No. 23-1155

IN THE

Supreme Court of the United States

PRISCILLA VILLARREAL,

Petitioner,

v.

ISIDRO R. ALANIZ, *et al.*,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION. 1

I. The Fifth Circuit's Decision Sharply Conflicts With This Court's Decisions 3

A. Respondents violated Villarreal's undoubted First Amendment rights to ask officials questions and to publish what they volunteer. .3

B. No reasonable official would have arrested Villarreal 7

II. The Fifth Circuit's Decision Conflicts With Decisions From Other Circuits 9

III. This Case Is An Excellent Vehicle To Resolve Especially Important Questions 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

ACLU v. Alvarez,
679 F.3d 583 (7th Cir. 2012) 6

Berge v. Sch. Comm.,
107 F.4th 33 (1st Cir. 2024) 7

Branzburg v. Hayes,
408 U.S. 665 (1972) 3

Citizens United v. FEC,
558 U.S. 310 (2010) 6

Cox Broad. Corp. v. Cohn,
420 U.S. 469 (1975) 4

Fla. Star v. B.J.F.,
491 U.S. 524 (1989) 4, 6, 12

Gonzalez v. Trevino,
144 S. Ct. 1663 (2024) 9, 12

Grosjean v. American Press Corp.,
297 U.S. 233 (1936) 5

Hope v. Pelzer,
536 U.S. 730 (2002) 7

Table of Authorities

Page

Houchins v. KQED, Inc.,
438 U.S. 1 (1978) 3

Jordan v. Jenkins,
73 F.4th 1162 (10th Cir. 2023) .10

Landmark Commc'ns, Inc. v. Virginia,
435 U.S. 829 (1978) 4

Lawrence v. Reed,
406 F.3d 1224 (10th Cir. 2005) .9

Leonard v. Robinson,
477 F.3d 347 (6th Cir. 2007) 10

Malley v. Briggs,
475 U.S. 335 (1986) 9

Michigan v. DeFillippo,
443 U.S. 31 (1979) 10

NAACP v. Button,
371 U.S. 415 (1963) 5

Okla. Publ'g Co. v. Dist. Ct.,
430 U.S. 308 (1977) 4, 6

Roaden v. Kentucky,
413 U.S. 496 (1973) 8

Page

Smith v. Daily Mail Publ'g Co.,
443 U.S. 97 (1979) 2, 4, 6, 7

Snider v. City of Cape Girardeau,
752 F.3d 1149 (8th Cir. 2014) 11

Taylor v. Riojas,
592 U.S. 7 (2020) 7

Statutes

42 U.S.C. § 1983 . . . . 2, 8

Tex. Gov't Code § 552.001(a) 5

Tex. Pen. Code § 39.06(c) 2

INTRODUCTION

As this Court's decisions and first principles make clear, Americans have an undoubted First Amendment right to ask government officials questions and publish what they volunteer. Respondents, police and prosecutors in Laredo, Texas, jailed Priscilla Villarreal for exercising that freedom. Their trampling of the First Amendment demands accountability under our Constitution and Section 1983.

But Respondents and the State of Texas insist on a bleaker vision for free expression and a free press, one in which the government can criminalize asking officials for information with impunity. Today, their chilling vision is the law in the Fifth Circuit, where a splintered nine-to-seven decision excused Respondents' obvious constitutional violations, affording them qualified immunity. Such a grave threat to the First Amendment warrants this Court's review.

Respondents and Texas have no answer to this Court's decisions from which the Fifth Circuit starkly departed. Instead, Respondents invite this Court to rewrite its own decisions as holding "the First Amendment poses no barrier to the state's ability to restrict the way in which information may be obtained." Resp'ts BIO.17. That may serve their desire for an "effective way" to stop people from asking for government information. *Id.* at 20. But it shows no regard for our self-government tradition, let alone this Court's many decisions entrenching the First Amendment rights to question officials and publish what they freely share. Pet.14–21.

Like the Fifth Circuit, Respondents and Texas miscast this case as one about "access" to government information. It is not. If it were, neither would scramble to mislabel Villarreal's polite questions to a police officer with scare-words like "soliciting" and "inciting." No matter the government label, the First Amendment protects obtaining information from officials "simply by asking." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99, 103–04 (1979).

Nor are statutes and warrants unassailable armor against Section 1983 damages claims, as Respondents and Texas suggest. If "under color of any statute" means anything, officials must face liability when they launder obvious First Amendment violations through state penal codes. 42 U.S.C § 1983. As Texas conceded below, this case is not about a statutory challenge.[1] Rather, it centers on Respondents misusing Texas Penal Code § 39.06(c) to turn basic journalism—like asking officials questions—into a felony.

In the Sixth, Eighth, and Tenth Circuits, qualified immunity would not shield them. Yet the Fifth Circuit stands alone, assuring near blanket immunity for officials who deploy state laws to criminalize exercises of undoubted First Amendment rights. This conflict warrants this Court's review.

The questions presented are vitally important, no matter how Respondents and Texas try repackaging them to avoid confronting an obvious First Amendment violation.

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1. *Villarreal v. City of Laredo*, No. 20-40359 (5th Cir. Aug. 15, 2022), ECF 117.

Seven dissenting Fifth Circuit judges and a small army of *amici* confirm why this Court's intervention is imperative. Neither Texas nor Respondents meaningfully engage with the dissents. Instead, Texas writes them off as predicting a "doomsday scenario." Texas BIO.32. But by swooping in to support local officials despite no statutory challenge or parties to defend, Texas's involvement only confirms the dissents' concerns and the importance of the issues at stake. The Court should grant certiorari and reverse.

I. The Fifth Circuit's Decision Sharply Conflicts With This Court's Decisions.

A. Respondents violated Villarreal's undoubted First Amendment rights to ask officials questions and to publish what they volunteer.

The Fifth Circuit's decision clashes with this Court's precedent and bedrock constitutional principles. "The Supreme Court guarantees the First Amendment right of engaged citizen journalists, like [Thomas] Paine, to interrogate the government," and obviously so. App.47a (Higginson, J., dissenting). At every turn, Respondents and Texas fail to overcome this Court's decisions that not only uphold that right, but leave no doubt Respondents violated the First Amendment when they arrested Villarreal for everyday journalism.

Respondents and Texas recognize this Court affirmed an "undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972)); Texas BIO.15; Resp'ts BIO.17. But their chief argument boils down to this: Government

officials, not the First Amendment, set the bounds of lawful newsgathering. Nothing could stray further from the Constitution and this Court's decisions.

Respondents and Texas resist the Court's long line of decisions cementing First Amendment protections for those, like Villarreal, who receive and publish even sensitive information government officials volunteer. *E.g.*, *Daily Mail*, 443 U.S. at 99, 103–04 (juvenile murder suspect's name); *Fla. Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (rape victim's name); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (deceased rape victim's name); *Okla. Publ'g Co. v. Dist. Ct.*, 430 U.S. 308, 311 (1977) (juvenile suspect's name); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (information about state's judicial investigation). Instead, they distort those decisions.

Take Respondents' answer to *Daily Mail*. There, the Court concluded lawful newsgathering includes what Villarreal did—using "routine newspaper reporting techniques," like asking police questions to gather and report the news. *Daily Mail*, 443 U.S. at 99, 103–04. Yet Respondents contend *Daily Mail* "suggests that the First Amendment poses no barrier to the state's ability to restrict the way in which information may be obtained." Resp'ts BIO.17.

They misread *Daily Mail.* Neither it nor any of this Court's precedents "suggests" the government has free rein to criminalize asking public servants for information. *Daily Mail* affirms the exact opposite, explaining that because of the First Amendment, "a free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Daily Mail,* 443 U.S. at 104.

But under Respondents' view, state and local governments may categorically prohibit and punish any "unauthorized" request for government information. That not only ignores *Daily Mail* and the Court's other relevant decisions, but also mocks a long American tradition of refusing to punish those who seek and publish information from government sources. Reporters Comm. Amicus Br. 6–8.

In fact, Texas confesses its own policy embraces the freedom to ask for government information, because "government is the servant and not the master of the people." Texas BIO.3 (quoting Tex. Gov't Code § 552.001(a)). Still, Texas tries relabeling asking police for facts with criminal buzzwords like "solicitation," "incitement," and "leaks." *E.g.,* Texas BIO.I, 1, 13. The First Amendment is not so easily evaded: "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). Nor does Texas explain what Villarreal "incited" here—the voluntary release of newsworthy information? Labels aside, this Court's decisions foreclosed making that a crime.

Because an "informed public opinion is the most potent of all restraints upon misgovernment," *Grosjean v. Am. Press Corp.*, 297 U.S. 233, 250 (1936), the First Amendment erects strong barriers against the government from turning routine newsgathering and publishing into a crime. And here, it is not a close call—Respondents breached those barriers.

Respondents and Texas also repeat the Fifth Circuit's strawman that this case turns on "access" to government information. Pet.21–22; Texas BIO.1, 15; Resp'ts BIO.16. Villarreal never claimed a right to "access" information.

Officer Goodman could have responded to Villarreal with, "File a public records request," or, "No." But Goodman freely shared facts when Villarreal simply *asked*. If Goodman lacked that authority, the consequences were hers alone to bear. *Fla. Star*, 491 U.S. at 534–35. Arresting Villarreal for something reporters do every day obviously violated the Constitution.

Respondents' and Texas's efforts to drive wedges between First Amendment protections for publishing and protections for newsgathering do not render the violation any less obvious. *See* Texas BIO.10–11; Resp'ts BIO.15–17. If the First Amendment safeguards "[t]he right of citizens to inquire, to hear, to speak, and to use information," then it protects newsgathering, expenditures, and other expressive activity preceding pure speech. *Citizens United v. FEC*, 558 U.S. 310, 339, 349 (2010); *see also ACLU v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) ("[T]here is no fixed First Amendment line between the act of creating speech and the speech itself….").

This Court's decisions in *Daily Mail*, *Florida Star*, and *Oklahoma Publishing* show that principle in action. While each involved the government punishing publication, the predicate newsgathering from officials sharing information was central to the Court upholding First Amendment protections in each case. *Daily Mail*, 443 U.S. at 99, 103–04; *Fla. Star*, 491 U.S. at 534; *Okla. Publ'g Co.*, 430 U.S. at 311. Just as the First Amendment obviously protected Villarreal's freedom to publish newsworthy facts Officer Goodman shared, it undoubtedly protected her freedom to ask Goodman for those facts.

B. No reasonable official would have arrested Villarreal.

Settled precedent and basic constitutional principles provided "obvious clarity" that arresting someone for basic journalism violates the First Amendment. Pet.13–18, 21–24; *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (citation omitted). Because Respondents acted as no reasonable officer would, qualified immunity does not shield them. *E.g.*, *Hope*, 536 U.S. at 741; *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (per curiam); *see also Berge v. Sch. Comm.*, 107 F.4th 33, 44–45 (1st Cir. 2024) (reversing qualified immunity for school officials who threatened a citizen journalist "because the general constitutional rules highlighted…are so clear that…the unlawfulness of what occurred is apparent").

Texas argues that under *Hope*, "the obviousness of the application must be determined based on 'the specific conduct in question.'" Texas BIO.24–25 (quoting *Hope*, 536 U.S. at 741). True enough. And *Daily Mail* and this Court's similar decisions gave clear warning that Respondents' "specific conduct" would violate the Constitution. Indeed, their "specific conduct" was engineering Villarreal's arrest for using the same protected "routine newspaper reporting techniques" reporters used in *Daily Mail*, like getting facts "simply by asking" the police. *Daily Mail*, 443 U.S. at 99, 103–04.

While Respondents—including two experienced prosecutors—suggest a lack of First Amendment training merits qualified immunity, that's both irrelevant and wrong. Resp'ts BIO.13. It is irrelevant because reasonable officials need no special training to know jailing reporters

for doing their job violates the First Amendment. And it is wrong because police "are explicitly trained to handle press inquiries and are encouraged to develop cooperative relationships with journalists." Reporters (Balko et al.) Amicus Br. 10–14 (describing police press training and press interactions).

Here, Respondents devised warrant affidavits describing no more than routine news reporting the First Amendment protects. App.218a–220a. And so they have no answer for the constitutional mainstay they violated and the Fifth Circuit ignored: Probable cause cannot rest on mere exercises of protected expression. Pet.18–21 (explaining the principle's historical roots); *see also* Project for Privacy & Surveillance Accountability Amicus Br. 6–9 (discussing cases applying the principle to deny qualified immunity). In fact, Texas explains the common meaning of "solicits" excludes "asking for information that ultimately cannot be released," highlighting why no reasonable officer would have enforced the statute here. Texas BIO.12–13.

Respondents and Texas are left parroting the Fifth Circuit's dangerous holding, insisting qualified immunity shields officials who squeeze time-honored exercises of First Amendment rights into a "duly enacted" criminal statute no court invalidated. App.11a, 22a–25a; Resp'ts BIO.2; Texas BIO.16–17. That reasoning defies Section 1983's plain text—something neither Texas nor Respondents seriously address—which covers constitutional violations "under color of any statute…of any State." 42 U.S.C. § 1983. It also flouts the historical rule that officials must "examine what is 'unreasonable' in the light of the values of freedom of expression." *Roaden v. Kentuck*y, 413 U.S. 496, 504 (1973); Pet.18–21.

In short, the Fifth Circuit's holding is backwards. "[T]he overarching inquiry is whether, *in spite of the existence of the statute*, a reasonable officer should have known that his conduct" violated the Constitution. *Lawrence v. Reed*, 406 F.3d 1224, 1232 (10th Cir. 2005) (emphasis added); *see also* App.83a (Ho, J., dissenting) ("A mountain of Supreme Court and circuit precedent reinforces this principle.").

The same principle extends to arrest warrants, as this Court made clear in *Malley v. Briggs*, 475 U.S. 335, 345 (1986). The issue is not, as Texas maintains, whether Respondents could rely on arrest warrants from a neutral magistrate. Texas BIO.I, 29. Rather, Respondents never should have sought the warrants, because any "reasonably well-trained officer in [Respondents'] position would have known that his affidavit failed to establish probable cause." *Malley*, 475 U.S. at 345; *see also id.* at 346 n.9 ("[The magistrate's] action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate."); *Gonzalez v. Trevino*, 144 S. Ct. 1663, 1666, 1667–68 (2024) (per curiam) (vacating dismissal of retaliatory arrest claim, despite neutral magistrate issuing an arrest warrant).

II. The Fifth Circuit's Decision Conflicts With Decisions From Other Circuits.

The Fifth Circuit accepted that decisions from other circuits have "denied qualified immunity where the courts held the underlying statutes or ordinances were 'obviously unconstitutional,'" including for First Amendment claims.

App.26a–27a n.20. Still, it split from those decisions, making officials "categorically immune from § 1983 liability, no matter how obvious the depredation, so long as they can recite some statute to justify it." App.72a (Ho, J., dissenting). The Court should grant certiorari to resolve this conflict.

Respondents and Texas miss the point in trying to distinguish the conflicting decisions. Both argue the constitutional rights in those cases, like criticizing police and using mild profanity at a public meeting, differ from the rights to ask officials questions and publish what they volunteer. Texas BIO.27–28 (discussing *Jordan v. Jenkins*, 73 F.4th 1162 (10th Cir. 2023), *cert denied*. 144 S. Ct. 1343 (2024) (mem.)); Resp'ts BIO.20 (discussing *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007)). Those are not relevant distinctions. What matters are two things. First, in those decisions and here, officials enforced state statutes against exercises of undoubted First Amendment rights. Pet.28–31. Second, the decisions outside the Fifth Circuit rightly denied qualified immunity despite the state statute, while the Fifth Circuit did not. *Id*.

Like the Fifth Circuit, Texas and Respondents lean on *Michigan v. DeFillippo*, 443 U.S. 31 (1979), arguing it insulates officials from liability for obvious First Amendment violations if they can simply point to an authorizing state statute. App.28a; Texas BIO.16–17; Resp'ts BIO.10–11. But *DeFillippo*, an exclusionary rule decision, does not go so far. In fact, the Sixth Circuit had little trouble reconciling *DeFillippo* when denying qualified immunity to officials who enforced state statutes against undoubted First Amendment rights. *Leonard*, 477 F.3d at 359. This conflict over *DeFillippo*'s fit with

qualified immunity underscores the broader conflict warranting this Court's review.

Respondents and Texas miss the point again with the Eighth Circuit's decision in *Snider v. City of Cape Girardeau*, which denied immunity to an officer who obtained an arrest warrant for flag desecration. 752 F.3d 1149, 1154 (8th Cir. 2014). Both fixate on *Snider* involving a different First Amendment right. Texas BIO.27; Resp'ts BIO.21. But just as this Court's precedent confirms political flag burning is no basis for an arrest warrant, so too for Villarreal's routine journalism. And while Texas insists the Fifth Circuit's "independent-intermediary doctrine" controls, it only magnifies the conflict. Texas BIO.29. The Fifth Circuit's decision suggests near-blanket immunity for officials who engineer an arrest warrant just because "a neutral magistrate issued the warrants." App.29a. Not only does that conflict with *Snider*, but it also conflicts with this Court's decision in *Malley*.

III. This Case Is An Excellent Vehicle To Resolve Especially Important Questions.

The questions presented are vitally important, as the seven dissenting judges and 41 *amici* recognize. Recent examples abound of officials targeting journalists who report on police and citizens who seek public records. *E.g.*, Indep. Journalists Amicus Br. 1 & n.2; Muckrock Found. Amicus Br. 21. Ever-expanding penal codes provide a cornucopia of laws to deploy against protected speech. Pet.32–35. And lower courts struggle to reconcile core First Amendment freedoms of speech and of the press with qualified immunity doctrine. Reporters Comm. Amicus Br. 12–16. Thus, the questions presented stand

not on a "doomsday scenario predicted by the dissents and adopted by Villarreal." Texas BIO.32. Rather, they stand on real-world experiences, bedrock First Amendment freedoms, and the grave threat the Fifth Circuit's decision poses to those freedoms and Section 1983's power to check government abuse.

Each of Texas's additional grounds for denying certiorari fall flat. Texas BIO.29. Texas claims Section 39.06(c)'s prohibition on receipt does not impact Villarreal's First Amendment rights. *Id*. But *Florida Star* proves Texas wrong, affirming Respondents could not punish Villarreal for receiving what Officer Goodman volunteered. *Fla. Star*, 491 U.S. at 534.

Texas also claims Villarreal "fails to rebut the Fifth Circuit's reason for rejecting" her retaliation claim. Texas BIO.30. That's wrong threefold. Above all, Texas overlooks Villarreal's *direct* First Amendment claim, which stands independent of retaliatory motive. App.230a–232a. Texas also misreads the Court's recent holding in *Gonzalez*. Villarreal alleges Laredo officials never enforced Section 39.06(c) against others who ask police for information, meeting *Gonzalez*'s "objective evidence" standard. 144 S. Ct. at 1667; App.223a, 233a, 241a–242a. And while the Fifth Circuit concluded Villareal did not allege Respondents "curtailed her exercise of free speech," that is no vehicle issue. *See* Texas BIO.31; App.39a. Getting thrown in jail for basic journalism is speech-chilling by any measure, as Villarreal alleged. App.235a

Respondents' vehicle arguments also lack substance. Despite their hand-wringing, granting certiorari will not affect the government's authority to discipline its

employees who mishandle sensitive information. *See* Resp'ts BIO.23. Disciplining the employee, not the inquiring citizen, is the state's only constitutionally permissible path. Finally, the Court should decline Respondents' plea to "be particularly hesitant to decide the First Amendment issue here." *Id*. The decisive First Amendment issue here is how starkly the Fifth Circuit departed from this Court's enduring First Amendment decisions and split with its sister circuits.

CONCLUSION

The Court should grant the petition for certiorari.

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