In the Supreme Court of the United States

PRISCILLA VILLARREAL, PETITIONER

v.

ISIDRO R. ALANIZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF STATE OF TEXAS IN OPPOSITION

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QUESTION PRESENTED

The core of Priscilla Villarreal's petition is her repeated assertion that she had an "undoubted" First Amendment right to solicit nonpublic information from a government official—and that Respondent Officials should have known it. Yet for nearly half a century, this Court has held that States may, consistent with the First Amendment, limit access to information held by the government and apply those limits to members of the media. *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality op.); *id.* at 16 (Stewart, J., concurring in the judgment); *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972). And for decades, Texas has made it a crime to solicit a leak of nonpublic information from a public official for personal gain. Tex. Penal Code § 39.06(c). Unless section 39.06(c) is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws," police are charged with enforcing it unless and until it is declared unconstitutional. *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979).

Before this Court, Villarreal does not contend that section 39.06(c) is flagrantly unconstitutional, nor does she identify any clearly established precedent holding a law like section 39.06(c) unconstitutional. Instead, she argues that Respondent Officials had an obligation to realize what no court has yet recognized—that the First Amendment supplies an as-applied defense to Villarreal. The question presented is:

Whether qualified immunity protects an officer's reliance on a properly issued arrest warrant for violation of a facially constitutional statute.

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INTRODUCTION

Using a framing the Fifth Circuit called "clever but misleading," Pet.App.33a, the petition repeatedly asserts that Priscilla Villarreal was arrested for exercising her "undoubted" First Amendment right to ask questions. But this Court has held that when it comes to solicitation, questions can be a crime—whether it be solicitation of another crime, *United States v. Hansen*, 599 U.S. 762, 771 (2023); of improper campaign contributions, *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 437 (2015); or even of legal clients, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978). Villarreal's "just asking questions" framing runs afoul of this Court's "repeated[]" command "not to define clearly established law at a high level of generality" when considering qualified immunity. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

Villareal was arrested for violating Texas Penal Code section 39.06(c), which does not criminalize merely asking questions. It requires conduct closer to inciting or commanding a public official to leak nonpublic information for the benefit of the requestor. And it accords with this Court's precedent that (1) permits States to limit access to government information, *Houchins*, 438 U.S. at 14 (plurality op.); *id.* at 16 (Stewart, J., concurring in the judgment), and (2) does not give the press any special privilege to violate generally applicable laws in the name of newsgathering, *Branzburg*, 408 U.S. at 683.

No court has held that section 39.06(c) violates the First Amendment, either facially or as applied. And Villarreal makes no argument to this Court that section 39.06(c) is "grossly and flagrantly unconstitutional." *DeFillippo*, 443 U.S. at 38. Other than reiterating her First Amendment argument, Villarreal does not contend that the neutral magistrate erred in finding probable cause to

believe Villarreal violated the law. That should end the qualified-immunity inquiry.

In the absence of clearly established law demonstrating that section 39.06(c) was unconstitutionally applied here, Villarreal points to this Court's precedent regarding *other* rights—the right to publish lawfully obtained information (which section 39.06(c) does not prohibit) and the right against unreasonable search and seizure (which Respondent Officials did not violate). And her two-paragraph argument about retaliation fails because no clearly established law in 2017 would have put Respondent Officials on notice that arresting Villarreal pursuant to a warrant based on probable cause could still violate the First Amendment.

Villarreal's claim of a circuit split fares no better. The cases she identifies all concern laws that themselves had been held unconstitutional or whose unconstitutionality was obvious under existing precedent. Not one addresses an arrest pursuant to a facially valid warrant for violating a facially constitutional law.

Even if there were a conflict, this would be a poor vehicle to resolve it because several alternative grounds exist to support the judgment. And Villarreal's hyperbolic assertion that her inability to obtain damages spells the end of the First Amendment ignores the variety of options available to plaintiffs and courts to protect First Amendment rights, even if Villarreal cannot recover in this case. The Court should deny the petition for certiorari.

STATEMENT

I. Statutory Background

A. For decades, it has been Texas's policy—embodied in its Public Information Act (PIA)—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." Tex. Gov't Code § 552.001(a). This policy stems from "the fundamental philosophy of the American constitutional form of representative government that . . . government is the servant and not the master of the people." *Id.* To effectuate that policy, the PIA defines "public information" broadly and requires it to be produced promptly upon request. *Id.* §§ 552.002(a), .221(a).

At the same time, the PIA "recognizes that public interests are best advanced by shielding some information from public disclosure." *Paxton v. City of Dallas*, 509 S.W.3d 247, 249-50 (Tex. 2017). "Information is excepted" from public disclosure "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Tex. Gov't Code § 552.101. The PIA includes over sixty categories of information that are excepted from disclosure, ranging from attorney-client communications to law-enforcement investigations to records of crime victims. *Id.* §§ 552.101-.163. Exceptions to disclosure can also be found outside of the PIA, including, for example, information in cybersecurity reports and abortion-reporting data. *Id.* § 2063.301(c); Tex. Health & Safety Code § 245.011(d).

Anyone may request that a governmental entity produce public information. Tex. Gov't Code §§ 552.003(6), .021. But if the governmental entity believes some or all of the information is excepted from disclosure, it may

seek an opinion from the Attorney General regarding whether the information must be disclosed. *Id.* § 552.301(a). Either the requestor or the government agency may then challenge the Attorney General's decision in court. *Id.* §§ 552.321, .324.

B. Helping to ensure that certain information held by the government remains nonpublic, Texas Penal Code section 39.06(c) makes it an offense to "solicit[] or receive[] 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." To prevent citizens from running afoul of the law simply for asking questions, section 39.06(c) is a specific-intent crime: The solicitor must have acted "with intent to obtain a benefit or with intent to harm or defraud another." *Id.* A "benefit" is "anything reasonably regarded as economic gain or advantage." *Id.* § 1.07(7).

For purposes of this statute, "information that has not been made public" means "any information to which the public does not generally have access, and that is prohibited from disclosure under" the PIA. *Id.* § 39.06(d). Texas state courts have held that information "prohibited from disclosure" refers to the exceptions to disclosure in the PIA. *Tidwell v. State*, No. 08-11-00322-CR, 2013 WL 6405498, at *12 (Tex. App.—El Paso Dec. 4, 2013); *State v. Ford*, 179 S.W.3d 117, 123 (Tex. App.—San Antonio 2005).

There is little precedent construing section 39.06(c), and none (other than this case) concerning how it interacts with the First Amendment. Although two Texas trial courts concluded that section 39.06(c) was unconstitutionally vague, the subsequent appeals were resolved on alternative grounds. *Ford*, 179 S.W.3d at 125; *State v. Newton*, 179 S.W.3d 104, 111 (Tex. App.—San Antonio

2005). Section 39.06(c) has also been cited with approval by a Texas court of appeals when referring an attorney to the State Bar for improper *ex parte* communications after he asked questions to a member of court staff. *Ex parte JBK*, 931 S.W.2d 581, 584 (Tex. App.—El Paso 1996).

II. Factual Background

Villarreal, known locally as "Lagordiloca," is a citizen journalist who covers the news in Laredo using her cell phone and a Facebook account with over 120,000 followers. Pet.App.25a, 217a. Although unaffiliated with any news organization, the *New York Times* has nonetheless called her "arguably the most influential journalist in Laredo." Pet.App.217a. Her admirers treat her to free meals, and she occasionally receives fees for promoting local businesses on her Facebook account. Pet.App.26a. She has also used her account to solicit donations for new equipment. Pet.App.26a.

In 2017, using Laredo Police Officer Barbara Goodman as a backchannel source, Villarreal published the name and occupation of a suicide victim. Pet.App.26a. Several weeks later, she posted a live feed of a fatal traffic accident and revealed the last name of a decedent after again texting with Officer Goodman. Pet.App.26a, 29a. At the time of her reports, the information had not been made public by the Laredo Police Department. Pet.App.29a.

Receiving a tip that Officer Goodman had secretly been communicating with Villarreal, LPD investigated and discovered extensive communications between the two—sometimes multiple times a day. Pet.App.27a-28a (noting about 72 calls per month). After retrieving text messages Officer Goodman had tried to delete, LPD suspended Goodman for twenty days. Pet.App.28a.

An officer with LPD also prepared probable-cause affidavits for Villarreal's arrest for violations of Texas Penal Code section 39.06(c). Pet.App.28a-29a. The affidavits quoted Villarreal's text exchanges with Officer Goodman about the suicide and accident victims, explained that the information had not previously been made public, and noted that Villarreal gained popularity on Facebook. Pet.App.28a-29a, 52a. The affidavits were approved by an assistant district attorney, and a justice of the peace issued the warrants. Pet.App.29a.

Villarreal voluntarily surrendered and was released on bond the same day. Pet.App.29a. A Texas judge granted her pretrial habeas petition, finding section 39.06(c) unconstitutionally vague. Pet.App.30a. The district attorney opted not to appeal. Pet.App.30a.

III. Procedural History

A. Following the dismissal of the charges, Villarreal sued two members of the Webb County District Attorney's office and multiple members of LPD ("Respondent Officials"). Pet.App.30a. As relevant to the only claim presented here, Villarreal asserted that her arrest violated the First Amendment because it was done in retaliation for her reporting and because her text messages with Officer Goodman were protected speech. Pet.App.252a-260a. She also alleged that it would have been evident to "any reasonable official that [Texas Penal Code section 39.06(c)] was facially unconstitutional." Pet.App.239a. Villarreal did not, however, inform the Texas Attorney General, as required by 28 U.S.C. § 2403(b), that her complaint challenged the constitutionality of a state statute. The district court dismissed the complaint under Rule 12(b)(6) based on qualified immunity. Pet.App.30a, 123a-210a.

B. On appeal, a divided panel of the Fifth Circuit reversed, *Villarreal v. City of Laredo* (*Villarreal I*), 17 F.4th 532, 536 (5th Cir. 2021), noting that a dissenting opinion was forthcoming. *Id.* at 536 n.*. The majority concluded that it should have been "patently obvious to any reasonable police officer" that arresting Villarreal violated her constitutional rights, *id.* at 540—in large part because the majority believed that section 39.06(c) was "grossly and flagrantly unconstitutional," *id.* at 541. But because the Texas Attorney General had not been notified that the constitutionality of a state law was at issue, the panel withheld the mandate for sixty days to allow the Attorney General to weigh in. *Id.* at 546-47.

Without taking a position on the propriety of prosecuting Villarreal on these facts, Texas intervened to defend the constitutionality of section 39.06(c). *See Cameron v. EMW Women's Surgical Ctr., PSC*, 595 U.S. 267, 277 (2022) (noting a sovereign's inherent interest "in the continued enforceability of its own statutes").

After Texas's intervention, the panel issued a new opinion, which concluded that section 39.06(c) was *not* "obviously unconstitutional." *Villarreal v. City of Laredo* (*Villarreal II*), 44 F.4th 363, 372 (5th Cir. 2022). Although the panel still held that qualified immunity was unavailable, it did so based on its view that arresting Villarreal for asking questions was obviously unconstitutional and that section 39.06(c) did not apply because Villarreal was not seeking a "benefit" but only practicing good journalism. *Id.* at 371-73.

Then-Chief Judge Richman dissented with respect to the First Amendment ruling, arguing that the independent-intermediary doctrine protected Respondent Officials and that Villarreal's arrest was based, not on protected speech, but on violations of a facially

constitutional statute. *Id.* at 390-91 (Richman, C.J., dissenting in relevant part).

Because the revised opinion did not conclude that section 39.06(c) was unconstitutional, the State did not seek en banc rehearing. Respondent Officials did, however, seek and obtain such review, Pet.App.211a-212a, potentially placing the constitutionality of section 39.06(c) back at issue.

C. The divided en banc court held (9-7) that Respondent Officials were entitled to qualified immunity. Pet.App.25a. As the majority summarized, "Villarreal was arrested on the defendants' reasonable belief, confirmed by a neutral magistrate, that probable cause existed based on her conduct in violation of a Texas criminal statute that had not been declared unconstitutional." Pet.App.33a. Because no controlling precedent put Respondent Officials on notice that section 39.06(c) or its application to Villarreal violated the Constitution, qualified immunity was appropriate. Pet.App.33a.

To reach that conclusion, the court first held that Respondent Officials reasonably believed that Villarreal violated section 39.06(c), pointing to precedent, statutes, and Attorney General opinions making certain information about accident victims and investigations confidential. Pet.App.37a-39a; *e.g.*, *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 679 (Tex. 1976) (discussing a right to privacy over personal information); Tex. Transp. Code § 550.065(f)(2)(A) (prohibiting release of personal information in collision report); Tex. Att'y Gen. OR2022-36798, 2022 WL 17552725, at *2 (2022) (recognizing a privacy interest in information regarding deceased relatives). Examining the warrant affidavits, the majority found they sufficed to show

probable cause that state law had been violated. Pet.App.42a-43a.

The court next expressly rejected Villarreal's argument that section 39.06(c) was "obviously unconstitutional" as applied to Villarreal and therefore could not be relied on by Respondent Officials. Pet. App.44a-54a. The court reasoned that (1) statutes are presumptively constitutional, (2) no state court had held section 39.06(c) *un*constitutional, and (3) the independent-intermediary doctrine shielded Respondent Officials from liability under such circumstances. Pet.App.44a-54a.

The majority also concluded that the precedent relied on by Villarreal was insufficient to overcome qualified immunity. Pet.App.55a-60a. Those cases, the court explained, concerned the right to publish, which "is different" from seeking personal gain from soliciting and receiving information. Pet.App.57a. The First Amendment does not guarantee journalists special access to information, and States are allowed to protect nonpublic information from being released. Pet.App.57a-59a (citing, *inter alia*, *Branzburg* and *Houchins*).

As for Villarreal's retaliation claim, the majority concluded that (1) Respondent Officials had probable cause to arrest Villarreal, and (2) Villarreal offered no evidence of similarly situated individuals who were not arrested for the same conduct, applying its view of the narrow exception contemplated in *Nieves v. Bartlett*, 587 U.S. 391, 406 (2019). Pet.App.60a-62a.

Without addressing this Court's holding that governments can prohibit information disclosure, the principal dissent adopted Villarreal's framing that asking questions to government officials is obviously constitutionally protected and that Respondent Officials should have known it. Pet.App.89a-97a (Ho, J., dissenting).

D. Villarreal filed a petition for certiorari. This Court granted, vacated, and remanded for further consideration in light of *Gonzalez v. Trevino*, 602 U.S. 653 (2024) (per curiam). Pet.App.22a.

E. On remand and confining itself to the question of retaliation resolved in *Gonzalez*, the en banc Fifth Circuit again recognized that Respondent Officials were entitled to qualified immunity, splitting 10-5. Pet.App.2a-4a. The majority reasoned that in 2012, this Court explained that it "ha[d] never recognized a First Amendment 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)). It was not until the Court's 2019 decision in *Nieves*, 587 U.S. at 406, that retaliation plaintiffs could assert in narrow circumstances that, despite the existence of probable cause, their arrest was still retaliatory. Pet.App.3a.

Because *Nieves* postdated Villarreal's arrest here by two years, the majority concluded that *Nieves*' narrow exception was not clearly established and Respondent Officials could not have knowingly violated the law when they arrested Villarreal. Pet.App.3a.

Believing the qualified-immunity issue required more attention, the dissenting judges would have remanded to the district court for further proceedings. Pet.App.18a-21a (Higginson, J., dissenting).

REASONS TO DENY THE PETITION

I. The Fifth Circuit's Decision Does Not Conflict with Precedent from This Court.

Villarreal's petition hinges on her assertion that every reasonable official would have known that arresting her under section 39.06(c) violated the First Amendment. But "[t]he enactment of a law forecloses speculation by enforcement officers concerning its constitutionality." *DeFillippo*, 443 U.S. at 38. The Texas Legislature enacted Texas Penal Code section 39.06(c), which is facially constitutional, and Respondent Officials demonstrated probable cause to a neutral magistrate to believe Villarreal violated it. "Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law," *id.* at 36, so any qualified-immunity analysis must consider the impact of section 39.06(c) on Respondent Officials' conduct.

To overcome qualified immunity, then, Villarreal must demonstrate that, notwithstanding section 39.06(c), "existing law . . . placed the constitutionality of [Respondent Officials'] conduct 'beyond debate.'" *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (quoting *al-Kidd*, 563 U.S. at 741). This requires identifying a "legal principle [that] clearly prohibit[s] the officer's conduct in the *particular circumstances* before him." *Id.* (emphasis added). And those circumstances must be defined with a "high 'degree of specificity.'" *Id.* (quoting *Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (per curiam)). That is particularly so in areas where "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine"—here, the First Amendment's interaction with crimes of solicitation—"will apply to the factual situation the officer confronts." *Mullenix*, 577 U.S. at 12.

Because Villarreal's petition does not challenge the facial constitutionality of section 39.06(c), she must show that every reasonable official would have known that, despite the existence of a warrant based on probable cause, the First Amendment provided an as-applied defense to Villarreal. She cannot do so in light of this Court's precedent permitting States to prohibit access to certain information and refusing to create a right of the press to access what others cannot. *Houchins*, 438 U.S. at 14 (plurality op.); *id.* at 16 (Stewart, J., concurring in the judgment); *Branzburg*, 408 U.S. at 683.

Villarreal attempts to fill this legal gap with various cases regarding the right to publish lawfully obtained information and the requirements for warrants. But neither line of precedent is implicated here. Nor can Villarreal create a certworthy issue by invoking the last resort of section 1983 plaintiffs facing a qualified-immunity defense: *Hope v. Pelzer*, 536 U.S. 730 (2002), and its limited rule that obvious constitutional violations are compensable even without factually analogous precedent. Even *Hope* requires consideration of the particular circumstances of the case. Finally, Villarreal's short discussion of retaliation fails to establish that the Fifth Circuit erred on remand.

A. Texas's law does not contravene this Court's First Amendment precedent.

Villarreal spends much of her argument blurring two distinct concepts: the right to publish information and the ability to obtain information. Texas Penal Code section 39.06(c), which provided the statutory basis for Villarreal's arrest, concerns only the latter. Specifically, section 39.06(c) prohibits certain forms of *access*—namely "solicit[ing] or receiv[ing] from a public servant" certain nonpublic information for improper reasons.

Villarreal asserts that every officer knows he cannot arrest someone merely for asking questions. Setting aside the improperly high level of generality of that assertion, merely asking questions is not what section 39.06(c) prohibits. Instead, it falls within this Court's precedent that permits States to enact laws keeping certain government-held information from being disclosed. *Houchins*, 438 U.S. at 14 (plurality op.); *id.* at 16 (Stewart, J., concurring in the judgment). Because section 39.06(c), properly construed, is not flagrantly unconstitutional—either facially or as-applied here—Respondent Officials were entitled to rely on it when determining whether to arrest Villarreal.

1. Section 39.06(c) does not criminalize merely asking questions.

As this Court has explained, a properly conducted First Amendment analysis starts with "assess[ing] the state laws' scope[:] What activities, by what actors, do the laws prohibit or otherwise regulate?" *Moody v. NetChoice, LLC*, 603 U.S. 707, 724 (2024). Villarreal assumes that "solicits," as used in section 39.06(c), includes merely asking questions. Although "solicit" *can* mean to "elicit" information, as Villarreal suggests, that is generally considered a mistake. *See* Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 816 (2d ed. 1995) (describing this use of "solicit" as a malapropism).

In the criminal context, solicitation is more akin to incitement. *See, e.g.*, *Hansen*, 599 U.S. at 772. For example, under the Texas Penal Code, a person is criminally responsible for an offense committed by another if, among other things, "acting with intent to promote or assist the commission of the offense, he *solicits*, encourages, directs, aids, or attempts to aid the other person to commit the offense." Tex. Penal Code § 7.02(a)(2)

(emphasis added). The Model Penal Code uses the terms "commands" and "encourages" in its definition of criminal solicitation, Model Penal Code § 5.02 (2001), while *Black*'s defines the term as the "criminal offense of urging, advising, commanding, or otherwise inciting another to commit a crime," *Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

This narrow understanding of "solicit" is further underscored by section 39.06's context. *See State v. Kahookele*, 640 S.W.3d 221, 225 (Tex. Crim. App. 2021) (interpreting statutes in context of whole statutory scheme). Section 39.06(d) defines nonpublic information with respect to Texas's PIA, which creates a process for individuals to ask for information from the government. *See supra* pp. 3-4. Given that context, it is highly unlikely that a Texas court would conclude that merely asking for information that cannot be released is a crime. *See, e.g.*, *Steger & Bizzell, Inc. v. Vandewater Constr., Inc.*, 811 S.W.2d 687, 693 (Tex. App.—Austin 1991) (explaining that "solicit" is best understood to "imp[ly] personal petition and importunity addressed to a particular individual to do some particular thing").

Like federal courts, Texas courts "start with the presumption that the rest of the government, no less than the judiciary, intends to comply with the Constitution"—state and federal—and "when presented with competing plausible interpretations of a statutory text," they will adopt the "construction that steers clear of such constitutional difficulties." *Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, 692 S.W.3d 288, 303 (Tex. 2024) (quotation marks omitted) (citing, *inter alia*, *Paxton v. Longoria*, 646 S.W.3d 532, 539 (Tex. 2022)). Thus, Texas courts are likely to use a narrower, more specialized interpretation of "solicits" drawn from criminal law—

particularly when doing so may be necessary to avoid any potential constitutional problems. *E.g.*, *Longoria*, 646 S.W.3d at 539 (citing with favor *Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019)); *Page v. State*, 492 S.W.2d 573, 576 (Tex. Crim. App. 1972).

As with any bar to solicitation, the conduct prohibited by section 39.06(c) is often verbal in nature. *Hansen*, 599 U.S. at 771 ("Neither solicitation nor facilitation requires lending physical aid; for both, words may be enough."). But "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

Properly construed, then, section 39.06(c) does not criminalize merely asking questions, and other than the withdrawn panel opinion in this case, no court has held that it violates the First Amendment facially or as-applied. Instead, at least one Texas appellate court has cited it with approval. *Ex parte JBK*, 931 S.W.2d at 584.

2. States may enact and enforce laws that keep information confidential.

By prohibiting the solicitation of nonpublic information, section 39.06(c) falls within this Court's precedent regarding access to government information. As explained by this Court, "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). To the contrary, because "[t]he Constitution itself is n[ot] a Freedom of Information Act," this Court has held that there is no First Amendment right to "have access to particular government information." *Houchins*, 438 U.S. at 14 (plurality op.) (quoting Potter Stewart, *Or of the*

Press, 26 HASTINGS L.J. 631, 636 (1975)); *id.* at 16 (Stewart, J., concurring in the judgment); *see also LAPD v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999) (declining to give out arrestee information does not violate the First Amendment). And as one legal commentator has noted regarding the Espionage Act, "[s]o long as the *retention* of classified national security information is itself unlawful, and so long as the reporters are being punished not for the act of publication itself, but for the unlawful gathering of secret information, it is impossible to find any precedent in the Supreme Court's jurisprudence that would recognize a First Amendment defense." Stephen I. Vladeck, *Inchoate Liability & the Espionage Act: The Statutory Framework & the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219, 234 (2007).

At most, the Court has recognized a right to "gather news 'from any source *by means within the law*.'" *Houchins*, 438 U.S. at 11 (plurality op.) (quoting *Branzburg*, 408 U.S. at 681-82 (emphasis added)). That is, the press does not have "special immunity from the application of general laws." *Branzburg*, 408 U.S. at 683 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)). Thus, "[a]lthough stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news." *Id.* at 691. Indeed, just one Term after the Court famously permitted the publication of the Pentagon Papers, *see N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), *Branzburg* said it would be "frivolous" to claim that "the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws." 408 U.S. at 691.

Texas Penal Code section 39.06(c) is such a "valid criminal law[]," *id.*, and represents how Texas's "political institutions" have "weigh[ed] the interests in privacy with the interests of the public to know and of the press to publish," *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975). Villarreal attempts to sidestep this precedent (at 24), calling the argument a "strawman" and asserting that she is not claiming a special right to access information. But she was arrested for violating a law regarding access to information, so she must demonstrate a First Amendment right to that access.

As this Court explained nearly 50 years ago, "[t]he enactment of [such] a law forecloses speculation by enforcement officers concerning its constitutionality," and "[p]olice are charged to enforce [it] until and unless" it is "declared unconstitutional." *DeFillippo*, 443 U.S. at 38. As a result, an officer is "excus[ed] … from liability" under section 1983 "for acting under a statute that he reasonably believed to be valid" even if it is "later held unconstitutional on its face or as applied." *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

No court has ever determined (1) whether section 39.06(c) prohibited Villarreal's actions in the first place, or (2) whether section 39.06(c) would be unconstitutional as applied here. Villarreal cites no clearly established precedent answering either question. At most, then, Villarreal has alleged only a "mistake[] in judgment" on behalf of law-enforcement personnel. *Butz v. Economou*, 438 U.S. 478, 507 (1978). And qualified immunity protects officers from liability for such mistakes "whether the mistake is one of fact or one of law." *Id.*

3. Section 39.06(c) is not flagrantly unconstitutional, facially or as applied.

a. The only "possible exception" to the general rule that officers are not required to speculate as to a law's constitutionality is when a law is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *DeFillippo*, 443 U.S. at 38. Villarreal does not try to meet this high standard for good reason. Any claim that section 39.06(c) is facially unconstitutional would impose a heavy burden on Villarreal, *Moody*, 603 U.S. at 723—let alone a claim that it is "flagrantly" so, *DeFillippo*, 443 U.S. at 38. Villarreal cannot meet that burden because this Court has specifically stated that its prior cases have "impl[ied] nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records." *Cox Broad. Corp.*, 420 U.S. at 496 n.26.

Because Villarreal violated a presumptively valid statute and no controlling precedent holds section 39.06(c) unconstitutional, Respondent Officials could not have been "required to anticipate that a court would later hold the [law] unconstitutional," *DeFillippo*, 443 U.S. at 38—a First Amendment ruling no court has yet made.

b. That rule applies with even greater force to Villarreal's assertion (*e.g.*, at 3, 33) that officials should be held liable for enforcing statutes "in ways" that violate the Constitution. In substance, this argument asks this Court to require officials, upon pain of losing qualified immunity, to correctly predict as-applied constitutional defenses to valid statutes. But if officers are not required to predict when a *law* will be held unconstitutional, *id.* at 37-38, they cannot be held to predict when an *application* will be held unconstitutional—a question that, by its

definition, depends on "the factual situation the officer confronts," *Mullenix*, 577 U.S. at 12.

This Court should not limit qualified immunity as Villarreal suggests when no appellate court has held section 39.06(c) unconstitutional either on its face or in factually analogous circumstances. As the Court has stated, "[s]ociety would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *DeFillippo*, 443 U.S. at 38.

This case is contrary to *Berge v. School Committee*, on which Villarreal relies (at 24) and in which a government official sought to bar publication of a video by relying on an obviously inapplicable statute. 107 F.4th 33, 43 (1st Cir. 2024). Here, section 39.06(c) did not bar publication, nor was it plainly inapplicable.

If there were any question that Villarreal's abstract framing is too broad, it is put to rest by this Court's decision in *Sause v. Bauer*, 585 U.S. 957 (2018) (per curiam). There, Sause alleged that officers prevented her from praying. *Id.* at 958. Acknowledging there was "no doubt that the First Amendment protects the right to pray," the Court nevertheless recognized that "there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place." *Id.* at 959. And without knowing those circumstances, the Court concluded it was "impossible to analyze petitioner's free exercise claim." *Id.* at 960.

So too here. Even assuming a high-level First Amendment right to ask questions, there are circumstances in which asking questions in a manner that constitutes solicitation is forbidden. *E.g.*, *Hansen*, 599 U.S. at 771; *Williams-Yulee*, 575 U.S. at 437. Whether those circumstances exist here depends on section 39.06(c)'s

constitutionality (which Villarreal does not appear to challenge) and Villarreal's actions (which a neutral magistrate determined fit within the statute).

As commenters have noted, "there is simply no precedent for the proposition that the First Amendment provides any defense to illicit acts of *gathering* the news." Vladeck, *supra* at 227; *see also* Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 928 (1992) ("[T]he Court has yet to explicitly afford special protections to the newsgathering process."). Villarreal has, therefore, not shown that the Fifth Circuit's decision was incorrect, much less that its ruling conflicts with existing precedent of this Court.

B. Villarreal relies on inapplicable precedent.

Unable to identify precedent that clearly establishes a First Amendment right to solicit a leak of nonpublic information in violation of state law, Villarreal cites a variety of cases discussing *other* constitutional principles. But the qualified-immunity analysis requires establishing a legal principle that "clearly prohibit[s] the officer's conduct in the particular circumstances before him." *Wesby*, 583 U.S. at 63. Villarreal's precedent falls far short of that standard.

1. Section 39.06(c) does not infringe the right to publish lawfully acquired information.

Villarreal repeatedly asserts (at 16-18) a right to engage in "routine newspaper reporting techniques," claiming this right was established in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). But *Daily Mail* concerned the press's First Amendment right to *publish* information that it *lawfully obtained*. *Id.* And this Court has recognized a distinction between information that is acquired lawfully and information that is

acquired unlawfully. *E.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001); *Branzburg*, 408 U.S. at 691. Far from creating a right to violate the law when gathering the news, the Court has indicated that the unlawful acquisition may be punished. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989) (noting that the Court had "raised but not definitively resolved" whether "in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well"); *Branzburg*, 408 U.S. at 691 (stating that members of the press could be convicted for "stealing documents or private wiretapping" in the name of newsgathering).

The cases upon which Villarreal relies turn entirely on publishing lawfully acquired information—actions section 39.06(c) does not prohibit. For example, *Daily Mail* concerned a law that prohibited "publish[ing]," without a written court order, the name of a child involved in certain court proceedings. 443 U.S. at 98-99 (quoting W. Va. Code § 49–7–3). The Court found the law unconstitutional, holding that "[i]f the information is *lawfully obtained* . . . the state may not punish its publication except when necessary to further an interest more substantial than is present here." *Id.* at 104 (emphasis added). The Court explicitly limited its holding to that fact pattern, stating "[t]here is no issue before us of unlawful press access to confidential judicial proceedings." *Id.* at 105.

Florida Star reiterated this principle, punctuating that "where a newspaper publishes truthful information *which it has lawfully obtained*, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." 491 U.S. at 541 (emphasis added). The same is true for *Oklahoma*

Publishing Co. v. District Court, 430 U.S. 308, 311 (1977) (per curiam) (permitting publication where there is "no evidence that petitioner acquired the information unlawfully"); *Cox Broadcasting*, 420 U.S. at 496 ("[T]he First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records."); and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978) ("We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it.").

Accordingly, Villarreal has established, at most, the right to publish information lawfully obtained—a right not impacted by section 39.06(c), which concerns only unlawfully soliciting information. Other than that principle, Villarreal's remaining authority is even more off-point, as section 39.06(c) has nothing to do with interrupting a police officer in the performance of his duties, *City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987); writing editorials, *Bridges v. California*, 314 U.S. 252, 270 (1941); or inflicting emotional distress, *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). That each of these cases involves the First Amendment does not establish a route around qualified immunity. Because "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established,'" *Mullenix*, 577 U.S. at 12 (quoting *al-Kidd*, 563 U.S. at 742), Villarreal cannot avoid closer scrutiny of her claim merely by invoking the First Amendment as a talisman.

2. Villarreal has not shown a violation of the Court's warrant precedent.

Villarreal next relies (at 21-23) on a trio of cases concerning Fourth and Fourteenth Amendment requirements for warrants to seize material arguably protected

by the First Amendment. But Villarreal has not pressed any Fourth or Fourteenth Amendment claim in this Court. Pet. i. Her theory instead requires the Court to create a new constitutional rule by analogizing to these cases. But (1) a new rule is, by definition, not clearly established for purposes of qualified immunity; and (2) to the extent the Court wishes to draw the analogy, Respondent Officials complied with the Fourth and Fourteenth Amendment requirements identified.

a. Villarreal's first two cases (at 21-22) address whether a warrant is required and what information it must contain before an officer can seize allegedly obscene material in accordance with the Fourth and Fourteenth Amendments. *Marcus v. Search Warrants of Prop. at 104 E. Tenth St.*, 367 U.S. 717 (1961); *Roaden v. Kentucky*, 413 U.S. 496 (1973). In *Marcus*, the Court held that a warrant issued "on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene" did not have "the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled." 367 U.S. at 731-32. And in *Roaden*, the Court extended *Marcus* to warrantless seizures of allegedly obscene material, holding that a magistrate must be afforded "an opportunity to 'focus searchingly on the question of obscenity.'" 413 U.S. at 497-98, 506 (citations omitted).

In short, these cases stand for the proposition—which Texas does not dispute—that where material to be seized may or may not be protected by the First Amendment, a warrant must describe the material in sufficient detail so that a judge can make a preliminary determination that there is probable cause to think the material

falls on the unprotected side of the First Amendment line. *Id.* at 506.

Villarreal concedes (at 22) that these cases are not directly applicable because they address only the seizure of *papers*. To be pertinent here, the Court would have to extend them to the seizure of *persons*. But "[t]he relevant inquiry is whether *existing* precedent placed the conclusion that [Respondent Officials] acted unreasonably in these circumstances 'beyond debate.'" *Mullenix*, 577 U.S. at 13-14 (emphasis added) (quoting *al-Kidd*, 563 U.S. at 741). Because Villarreal's argument relies on the extension of precedent, the Fifth Circuit's decision does not conflict with existing precedent on the question of qualified immunity. Sup. Ct. R. 10(a); *accord Pearson v. Callahan*, 555 U.S. 223, 234 (2009).

Further, as the en banc majority noted, Respondent Officials obtained warrants for Villarreal's arrest. Pet.App.28a-29a. And, unlike in *Marcus*, the warrants were supported by eight-page affidavits that quoted the allegedly First Amendment protected conversations between Villarreal and Officer Goodman, permitting the neutral magistrate to "focus searchingly" on the speech at issue, *Roaden*, 413 U.S. at 506, and whether it crossed the legal line to unlawful solicitation, Pet.App.52a. At most, the state-court judge who reviewed the warrant application made "a reasonable mistake" regarding where to draw that line—not the type of "unacceptable error indicating gross incompetence or neglect of duty" that would give notice to a police officer that he should not rely upon the magistrate's judgment. *Malley v. Briggs*, 475 U.S. 335, 346 n.9 (1986).

b. Villarreal's third case (at 22), *Stanford v. Texas*, strays further from the facts of this case, as it concerned a warrant "of a kind which it was the purpose of the

Fourth Amendment to forbid—a general warrant." 379 U.S. 476, 480 (1965). The warrant authorized the search for and seizure of what amounted to any document concerning the Communist Party or its operations. *Id.* at 478-79. After discussing the English monarchy's abuse of search and seizure powers to suppress publications, *id.* at 481-85, the Court held that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." *Id.* at 485.

This Court has questioned whether there can be a general warrant for the arrest of a person. *See al-Kidd*, 563 U.S. at 742-43. Assuming there can, Villarreal would at minimum need to directly challenge the breadth of the arrest warrants by specifying how the language of the warrant was overbroad. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007). But she has not. Pet.App.253a-288a. The arrest warrants did not violate *Stanford* or its underlying principles, and Villarreal still has not shown a conflict with this Court's precedent.

3. *Hope* does not save Villarreal's claim.

Because "none of the [Court's] cases squarely governs the case here," *Mullenix*, 577 U.S. at 13 (citation modified), Villarreal opts for repeatedly declaring her right to ask questions and asking this Court to find that right obvious under *Hope*, 536 U.S. 730, and *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam). But *Hope* will not save Villarreal's claim because any constitutional violation is far from legally obvious.

Hope creates a narrow exception to the general rule that a plaintiff seeking monetary damages for a constitutional tort must cite on-point precedent to defeat qualified immunity. 536 U.S. at 741. It recognizes the

common-sense principle that because qualified immunity ultimately turns on notions of "fair notice," there are some circumstances when a "general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful." *Id.* at 740-41 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). To prevent the exception from swallowing the rule, *Hope* itself made clear that the obviousness of the application must be determined based on "the specific conduct in question." *Id.* at 741 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

Here, that "specific conduct" is arresting Villarreal, not for asking questions in the abstract, but for soliciting and receiving nonpublic information in violation of Texas law. As discussed above, this Court's precedent in *Houchins* and *Branzburg*, among others, renders any potential First Amendment violation far from "obvious." *See supra* pp. 15-20; *see also* Vladeck, *supra* at 231 (recognizing that there is "a colorable argument that a reporter may be prosecuted . . . for soliciting the unlawful removal of classified governmental information"). Because any constitutional violation was far from "beyond debate," the Fifth Circuit's conclusion that Respondent Officials were entitled to qualified immunity does not conflict with this Court's caselaw. *Mullenix*, 577 U.S. at 14 (quoting *al-Kidd*, 563 U.S. at 741).

C. Villarreal fails to identify a conflict with the Court's retaliation precedent.

Villarreal spends little time attempting to demonstrate that the Fifth Circuit's decision on remand violated this Court's retaliation precedent. Pet. 26-27. She does not question the majority's timeline: Her arrest

occurred before the Court recognized in *Nieves* that, in narrow circumstances, an arrest may still violate the First Amendment despite the existence of probable cause. Pet.App.3a-4a. Because this legal principle was not clearly established when Villarreal was arrested in 2017 (and the clarity provided by *Gonzalez* did not come until 2024), Respondent Officials are entitled to qualified immunity.

In response, Villarreal first returns to her argument (at 26) that Respondent Officials should have known they could not arrest her for "exercising an undoubted First Amendment right." For the reasons explained above, *supra* pp. 15-26, she has not demonstrated that it would have been apparent to every reasonable official that, in light of section 39.06(c), her First Amendment right was "undoubted."

Next, Villarreal asks the Court (at 26) to draw a line between probable cause based on conduct versus speech, suggesting it would have violated the First Amendment in *Reichle* to have arrested the plaintiff, not for physically contacting the Vice President, but only for criticizing him. But that is not the appropriate analogy. Criticizing the Vice President does not violate any statute; soliciting information in violation of Texas Penal Code section 39.06(c) does. Thus, the relevant question when Villarreal was arrested in 2017 was whether there was probable cause to believe she violated section 39.06(c), a facially constitutional statute. And other than reciting her First Amendment argument, Villarreal makes no argument that probable cause was lacking. The presence of probable cause defeats her retaliation claim under the law that existed at that time. *See Reichle*, 566 U.S. at 664-65.

II. The Fifth Circuit's Ruling Does Not Conflict with Decisions from Other Circuits.

Villarreal's next argument in support of certiorari (at 32-36) is that the Fifth Circuit's decision conflicts with those of other circuits. It does not. Not one of those cases involved a statute regulating access to government data, found a police officer liable for monetary damages because he relied on a facially valid warrant based on a facially constitutional statute, or concerned retaliation. As a result, none demonstrates a split between the Fifth Circuit and another court of appeals "on the same important matter." Sup. Ct. R. 10(a).

A. The Sixth Circuit's decision in *Leonard v. Robinson* concerned a public utterance alleged to violate laws that were "either facially invalid, vague, or overbroad when applied to speech (as opposed to conduct)." 477 F.3d 347, 356 (6th Cir. 2007). A citizen was arrested for violating state laws prohibiting obscenity, blasphemy, and disorderly conduct when he uttered the phrase "G-d damn" at a township board meeting. *Id.* at 351. Considering a Fourth Amendment claim, the Sixth Circuit held that (1) one law had already been declared unconstitutionally vague, *see People v. Boomer*, 655 N.W.2d 255, 257 (Mich. Ct. App. 2002); (2) another applied only to conduct and would be "flagrantly unconstitutional" if extended to speech; and (3) the application of the third to the conduct at hand was unconstitutional under *Cohen v. California*, 403 U.S. 15, 26 (1971). *Leonard*, 477 F.3d at 358-60.

The final statute prohibited "mak[ing] or excit[ing] any disturbance or contention" at a public meeting. *Id.* at 360. In holding that no reasonable officer could have believed uttering "G-d damn" disturbed the peace, the Sixth Circuit cited six cases from this Court reversing

convictions for disturbing or breaching the peace based on protected speech. *Id.* at 360-61. In particular, the Court relied on *Street v. New York*, where a protestor stated, "We don't need no damn flag," after setting fire to a flag in an outdoor protest, 394 U.S. 576, 591-92 (1969); and *Cohen*, where a protestor wore a jacket saying "F--k the Draft" at an indoor protest, 403 U.S. at 26. Although *Leonard* involved "milder profanity," the Sixth Circuit concluded that distinction made no constitutional difference. 477 F.3d at 359.

Leonard is of little use because, as already discussed, section 39.06(c) regulates access to information—not publication (or public utterance) of that information. *Supra* pp. 13-17. Nor can the Court derive a broader principle about the obviousness of constitutional violations because there is no body of caselaw analogous to *Cohen* and its progeny that would have put all reasonable officials on notice that their actions under section 39.06(c) might violate the Constitution, *supra* pp. 15-26.

B. The Eighth Circuit's decision in *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014), and two of the Tenth Circuit decisions involved specific applications of state statutes that had already been held unconstitutional. In *Snider*, a citizen was arrested for desecrating an American flag. *Id.* at 1154. Even though the officers obtained a warrant before making the arrest, *id.* at 1157, there was a body of case law dating back decades that would have given a reasonable officer notice of the unconstitutionality of the arrest. *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989). These cases were so clear that the Eighth Circuit found it "fairly inexplicable" that neither the prosecutor nor the magistrate who issued the warrant recognized it.

Snider, 752 F.3d at 1157. No such precedent exists in this case. *Supra* pp. 15-26.

Two cases Villarreal cites from the Tenth Circuit (at 33-34) are similarly distinguishable. In *Jordan v. Jenkins*, the Court denied qualified immunity because the plaintiff was arrested for criticizing a police officer—conduct this Court had already held to be constitutionally protected. 73 F.4th 1162, 1168-71 (10th Cir. 2023) (relying on *Hill*, 482 U.S. at 453-54). And *Mink v. Knox* involved writing a parody rather than criticizing an officer, but the principle was the same: Because such expression had already been held to be constitutionally protected, the defendant was not entitled to qualified immunity. 613 F.3d 995, 1005-06 (10th Cir. 2010) (relying on, *inter alia*, *Hustler Magazine*, 485 U.S. at 51).

C. Finally, in *Lawrence v. Reed*, the defendant *admitted* that he violated clearly established law when he towed 70 of plaintiff's vehicles to a landfill without a warrant or hearing. 406 F.3d 1224, 1229-30 (10th Cir. 2005). Nevertheless, he argued that qualified immunity was appropriate because a local ordinance authorized such a seizure. *Id.* at 1231-33. The Tenth Circuit rejected that argument, holding that the ordinance was "obviously unconstitutional" because it provided for no hearing at all—a fundamental requirement of due process of which government officials should be aware. *Id.* at 1233. But again, Villarreal has not argued that section 39.06(c) is obviously unconstitutional, so the Fifth Circuit's decision is consistent with *Lawrence* as well as the other authorities upon which Villarreal's claim of a circuit split rests. Accordingly, no circuit split requires this Court's resolution.

III. No Additional Reasons Exist to Grant Certiorari.

A. Beyond Villarreal's failure to identify grounds warranting certiorari, there are other reasons to deny it. This is far from an "ideal vehicle" to resolve the questions raised. *Contra* Pet. 36. This Court "review[s] judgments of the lower courts, not statements in their opinions," *Amgen, Inc. v. Sanofi*, 598 U.S. 594, 615 (2023) (citing *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)), and has reminded courts to "think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" *al-Kidd*, 563 U.S. at 735 (quoting *Pearson*, 555 U.S. at 236-37). Because there are additional "ground[s] upon which to dispose of the case," the "prudent exercise of this Court's jurisdiction" suggests that it should decline to resolve Villarreal's constitutional claims. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)).

First, section 39.06(c) prohibits "solicit[ing] *or receiv[ing]*" nonpublic information with the intent to benefit oneself. By Villarreal's own admission, she received information from Officer Goodman. Pet.App.234a-235a. But Villarreal does not make an argument that this Court's right-to-receive precedent clearly establishes a right here. *See, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). Nor could she. Recognizing a First Amendment right to receive confidential information held by the government would, at a minimum, create tension with the Court's holding that there is no First Amendment right to "have access to particular government information."

Houchins, 438 U.S. at 14 (plurality op.); *id.* at 16 (Stewart, J., concurring in the judgment). Until this Court addresses the intersection of those lines of precedent, Villarreal has no clearly established right to receive information, and Respondent Officials had grounds to arrest Villarreal under section 39.06(c) that did not violate the Constitution.

Second, as the Fifth Circuit explained, the independent-intermediary doctrine represents an alternative ground for judgment. Pet.App.51a-54a. Arising from the Fourth Amendment context, the doctrine provides that "the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012). Having found evidence that the Respondent Officials properly obtained a warrant with substantive affidavits demonstrating the violation of a presumptively valid law, Pet.App.52a, the Fifth Circuit properly held that the Respondent Officials were entitled to the protection the doctrine affords, Pet.App.53a.

B. Villarreal further attempts to grab the Court's attention (at 28) by claiming the Fifth Circuit's decision spells the end of the First Amendment. Quoting the Fifth Circuit dissents, Villarreal's petition suggests that government officials in the Fifth Circuit "don't have to comply with the First Amendment at all," Pet.App.101a (Ho, J., dissenting); that the legislative and executive branches of Texas's state government will conspire to limit the First Amendment rights of citizens by passing and enforcing viewpoint discriminatory laws, Pet.App.102a (Ho, J., dissenting); and that officials will wield constitutional laws as "cudgels" to silence speech, Pet.App.86a (Willett, J., dissenting). The dissents' fears are unfounded. The majority's recognition of qualified

immunity here did not eliminate the First Amendment any more than this Court's recognition of qualified immunity in *Mullenix* (or any other excessive-force case) eliminated the Fourth Amendment.

Even so, courts are not powerless to enforce First Amendment rights, even if qualified immunity prohibits damages in this case. After all, "grossly and flagrantly" unconstitutional laws will provide no protection to government officials. *DeFillippo*, 443 U.S. at 38. Nor will the presumption of constitutionality immunize an official's application of a facially valid law when that application has been declared unconstitutional. *Jordan*, 73 F.4th at 1168-71. And retaliation claims now remain available for those arrested for their speech even if probable cause exists for their arrest. *Gonzalez*, 602 U.S. 653.

Nor are damages the only option. Declaratory-judgment actions can provide guidance on whether a law is unconstitutional or being unconstitutionally applied. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). And *Ex parte Young* suits can restrain officials from taking unconstitutional actions. *E.g.*, *br, Inc. v. Wong*, 91 F.4th 318 (5th Cir. 2024); *Freedom From Religion Found. v. Abbott*, 955 F.3d 417 (5th Cir. 2020). All of these options are available to protect First Amendment rights, regardless of whether Villarreal succeeds in this lawsuit.

C. Finally, Villarreal vaguely challenges the doctrine of qualified immunity. Her argument (at 29) that it is unfair that officials will not be held responsible for First Amendment violations unless a court has held the governing statute unconstitutional is nothing more than a request to weaken the Court's qualified-immunity precedent. The same is true for Villarreal's suggestion (at 30) that the text of section 1983 requires compensation for

any constitutional violation—it is in effect an argument to end qualified immunity.

But this Court has repeatedly held that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U.S. at 743; *see also Heien v. North Carolina*, 574 U.S. 54, 57 (2014) (finding no Fourth Amendment violation when officer makes a reasonable mistake of law). And Villarreal has pointed to no reason to eliminate that breathing room in this case or any other.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2025