NO. 20-40359
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PRISCILLA VILLARREAL,

Plaintiff-Appellant

v.

THE CITY OF LAREDO, TEXAS; WEBB COUNTY, TEXAS; ISIDRO R. ALANIZ; MARISELA JACAMAN; CLAUDIO TREVINO, JR.; JUAN L. RUIZ; DEYANRIA VILLARREAL; ENEDINA MARTINEZ; ALFREDO GUERRERO; LAURA MONTEMAYOR; DOES 1-2,

Defendants-Appellees

APPELLANT'S RESPONSE TO PETITION FOR REHEARING EN BANC OF DEFENDANTS-APPELLEES THE CITY OF LAREDO, TEXAS; CLAUDIO TREVINO, JR.; JUAN L. RUIZ; DEYANRIA VILLARREAL; ENEDINA MARTINEZ; ALFREDO GUERRERO; LAURA MONTEMAYOR; and DOES 1-2

On Appeal from the United States District Court for the Southern District of Texas, Laredo Division, Civil Action No. 5:19-CV-48
Hon. John A. Kazen Presiding

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Supplemental Certificate of Interested Parties

The cause number and style of the case is No. 20-40359, *Priscilla Villarreal v. City of Laredo, Texas, et al*. (USDC Civil No. 5:19-CV-48, Southern District of Texas).

In addition to those persons and entities identified in the parties' briefs and the *amici curiae* briefs, the undersigned counsel of record certifies that the following additional listed persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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The undersigned also certifies under Fed. R. App. P. 26.1(a) that Foundation for Individual Rights and Expression (FIRE) is not a publicly held corporation, has no parent corporation, and that no publicly held corporation owns 10 percent or more of FIRE stock.

Respectfully submitted,

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INTRODUCTION

> If the First Amendment means anything, it surely means that a citizen journalist has the right to ask a public official a question, without fear of being imprisoned. Yet that is exactly what happened here: Priscilla Villarreal was put in jail for asking a police officer a question.[1]

In those two sentences, the panel majority pinpoints the heart of this case: Defendants arrested Villarreal—a citizen journalist in Laredo, Texas who often reports on local officials—because she asked a police officer about newsworthy matters. No reasonable official would have criminalized journalism like the Defendant police officers and district attorneys did with Villarreal.

In finding that the City Defendants have no qualified immunity for arresting Villarreal, the panel majority faithfully applied "the central concept" of qualified immunity's objective reasonableness inquiry: fair warning. And the City Defendants had fair warning of a constitutional violation. Indeed, the panel majority points to ample precedent establishing a clear First Amendment right to ask officials questions as part of news reporting. So clear, in fact, that it would have been obvious to a reasonable officer that they could not arrest Villarreal for asking

[1] *Villarreal v. City of Laredo, Tex.*, 44 F.4th 363, 367 (5th Cir. 2022).

those questions under Tex. Penal Code § 39.06(c) (or any other law). All the more so because a reasonable officer—having months to deliberate about arresting Villarreal, as Defendants did while orchestrating Villarreal's arrest—would have had plenty of time to recognize the unconstitutionality of that arrest.

In seeking rehearing en banc, the City Defendants argue that the panel majority creates a "new standard for the waiver of qualified immunity" and "establishes journalists as a distinct class." Both arguments are wrong. The panel majority faithfully adheres to the Supreme Court's qualified immunity precedent and settled First Amendment principles that leave no doubt about Villarreal's First Amendment right to question public officials without being arrested. Far from creating a "distinct class" for journalists, the panel majority affirms the constitutional right of all citizens to ask their public officials questions—a core First Amendment right essential to an informed public and good self-government.

For these reasons, this Court should deny en banc review.

ARGUMENT

I. The Panel Majority Correctly Applies the Supreme Court's "Fair Warning" Rule in Denying the City Defendants Qualified Immunity.

As this Court has emphasized, twenty years ago the Supreme Court explained the core of qualified immunity and its objective reasonableness standard: "[t]he central concept is that of 'fair warning.'" *Kinney v. Weaver,* 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)). Pointing to its 1987 decision in *Anderson v. Creighton*, the Supreme Court reaffirmed in *Hope* that "'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.'" *Hope*, 536 U.S. 730 at 741 (alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Faithfully applying *Hope* and *Anderson*, the panel majority summed up the Supreme Court's qualified immunity framework well: "The doctrine of qualified immunity does not always require the plaintiff to cite binding case law involving identical facts. An official who commits a patently 'obvious' violation of the Constitution is not entitled to

qualified immunity." *Villarreal*, 44 F.4th at 371 (citing *Hope*, 536 U.S. at 745). *Hope* itself established how a constitutional violation can be obvious, denying qualified immunity to officials who handcuffed a prisoner to a hitching post in the sun because of the "[t]he obvious cruelty inherent" in the act. 536 U.S. at 745.

Recent decisions from the Supreme Court prove the "fair warning" standard and its application to find obvious constitutional violations are alive and well. For instance, the panel majority explained how the Supreme Court denied qualified immunity to officials who kept a prisoner in feces-filled jail cells for days, an obvious constitutional violation despite a lack of precisely on-point binding president. *Villarreal*, 44 F.4th at 370 (citing *Taylor v. Riojas*, 141 S. Ct. 52 (2020) *(per curiam)*).[2] Likewise, the panel majority pointed out how the Supreme Court found that because "[t]here can be no doubt that the First Amendment protects the right to pray," officers who ordered a woman to stop praying had no qualified immunity despite the lack of a factually similar case. *Id.* (citing *Sause v. Bauer*, 138 S. Ct. 2561 (2018) (*per curiam*).

[2] *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (Mem.), granting, vacating, and remanding, 950 F.3d 226 (5th Cir. 2020) (directing reconsideration "in light of *Taylor*").

Like the panel majority, other circuit decisions of late have faithfully followed the Supreme Court's holdings and denied qualified immunity for obvious violations of First Amendment rights.[3] For example, the Tenth Circuit denied qualified immunity to a college administrator who punished a student after she criticized a professor over email, even though it found no precedent with identical facts. *Thompson v. Ragland,* 23 F.4th 1252, 1255–56, 1259–60 (10th Cir. 2022). And the Ninth Circuit recently denied qualified immunity on summary judgment to a detective after he arrested activists for "chalking" anti-police messages on public sidewalks, finding the First Amendment right to be free from retaliatory arrest clearly established despite a lack of factually identical precedent. *Ballentine v. Tucker,* 28 F.4th 54, 66 (9th Cir. 2022).

These recent decisions confirm the vitality of the Supreme Court's fair warning standard. In turn, they highlight why the City Defendants

[3] Even though it is not in the First Amendment context, this Court's recent decision in *Tyson v. County of Sabine* provides another example of why officials do not have qualified immunity for obvious constitutional violations. In *Tyson*, a unanimous panel applied *Hope* in denying qualified immunity to an officer who coerced a person to perform nonconsensual sex acts, despite a lack of similar cases, affirming that qualified immunity "does not immunize those officials who commit novel, but patently 'obvious' violations of the Constitution." 42 F.4th 508, 512 (5th Cir. 2022) (quoting *Hope*, 536 U.S. at 745).

cannot show the panel majority did anything but faithfully apply Supreme Court precedent in scrutinizing their qualified immunity claim. The panel majority does not, as the City Defendants claim, create a "new standard for the waiver of qualified immunity" based on "implied or derivative rights." City Defs.' Pet. for Reh'g En Banc (City PFR) 13. In fact, it does the opposite. The panel majority carefully explains how Supreme Court precedent teaches that clear constitutional principles are enough to give fair warning that conduct flouting those principles violates the Constitution—including patently obvious violations like those the Defendants committed. *Villarreal*, 44 F.4th at 370–71. And there is nothing "implied" about a patently obvious violation.

Finally, the Supreme Court decisions the City Defendants point to do not contradict the panel majority's fidelity to established qualified immunity doctrine. City PFR 13 (citing *City of Tahlequah v. Bond*, 142 S. Ct. 9 (2021) (*per curiam*); *Rivas-Villegas v. Contesluna*, 142 S. Ct. 4 (2021) (*per curiam*)). Neither *Bond* nor *Rivas-Villegas* overrules or alters *Hope's* core holding or its correct application in cases like *Riojas* and *Ragland*. And as detailed in Section I.B, both cases involve police officers making split-second use of force decisions in dangerous circumstances—

a far cry from the months Defendants had to contemplate the clear First Amendment principles providing fair warning that arresting Villarreal would violate the Constitution.

Faithfully applying the Supreme Court's "fair warning" standard, the panel majority correctly denied the City Defendants qualified immunity for arresting Villarreal because she asked a police officer questions while investigating and reporting the news. *Villarreal*, 44 F.4th at 371–72. There is no basis for en banc review.

A. The panel majority was right in finding that Villarreal's arrest was an obvious constitutional violation that bars qualified immunity.

The panel majority looked to established First Amendment principles in concluding that "[i]f the First Amendment means anything, it surely means that a citizen journalist has the right to ask a public official a question, without fear of being imprisoned." *Villarreal*, 44 F.4th at 367. For example, the panel majority identified decisions establishing a First Amendment right to curse at public officials, making obvious the First Amendment right to politely inquire of officials. *Id.* at 371 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942); *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997); *Buffkins v. City of Omaha*,

922 F.2d 465, 467 (8th Cir. 1990)). So too did the panel majority pinpoint decisions establishing First Amendment protection for freely publishing information the government provides, making not only that right clearly established, but also the right to ask for that information. *Id.* (citing *The Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989); *In re Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982)).

Consider also the many decisions the panel majority cited showing that officials like the City Defendants cannot escape liability by trying to shield obvious First Amendment violations behind the pretext of a statute. *Villarreal*, 44 F.4th at 372 (citing cases). Just as the government officials in *Leonard v. Robinson* had no qualified immunity for hiding behind antiquated laws prohibiting swearing to arrest a critic,[4] the City Defendants cannot invoke qualified immunity to hide behind the derelict Texas Penal Code § 39.06(c) and excuse themselves for arresting Villarreal for routine newsgathering and reporting.

Moreover, the Supreme Court's decision in *Smith v. Daily Mail Publishing Co.* adds to those cases the panel majority rightly looked to in finding that Villarreal's arrest was an obvious constitutional violation. In

[4] 447 F.3d 347, 359–61 (6th Cir. 2007).

Daily Mail, the Supreme Court held the state could not criminalize the truthful publication of a juvenile suspect's name that reporters pursuing a lead learned "simply by asking various witnesses, *the police, and an assistant prosecuting attorney* . . ." 443 U.S. 97, 99, 105–06 (1979) (emphasis added). In effect, Villarreal did nothing different from the reporters in *Daily Mail* when she peaceably asked a police officer to verify information she received from another source. ROA.166 [¶¶ 65–66], ROA.170 [¶89]. To that end, *Daily Mail* alone provided more than fair warning that arresting Villarreal would violate the Constitution.

In short, if the First Amendment clearly protects right to curse at officials and the right to publish information the government volunteers—and it does—then it obviously protects the right to peaceably ask an official for information, including as part of reporting the news. As the panel majority rightly pointed out, "[i]f the government cannot punish someone for *publishing* the Pentagon Papers, how can it punish someone for simply *asking* for them?" *Villarreal*, 44 F.4th at 371 (citing *New York Times Co. v. United States,* 403 U.S. 713 (1971) (*per curiam*)) (emphasis in original); *see also Florida Star*, 491 U.S. at 534–35 ("[w]here information is entrusted to the government, a less drastic means than

punishing truthful publication almost always exists for guarding against the dissemination of private facts.").

In the end, these clear First Amendment principles validate the panel majority's key finding: If putting Villarreal "in jail for asking a police officer a question . . . is not an obvious violation of the Constitution, it's hard to imagine what would be." *Villarreal*, 44 F.4th at 367. On that basis, the panel majority correctly held the City Defendants have no qualified immunity.

None of the reasons the City Defendants offer show a need for en banc review. First, the City Defendants wrongly argue that the Ninth Circuit's decision in *Saved Magazine v. Spokane Police Department* "establishes that it is reasonable for an officer to believe it is constitutional to restrict a journalist from engaging in questioning." City PFR 14–15 (citing *Saved Magazine*, 19 F.4th 1193 (9th Cir. 2021)). For one thing, the facts in *Saved Magazine* share nothing in common with those here. The case involved police interrupting a journalist from using his press pass as a license to "preach the Bible" to protestors. *Saved Magazine*, 19 F.4th at 1196–97. Interrupting protestors—ostensibly exercising their own First Amendment rights—is far removed from

Villarreal peaceably asking an official for information. To that end, the Ninth Circuit held that "a reasonable person" in the officer's position "could have concluded that the Constitution permitted his relatively modest efforts to prevent [the journalist] from provoking counterprotestors in their designated zone, even if his actions involved restricting [the journalist's] speech." *Id.* at 1200.

Above all, the Ninth Circuit's decision affirms the same Supreme Court precedent the panel majority looked to in explaining Villarreal's First Amendment newsgathering rights. Echoing the panel majority here, the Ninth Circuit recognized that "there is no question that news gathering is protected by the First Amendment." *Id.* at 1198 (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)); *Villarreal*, 44 F.4th at 371 (citing *Branzburg* and other cases in affirming that "[i]f freedom of the press guarantees the right to publish information from the government, then it surely guarantees the right to ask the government for that information in the first place").

The Ninth Circuit's recognition of the core First Amendment protection for newsgathering refutes the City Defendants' claim that *Saved Magazine* endorses police "restrict[ing] a journalist" from asking

an official questions. City PFR 14–15. And this same clear First Amendment principle shuts down another of the City Defendants' unpersuasive arguments—that the panel majority "implies a right to solicit government records." City PFR 16. Because the First Amendment right to ask questions of officials while newsgathering is obvious, the panel majority implied nothing.

Finally, the City Defendants wrongly rely on *McBurney v. Young* to justify arresting Villarreal for asking a police officer for information. City PFR 16. *McBurney* involved a non-Virginia resident making a Privilege and Immunities Clause and dormant Commerce Clause challenge to Virginia's public records law. 569 U.S. 221, 224 (2013). True enough, the Supreme Court noted "there is no constitutional right to *obtain* all the information provided by FOIA laws." *Id.* at 232 (citations omitted) (emphasis added). But the Supreme Court placed no limit on the First Amendment right to *ask* officials for information, including public records. *See id.* Nor did *McBurney* weaken the holdings of cases like *Florida Star*, *New York Times,* and *Daily Mail*, which establish beyond doubt a clear First Amendment right to ask officials for information and freely publish what they volunteer.

The point is this: even if a non-resident lacks a constitutional right under the Privileges and Immunities Clause or the dormant Commerce Clause to obtain records under a state's public records law, that does not alter the obvious First Amendment right to simply *ask* an official for information. No reasonable officer would have interpreted *McBurney* otherwise. In short, nothing in *McBurney* conflicts with the panel majority's finding of an obvious constitutional violation.

B. Premeditated acts that defy established First Amendment principles deserve no deference.

The panel majority correctly observed that the difference between split-second decisions by police officers and premediated decisions to arrest someone for routine journalism underscores "an especially weak basis for invoking qualified immunity" here. *Villarreal,* 44 F.4th at 371–72. True enough, "fair warning" of a constitutional violation might require more factual specificity in the law for a police officer who uses force in a heated situation requiring split-second decisions. *E.g.*, *Mullenix v. Luna,* 577 U.S. 7, 12 (2015) (*per curiam*) ("[S]pecificity is especially important in the Fourth Amendment context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine, here

excessive force, will apply to the factual situation the officer confronts.") (citation and internal quotations omitted).

But "fair warning" will be much less exacting for deliberative decisions, like arresting a local journalist after manufacturing arrest warrants over several months. In his recent criticism of a "one-size-fits-all" view of qualified immunity, Justice Thomas aptly summed up this difference: "[W]hy 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 concurring in a denial of qualified immunity to university official?" *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422, (2021) (statement of Thomas, J., respecting the denial of certiorari).

The fundamental difference between split-second decisions and deliberative decisions in the objective reasonableness inquiry is another reason why neither *Bond* nor *Rivas-Villegas*, cited by the City Defendants, contradict the panel majority's holding. *See* City PFR 13. In both cases, police officers faced heat-of-the-moment, use-of-force decisions, where "fair warning" might require factual specificity beyond

clear constitutional principles. *Bond*, 142 S. Ct. at 10–11 (finding officers who used deadly force against a suspect wielding a hammer at the officers had qualified immunity); *Rivas-Villegas*, 142 S. Ct. at 6–8; *see also Mullenix,* 577 U.S. at 12. But again, that exacting specificity is not necessary to overcome qualified immunity where officials made a deliberative decision to arrest someone for exercising their fundamental First Amendment rights, like Defendants' orchestrated decision to arrest Villarreal. *Villarreal*, 44 F.4th at 371–72. Indeed, as the panel majority recognized, the obviousness of the constitutional violation here is even more plain considering Defendants had *months* to consider and plan Villarreal's arrest. *Id.*

Simply put, Defendants arrested Villarreal despite having months to recognize the clear First Amendment principles, giving them fair warning that going through with the arrest would violate the Constitution. Their orchestrated arrest of Villarreal mirrors those deliberative acts for which officials had no qualified immunity in cases like *Riojas, Ballentine*, and *Ragland.* And it is far removed from the split-second, high-pressure law enforcement decisions at issue in *Mullenix, Bond,* and *Rivas-Villegas*.

Defendants' calculated choice to arrest Villarreal in violation of established First Amendment protections underscores why the arrest was an obvious constitutional violation. The panel majority got it right, and en banc review is not warranted.

II. The Panel Majority Does Not Create "Special Rights" for Journalists But Upholds the Established Right of All Citizens to Peaceably Ask Public Servants Questions Without Fearing Arrest.

By insisting that the panel majority went out of its way to create a "special right" for journalists, the City Defendants miss the point. Nothing in the panel majority's opinion gives journalists a right beyond that of any other citizen to ask officials for information. Nor does it give journalists any more right than other citizens to publish what the officials freely disclose.

The essence of the First Amendment right here—which the panel majority correctly identified through ample precedent—is that journalists and non-journalists have a First Amendment right to ask their elected officials questions, including questions about information the government possesses. There are few rights more apparent in our system of self-government; indeed, the Supreme Court explained that "speech concerning public affairs is more than self-expression; it is the

essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74–75 (1964). That is why the First Amendment so obviously bars public officials from abusing their powers to distort the news and punish citizens who *ask* for newsworthy information, as the panel majority correctly reasoned. *Villarreal*, 44 F.4th at 371.

In misinterpreting the panel majority, the City Defendants mistake Judge Ho's example about "a citizen who tries to obtain non-public information from a public official about a confidential investigation into a major company, with the intent of turning a profit by selling that company's stock short once the investigation becomes public." *Villarreal*, 44 F.4th at 380 (Ho, J., concurring). That example does not suggest that journalists are exempt from § 39.06(c)'s scope, as the City Defendants insist. Rather, it shows the stark contrast between permissible applications of the statute, like criminalizing securities fraud or bid-rigging, with applications that obviously violate the Constitution, like criminalizing Villarreal's routine journalism. *Id.* at 380–81.

But clearly unconstitutional applications of § 39.06(c) do not end with criminalizing journalism. Just as no reasonable official would have enforced § 39.06(c) against Villarreal's newsgathering and reporting, no

reasonable official would have enforced the law against a citizen simply asking a public servant for information—including information the government may consider non-public. Imagine a curious bystander asking police leaving a crime scene what happened. Or consider the school board critic who asks a board member what occurred in a closed-door board meeting. No reasonable government official could believe that the Constitution permits *arresting* either person for asking about ostensibly non-public information, whether under § 39.06(c) or another law. The same First Amendment principles the panel majority identified confirm as much.

In the end, the panel majority does not create an elevated class for journalists. Instead, it affirms the essential First Amendment right to ask our elected officials questions, whether in the course of reporting the news or simply being a civic-minded community member. That essential right is one any reasonable official would have had fair warning of before arresting Villarreal.

CONCLUSION

The panel majority correctly applied the Supreme Court's qualified-immunity doctrine and long-established First Amendment principles in

reversing the trial court and denying the City Defendants qualified immunity after arresting Villarreal for everyday newsgathering. En banc review is not warranted, and the Court should deny the City Defendants' petition for en banc rehearing.

Dated: September 19, 2022

Respectfully Submitted,

/s/ JT Morris

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CERTIFICATE OF COMPLIANCE

1. This response complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) because this response contains 3,547 words, excluding the parts of the brief exempted by Local Rule 28.3 and Fed R. App. P. 32(f).

2. This response complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Century Schoolbook font.

/s/ JT Morris
JT Morris

CERTIFICATE OF SERVICE

This certifies that on September 19, 2022, in compliance with Rules 25(b) and (c) of the Federal Rules of Appellate Procedure, the undersigned served the foregoing via the Court's ECF filing system on all registered counsel of record.

/s/ JT Morris
JT Morris