No. 23-

In the
Supreme Court of the United States

PRISCILLA VILLARREAL,

Petitioner,

v.

ISIDRO R. ALANIZ, SUED IN HIS INDIVIDUAL CAPACITY, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents are police officers and prosecutors who sent Petitioner Priscilla Villarreal to jail for asking a police officer for facts and then reporting what the officer volunteered. Those officials plotted the local journalist's arrest not for any legitimate purpose, but to silence a vocal critic.

In a nine-to-seven en banc decision with four dissenting opinions, the Fifth Circuit held the officials have qualified immunity. The Fifth Circuit concluded it was reasonable to arrest Villarreal for routine news reporting under a Texas felony statute no local official had enforced in its 23-year history. In dissent, Judge Ho explained that the majority "treat[s] the First Amendment as a second-class right" and "contradicts" this Court's holdings that "subject arrests to First Amendment scrutiny." App. 77a, 80a. The Fifth Circuit's decision also conflicts with multiple circuits that have held officials are not entitled to qualified immunity when they use state statutes in ways that criminalize undoubted First Amendment rights.

The questions presented are:

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

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

PARTIES TO THE PROCEEEDING

Petitioner Priscilla Villarreal was the plaintiff in the district court and the appellant in the Fifth Circuit.

Respondents Isidro R. Alaniz, Marisela Jacaman, Claudio Treviño Jr., Juan L. Ruiz, Deyanira Villarreal, and Does 1–2 were individual defendants in the district court and appellees in the Fifth Circuit.

Defendant City of Laredo was a municipal entity defendant in the district court and appellee in the Fifth Circuit at the panel stage. Villarreal's dismissed claim against the City was not part of the rehearing en banc.

Defendants Enedina Martinez, Alfredo Guerrero, Laura Montemayor, and Webb County, Texas were defendants in the district court. Villarreal did not appeal the district court's dismissal of her claims against those Defendants.

The State of Texas was an intervening party in the Fifth Circuit.

RELATED PROCEEDINGS

This case arises from these proceedings:

- *Villarreal v. City of Laredo et al.*, No. 20-40359, 5th. Cir. (Jan. 23, 2024) (en banc) (affirming dismissal);
- *Villarreal v. City of Laredo et al.*, No. 20-40359, 5th Cir. (Oct. 28, 2022) (ordering rehearing en banc and vacating the August 12, 2022 panel decision);
- *Villarreal v. City of Laredo et al.*, No. 20-40359, 5th Cir. (Aug. 12, 2022) (withdrawing the November 1, 2021 panel decision, still reversing dismissal in part);
- *Villarreal v. City of Laredo et al.*, No. 20-40359, 5th Cir. (Nov. 1, 2021) (reversing dismissal in part); and
- *Villarreal v. City of Laredo et al.*, Civil Action No. 5:19-CV-48, S.D. Tex (May 8, 2020) (granting motion to dismiss).

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PETITION FOR WRIT OF CERTIORARI

For months, the police chief, district attorney, and other officials of Laredo, Texas looked for any excuse to arrest Petitioner Priscilla Villarreal, a local journalist who often shines a light on government affairs. They settled on arresting Villarreal because she asked a police officer for facts while reporting on two news stories—facts the officer freely shared. In short, Villarreal went to jail for basic journalism.

When Villarreal sued the Laredo officials under Section 1983, it "should've been an easy case for denying qualified immunity." App. 75a (Ho, J., dissenting). But not according to the Fifth Circuit. The decision below goes far beyond granting the Laredo officials qualified immunity: It "opens by claiming that Defendants don't have to comply with the First Amendment *at all*." *Id.* at 79a. Little could clash more with founding principles and this Court's precedent.

Rather than affirm that arresting someone for peaceably asking the government a question obviously violates the First Amendment, the Fifth Circuit majority erases the line "distinguish[ing] a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 463 (1987). It imperils journalists who routinely request nonpublic information from public officials as part of "a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). And it ignores this Court's warnings that when a search or seizure decision involves a person's speech, police, prosecutors, and judges must take strict

care not to trample First Amendment rights—a founding principle born "against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus v. Search Warrants of Prop.*, 367 U.S. 717, 729 (1961). The Fifth Circuit's decision excuses officials from having to consider whether probable cause rests on protected expression, converting the Fourth Amendment from a fundamental check on government power into a license to violate the First Amendment. This stark departure from basic constitutional guarantees merits the Court's review.

So too does the Fifth Circuit's conclusion that Laredo officials acted reasonably when arresting Villarreal for routine journalism under a 23-year-old Texas statute local officials had never enforced. App. 12a–28a. That approach, dissenting Judge Ho warned, "spells the end of the First Amendment," creating a free pass for any official who unearths an obscure statute to make protected expression a crime. App. 80a. It also conflicts with Section 1983's text, which provides a remedy for constitutional violations "under color of any statute . . . of any State." 42 U.S.C. § 1983.

Unlike the Fifth Circuit, several circuits have held qualified immunity does not shield officials who enforce state statutes in ways that unmistakably violate the First Amendment. *E.g.*, *Leonard v. Robinson*, 477 F.3d 347, 361 (6th Cir. 2007); *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1156–57 (8th Cir. 2014); *Jordan v. Jenkins*, 73 F.4th 1162, 1171 (10th Cir. 2023), *cert. denied*, No. 23-541, 2024 WL 1607750 (Apr. 15, 2024). Those cases illustrate how "the 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). While law enforcement officials are not expected to be legal scholars, the Constitution demands more than blindly enforcing state laws against expression the First Amendment no doubt protects. So does this Court's qualified immunity framework.

In dissent, Judge Willett warned that extending qualified immunity to officials who "enforc[e] a statute in an obviously unconstitutional way" ignores "the possibility—indeed, the real-world certainty—that government officials can wield facially constitutional statutes as blunt cudgels to silence speech (and to punish speakers) they dislike." App. 64a. The Court should grant review to ensure that the First Amendment and Section 1983 remain unshakable against government officials wielding those "blunt cudgels."

OPINIONS BELOW

The Fifth Circuit en banc opinion and dissenting opinions are reported at 94 F.4th 374. App. 1a–100a. The Fifth Circuit order for en banc rehearing and vacating the panel decision is reported at 52 F.4th 265. App. 189a–190a. The Fifth Circuit substituted panel decision is reported at 44 F.4th 363, and the withdrawn panel decision is reported at 17 F.4th 532. The district court's memorandum and order on dismissal is unreported but available at 2020 WL 13517246. App. 101a–188a.

JURISDICTION

The Fifth Circuit issued its en banc opinion on January 23, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

In the withdrawn panel opinion, the Fifth Circuit ordered the clerk to certify to the Texas Attorney General that the constitutionality of Texas Penal Code § 39.06(c) was drawn into question. *Villarreal v. City of Laredo*, 17 F.4th 532, 546–47 (5th Cir. 2021), *withdrawn and superseded*, 44 F.4th 363 (5th Cir. 2022). Before the Fifth Circuit ordered rehearing en banc, Texas acknowledged that the superseding panel opinion "no longer calls into question the facial constitutionality of section 39.06(c)." *Villarreal v. City of Laredo*, No. 20-40359, ECF 117 (5th Cir. Aug. 15, 2022). Texas still intervened during rehearing en banc. Thus, Villarreal states under Rule 29.4(c), out of an abundance of caution, that 28 U.S.C. § 2403(b) may apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. § 1983 provides, as relevant here:

"Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."

Texas Penal Code § 39.06(c) and § 1.04(7) are reproduced at App. 191a–192a.

STATEMENT OF THE CASE

Villarreal's influential journalism draws the ire of Laredo officials.

Priscilla Villarreal is "arguably the most influential journalist in Laredo, Texas."[1] Known to her readers as "Lagordiloca," she publishes a wealth of information, livestreams, and commentary about local crime, traffic, and other news. Her candid news reporting has earned Villarreal more than 200,000 followers on her Facebook page, "Lagordiloca News."

1. Simon Romero, *La Gordiloca: The Swearing Muckraker Upending Border Journalism*, N.Y. Times (Mar. 10, 2019), https://www.nytimes.com/2019/03/10/us/gordiloca-laredo-priscilla-villarreal.html.

Villarreal's unfiltered style is not popular with everyone—including the Laredo government. Villarreal sometimes praises the Laredo Police Department, but she does not shy away from criticizing it. App. 206a. And she shines light on other officials, too, like respondents. For example, Villarreal reported about animal abuse at a local property, soon learning the land belonged to a close relative of Marisela Jacaman, the local chief assistant district attorney. *Id.* After District Attorney Isidro Alaniz's office withdrew an arrest warrant for the abuse, Villarreal reported on and sharply criticized the decision. *Id.*

Alaniz did not respond lightly. Instead, he took Villarreal behind closed doors with other local officials and chastised her for publicly criticizing his office. App. 209a. Villarreal also faced regular harassment from the Laredo police at the encouragement of Laredo's police chief, Claudio Treviño. App. 207a–211a, 223a–224a. But Villarreal persisted with her reporting.

Laredo police and prosecutors contrive Villarreal's arrest.

In late 2017, Treviño, Alaniz, and Jacaman set out to arrest Villarreal and bully her into silence. App. 212a–214a, 222a. Laredo police officers Juan Ruiz and Deyanira Villarreal (no relation to petitioner) joined in. *Id.* These prosecutors and police officers focused on two news reports Villarreal published months earlier, in spring of 2017. App. 212a–213a. One report named a border agent who had committed suicide by jumping off a Laredo overpass. *Id.* The second report relayed information about a fatal traffic accident and a Houston family harmed in

the crash. App. 213a. For both reports, private citizens provided Villarreal with leads. App. 212a–213a.

Any good journalist verifies facts before publishing. And like other local reporters, Villarreal routinely asks Laredo police questions while reporting the news. App. 213a, 223a, 241a–242a. So she contacted Laredo police officer Barbara Goodman, who confirmed the information for Villarreal's stories about the suicide and car accident. App. 212a–213a, 218a–219a. With the facts Officer Goodman verified, Villarreal published her stories to "Lagordiloca News."

To further their plan to rein in Villarreal, District Attorney Alaniz, Assistant District Attorney Jacaman, and the Laredo police officers searched for a criminal statute to ensnare Villarreal's routine newsgathering and reporting. App. 214a, 223–225a. And they found one—Texas Penal Code § 39.06(c), which makes it a felony if, "with intent to obtain a benefit," a person "solicits or receives from a public servant information that . . . has not been made public." App. 191a. The law defines "information that has not been made public" as "information to which the public does not generally have access, and that is prohibited from disclosure" under the Texas Public Information Act. *Id.* The Texas Penal Code defines "benefit" as "anything reasonably regarded as economic gain or advantage." *Id.*

Relying on Section 39.06(c) was unprecedented. No local official had enforced the statute in its 23 years of existence, let alone against local journalists who routinely asked for and received information from Laredo police officers. App. 223a, 233a, 241a–242a.

But months after Villarreal published her news reports about the public suicide and the car accident, the Laredo prosecutors and police officers engineered Villarreal's arrest under Section 39.06(c). App. 216a–220a, 223a–226a. Each played a part. Assistant District Attorney Jacaman approved investigatory subpoenas targeting Villarreal's reporting, with District Attorney Alaniz's endorsement. App. 225a–226a. And Officer Ruiz assembled two arrest warrant affidavits with direction and approval from Chief Treviño, Alaniz, and Jacaman, each of whom wanted to silence Villarreal's candid reporting about their performance. App. 218a, 222a, 226a.

In the arrest warrant affidavits, Officer Ruiz claimed an unnamed source told Officer Deyanira Villarreal that Officer Goodman was communicating with Priscilla Villarreal. App. 218a. Ruiz asserted that Villarreal asked for or received information from Goodman about the public suicide and fatal car accident which "had not been made public." App. 218a–219a. He did not specify any "economic" "benefit" Villarreal intended to obtain from asking for or receiving the information except to assert Villarreal's release of the information before other news outlets "gained her popularity in Facebook." App. 219a–220a.

After Assistant District Attorney Jacaman approved Officer Ruiz's affidavits (with District Attorney Alaniz's encouragement), a local magistrate issued two arrest warrants against Villarreal. App. 220a, 225a–226a. When Villarreal turned herself in, Laredo police officers took cell phone pictures of the reporter in handcuffs while mocking and laughing at her. App. 221a.

After posting bond, Villarreal filed for a writ of habeas corpus, arguing Section 39.06(c) was facially invalid. App. 229a. A Webb County district court judge made a bench ruling granting the writ, finding the statute unconstitutionally vague. App. 230a.

Villarreal sues, and a Fifth Circuit panel vindicates her constitutional rights.

In 2019, Villarreal sued the police and prosecutors responsible for her arrest under 42 U.S.C. § 1983 for violating her First, Fourth, and Fourteenth Amendment rights. Those officials moved for dismissal, asserting qualified immunity. App. 101a–102a. Alaniz and Jacaman also asserted absolute prosecutorial immunity, which the district court denied. App. 118a. But the court granted the motions to dismiss based on qualified immunity. App. 102a, 128a, 137a, 145a.

On appeal to the Fifth Circuit, a panel majority reversed the dismissal of Villarreal's First, Fourth, and Fourteenth Amendment claims and her civil conspiracy claim against respondents. *Villarreal v. City of Laredo*, 17 F.4th 532 (5th Cir. 2021). Ten months later, the panel majority issued a substitute opinion resulting in the same reversal. *Villarreal v. City of Laredo*, 44 F.4th 363 (5th Cir.), *reh'g en banc granted and opinion vacated*, 52 F.4th 265 (5th Cir. 2022). Denying qualified immunity, the panel majority explained the heart of the case:

> 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.
>
> If that is not an obvious violation of the Constitution, it's hard to imagine what would be.

Id. at 367. The panel majority also held the magistrate-issued arrest warrants did not bar Villarreal's wrongful arrest claim because police cannot base probable cause on protected speech. *Id.* at 375. Chief Judge Richman dissented from the reversal, agreeing with the district court "that the defendants were entitled to qualified immunity." *Id.* at 382–93.

A nine-to-seven Fifth Circuit holds the Laredo officials have qualified immunity for arresting Villarreal.

The Fifth Circuit vacated the panel opinion and ordered rehearing en banc. App. 190a. In late January 2024, the en banc Fifth Circuit voted nine-to-seven to affirm dismissal, holding the Laredo prosecutors and police have qualified immunity for orchestrating Villarreal's arrest. App. 3a. The en banc majority concluded those officials reasonably believed Villarreal violated Section 39.06(c) because (1) Villarreal asked an "unofficial" government source for information rather than wait for "an official LPD report" and (2) she obtained "benefits" for "her first-to-report reputation," like advertising revenue "for promoting a local business" and occasional "free meals from appreciative readers." App. 17a–21a (cleaned up).

The majority rejected the panel's conclusion that Villarreal's arrest obviously violated the First Amendment.

Instead, it held qualified immunity shields the Laredo officials because (1) "no final decision of a state court had held [Section 39.06(c)] unconstitutional at the time of the arrest," (2) the "Supreme Court and lower courts have not relevantly defined the contours of an 'obviously unconstitutional' statute," and (3) "a neutral magistrate issued warrants for Villarreal's arrest." App. 22a.

Seven judges dissented across four opinions. Judges Douglas, Elrod, Graves, Higginson, Ho, and Willett joined in all four. App. 42a, 47a, 61a, 67a. Judge Oldham joined Judge Higginson's dissent. App. 47a.

Judge Ho wrote to explain why Villarreal's arrest obviously violated the First Amendment, stressing "[i]f any principle of constitutional law ought to unite all of us as Americans, it's that the government has no business imprisoning citizens for the views they hold or the questions they ask." App. 74a. He also criticized the majority's reliance on Section 39.06(c), observing that "no one has been able to identify a single successful prosecution" under the law, "and certainly never against a citizen for asking a government official for basic information of public interest so that she can accurately report to her fellow citizens." App. 71a. And Judge Ho called the majority's reasoning "a recipe for public officials to combine forces with state or local legislators to do—whatever they want to do. It's a level of blind deference and trust in government power our Founders would not recognize." App. 72a.

Writing "to emphasize the importance of gathering and reporting news," Judge Graves explained Villarreal's arrest "is also obviously unconstitutional in light of the related and equally well-established right of journalists

to engage in routine newsgathering." App. 44a. And he criticized the majority for "conflat[ing]" the government's "power to protect certain information" with "a person's right to ask for it." *Id.*

Judge Higginson wrote to highlight how "the district court failed to address, much less credit," Villarreal's "detailed" allegations, including her allegations that "Defendants misled the magistrate" to secure Villarreal's arrest warrants. App. 51a. Judge Higginson also pointed out how the district court ignored Villarreal's allegations about Laredo officials enforcing Section 39.06(c) against Villarreal "despite knowing that [local authorities] had never arrested, detained, or prosecuted any person before under the statute." App. 57a–58a. In his view, "this conduct falls squarely within the *Nieves* exception. In fact, there could be no better example of a crime never enforced than this one." App. 55a.

Judge Willett underscored that Villarreal's arrest was not a "fast-moving, high-pressure, life-and-death situation." App. 61a. He criticized the majority for ignoring that "just as officers can be liable for enforcing an obviously unconstitutional statute, they can also be liable for enforcing a statute in an obviously unconstitutional way." App. 63a. Finally, he explained how the decision breaks from "the plain text of § 1983," which "declares that government officials 'shall be liable' for violating the Constitution if they were acting 'under color of any state statute.'" App. 64a (quoting 42 U.S.C. § 1983).

REASONS FOR GRANTING THE PETITION

This Court's long-settled precedent leaves no doubt that arresting Villarreal for asking the government for information and publishing the response violated the First Amendment—and every reasonable official would have known that. Time and again, this Court has upheld the right to publish when government officials shared information only for the government to turn around and try to punish those who gathered and published the information. If the First Amendment protects publishing sensitive information reporters "lawfully obtain[]" by asking police, then the First Amendment surely protected Villarreal from arrest for using the same "routine newspaper reporting techniques." *See Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99, 103–04 (1979). Because the Fifth Circuit's decision sharply conflicts with this Court's precedent and enduring First Amendment principles,[2] it warrants the Court's review.

The Fifth Circuit's decision also warrants review because it entitles law enforcement to qualified immunity when they launder obvious First Amendment violations, like the one here, through state statutes. Not only does

2. Those enduring principles stand in stark contrast to recent targeting of reporters in authoritarian nations, like *Wall Street Journal* reporter Evan Gershkovich's ongoing detention in a Russian jail. "But in Vladimir Putin's Russia, the pursuit of independent journalism and the gathering of trustworthy facts—the hallmarks of what we stand for at the [Wall Street] Journal—are considered a crime." Emma Tucker, *Evan Gershkovich | A Letter From the Wall Street Journal's Editor in Chief*, Wall St. J. (Mar. 29, 2024), https://www.wsj.com/world/evan-gershkovich-a-letter-from-the-wall-street-journals-editor-in-chief-b643ae0f.

that decision defy the Constitution and the text of Section 1983, but it also conflicts with rulings in the Sixth, Eighth, and Tenth Circuits. Those circuits framed the question as whether a reasonable official could believe turning plainly protected speech into a crime was constitutional, not whether the official could squeeze the speech into some provision of the penal code. Without reversal, the chill from the decision below will only spread wider, as ever-growing criminal codes provide a grab bag of statutes officials can wield against disfavored speech.

I. The Decision Below Squarely Conflicts with the Court's Precedents and Bedrock Constitutional Guarantees.

A. Laredo officials arrested Villarreal for merely exercising well-understood First Amendment rights.

The Founders knew that "a people who mean to be their own Governours, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822).[3] Thus, they ensured the Constitution protects "the right of citizens to inquire," as "a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). Citizens and public officials alike see that right in action every day, from well-trod podiums at local school board meetings to the White House Press Briefing Room.

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3. https://founders.archives.gov/documents/Madison/04-02-02-0480.

If the First Amendment guarantees the right to "verbally oppose or challenge police action without thereby risking arrest" as "one of the principal characteristics by which we distinguish a free nation from a police state," then it guarantees the right to peaceably ask an officer questions without risking arrest. *Hill*, 482 U.S. at 462–63. Likewise, if the government cannot hold Americans in contempt for "speak[ing] one's mind, although not always with perfect good taste, on all public institutions," it cannot throw them in jail for asking questions of those institutions. *Bridges v. California*, 314 U.S. 252, 270 (1941).

Those principles secure "a vigilant and courageous press" vital to checking government "malfeasance and corruption" and "unfaithful officials." *Near v. Minnesota*, 283 U.S. 697, 719–20 (1931); *see also* App. 44–46a (Graves, J., dissenting). From the pre-founding free press case of John Peter Zenger[4] to the Court refusing a prior restraint on the Pentagon Papers in *New York Times Co. v. United States*, 403 U.S. 713 (1971), our Nation's free speech and free press traditions embrace an informed public and the freedom to criticize officials. After all, "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. That is why the First Amendment protects 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)).

4. *See, e.g., The Tryal of John Peter Zenger* (1738), https://history.nycourts.gov/wp-content/uploads/2018/11/History_Tryal-John-Peter-Zenger.pdf.

Decades ago, the Court confirmed that "undoubted right" protects using "routine newspaper reporting techniques," like asking police officers for information about crimes and publishing what they share, against criminal sanction. *Daily Mail*, 443 U.S. at 99, 103–04 (concluding reporters "lawfully obtained" the name of a juvenile murder suspect "simply by asking various witnesses, the police, and an assistant prosecuting attorney"). That is exactly what Villarreal did here. It makes no constitutional difference if officials lack authorization to volunteer information when responding to those questions. While the government sometimes has an interest in protecting sensitive information, the First Amendment prohibits the government from punishing the press when officials share that information, even inadvertently. *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989); *see also Bartnicki v. Vopper*, 532 U.S. 514, 534–35 (2001) ("[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.").

Laredo officials arrested Villarreal for doing only what the First Amendment plainly guarantees. Villarreal made no threat, offered no bribe, and stole nothing. Rather, the arrest warrant affidavits confirmed that Villarreal asked Officer Goodman for facts, Goodman freely answered, and Villarreal published those facts as a matter of routine. App. 218a–220a. Any reasonable official would have known the First Amendment forbid arresting Villarreal because she "lawfully obtained" those facts. *Daily Mail*, 443 U.S. at 103–04.

But the Fifth Circuit majority "overlook[ed] that protection all too cavalierly." App. 43a (Graves, J.

dissenting). Just as troubling, the decision below suggests that Villarreal deserved no First Amendment protection because she used a "backchannel source." App. 3a, 19a-20a. But it cites no precedent from this Court in support—because none exists.

In every case where a government official or government body made even sensitive information available without coercion or subterfuge, this Court has held the First Amendment protects the recipient and the publisher. *See Daily Mail*, 443 U.S. at 99, 103–04 (name of juvenile murder suspect); *Florida Star*, 491 U.S. at 534 (name of rape victim); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (name of deceased rape victim); *Oklahoma Publ'g Co. v. Dist. Ct.*, 430 U.S. 308, 311 (1977) (name of minor involved in juvenile hearing); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (information about the state's investigation of a judge); *see also New York Times Co.*, 403 U.S. at 714 (rejecting the government's efforts to suppress a classified Vietnam War study's publication after an unauthorized source provided it to newspaper reporters). Villarreal's routine journalism falls well within these precedents. And if Officer Goodman gave out information without the government's blessing, any consequences were hers alone to bear. *Florida Star*, 491 U.S. at 534–35; *see also Bartnicki*, 532 U.S. at 534–35. The government may not have to answer a reporter's questions, but it cannot jail her for asking them.

The majority also suggested Villarreal's reporting lacked First Amendment protection because she "sought to capitalize on others' tragedies to propel her reputation and career." App. 3a. But whatever one may make of Villarreal's journalistic ethics, they are of no constitutional

significance. Public officials have no legitimate business policing newspapers or other speech for "good taste." *Bridges*, 314 U.S. at 270; *see also Cohen v. California*, 403 U.S. 15, 25 (1971). One might have recoiled at *The Florida Star*'s choice to publish a rape victim's name the police made available, but the First Amendment protected it. *Florida Star*, 491 U.S. at 534–35; *see also Hustler Mag. Inc. v. Falwell*, 485 U.S. 46, 48, 55–56 (1988) (First Amendment protected *Hustler Magazine*'s decision to mock a religious leader by painting him as an incestuous drunk). If the First Amendment protected *The Florida Star*'s and *Hustler Magazine*'s speech, it protected Villarreal reporting truthful facts about two public tragedies, even if some find it distasteful.

Not only did the Fifth Circuit "cavalierly" overlook Villarreal's unquestionable First Amendment rights, App. 43a (Graves, J., dissenting), it reasoned Laredo law enforcement *did not need to consider them at all*. That holding alone warrants the Court's review.

B. The Fifth Circuit's majority opinion prioritizes the government's seizure power, clashing with historical First Amendment guarantees.

Instead of first evaluating Villarreal's First Amendment rights against the arrest decision, the Fifth Circuit decided "to evaluate Villarreal's conduct against the standards of Texas law," isolating the probable cause question from the First Amendment one. App. 11a. The majority reasoned that so long as police, prosecutors, and judges can tick off the probable cause box, it is unnecessary to reconcile the "crime" with free speech and press guarantees—even when the police base probable

cause entirely on protected expression. As Judge Ho observed, the majority concluded "that Defendants don't have to comply with the First Amendment *at all*." *Id.* at 79a.

But First and Fourth Amendment concerns are not so distinct. This Court has detailed how "[h]istorically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." *Marcus*, 367 U.S. at 724 (citing Fred. S. Siebert, *Freedom of the Press in England, 1476–1776* (1952); Laurence Hanson, *Government and the Press, 1695–1763* (1936)); *see also Boyd v. United States,* 116 U.S. 616, 625–27 (1886). That struggle resulted in major victories for the press over general warrants targeting government critics, including *Entick v. Carrington*, a case this Court branded "one of the landmarks of English liberty." *Boyd*, 116 U.S. at 625–27 (citing 1765 19 How. St. Tr. 1029).

Thus, the Founders fashioned the First and Fourth Amendments "against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus*, 367 U.S. at 729. This means law enforcement must apply the Fourth Amendment with "scrupulous exactitude" when speech is involved. *Stanford v. Texas*, 379 U.S. 476, 485 (1965). When the First and Fourth Amendments meet, police and courts cannot mechanically squeeze speech into a penal statute. Instead, they must "examine what is 'unreasonable' in the light of the values of freedom of expression." *Roaden v. Kentucky*, 413 U.S. 496, 501, 504 (1973) ("The Fourth Amendment . . . must not be read in a vacuum."). True enough, decisions like *Marcus, Stanford*,

and *Roaden* involve the unconstitutional seizure of papers. But if officials know they must exercise "scrupulous exactitude" when seizing writings, they know they must exercise the same when seizing a *person* based on her expression. *See Stanford*, 379 U.S. at 485.

The Fifth Circuit absolved Laredo officials of that duty, relegating the First Amendment to the background. It did so by misreading this Court's ruling in *Sause v. Bauer*, which reversed a grant of qualified immunity to officers who harassed someone kneeling in prayer. The majority cited *Sause* to propose that courts can resolve First Amendment claims solely through a Fourth Amendment lens because "First and Fourth Amendment issues may be inextricable. " App. 10a (quoting 575 U.S. 957, 959 (2018)). But *Sause* suggests no such thing. Rather, *Sause* reaffirms courts cannot insulate police action from First Amendment scrutiny. *Sause*, 575 U.S. at 959. If police had arrested Mary Anne Sause simply for kneeling in prayer, no Fourth Amendment analysis could purge such an intolerable Free Exercise Clause violation. So too here, with the Laredo officials arresting Villarreal simply for using routine reporting techniques to publish the news.

Arresting someone for exercising a long-settled First Amendment right is "'unreasonable' in the light of the values of freedom of expression." *Roaden*, 413 U.S. at 504. Any other rule would swallow the First Amendment, leaving Americans' expressive freedom at the mercy of overzealous law enforcement officials. That's a dangerous outcome by any measure, and especially so for government critics like Villarreal. Nothing in this Court's precedent supports the Fifth Circuit's contrary view.

"The First Amendment . . . seeks not to ensure lawful authority to arrest but to protect the freedom of speech." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1731 (2019) (Gorusch, J., concurring in part and dissenting in part). The Fifth Circuit spurned that principle, turning probable cause from a check on government power into a weapon to silence speech and the press. That alone makes this Court's review imperative.

C. Arresting Villarreal obviously violated the First Amendment.

The Court has held that when public officials violate the Constitution in obvious ways, they do not get qualified immunity. *Hope v. Pelzer,* 536 U.S. 730, 741 (2002); *Taylor v. Riojas,* 592 U.S. 7, 9 (2020). In these cases, the obvious violation may be "inherent" in the act. *Hope*, 536 U.S. at 745. Or, "a general constitutional rule already identified in the decisional law appl[ies] with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.'" *Id.* at 741 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

Here, a reasonable officer would have known throwing Americans in jail for basic journalism violates the First Amendment. *See* Section I.A, *supra*. Yet Laredo officials plotted Villarreal's arrest despite "obvious clarity" from settled precedent and basic constitutional principles that arresting Villarreal would violate the Constitution. *See Hope*, 536 U.S. at 741 (citation omitted). Attacking a strawman, the Fifth Circuit majority focused on the lack of "a constitutional right of special access to information," App. 35a–36a, a claim Villarreal never made. Rather,

she sued because Laredo officials sent her to jail for asking a police officer questions and sharing facts the officer volunteered—something the First Amendment undeniably protects. *See* Section I.A, *supra*.

A reasonable official would have known he could not base probable cause solely on Villarreal's exercise of First Amendment rights. *See* Section I.B, *supra*; *see also Mink v. Knox,* 613 F.3d 995, 1003–04 (10th Cir. 2010) (affirming an official "may not base her probable cause determination on an 'unjustifiable standard,' such as speech protected by the First Amendment") (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)). Nor would the reasonable official have pursued arrest warrants under affidavits describing routine journalistic acts, because it "created the unnecessary danger of an unlawful arrest." *Malley v. Briggs*, 475 U.S. 335, 345 (1986). To that end, Laredo officials obviously violated the Fourth Amendment's bar against false arrest, too. *Id.* at 340–41, 345–46.

Though the Fifth Circuit fixated on shoehorning Villarreal's protected speech into the elements of Texas Penal Code § 39.06(c), App. 12a–21a, the statute's provisions do not make the arrest any less of a constitutional violation. Reasonable officials know that using routine reporting techniques to deliver the news quickly and accurately is basic journalism the First Amendment protects. *E.g.*, *Daily Mail*, 443 U.S. at 99, 103–04. Thus, no reasonable official would have believed Villarreal using those techniques to reach a growing audience was a criminal "benefit." *See* App. 219a–220a. And anyone watching the stream of commercials during the nightly news understands that "[s]peech likewise is protected even though it is carried in a form that is 'sold' for profit." *See,*

e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

Likewise, reasonable officials know they cannot target reporters and other citizens who ask for "nonpublic" information, even when loose-lipped public officials reveal it. *E.g.*, *Daily Mail*, 443 U.S. at 103–04; *Fla. Star*, 491 U.S. at 534. Otherwise, many White House, State Department, and police press briefings would be an active crime scene. And as Judge Higginson noted in dissent, Villarreal alleged in detail how the Laredo officials offered no facts or circumstances showing why information about two public incidents was "non-public." App. 48a–51a.

The Laredo officials committed obvious constitutional violations. Still, the Fifth Circuit reasoned that fact cannot defeat qualified immunity because decisions like *Hope and Taylor* are "Eighth Amendment cases where the Supreme Court denied qualified immunity for deliberate indifference to unconstitutional prison conditions . . . ." App. 33a. But this Court has never limited obvious violations to Eighth Amendment claims—*Sause* proves that. And just as tying a prisoner to a hitching post in the midday sun is obviously unlawful under the Eighth Amendment, *Hope*, 536 U.S. at 745–46, throwing an American in jail because she asked public officials for facts is obviously unlawful under the First Amendment. Underscoring how isolated the Fifth Circuit is, at least nine circuits have readily denied qualified immunity for obvious First Amendment violations. App. 77a–78a (Ho, J., dissenting) (citing cases).

If the freedoms of speech and of the press are the bulwark of liberty, then Americans must have a remedy

when officials plainly violate the First Amendment. "After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) (Gorsuch, J., for the majority). Villarreal's arrest fits that bill.

This Court has corrected the Fifth Circuit more than once for granting qualified immunity to officials who obviously violated the Constitution. *Hope*, 536 U.S. at 741; *Taylor*, 592 U.S. at 9. It should do so again here.

II. In Holding Laredo Officials Could Invoke a State Statute to Excuse an Obvious First Amendment Violation, the Decision Below Conflicts with the Constitution, Section 1983's Text, and a Consensus of Circuits.

No state statute trumps the Constitution, as every reasonable official knows. U.S. Const. art. VI, cl. 2. Thus, public officials are "liable for enforcing a [state] statute in an obviously unconstitutional way." App. 63a (Willett, J., dissenting). So when officials arrest someone for exercising an undoubted First Amendment right, they "shall be liable," no matter the state statute they use to justify the arrest. 42 U.S.C. § 1983.

But in the Fifth Circuit, public officials who base arrests on clearly protected speech are "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). That impossible

qualified immunity standard puts the Fifth Circuit on the wrong side of the Constitution, Section 1983's text, and its sister circuits. This Court should intervene to reject the Fifth Circuit's untethered standard.

A. The Fifth Circuit now shields officials from liability for even the most clear-cut First Amendment violations, so long as a state statute authorizes it.

The Fifth Circuit imposes two new barriers for Section 1983 plaintiffs suing officials who turn exercises of First Amendment rights into a crime. First, plaintiffs must show a Fourth Amendment violation to sue an officer for the First Amendment violation. App. 10a. Judge Ho explained the rule "spells the end of the First Amendment," because "[a]ll the government would have to do is to enact some state statute or local ordinance forbidding some disfavored viewpoint—and then wait for a citizen to engage in that protected-yet-prohibited speech." *Id.* at 80a. Judge Ho's warning echoes the Founders' concerns over officials abusing the seizure power to silence free expression. *See* Section I.B, *supra*.

The second barrier the Fifth Circuit has erected to First Amendment arrest claims is just as troubling. Its decision absolves officials who arrest a person based on their protected speech if "no final decision of a state court had held the [arresting statute] unconstitutional." App. 22a. In effect, then, First Amendment plaintiffs in the Fifth Circuit must now win a pre-enforcement challenge to a penal law (and self-censor until victory), or risk losing their ability to sue after an official arrests them for their speech under that law. In fact, that is what the Fifth

Circuit suggested Villarreal should have done (App. 3a), instead of count on well-settled First Amendment rights to protect her. No American should face such an unjust standard.

B. The decision below ignores both the Constitution and Section 1983's text.

Public officials cannot use a state statute to turn exercises of familiar First Amendment rights into probable cause. Under the Supremacy Clause, federal constitutional rights trump state statutes. U.S. Const. art. VI, cl. 2. Reasonable officials understand the Supremacy Clause's basic rule. *See, e.g.*, *id.*; *Poindexter v. Greenhow*, 114 U.S. 270, 292 (1885). But by concluding that "officers are almost always entitled to qualified immunity when enforcing even an unconstitutional law, so long as they have probable cause," the decision below clashes with the Constitution. App. 25a.

It also clashes with the text of Section 1983, which enables Americans to sue for constitutional violations made "under color of any statute . . . of any State." "Under color of any statute" plainly covers constitutional violations that result from an authorizing state statute. *See, e.g.*, *Myers v. Anderson*, 238 U.S. 368, 377–78 (1915). And of course, Section 1983's text provides no safe harbor for officials who violate the Constitution under *cover* of a state statute. In holding otherwise, the Fifth Circuit ignored the plain text of Section 1983, getting a crucial remedy for constitutional violations backwards.

The point is not that police and other public officials must be constitutional scholars to avoid liability. *Cf.*

Michigan v. DeFillippo, 443 U.S. 31, 38 (1979). Rather, when officials enforce statutes in obviously unconstitutional ways, qualified immunity is no shield. This principle tracks the historical availability of damages when officials wielded state statutes against clear constitutional rights. *E.g.*, *Myers*, 238 U.S. at 377–78; *Nixon v. Herndon*, 273 U.S. 536, 540–41 (1927) (reversing dismissal of damages claim based on state officials relying on an authorizing Texas statute to deny voting rights, "because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth [Amendment].").

It also tracks the Court's qualified immunity precedent. Imagine if the prison guards in *Hope* invoked a state statute permitting "appropriate restraint measures" for unruly prisoners. The outcome should be the same: Handcuffing someone to a hitching post in the midday sun undeniably violates the Eighth Amendment, authorizing statute or not. Or suppose the officers in *Sause* employed a statute authorizing police to impede "offensive, intimidating, or belligerent conduct" during an investigation. Mary Anne Sause's undoubted right to pray should still have prevailed. The same holds for obvious Free Speech and Press Clause violations, like throwing Villarreal in jail for asking the police questions, no matter what Section 39.06(c) provided.

The Fifth Circuit sidestepped that principle, instead claiming the Court's decisions in *DeFillippo* and *Heien v. North Carolina* entitle officials to "qualified immunity when enforcing *even an unconstitutional law*, so long as they have probable cause." App. 25a (citing *DeFillippo*, 443 U.S. at 38; *Heien v. North Carolina*, 574 U.S. 54, 64 (2014)) (emphasis added). But neither *DeFillippo* nor

Heien address First Amendment rights or qualified immunity, let alone the obvious unconstitutionality of a months-long operation to jail a local reporter for asking police questions. If "[t]he Fourth Amendment tolerates only *reasonable* mistakes," *Heien*, 574 U.S. at 66, then it does not tolerate arrests where the sole basis for probable cause is the exercise of a familiar First Amendment right. The Fifth Circuit's contrary standard upends the constitutional duty of officials to "examine what is 'unreasonable' in the light of the values of freedom of expression." *Roaden*, 413 U.S. at 504.

More broadly, *DeFillippo* confirms that state statutes do not give law enforcement free rein to violate clearly established constitutional rights. By contrast, it explains officials cannot rely on a "law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." 443 U.S. at 38. *DeFillippo* aligns with the guiding principle here: When reasonable officials would know that enforcing a criminal law would violate the Constitution, they uphold their oath and don't enforce it. Thus, *DeFillippo* does not support the Fifth Circuit's impossible standard, especially because law enforcement officials know they must make arrest decisions with "scrupulous exactitude" when targeting expression. *Stanford*, 379 U.S. 485.

C. The Fifth Circuit stands alone from its sister circuits in allowing officials to shroud obvious First Amendment violations in state statutes.

The Fifth Circuit stood by its near-impossible qualified immunity standard despite acknowledging its sister circuits have "denied qualified immunity where the courts

held the underlying statutes or ordinances were 'obviously unconstitutional,'" including in the First Amendment context. App. 26a–27a. It distinguished those cases based on immaterial factual differences, but overlooked how "the 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*, 406 F.3d at 1232. Indeed, "a mountain of Supreme Court and circuit precedent reinforces this principle." App. 83a (Ho, J., dissenting) (citing cases). And in the First Amendment context, several circuits have denied qualified immunity to officials who enforced statutes in ways that unmistakably violated the First Amendment.

For example, the Sixth Circuit denied qualified immunity to a police officer who invoked three Michigan statutes to justify arresting a man for saying "God damn" at a township board meeting. *Leonard v. Robinson*, 477 F.3d 347, 351 (6th Cir. 2007). The Sixth Circuit acknowledged that no court had commented "clearly and directly upon the constitutionality of" the three statutes at issue, but held *DeFillippo*'s standard for "flagrantly unconstitutional" laws applied to all three because they are "radically limited by the First Amendment." *Id.* at 359, 360. Unlike the Fifth Circuit here, the Sixth Circuit did not focus on if a reasonable official could have believed the speech—"mild profanity while peacefully advocating a political position"—met the elements of Michigan's bygone blasphemy and swearing laws. *See id.* at 361. Instead, it considered whether a reasonable official could believe the speech "could constitute a criminal act" given "First Amendment jurisprudence that is decades old" and "the prominent position that free political speech has in our jurisprudence and in our society." *Id.* at 359–61.

Just last year, the Tenth Circuit denied qualified immunity to police officers who arrested a police critic under a state obstruction of justice statute. *Jordan*, 73 F.4th at 1171. Looking to *Houston v. Hill*, the court concluded "no reasonable officer could have believed they had arguable probable cause for arrest" because the First Amendment protects the freedom to disagree with the police. *Id.* In another decision from the Tenth Circuit, the court denied qualified immunity to officials who invoked a criminal libel statute to arrest a student blogger for what every reasonable officer would know is protected satire. *Mink*, 613 F.3d at 1009–10. At the decision's core was a longstanding First Amendment principle: An official "may not base her probable cause determination on an 'unjustifiable standard,' such as speech protected by the First Amendment." *Id.* at 1003–04 (citing *Wayte*, 470 U.S. at 608). Justice Gorsuch, then sitting on the Tenth Circuit, wrote separately to stress that because "the First Amendment precludes defamation actions aimed at parody," probable cause was lacking. *Id.* at 1012 (Gorsuch, J., concurring).

While the plaintiffs in *Jordan* and *Mink* rested on Fourth Amendment claims, that makes no meaningful difference. *See Roaden*, 413 U.S. at 501–04 (explaining that where free expression is involved, "[t]he Fourth Amendment . . . must not be read in a vacuum."). The Tenth Circuit denied qualified immunity in both decisions because officials based a search or seizure under a state statute on the exercise of a long-settled First Amendment right.

The Eighth Circuit explained why not even an arrest warrant can shield an official who enforces state statutes

to criminalize undoubted First Amendment rights. *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014). In *Snider*, the Eighth Circuit denied qualified immunity to an officer who arrested a citizen for trying to burn the American flag and shredding it with a knife because "he hated the United States." *Id.* at 1154. The officer, like the Laredo officials, invoked an authorizing statute (one "prohibiting flag desecration") and convinced a neutral magistrate to issue an arrest warrant. *Id.* Applying this Court's decision in *Malley v. Briggs*, the Eighth Circuit explained, "[a] reasonably competent officer in [the officer's] position would have concluded no arrest warrant should issue for the expressive conduct . . . Although it is unfortunate and fairly inexplicable that the error was not corrected by the county prosecutor or the magistrate judge, no warrant should have been sought in the first place." *Id.* at 1157.

Not only does *Snider* harmonize with its sister circuits' decisions in *Leonard, Jordan*, and *Mink*, but it also shows how the Fifth Circuit's rule granting near-total immunity if officers obtain an arrest warrant squarely conflicts with this Court's decision in *Malley. Malley* explained that if "a reasonably well-trained officer in [Defendants'] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant . . . the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest." 475 U.S. at 345. That "unnecessary danger" is especially high when an officer applies for a warrant based on the exercise of clearly established First Amendment rights, no matter the authorizing statute under which he feigns probable cause. Villarreal's allegations highlight that

danger even more. *See* App. 51a (Higginson, J., dissenting) (explaining how the Fifth Circuit majority overlooked Villarreal's allegations about the Laredo officials' deficient and misleading arrest warrant affidavits).

Had the reasoning of the Sixth, Eighth, and Tenth Circuits applied here, the Laredo officials would not be entitled to qualified immunity and Villarreal's suit would have gone forward to discovery. That reasoning makes perfect sense through the lens of *Hope* and its "fair warning" standard. 536 U.S. at 740 (explaining the "fair warning" qualified immunity standard). If an official enforces a criminal law against the exercise of a First Amendment right of which a reasonable official would have "fair warning," qualified immunity is no shield to liability.

The Constitution limits the reach of state statues—not, as the Fifth Circuit held, the other way around. This Court should grant certiorari and confirm that public officials are not entitled to qualified immunity when they employ state statutes to violate the First Amendment in obvious ways.

III. This Case Presents Exceptionally Important and Recurring Issues, and Is an Ideal Vehicle to Resolve Them.

This case centers on the exceptionally important and recurring issues of officials criminalizing undoubted First Amendment rights and the power of Americans to remedy those obvious constitutional violations. Just a few years ago, Justice Gorsuch warned, "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can

be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties . . . ." *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part and dissenting in part). This case puts a face on that danger to the First Amendment. So do other recent First Amendment abuses:

- In Kansas, after a local newspaper began investigating misconduct by the incoming police chief, the chief instigated a raid on the newspaper's office. The pretense for the raid echoed the faux excuse for Villarreal's arrest: Law enforcement said that a reporter who accessed public records on a public website violated Kansas's identity theft law.[5]

- An Iowa man attended a city council meeting where he peacefully criticized his mayor and police department. The government responded by arresting the man and charging him for disrupting a lawful assembly.[6]

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5. Rachel Mipro, *Marion Police Chief Resigns after Footage Shows Him Rifling Through Records about Himself*, Kansas Reflector (Oct. 3, 2023), https://kansasreflector.com/2023/10/03/marion-police-chief-resigns-after-body-cam-footage-shows-him-rifling-through-records-about-himself.

6. Clark Kauffman, *City Sued for Arresting Man Who Criticized Newton Mayor and Police*, Iowa Capital Dispatch (Oct. 12, 2023), https://iowacapitaldispatch.com/2023/10/12/city-sued-for-arresting-man-who-criticized-newton-mayor-and-police.

- In Pennsylvania, police arrested and charged a man with disorderly conduct for peacefully quoting Bible verses on a public sidewalk across from a Pride Month event at city hall. The arresting officer claimed the man was making "derogatory comments to people at the event."[7]

All of this comes at a time where, as the Wall Street Journal front page put it, "Authoritarians Threaten Journalists Around the Globe."[8] Our nation's free press traditions and the First Amendment separate us from the world's autocratic regimes.

But if the Fifth Circuit's decision remains standing, it offers would-be-authoritarians "a roadmap for destroying the First Amendment." App. 80a (Ho, J., dissenting). The decision subjects the First Amendment to the least-explored crevices of state penal codes. And those crevices run deep, as the derelict Texas statute here shows. So too does Michigan's criminal code, which prohibits "swear[ing] by the name of God, Jesus Christ, or the Holy Ghost" (Mich. Comp. Laws § 750.103) and "advocat[ing]" the concept of polygamy (*id.* § 750.441). And in Massachusetts,

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7. Michelle Lynch, *Police Department Suffering Fallout from Arrest of Preacher at Pride Event*, Reading Eagle (June 13, 2023), https://www.readingeagle.com/2023/06/13/reading-police-department-suffering-fallout-from-arrest-of-preacher-at-pride-event.

8. Matthew Dalton and Jack Gillum, *Authoritarians Threaten Journalists Around the Globe*, Wall St. J. (Mar. 29, 2024), https://www.wsj.com/world/authoritarians-threaten-journalists-around-the-globe-38cda1d7.

a fine awaits those who perform the Star Spangled Banner with an improper amount of "embellishment" or "as dance music." Mass. Gen. Laws ch. 264, § 9. In short, when public officials want to target a critic, they have a bottomless well of statutes from which to draw.

Americans have their own weapon to deploy against those abuses of power: Section 1983. But the Fifth Circuit's decision thwarts Section 1983's remedy for undeniable First Amendment violations cloaked in a state statute. If this Court does not act, the more penal codes grow, the more officials will be able to dodge accountability when they violate the First Amendment.

Making the Court's review even more imperative is how often lower courts increasingly grapple with cases, like this one, where qualified immunity meets the First Amendment. A recent study of circuit court cases involving qualified immunity found 18 percent involved First Amendment claims—the largest category after excessive force and false arrest claims.[9] This Court's review will provide much needed guidance and clarity for the lower courts on a recurring issue.

Finally, this case is an ideal vehicle to resolve the questions presented. It comes on a motion to dismiss, with no thorny factual disputes. Villarreal's allegations show a clear-cut exercise of First Amendment rights. Nothing in

9. Jason Tiezzi et al., *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises*, 4, 18, Institute for Justice (Feb. 2024), https://ij.org/wp-content/uploads/2023/11/Unaccountable-qualified-immunity-web.pdf.

the arrest warrant affidavits hinted at Villarreal making threats, bribing officers, or doing anything else close to unprotected speech or independently illegal conduct. Nor does this case involve difficult split-second policing decisions; it involves officers "sitting at their desks drafting affidavits." App. 99a (Ho, J., dissenting).

Rather than allow the Fifth Circuit's decision to erode founding principles, this Court's First Amendment jurisprudence, and Section 1983 all at once, the Court should grant certiorari and make clear that Americans have a cause of action when officials abuse state penal codes to trample First Amendment rights.

CONCLUSION

For all these reasons, the Court should grant certiorari.[10]

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10. While this case warrants review given the importance and recurrence of the issues involved, the Court at the very least should grant, vacate, and remand on Villarreal's First Amendment retaliation claim (which she pleaded alongside her direct First Amendment violation claim, App. 230a–237a), particularly if the Court reverses in *Gonzalez v. Trevino*, No. 22-1025 (argued Mar. 20, 2024). Reversal in *Gonzalez* would bear on some of the issues here, as Villarreal alleged objective evidence of retaliation making probable cause irrelevant. *See Nieves*, 139 S. Ct. at 1727. For instance, she alleged how local officials had never enforced Section 39.06(c) in the law's 23-year history, including against local journalists and many others who ask Laredo officials for information and publish what those officials share. App. 223a, 233a, 241a–242a. As Judge Higginson explained, "there could be no better example of a crime never enforced than this one." App. 55a.

Respectfully submitted,

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April 22, 2024

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 23, 2024

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20-40359

PRISCILLA VILLARREAL,

Plaintiff—Appellant,

versus

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.

January 23, 2024, Filed

Appeal from the United States District Court for the Southern District of Texas. USDC No. 5:19-CV-48.

Appendix A

Before RICHMAN, *Chief Judge*, and JONES, SMITH, STEWART, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, WILSON and DOUGLAS, *Circuit Judges*.*

EDITH H. JONES, *Circuit Judge*, joined by RICHMAN, *Chief Judge*, and SMITH, STEWART, SOUTHWICK, HAYNES, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*:

Priscilla Villarreal alleged First and Fourth Amendment § 1983 claims arising from her brief arrest for publicly disseminating nonpublic law enforcement information, including the identities of a suicide and deceased motor vehicle accident victims. The district court dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because the officials involved were entitled to qualified immunity.

Villarreal was arrested for illegally soliciting information that had not yet been officially made public "with intent to obtain a benefit." TEX. PENAL CODE § 39.06(c), (d). The arrest warrants were approved by the Webb County District Attorney's office and by a magistrate. We do not reach the ultimate question of this facially valid statute's constitutionality as applied to this citizen-journalist. Federal courts do not charge law enforcement officers with predicting the constitutionality of statutes because the Fourth Amendment's benchmark is reasonableness, and "[t]o be reasonable is not to be

* Judge RAMIREZ joined the court recently and elected not to participate in this case.

perfect." *Heien v. North Carolina*, 574 U.S. 54, 60, 135 S. Ct. 530, 536, 190 L. Ed. 2d 475 (2014). Moreover, the statute is not "obviously unconstitutional" as applied here.

Villarreal and others portray her as a martyr for the sake of journalism. That is inappropriate. She could have followed Texas law, or challenged that law in court, before reporting nonpublic information from the backchannel source. By skirting Texas law, Villarreal revealed information that could have severely emotionally harmed the families of decedents and interfered with ongoing investigations. Mainstream, legitimate media outlets routinely withhold the identity of accident victims or those who committed suicide until public officials or family members release that information publicly. Villarreal sought to capitalize on others' tragedies to propel her reputation and career.

For a number of reasons, the officials were entitled to qualified immunity and the district court's judgment is AFFIRMED.

I. Background

Villarreal is a well-known Laredo citizen-journalist (a/k/a "Lagordiloca") who publishes to over a hundred thousand followers on Facebook.[1] She frequently posts about local police activity, including content unfavorable to

1. *See* Simon Romero, *La Gordiloca: The Swearing Muckraker Upending Border Journalism*, N.Y. Times, Mar. 10, 2019, https://tinyurl.com/4ntwktwy.

the Laredo Police Department ("LPD" or "Department"), the district attorney, and other local officials.

Her complaint alleges that, as a result of her "gritty style of journalism and often colorful commentary," Villarreal has critics as well as admirers. The admirers treat her to occasional free meals, and she occasionally receives fees for promoting local businesses. She has used her Facebook page to ask for and obtain donations for new equipment to support her journalistic efforts. But, she alleges, officials in Laredo city government and the LPD engaged in a campaign to harass and intimidate her and stifle her work.

The events before us began on April 11, 2017, when Villarreal published, as a likely suicide, the name and occupation of a U.S. Border Patrol employee who jumped off a Laredo public overpass to his death. She had corroborated this information with LPD Officer Barbara Goodman, her back-channel source, who was not an official city or LPD information officer. Then, on May 6, she posted a live feed of a fatal traffic accident, including the location and last name of a decedent in a family from Houston. Officer Goodman also corroborated the information on this tragic event. In each instance, Villarreal went behind the official information channel and published while the incident was being investigated. She acknowledges that for several years she had published information obtained unofficially.

Villarreal alleges that several named Appellees conspired to suppress her speech and arrest her for violating a law they had to know was unconstitutionally

applied to her. Facts revealed by publicly available documents and incorporated by reference in Villarreal's complaint complete the picture.[2]

LPD investigator Deyanira Villarreal ("DV" or "investigator")[3] is tasked with upholding the Department's professional standards. She received a tip from her colleagues on July 10, 2017, that Officer Barbara Goodman was secretly communicating with Villarreal.[4] Along with the tip, DV noticed that some of the content posted to Villarreal's Facebook page was not otherwise publicly available information.

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2. "[W]hen ruling on a Rule 12 motion, a court may consider "documents that are referred to in the plaintiff's complaint and are central to the plaintiff's claim." *Armstrong v. Ashley*, 60 F.4th 262, 272 n.10 (5th Cir. 2023) (quoting *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003)); *see also Lormand v. US Unwired, Inc.*, 565 F.3d 228, 251 (5th Cir. 2009). Villarreal's complaint relies on, and references, criminal complaints, a search warrant affidavit and magistrate approval, and arrest warrant affidavits and approvals. Those documents were not attached to the complaint, but they are publicly available documents Villarreal incorporated in her complaint by reference and are central to her claims. Villarreal does not deny the information in those documents, although she alleges the documents were "manufacture[d]." Her conclusory allegation is insufficient to dispute all the information in the incorporated documents. "[C]onclusory statements, naked assertions, and threadbare recitals fail to plausibly show violations . . . [of] clearly established constitutional rights." *Armstrong*, 60 F.4th at 269.

3. Officer Deyanira Villarreal shares Plaintiff-Appellant's last name. We are aware of no familial relationship between them.

4. Villarreal alleges Does 1 and 2 tipped DV. Does 1 and 2 are allegedly employees of either Laredo or Webb County.

Two weeks later, DV assigned Officer Juan Ruiz to investigate. Ruiz prepared two grand jury subpoenas for phone records from cellphones belonging to Officer Goodman, Officer Goodman's husband, and Priscilla Villarreal. Webb County Assistant District Attorney Marisela Jacaman approved the subpoenas.

The phone records revealed that Officer Goodman and Villarreal communicated with each other regularly and at specific times coinciding with law enforcement activities.[5] Ruiz presented to a Webb County magistrate an affidavit in support of a warrant to search Officer Goodman's cellphones. The court approved that search. Officers performed forensic extractions on the phones and sent additional subpoenas for call logs. As a result of the investigation, Goodman was suspended for twenty days.

With evidence in hand, Ruiz prepared two probable cause affidavits to arrest Villarreal for her conversations with Officer Goodman that were uncovered during the investigation. In the first conversation, Villarreal texted Officer Goodman about the man who committed suicide by jumping from a highway overpass. She asked about the deceased's age, name, and whether he was employed by U.S. Customs and Border Protection. Goodman answered her questions.[6]

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5. The document indicates about 72 calls per month between Villarreal and Officer Goodman occurring from January 1 to July 26, 2017.

6. Officer Goodman deleted these messages, but LPD software retrieved them.

The second conversation involved a fatal car accident. On the date of the accident, Villarreal sent dozens of text messages to Officer Goodman. Villarreal then posted on Facebook that one person, whom she named, died in the accident. She also disclosed that a family from Houston was in the car and that three children had been med-evac'd to San Antonio. Villarreal's text messages asked Goodman about those precise details.

Ruiz's affidavits stated that the information Villarreal requested, and Goodman provided, "was not available to the public at that time." The affidavits further stated that by posting this information on her Facebook page "before the official release by the Laredo Police Department Public Information Officer" and ahead of the official news media, Villarreal gained "popularity in 'Facebook.'"

Attorney Jacaman approved the two affidavits and submitted them to the Webb County Justice of the Peace. The judge, finding probable cause, issued two warrants for Villarreal's arrest for misuse of official information in violation of section 39.06(c) of the Texas Penal Code. Section 39.06(c) prohibits individuals from soliciting or receiving nonpublic information from a public servant who has access to that information by virtue of her position with the intent to obtain a benefit.

Villarreal voluntarily surrendered. She alleges that she was detained, not that she was "jailed," and she was released on bond the same day. Villarreal alleges that when she surrendered, many LPD officers and employees, including Enedina Martinez, Laura Montemayor, and

Alfredo Guerrero, surrounded her, laughed at her, took pictures with their cell phones, and "otherwise show[ed] their animus toward Villarreal with an intent to humiliate and embarrass her."

Villarreal petitioned for a writ of habeas corpus. A Texas district court judge granted her petition and, in a bench ruling, held section 39.06(c) unconstitutionally vague. The state did not appeal.

II. Procedural Background

In April 2019, Villarreal sued Laredo police officers, the Doe defendants, the Laredo Chief of Police (Claudio Treviño, Jr.), Webb County prosecutors, the county, and the city in federal court under § 1983 for violating the First, Fourth, and Fourteenth Amendments. She alleged multiple counts, including direct and retaliatory violations of free speech and freedom of the press, wrongful arrest and detention, selective enforcement in violation of equal protection, civil conspiracy, and supervisory and municipal liability.

The defendants moved to dismiss under Rule 12(b)(6) on the basis of their qualified immunity and for failure to state a claim. The district court dismissed all claims. Villarreal appealed, excepting her claims against Laredo and Webb County.

Initially, a panel of this court reversed in part and held principally that the defendants were not entitled to qualified immunity because the arrest was "obviously"

unconstitutional. *Villarreal v. City of Laredo*, 17 F.4th 532, 541 (5th Cir. 2021). Later, the panel replaced its opinion with a new one but reached the same result. *Villarreal v. City of Laredo*, 44 F.4th 363, 372 (5th Cir. 2022) (opinion on rehearing). Chief Judge Richman concurred in part and dissented in part.[7] *Id.* at 382. The panel opinion was vacated and ordered to be reheard en banc. *Villarreal v. City of Laredo*, 52 F.4th 265, 265 (5th Cir. 2022).

This court reviews the district court's order granting a Rule 12(b)(6) motion *de novo* to determine whether the facts pled state plausible claims cognizable in law. *NiGen Biotech*, LLC *v. Paxton*, 804 F.3d 389, 393 (5th Cir. 2015) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)).

III. Discussion

A. Fourth Amendment Arrest Claim

We first address Villarreal's Fourth Amendment and First Amendment claims against Ruiz for the search warrant affidavits; DV, for her role in the investigation; Does 1 and 2, who tipped off DV; Treviño, who supervises LPD officers; Jacaman, the prosecutor who signed off on the subpoenas and warrant affidavits; and Alaniz, another prosecutor who allegedly endorsed the subpoenas and warrant affidavits. Villarreal alleges each of these

7. The Chief Judge concurred to the extent that the panel majority affirmed dismissal of Villarreal's First Amendment retaliation and municipal liability claims.

defendants caused a warrant to issue without probable cause for conduct protected by the First Amendment. Because Villarreal's First Amendment free speech claim arises from her arrest and is inextricable from her Fourth Amendment claim, liability for both rises and falls on whether the officers violated clearly established law under the Fourth Amendment. *See Sause v. Bauer*, 585 U.S. , 138 S. Ct. 2561, 2563, 201 L. Ed. 2d 982 (2018) ("When an officer's order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights, the First and Fourth Amendment issues may be inextricable.").

To obtain money damages against the defendants, Villarreal must overcome their qualified immunity by showing that (a) each defendant violated a constitutional right, and (b) the right at issue was "clearly established" at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 816, 172 L. Ed. 2d 565 (2009). To be clearly established means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). Accordingly, qualified immunity shields from suit "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986).[8]

8. Ordinarily, a plaintiff must explain why each individual defendant is not entitled to qualified immunity based on that defendant's actions and the corresponding applicable law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S. Ct. 1937, 1948, 173 L.

Villarreal fails to satisfy her burden on either prong. This is not a case about a "citizen journalist just asking questions." That clever but misleading phrase cannot relieve this court of our obligation to evaluate Villarreal's conduct against the standards of Texas law. 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. We need not speculate whether section 39.06(c) allegedly violates the First Amendment as applied to citizen journalists who solicit and receive nonpublic information through unofficial channels. No controlling precedent gave the defendants fair notice that their conduct, or this statute, violates the Constitution facially or as applied to Villarreal. Each defendant[9] is entitled to qualified immunity from suit.

Ed. 2d 868 (2009) ("[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Meadours v. Ermel*, 483 F.3d 417, 421 (5th Cir. 2007). Plaintiff failed to plead properly. However, the district court opinion, in concluding that the statute did not facially violate clearly established law and probable cause existed for the arrest, correctly found all defendants protected by qualified immunity.

9. We assume *arguendo* that Jacaman and Alaniz, Assistant District Attorneys, are counted among defendant officers despite their positions as prosecutors. Participating in the issuance of the warrants here was arguably outside their absolute prosecutorial immunity. *See* Richard H. Fallon Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 1044 (7th ed. 2015) ("[P]rosecutorial immunity extends only to prosecutorial functions related to courtroom advocacy[.]"). Under this assumption, they are entitled to qualified immunity along with the police officer defendants. *See id.*

1. The Officials Reasonably Believed They Had Probable Cause

Probable cause to arrest "is not a high bar." *Kaley v. United States*, 571 U.S. 320, 338, 134 S. Ct. 1090, 1103, 188 L. Ed. 2d 46 (2014). It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 2335 n.13, 76 L. Ed. 2d 527 (1983). And in the qualified immunity context, "[e]ven law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L. Ed. 2d 589 (1991)).

We begin with the text of the statute officers believed Villarreal violated. A person violates section 39.06(c) of the Texas Penal Code

> if, with intent to obtain a benefit . . . , he solicits or receives from a public servant information that: (1) the public servant has access to by means of his office or employment; and (2) has not been made public.[10]

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

Section 39.06(d) defines "information that has not been made public" as "any information to which the public does not generally have access, and that is prohibited from disclosure under" the Texas Public Information Act ("TPIA"), TEX. GOV'T CODE §§ 552.001-.353.

The Texas Penal Code further defines a "benefit" as "anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested." TEX. PENAL CODE § 1.07(a)(7).

The TPIA, expressly referenced in section 39.06(c), governs the overall availability of public records.[11] This Act, formerly known as the Open Records Act, states as its policy "that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government." TEX. GOV'T CODE § 552.001. But to protect important governmental interests, and ensure that some categories of nonpublic information are not unwisely disclosed, the TPIA lists various exceptions from required public disclosure. *Id.* §§ 552.101-.163.[12] Officials lack discretion to disclose

11. The TPIA requires agencies promptly to respond to requests for information, with appeal available to the state Attorney General and state courts. TEX. GOV'T CODE §§ 552.221(a), 552.234(a), 552.305(b), 552.325. In addition, the LPD employed a public information officer entrusted with reporting to the press and public.

12. Texas courts have held that the distinction between exceptions and outright prohibitions on disclosing information is irrelevant for purposes of section 39.06(c). *See State v. Newton*, 179 S.W.3d 104, 109 (Tex. App.—San Antonio 2005) (holding "the

some information. For example, "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," is protected from disclosure. *Id.* § 552.101; *see also id.* § 552.007(a) (allowing voluntary disclosure "unless the disclosure is expressly prohibited by law or the information is confidential under law"). For a small subset of the categories of excepted information, improper disclosure may result in criminal penalties. *See* Tex. Att'y Gen. Op. ORD 676, 2002 WL 31827950, at *2 (2002) (citing Tex. Gov't Code §§ 552.007, 552.101, 552.352). Further, certain information pertinent to the detection, investigation, or prosecution of crime is excluded from disclosure. *See* Tex. Gov't Code § 552.108 (requiring the release of "basic information about an arrested person, an arrest, or a crime," but not other information if it would "interfere with the detention, investigation, or prosecution of crime").

The Supreme Court of Texas has held that statutes like section 39.06 permissibly shield from public disclosure certain sensitive "information that has not been made public." *See Hous. Chron. Pub. Co. v. City of Houston*, 536 S.W.2d 559, 561 (Tex. 1976) (upholding provisions of the Texas Open Records Act, predecessor to the TPIA, that excepted certain police records from disclosure), *aff'g Hous. Chronicle Pub. Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975).

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phrase 'prohibited from disclosure' in § 39.06(d)" means "the set of exceptions to disclosure listed in Subchapter C" of the TPIA); *Texas v. Ford*, 179 S.W.3d 117, 123 (Tex. App.—San Antonio 2005) (same); *Tidwell v. State*, No. 08-11-00322-CR, 2013 Tex. App. LEXIS 14647, 2013 WL 6405498, at *12 (Tex. App.—El Paso 2013) (same).

The state has a longstanding policy to protect individual privacy in law enforcement situations that appear to involve suicide or vehicular accidents. In 1976, the Texas Attorney General authoritatively interpreted the Open Records Provision dealing with criminal investigation, and stated:

> We do not believe that this exception was intended to be read so narrowly that it only applies to those investigative records which in fact lead to prosecution. We believe that it was also intended to protect other valid interests such as . . . insuring the privacy and safety of witnesses willing to cooperate with law enforcement officers.

Tex. Att'y Gen. Op. ORD 127 at 7 (1976); *see also Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 678-85 (Tex. 1976) (recognizing both a federal constitutional right and a separate common-law right to privacy); *id.* at 685 ("[I]nformation [is] deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.").

Recently, the Texas Attorney General has stated that under the Texas Constitution, "surviving family members can have a privacy interest in information relating to their deceased relatives." Tex. Att'y Gen. OR2022-36798, 2022 WL 17552725, at *2 (2022) (citing *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 168, 124 S. Ct. 1570, 1578,

158 L. Ed. 2d 319 (2004)). This right extends at least until the government has notified the deceased's family. *See* Office of the Texas Attorney General, Public Information Act Handbook 76 & n.363 (2022), https://perma.cc/6NJB-X5NM (citing Tex. Gov't Code § 552.304). Thus, because Texas law protects the privacy of the bereaved family, the identity of a suicide or a deceased car accident victim may be considered confidential, especially when a law enforcement investigation has just begun or is ongoing.

Finally, Texas law prevents the disclosure of certain personal identifying information of victims in accident reports and exempts disclosure of information related to ongoing criminal investigations. *See* Tex. Transp. Code § 550.065(f)(2)(A) (requiring the Texas Department of Transportation to withhold or redact "the first, middle, and last name of any person listed in a collision report"); Tex. Gov't Code § 552.108(a)(1)-(2) (exempting from disclosure information dealing with the investigation of a crime).

Moving from Texas law to the objective facts available to the defendant officers, there was abundant evidence for a reasonable belief that Villarreal's conduct matched the elements of a section 39.06(c) violation. Officer Ruiz attested in support of a warrant for misuse of official information that Villarreal "had received or solicited the name and condition of a traffic accident victim and the name and identification of a suicide victim" from Officer Goodman while their deaths were under investigation. The affidavit also states that Villarreal gained popularity through her readership on Facebook. Officer Goodman

was in possession of nonpublic information by virtue of her position but was not authorized to provide this information to Villarreal.

Villarreal disputes none of these facts. Instead, Villarreal denies that she solicited and received the information with "intent to obtain a benefit," and she contends that the information was not "nonpublic." She also maintains that the warrants fail because the officers did not identify the specific TPIA or other exceptions on which they relied. We reject each contention. In her most extensive argument, which is dealt with in succeeding sections, Villarreal asserts that section 39.06 was "obviously unconstitutional" as applied to her conduct as a citizen-journalist.

First, Villarreal claims she could not "benefit" from soliciting information from Officer Goodman if she already knew the requested information from tips. In other words, soliciting and receiving information that she already knew, even though she could not confirm its accuracy, cannot be a prohibited benefit. But Texas law defines "benefit" broadly as "anything reasonably regarded as economic gain or advantage." TEX. PENAL CODE § 1.07(a)(7). Scorning to await an official LPD report, and ignoring other TPIA open records procedures, Villarreal secretly solicited information from Officer Goodman to bolster her first-to-report reputation. Her reputation is integral to her local fame and success as a journalist. After all, if she did not confirm the name and condition of a traffic accident victim or suicide victim from a back-channel police source, Villarreal would face a choice: (a) report the raw witness

information and run the risk of grotesque error, or (b) take time to go through local or TPIA channels and sacrifice the status of getting a scoop.

Villarreal's federal complaint, in any event, readily admits the "benefits" of her journalistic style. She boasts over one hundred thousand Facebook followers and a well-cultivated reputation, which has engendered publicity in the *New York Times*, free meals "from appreciative readers," "fees for promoting a local business," and "donations for new equipment necessary to her citizen journalism efforts." Villarreal pleads that she "does not generate regular revenue or other regular economic gain from her citizen journalism." That bald assertion, however, does not contradict the pleadings showing she benefited from receiving the nonpublic information solicited through a backchannel.

Further, at the time of her arrest, no Texas court had construed the meaning of "with intent to obtain a benefit" as used in section 39.06(c) to exclude the perks available to citizen journalists. Her effort at statutory construction hardly shows the law was so clearly established that "every reasonable [law enforcement officer] would have understood" the statute could not apply to Villarreal. *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5, 142 S. Ct. 4, 7, 211 L. Ed. 2d 164 (2021).

Second, Villarreal maintains that information already known to her cannot be nonpublic. More precisely, her complaint alleges that, because she initially received information from two non-government witnesses, that

information was "generally accessible by the public." She also asserts that Officer Goodman simply corroborated the information she had independently ascertained. But whether information is nonpublic is determined by the terms of the statute. There is no "corroboration" exclusion to the provision. What matters under section 39.06 is whether the information qualifies for a TPIA exception or is prohibited from disclosure under the Texas Constitution, a statute, or a judicial decision. As Chief Judge Richman explained in her panel dissent,

> [u]nder Villar[r]eal's reading of the statute, information would rarely if ever be nonpublic because in virtually every scenario, a person who is not a "public servant" would have some knowledge of the event or incident. The fact that there are witnesses to a crime, for example, does not mean that information the witnesses have or may have related to other individuals is publicly accessible. Information individual witnesses have is not commonly thought of as generally accessible to the public.

Villarreal, 44 F.4th at 388 (Richman, C.J., dissenting). That a private third-party knows some information does not change whether the information is nonpublic under the statute.

Further undermining this (unconvincing) interpretation of the statute, Villarreal never alleges that any defendant actually knew "that she had obtained the identities of the victims before she approached

her backchannel source." *Id.* at 387. But if the officers did not know she had obtained information first from non-government sources, then they could not have been unreasonable in inferring that she obtained the information illegally from Officer Goodman.

Third, Villarreal contends that probable cause was defeated because the affidavits fail to identify a specific TPIA exception. But an arrest warrant affidavit is not required to paraphrase the elements of the law the defendant allegedly violated. *See Adams v. Williams*, 407 U.S. 143, 149, 92 S. Ct. 1921, 1924, 32 L. Ed. 2d 612 (1972) ("Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction."). The whole point of a probable cause affidavit is to present relevant "facts and circumstances" so that a *judge* can independently determine the legal question—whether probable cause exists that a law was violated. *United States v. Satterwhite*, 980 F.2d 317, 321 (5th Cir. 1992). The judge looks to the "totality of the circumstances" and decides "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer," demonstrate "a probability or substantial chance of criminal activity." *District of Columbia v. Wesby*, 583 U.S. 48, 56-57, 138 S. Ct. 577, 586, 199 L. Ed. 2d 453 (2018) (quotations and citations omitted).

Here, the affidavits clearly and expressly allege that Villarreal sought and obtained nonpublic information from an unofficial source in violation of section 39.06(c). They describe the information, the benefit obtained,

and the circumstances surrounding how she used an illicit backchannel to obtain the nonpublic information. In reporting the identity of victims, the employer of one victim, and the victims' possible causes of death while those matters remained under investigation, the conduct alleged in the affidavits sufficed to establish probable cause.[13] We reiterate: probable cause is a "practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Maryland v. Pringle*, 540 U.S. 366, 370, 124 S. Ct. 795, 799, 157 L. Ed. 2d 769 (2003) (internal citations and quotations omitted). It turns "on the assessment of probabilities in particular factual context—not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 371, 124 S. Ct. at 800 (internal citation omitted).

It is not this court's task to say whether Villarreal would have been convicted under the statute. But applicable state law confirms that all of the officers involved here reasonably believed they had probable cause to seek her arrest.[14]

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13. *See also* Tex. Gov't Code § 552.108(a)(1)-(2) (exempting such information from disclosure).

14. Villarreal repeatedly alleges that the officials were motivated by animus toward her style of journalism and past criticism of LPD. We need not discuss this point, because it is well established that the motivation for an arrest is not relevant to its constitutionality. *See Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774, 135 L. Ed. 2d 89 (1996). The extent to which motivation may affect Villarreal's retaliatory First Amendment prosecution claim is discussed in Section C.1 below.

2. No "Obvious Unconstitutionality"

The crux of Villarreal's argument is that even if probable cause existed, she was unlawfully arrested because as applied to her, section 39.06(c) "obviously" violates the First Amendment. The panel majority initially agreed with her, but on rehearing, it retreated from proclaiming section 39.06(c) "obviously" unconstitutional. *See Villarreal*, 44 F.4th at 384 (5th Cir. 2022) (opinion on rehearing) ("On its face, Texas Penal Code § 39.06(c) is not one of those 'obviously unconstitutional' statutes."). As that turnabout suggests, Villarreal's contention fails to surpass three high hurdles. First, no final decision of a state court had held the law unconstitutional at the time of the arrest. Thus, even if the law were ultimately held to violate the First Amendment as applied to Villarreal's conduct, probable cause would continue to shield the officers from liability. Second, the Supreme Court and lower courts have not relevantly defined the contours of an "obviously unconstitutional" statute. Third, the independent intermediary rule affords qualified immunity to the officers because a neutral magistrate issued the warrants for Villarreal's arrest.

a. *Enacted Statutes Are Presumptively Constitutional*

Courts do not charge officers with predicting the constitutionality of statutes because the Fourth Amendment's benchmark is reasonableness. *Heien*, 574 U.S. at 60, 135 S. Ct. at 536. Accordingly, the law affords officers "fair leeway" to make reasonable mistakes of law

and fact. *Id.* at 61, 135 S. Ct. at 536 (quoting *Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879 (1949)). In the end, "[w]hether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: The facts are outside the scope of the law." *Id.* Thus, when a grand jury fails to indict, or charges are later dismissed, officers cannot be held liable solely for arrests made reasonably but without probable cause.[15] Whether section 39.06 ultimately violates First Amendment principles as applied here, "the officers' assumption that the law was valid was reasonable." *Id.* at 64, 135 S. Ct. at 538.[16]

This principle defeats Villarreal's contention. At the time of Villarreal's arrest, no final decision of a state court had held section 39.06(c) unconstitutional. When Villarreal petitioned for a writ of habeas corpus after posting bail, the Texas district court orally granted the writ and ruled section 39.06 unconstitutionally vague. But that decision is irrelevant. First, courts only take account of what notice officers had at the time of arrest. As just noted, police officers are not "expected to predict the future course of constitutional law." *Wilson v. Layne*, 526 U.S. 603, 617,

15. The Supreme Court's recent decision in *Thompson v. Clark*, 596 U.S. , 142 S. Ct. 1332, 212 L. Ed. 2d 382 (2022), is not to the contrary. That decision held only that actual innocence is not required as an element of a Fourth Amendment malicious prosecution claim. *Id.* at 1335.

16. Chief Justice Roberts's opinion for the Court in *Heien* traces this sort of immunity for reasonable mistakes of law back to Chief Justice John Marshall in *United States v. Riddle*, 9 U.S. (5 Cranch) 311 (1809). 574 U.S. at 62, 135 S. Ct. at 537.

119 S. Ct. 1692, 1701, 143 L. Ed. 2d 818 (1999) (quoting *Procunier v. Navarette*, 434 U.S. 555, 562, 98 S. Ct. 855, 860, 55 L. Ed. 2d 24 (1978)). Second, the state habeas court declined to apply section 39.06 to Villarreal *not* because its application violated the First Amendment, but because the law was unconstitutionally *vague*. (Villarreal does not contend the statute is unconstitutionally vague.)

Prior to Villarreal's arrest, one Texas intermediate appellate court explicitly left open the question of this statute's vagueness, while distancing itself from the trial court's holding of unconstitutionality. *State v. Newton*, 179 S.W.3d 104, 111 (Tex. App.—San Antonio 2005) ("[W]e do not address the remaining issues raised on appeal, including the constitutionality of § 39.06(c) and (d) of the Penal Code.").[17] Moreover, *Newton* was a companion case to another prosecution initiated under section 39.06(c). *See State v. Ford*, 179 S.W.3d 117, 125 (Tex. App.—San Antonio 2005) (dismissing indictment because the TPIA does not apply to judicial information); *see also Matter of J.B.K.*, 931 S.W.2d 581, 584 (Tex.

17. The dissents inaccurately trumpet that district court decisions in *Newton* and *Ford* held sections 39.06(c) and (d) unconstitutionally vague. Even so, such rulings were abrogated by the court of appeals, which did not endorse the lower court's constitutional ruling when dismissing indictments on the statutory analysis that grand jury testimony is not included in the Open Records Act. It would have been judicially improper for the appellate court to rule on a constitutional ground when the statutory basis was not even applicable to the defendants. Moreover, these companion cases arose out of the same transaction, so they can hardly be disaggregated into two separate constitutional rulings.

App.—El Paso 1996) (referring to a potential violation of section 39.06(c) in an attorney discipline proceeding). Several other prosecutions have been brought under the companion section 39.06(b), which prohibits a public servant from disclosing nonpublic information. *See Patel v. Trevino*, No. 01-20-00445-CV, 2022 Tex. App. LEXIS 6494, 2022 WL 3720135 (Tex. App.—Houston Aug. 30, 2022); *Tidwell v. State*, No. 08-1100322-CR, 2013 Tex. App. LEXIS 14647, 2013 WL 6405498 (Tex. App.—El Paso Dec. 4, 2013); *Reyna v. State*, No. 13-02-499-CR, 2006 Tex. App. LEXIS 75, 2006 WL 20772 (Tex. App.—Corpus Christi Jan. 5, 2006). These cases reinforce that the officers had no need to predict the future exegesis of a presumptively constitutional law.

b. *Section 39.06(c) Is Not Grossly and Flagrantly Unconstitutional as Applied*

Villarreal characterizes her First Amendment claims as invoking her rights "to peaceably ask officials questions and to engage in routine newsgathering and reporting." These rights, she asserts, are "obvious to every reasonable official." If probable cause turned on a defendant's self-serving rationales for her conduct, very little law enforcement could take place. But under existing caselaw, officers are almost always entitled to qualified immunity when enforcing even an unconstitutional law, so long as they have probable cause. *Michigan v. DeFillippo*, 443 U.S. 31, 38, 99 S. Ct. 2627, 2632, 61 L. Ed. 2d 343 (1979). *DeFillippo* explained the rule and a *possible* exception for "a law so grossly and flagrantly

unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.* (emphasis added).[18] The Court in *Heien* paraphrased this language when summarizing *DeFillippo. See Heien*, 574 U.S. at 64, 135 S. Ct. at 538 ("Acknowledging that the outcome might have been different had the ordinance been 'grossly and flagrantly unconstitutional,' we concluded that under the circumstances, 'there was abundant probable cause to satisfy the constitutional prerequisite for an arrest.'" (quoting *DeFillippo*, 443 U.S. at 37-38, 99 S. Ct. at 2632)).[19] Both *DeFillippo* and *Heien* note no more than a *possible* exception—which the Supreme Court has not further developed in the forty-three years since *DeFillippo* was decided. Although a few circuit court decisions before and after *DeFillippo* have rested on the idea of "obvious unconstitutionality," none is apposite here, and this case presents no occasion to deviate from the broad proposition that "[t]he enactment of a law forecloses speculation by enforcement officers concerning its constitutionality." *DeFillippo*, 443 U.S. at 38, 99 S. Ct. at 2632.[20]

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18. *Cf. Myers v. Anderson*, 238 U.S. 368, 382, 35 S. Ct. 932, 936, 59 L. Ed. 1349 (1915) (rejecting immunity of officials against § 1983 liability for refusing to register black citizens to vote in plain violation of the Fifteenth Amendment). *Myers*, of course, does not deal with probable cause.

19. *DeFillippo*, it bears emphasis, is not limited to the exclusionary rule remedy for a constitutional violation—it applies to the determination of a Fourth Amendment violation itself. *See Heien*, 574 U.S. at 66, 135 S. Ct. at 539.

20. A handful of circuit court decisions that predate *Heien* denied qualified immunity where the courts held the underlying statutes or ordinances were "obviously unconstitutional." None is remotely similar to the case before us. *See Leonard v. Robinson*,

Villarreal analogizes her conduct to that in *Sause v. Bauer*, in which, she alleges, the Supreme Court held it is "obvious" that the right to pray is protected by the First Amendment, and that an arrest of someone praying was an obvious constitutional violation. She misconstrues *Sause*. The Supreme Court reversed and remanded for further proceedings because there were not enough facts to determine whether "circumstances [existed] in which a police officer may lawfully prevent a person from praying at a particular time and place." *Sause*, 138 S. Ct. at 2562.

> For example, if an officer places a suspect under arrest and orders the suspect to enter a police vehicle for transportation to jail, the suspect does not have a right to delay that trip by insisting on first engaging in conduct that, at another time, would be protected by the First Amendment.

Id. at 2562-63. *Sause* made no holding that the "obvious" violation exception applies broadly to arrests that may impinge on First Amendment rights; indeed, the court's hypothetical example suggests the opposite proposition.

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477 F.3d 347, 359 (6th Cir. 2007) (disruption of a public assembly with profanity); *Lawrence v. Reed*, 406 F.3d 1224, 1233 (10th Cir. 2005) (denial of due process); *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002) (failure to provide ID to police). Two more recent decisions are no more apposite because they involve quite different First Amendment issues. *Ballentine v. Tucker*, 28 F.4th 54, 66 (9th Cir. 2022) (retaliatory arrest for "chalking" anti-police messages); *Thompson v. Ragland*, 23 F.4th 1252, 1255-56 (10th Cir. 2022) (discipline against college student exercising speech).

Closer on point is *DeFillippo*, where the Court upheld an officer's arrest of a suspect for failing to identify himself in violation of Michigan law, even though a state court later held that law unconstitutionally vague. *DeFillippo*, 443 U.S. at 34-35, 99 S. Ct. at 2631 (noting that DeFillippo was ultimately charged with possession of a controlled substance). The law on its face raised an issue of compelled speech in violation of the First Amendment. Yet at the time of DeFillippo's arrest, "there was no controlling precedent that this statute was or was not constitutional, and hence the conduct violated a presumptively valid ordinance." *Id.* at 37, 99 S. Ct. at 2632. Even if Villarreal's arrest implicated her First Amendment rights, this case is substantially similar to *DeFillippo* because there was certainly no "obvious" constitutional violation.

If more were needed, in *Vives v. City of New York*, 405 F.3d 115, 116-17 (2d Cir. 2004), the court held that officers were entitled to qualified immunity for arresting a defendant under an "aggravated harassment" statute on account of his harassing letter to a candidate for state office. The statute had never before been declared unconstitutional, and state courts had declined to find it unconstitutional. Consequently, the statute was far from being "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.* at 117 (quoting *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 103 (2d Cir. 2003)).

Because Villarreal's conduct fell within the elements of a violation of section 39.06(c), a statute that is not "grossly and flagrantly unconstitutional," the officials could rely on the presumptively valid law.

c. *The Independent Intermediary Rule Shields the Officers*

The third basis for sustaining the Appellees' qualified immunity is that a neutral magistrate issued the warrants for Villarreal's arrest. A warrant secured from a judicial officer typically insulates law enforcement personnel who rely on it. *See Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988); *see also Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 553-54 (5th Cir. 2016) (applying independent intermediary doctrine to false arrest claims under First and Fourth Amendment). Villarreal argues her claim can be shoehorned into the independent intermediary rule's single, narrow exception, which arises "when 'it is obvious that *no* reasonably competent officer would have concluded that a warrant should issue.'" *Messerschmidt v. Millender*, 565 U.S. 535, 547, 132 S. Ct. 1235, 1245, 182 L. Ed. 2d 47 (2012) (emphasis added) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986)). Further, the magistrate's mistake in issuing the arrest warrant must be "not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty." *Malley*, 475 U.S. at 346 n.9, 106 S. Ct. at 1098 n.9.

That is a high bar. The Supreme Court puts such weight on a magistrate's determination because

> [i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In

> the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient.

United States v. Leon, 468 U.S. 897, 921, 104 S. Ct. 3405, 3419, 82 L. Ed. 2d 677 (1984). "It is a sound presumption that the magistrate is more qualified than the police officer to make a probable cause determination." *Malley*, 475 U.S. at 346 n.9, 106 S. Ct. at 1098 n.9.

It cannot be said *no* reasonable officer would think warrants should have issued here. The warrant affidavits were not mere "barebones" affidavits without any factual support. *Spencer v. Staton*, 489 F.3d 658, 661 (5th Cir. 2007), *modified on other grounds on reh'g*, 489 F.3d 666 (5th Cir. 2007). Nor has Villarreal alleged anything beyond conclusional assertions that defendants tainted the intermediary's decision-making process by "maliciously withh[olding] relevant information or otherwise misdirect[ing] the intermediary." *Shaw v. Villanueva*, 918 F.3d 414, 417 (5th Cir. 2019). Each arrest warrant affidavit is eight pages long and each one quotes conversations between Villarreal and Officer Goodman about information not yet made public and later posted on Villarreal's Facebook page to the benefit of her journalism activity. Villarreal's conduct more than arguably matches what is forbidden by the text of section 39.06(c).

The reasoning of *DeFillippo* and *Heien* concerning mistakes of law is also relevant to the independent intermediary rule. Suppose the officers were unsure

whether section 39.06(c) applied to Villarreal. They had every right to rely on the legal experience of the District Attorney and neutral magistrate judge. It is one thing to hold the DA, assistant DA, and the officers responsible under *Malley* and its progeny for known mistakes of fact (although Villarreal identifies no specific factual mistakes in the warrant affidavits). It is entirely different and unreasonable to say the officers' reliance on a neutral magistrate's application of the law is outside the boundary of reasonableness for qualified immunity.[21] To hold otherwise, as Chief Judge Richman's dissent urged, would "shred[] the independent intermediary doctrine." *Villarreal*, 44 F.4th at 380 (opinion on rehearing).

Probable cause existed to arrest Villarreal for allegedly violating a presumptively valid Texas law that had not previously been overturned. On its face, the law was not grossly and flagrantly unconstitutional, and the arrest warrants were approved by a neutral magistrate.

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21. Villarreal makes conclusory allegations that Officer Ruiz "knew or should have known" that the information she published was not subject to a TPIA exception, and that Villarreal did not use her Facebook page "as a means of economic gain." These allegations ask for conclusions of law, precisely the domain of the magistrate who oversaw issuance of the warrants. Yet Judge Higginson's dissent asserts these statements amounted to material misstatements and omissions that tainted the magistrate's neutral decisional process. How can that be? The terms of the statute and the TPIA regarding "nonpublic information" and "benefit" were exactly what the magistrate was called upon to apply to the facts before him. Any error about "benefit," it must also be recalled, is harmless because Villarreal's own pleadings admit she received "benefits" from her citizen journalism.

Since there was no Fourth Amendment violation, the officers have qualified immunity on these grounds alone from Villarreal's First Amendment claims.

B. No Clearly Established Right

Nonetheless, because Villarreal rests her case on the "obviousness" of her First Amendment rights to "ask questions of a government official" and "pursue her work as a journalist," we proceed to the second step of the qualified immunity analysis and consider whether the asserted constitutional rights were "clearly established" at the time of the alleged violation. Thus, even if the arrests were constitutionally infirm, the officers are entitled to qualified immunity unless Villarreal can identify binding precedent that "placed the statutory or constitutional question beyond debate," so that "every reasonable official would have understood that what he is doing violates that right." *Rivas-Villegas*, 595 U.S. at 5, 142 S. Ct. at 7-8 (internal quotations and citations omitted). "That is because qualified immunity is inappropriate only where the officer had fair notice—in light of the specific context of the case, not as a broad general proposition—that his *particular* conduct was unlawful." *Craig v. Martin*, 49 F.4th 404, 417 (5th Cir. 2022) (internal quotation marks and citation omitted). In other words, "police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela v. Hughes*, 584 U.S. , 138 S. Ct. 1148, 1153, 200 L. Ed. 2d 449 (2018) (per curiam) (internal quotation marks and citation omitted).

Villarreal cites no case, nor are we aware of one, where the Supreme Court, or any other court, has held that it is unconstitutional to arrest a person, even a journalist, upon probable cause for violating a statute that prohibits solicitation and receipt of nonpublic information from the government for personal benefit. Under the normal standards of qualified immunity, no "clearly established law" placed the officers on notice of Villarreal's First Amendment right not to be arrested. Villarreal, however, relies on Eighth Amendment cases where the Supreme Court denied qualified immunity for deliberate indifference to unconstitutional prison conditions and declined to scrutinize the cases fact-specifically. *See Hope v. Pelzer*, 536 U.S. 730, 738-39, 122 S. Ct. 2508, 2514-15, 153 L. Ed. 2d 666 (2002) ("[T]he risk of harm [to the prisoners] is obvious."); *Taylor v. Riojas*, 592 U.S. , 141 S. Ct. 52, 54, 208 L. Ed. 2d 164 (2020)(per curiam) ("Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution.") (footnote omitted)); *McCoy v. Alamu*, 141 S. Ct. 1364, 209 L. Ed. 2d 114 (2021) (instructing the court to reconsider an Eighth Amendment case "in light of *Taylor*").

Hope and its progeny express a general, but decidedly narrow, obviousness exception to the requirement that "clearly established law" be founded on materially identical facts. In any event, those cases are inappropriate templates for describing "clearly established" law in this context. In *Morgan v. Swanson*, 659 F.3d 359, 373 (5th Cir. 2011) (en banc), a case involving First Amendment free exercise rights, this court noted that *Hope* does not

stand for the broad proposition that plaintiffs need not offer any similar cases to prove that an officer should have been on notice that his conduct violated the Constitution. *Hope* does not excuse plaintiffs from proving that every reasonable official would know the conduct at issue violates the Constitution. And *Sause*, if anything, also strongly implies that an individual's claimed First Amendment rights must be closely analyzed when the question involves probable cause for an arrest, or an officer's qualified immunity. 142 S. Ct. at 2562-63.

Consequently, we adhere to the general rule that for an asserted right to be clearly established for purposes of qualified immunity, it must "have a sufficiently clear foundation in then-existing precedent" that it is "settled law." *Wesby*, 583 U.S. at 63, 138 S. Ct. at 589 (citation omitted). "The precedent must be clear enough that *every* reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.*, 138 S. Ct. at 590 (emphasis added). The law is not clearly established if referenced cases are "materially distinguishable and thus do[] not govern the facts of this case." *Rivas-Villegas*, 595 U.S. at 6, 142 S. Ct. at 8.

Villarreal identifies a general First Amendment principle—that a third party may publish sensitive government information already in the public domain—as evidence that the officer defendants violated clearly established law by arresting her with a warrant upon probable cause for violating section 39.06. But the alleged unlawfulness of the defendants' conduct here "does not follow immediately," or even secondarily, from the cases

Villarreal cites. *Wesby*, 583 U.S. at 64, 138 S. Ct. at 590 (quoting *Creighton*, 483 U.S. at 641, 107 S. Ct. at 3039).

The principal cases Villarreal relies on involve *publication* of certain information already in the public domain. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714, 91 S. Ct. 2140, 2141, 29 L. Ed. 2d 822 (1971) (per curiam) (vacating an injunction against publishing the Pentagon Papers, a classified study of United States involvement in Vietnam, obtained without illegal action by the press); *Fla. Star v. B.J.F.*, 491 U.S. 524, 538, 109 S. Ct. 2603, 2611, 105 L. Ed. 2d 443 (1989) (stating that, when the government inadvertently places an incident report *in the pressroom*, "it is clear . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity"). A right to *publish* information that is no longer within the government's control is different from what Villarreal did: she *solicited and received nonpublic* information from a public official for personal gain.

Moreover, Villarreal correctly asserts that journalists have an undoubted right to gather news "from any source by means within the law," but "[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 681-82, 684, 92 S. Ct. 2646, 2657-58, 33 L. Ed. 2d 626 (1972) (citing cases); *see also Houchins v. KQED, Inc.*, 438 U.S. 1, 15, 98 S. Ct. 2588, 2597, 57 L. Ed. 2d 553 (1978) (plurality opinion) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access

to government information or sources of information within the government's control."). "Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." *Branzburg*, 408 U.S. at 684-85, 92 S. Ct. at 2658. Further, "[t]he Court has emphasized that '(t)he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.'" *Id.* at 683, 92 S. Ct. at 2657 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33, 57 S. Ct. 650, 656, 81 L. Ed. 953 (1937)). And the Court has been unequivocal that there is no journalist privilege or immunity from prosecution under generally applicable law. Nor is a journalist "free to publish with impunity everything and anything [he] desires to publish." *Id.*, 92 S. Ct. at 2658 (citing cases). Villarreal's First Amendment rights as a citizen journalist are therefore based on news gathering by "means within the law." Far from supporting the "obviousness" of her claims, these authorities require further careful analysis before any constitutional violation can be ascribed to her arrest.

The First Amendment also does not prevent the elected political branches from protecting "nonpublic" information. *L.A. Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 40, 120 S. Ct. 483, 489, 145 L. Ed. 2d 451 (1999) ("[W]hat we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out

arrestee information at all without violating the First Amendment."). The State of Texas chose to protect certain information from immediate disclosure in order to ensure that the government can function. If citizens possessed some overarching constitutional right to obtain information from the government, laws like the TPIA and the Freedom of Information Act would be superfluous. We do not presume the Texas legislature or Congress performed meaningless acts in protecting public access to information that was already required to be in the public domain under the First Amendment. To the contrary, "[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Houchins*, 438 U.S. at 14, 98 S. Ct. at 2596 (plurality opinion).[22] Whatever the outcome of particular challenges to denials of access to nonpublic information, Villarreal cannot sustain the proposition that Texas "obviously" had no authority to outlaw disclosure (at least temporarily, e.g., pending notification of next of kin) of the information she sought or to prohibit her from soliciting unlawful disclosure for her benefit.

An addendum to Villarreal's position is her claim that the First Amendment "right to petition for a redress of grievances" was "obviously" violated by her arrest. "The right to petition allows citizens to express their

22. The Court examined the history of Freedom of Information Act laws and noted they "are of relatively recent vintage." *McBurney v. Young*, 569 U.S. 221, 234, 133 S. Ct. 1709, 1719, 185 L. Ed. 2d 758 (2013) (holding the Virginia Freedom of Information Act did not violate the Privileges and Immunities Clause).

ideas, hopes, and concerns to their government and their elected representatives." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388, 131 S. Ct. 2488, 2495, 180 L. Ed. 2d 408 (2011). The Petition Clause is plainly not relevant to establish the right she promotes. Soliciting nonpublic information for personal benefit is neither an act of "petition" nor "for a redress of grievances."

No case would have given these officers "fair notice" that their conduct in arresting Villarreal would run afoul of the First Amendment. Consequently, she has not met her burden on the second prong of the qualified immunity standard. *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 599, 160 L. Ed. 2d 583 (2004).

C. Additional Claims

Each defendant is entitled to qualified immunity on Villarreal's remaining claims because she fails to allege any plausible constitutional violations.

1. First Amendment Retaliation

Villarreal fails to state a First Amendment retaliation claim. "The First Amendment prohibits not only direct limits on individual speech but also adverse governmental action against an individual in retaliation for the exercise of protected speech activities." *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). To establish such a claim against the defendants, Villarreal

> must show that (1) [she] w[as] engaged in constitutionally protected activity, (2) the

> defendants' actions caused [her] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against [her] exercise of constitutionally protected conduct.

Id. (citations omitted).

Villarreal fails to adequately plead a First Amendment retaliation claim because the officers had probable cause under section 39.06, and she does not allege that defendants curtailed her exercise of free speech. Nor does Villarreal have an actionable retaliatory investigation claim, because this court does not recognize such a claim. *See Colson v. Grohman*, 174 F.3d 498, 512 (5th Cir. 1999) (holding that "criticism, an investigation (or an attempt to start one), and false accusations" are "all harms that . . . are not actionable under our First Amendment retaliation jurisprudence").

Further, the Supreme Court maintains that probable cause "generally defeat[s] a First Amendment retaliatory arrest claim." *Nieves v. Bartlett*, 587 U.S. , 139 S. Ct. 1715, 1726 (2019). The Court articulated a narrow exception "where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1727. To benefit from this exception, Villarreal must "present[] objective evidence that [s]he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* Villarreal does not offer evidence of other similarly situated individuals who engaged in the same conduct in violation of section 39.06(c) yet were not arrested.

Judge Higginson suggests the *Nieves* exception has been met here because, allegedly, no one has ever been prosecuted for violating section 39.06(c). There have been prosecutions under other related statutory sections, of course. By the same token, Judge Higginson's analysis does not identify "similarly situated individuals" who solicited or received nonpublic information to obtain a benefit but were not prosecuted; he merely assumes the conclusion. But more to the point, plaintiff offered no evidence of similarly situated individuals, perhaps because others are not in the habit of obtaining backchannel information about ongoing criminal investigations, like Villarreal.

2. Fourteenth Amendment Selective Enforcement

Villarreal's Fourteenth Amendment selective enforcement claim likewise required her to identify "examples" of similarly situated individuals who were nonetheless treated differently. *Tex. Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 514 (5th Cir. 2021). "'Similarly situated' means 'in all relevant respects alike.'" *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 978 (5th Cir. 2022) (quoting *Tex. Ent. Ass'n*, 10 F.4th at 513). Villarreal did not provide even one example of an individual similarly situated to her in all relevant respects who was not arrested for his conduct. This claim fails.

3. Conspiracy

Last, Villarreal cannot maintain a § 1983 conspiracy claim because each officer is immune from suit. "To support a conspiracy claim under § 1983, the plaintiff must allege facts that suggest 'an agreement between the . . . defendants to commit an illegal act' and 'an actual deprivation of constitutional rights.'" *Terwilliger v. Reyna*, 4 F.4th 270, 285 (5th Cir. 2021) (quoting *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994)). If all the "acts fall under qualified immunity, there can be no § 1983 conspiracy claim." *Mowbray v. Cameron County*, 274 F.3d 269, 279 (5th Cir. 2001). The conspiracy claim was correctly dismissed.

IV. Conclusion

For the foregoing reasons, we AFFIRM the district court's judgment.

Appendix A

JAMES E. GRAVES, JR., *Circuit Judge*, joined by ELROD, HIGGINSON, WILLETT, HO, and DOUGLAS, *Circuit Judges*, dissenting:

I agree with the persuasive opinions from my dissenting colleagues. I agree with Judge Higginson that the majority errs by failing to credit Villarreal's allegations as true; with Judge Willett that qualified immunity is not appropriate here, where no official was compelled to make a "split-second judgment"; and with Judge Ho that, among other things, the majority opinion will permit government officials to retaliate against speech while hiding behind cherry-picked state statutes.

As Judge Ho notes, the majority is also wrong to disparage Villarreal for, as it writes, "capitaliz[ing] on others' tragedies to propel her reputation and career." *Ante* at 2. Not only is that characterization of Villarreal's enterprise unfair—as the majority writes, her journalistic endeavor survives off the solicitude of fans and "occasional" advertising, *id.* at 3—but it insinuates that Villarreal's First Amendment rights are somehow diminished because she makes a modest living while exercising them.

I write separately to emphasize the importance of gathering and reporting news. Villarreal is a journalist.[1]

1. Villarreal's appeal is supported by, among other amici, the Texas Press Association, the Texas Association of Broadcasters, the Freedom of Information Foundation of Texas, the Reporters Committee for Freedom of the Press, the Texas Tribune, the Dallas Morning News, the National Association of Hispanic Journalists, and the Society of Professional Journalists. Together,

A journalist is someone who, on a professional or even semi-professional basis, acts as an agent for the people, representing what the Supreme Court has called the "public interest, secured by the Constitution, in the dissemination of truth," *Florida Star v. B. J. F.*, 491 U.S. 524, 533, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989). The right to gather and report news could not be more firmly embedded in the Constitution. The text of the First Amendment itself forbids the government from "abridging the freedom . . . of the press." U.S. CONST. AMEND. I.

There is simply no way such freedom can meaningfully exist unless journalists are allowed to seek non-public information from the government. Today's majority opinion overlooks that protection all too cavalierly. But in fact, the right to "newsgathering" has long been protected in American jurisprudence. *See Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."). The Supreme Court has made clear that the First Amendment protects the publication of information obtained via "routine newspaper reporting techniques"—which include asking for the name of a crime victim from government workers not clearly authorized to share such information. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 99-104, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979).

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they write that "Villarreal is a citizen journalist" who "provides a valued source of information for over 120,000 followers on local news and events, at a time when mainstream news organizations are increasingly stretched thin to cover community news."

The majority at times conflates that right with the government's prerogative to "guard against the dissemination of private facts." *Fla. Star*, 491 U.S. at 534. But those two principles are not mutually exclusive—the government's power to protect certain information has little to do with a person's right to ask for it. This case does not concern the rights of the officer who furnished Villarreal with information, or what means a local government may use to prevent employees from exposing sensitive information. It concerns only the rights of a third party who did nothing more than ask.

Moreover, the Supreme Court has held that restraints on the *publication* of lawfully obtained, truthful information are only allowed when they further "a state interest of the highest order." *Fla. Star*, 491 U.S. at 541. And the Court has already explained that preserving the anonymity of a juvenile offender did not meet that standard—so it seems unlikely that preserving the anonymity of automobile accident victims, or victims of suicide, as in this case, would fare any better. *Smith*, 443 U.S. at 104. Nor did anything make it unlawful for Villarreal to obtain that information, except for the law that she now argues is unconstitutional.

While I agree with Judge Ho that the enforcement of Texas Penal Code § 39.06(c) against Villarreal was obviously unconstitutional in light of the broad right of each person to ask questions of the government, it is also obviously unconstitutional in light of the related and equally well-established right of journalists to engage in routine newsgathering. That right, arising out of the plain language of the Constitution, acknowledges that

journalists play a special role in our society as agents of the people. They are individuals who take on a civic and professional responsibility to keep the public informed, and thereby provide a crucial check on the power of the government. That is not to say that press possess any right of access to information that is unavailable to the general public, *see Branzburg*, 408 U.S. at 684—only that, more often than not, it is the press to which we delegate the responsibility of asking for that information.

Today's decision has profound practical implications. As amici note, American society has often benefitted when journalists have acquired nonpublic information from unofficial sources. Americans only learned about the horrific My Lai Massacre, during the Vietnam War, because a journalist asked a backchannel Pentagon source about it.[2] Many years later, that same journalist reported details of prisoner abuse at the Abu Ghraib prison after gleaning them from a non-public military report.[3] Confidential sources have also played an important role in exposing police abuses.[4] And in one particularly

2. Ian Shapira, *'It was insanity': At My Lai, U.S. soldiers slaughtered hundreds of Vietnamese women and kids*, The Washington Post (March 16, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/03/16/it-was-insanity-atmy-lai-u-s-soldiers-slaughtered-hundreds-of-vietnamese-women-and-kids.

3. Seymour M. Hersh, *Torture at Abu Ghraib*, The New Yorker (April 30, 2004), https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib.

4. *Los Angeles Sheriff's deputies say gangs targeting "young Latinos" operate within department*, CBS News (February 25, 2021), https://www.cbsnews.com/news/losangeles-sheriffs-deputies-gangs-young-latinos.

noteworthy example, an unauthorized source provided a classified study on war policy to American news outlets—and the ensuing legal case made it to the Supreme Court, which rejected efforts to suppress the study's publication. *See New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971).

But now, the majority would limit journalists who work the government beat to publicly disclosed documents and official press conferences, meaning they will only be able to report information the government chooses to share. That outcome is unfortunate, unfair, and unconstitutional. It is unfortunate because a democracy functions properly only when the citizenry is informed. It is unfair because it restricts the journalistic freedom to gather information. And it is unconstitutional, for "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Smith*, 443 U.S. at 104. Indeed, it is not even clear whether the majority's opinion would allow journalists to request information in good faith from official channels without fear of reprisal.

I respectfully dissent.

Appendix A

STEPHEN A. HIGGINSON, *Circuit Judge*, joined by ELROD, GRAVES, WILLETT, HO, OLDHAM, and DOUGLAS, *Circuit Judges*, dissenting:

Few constitutional progenitors are more celebrated by our Founding Fathers than Thomas Paine, the citizen-journalist who published *Common Sense*, the pro-independence pamphlet that historian Gordon Wood describes as "the most incendiary and popular pamphlet of the entire revolutionary era." Gordon S. Wood, THE AMERICAN REVOLUTION: A HISTORY 55 (Modern Library, 2002). To safeguard both the text of the Constitution, as well as the values and history that it reflects, the Supreme Court guarantees the First Amendment right of engaged citizen-journalists, like Paine, to interrogate the government. Judge Ho forcefully describes the obviousness of that guarantee, and I am confident all judges share the late Judge Silberman's similar, cautionary sentiment "that the most heinous act in which a democratic government can engage is to use its law enforcement machinery for political ends."[1]

Priscilla Villarreal alleges that law enforcement officials in Laredo, Texas did precisely this: They arrested her because her newsgathering and reporting activities annoyed them. To silence her as a critic and gadfly, she claims, they arrested her.

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1. Laurence H. Silberman, *Hoover's Institution*, WALL ST. J. (July 20, 2005), https://www.wsj.com/articles/SB112182505647390371.

Villarreal is entitled to have the district court resolve her plausible allegation that the government officers who arrested her lacked probable cause, and misled the magistrate whose warrants they now claim should insulate them from liability for their unconstitutional actions. And even if these officers had probable cause to arrest her, the Supreme Court in *Nieves v. Bartlett*, 139 S.Ct. 1715, 204 L. Ed. 2d 1 (2019) has instructed courts on how to respond when an individual brings a complaint against the government for First Amendment retaliation. Because that instruction was not applied, I would vacate and remand.

I. Villarreal alleges that her arresting officers lacked probable cause and misled the magistrate who issued her arrest warrants.

Even if the majority is correct that Villarreal is obliged to plead no probable cause as to a crime that does not exist, *see Trevino v. Iden*, 79 F.4th 524, 531 (5th Cir. 2023), she did. In the light most favorable to her, her allegation is that Defendant Ruiz, supervised and directed by the other named Defendants, tainted evidence to mislead and obtain warrants to arrest and silence her:

> 90. Ruiz knew or should have known that the Statute required a showing that the information at issue not be generally available to the public and that it be excepted from disclosure under the TPIA. And Ruiz knew or should have known that the information Villarreal published was not subject to a TPIA exception and was

generally accessible to the public. But Ruiz failed to mention or discuss these essential elements of the Statute in the Arrest Warrant Affidavits. He also failed to disclose that the information Villarreal received or published was generally accessible to the public and not subject to a TPIA exception. On information and belief, Ruiz's misrepresentations and omissions were deliberate.

...

92. Ruiz also knew or should have known that the Statute required a showing that Villarreal intended to enjoy an economic advantage or gain from the request for or receipt of the information in the Targeted Publications. But Ruiz failed to recite this essential element of the Statute in the Arrest Warrant Affidavits, and failed to state how or why Villarreal intended to enjoy an economic gain or advantage from the information. Ruiz alleged only that Villarreal's release of the information before other news outlets gained her popularity in Facebook. On information and belief, Ruiz's misrepresentations and omissions were deliberate.

93. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants were aware or should have been aware that at all times leading up to Villarreal's arrest, Villarreal

did not use her Facebook page as a means of economic gain.

94. Ruiz's statements in the Arrest Warrant Affidavits did not address Villarreal's intent or knowledge in receiving or using the information, despite this being required by the statute. The affidavits also did not address whether Villarreal knew she was asking for or receiving non-publicly accessible information from an official source. On information and belief, Ruiz's omissions were deliberate.

95. Two warrants for Villarreal's arrest—for each of the Targeted Publications—were issued on December 5, 2017 ("Arrest Warrants"). The Arrest Warrant issued as a result of the knowing or reckless misrepresentations and omissions of key elements and facts Arrest Warrant Affidavits.

...

165. Lacking a valid basis to arrest Villarreal, Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants (a) knowingly manufactured allegations under a pretextual application of Texas Penal Code § 39.06, upon which no reasonable official would have relied under the circumstances; (b) knowingly prepared and obtained a warrant

> for Villarreal's arrest under false pretenses; and (c) knowingly arrested and detained her and/or caused her arrest and detention without probable cause and against her will, based on a knowing or deliberately indifferent wrongful application of TEXAS PENAL CODE § 39.06.

This extensive allegation is detailed. It is a plausible allegation that law enforcement knew, but did not disclose to the court they approached for the authority to arrest Villarreal, that she had sought *no* benefit from her sourcing, and that she had obtained *no* non-public information. It is an allegation that exculpatory facts were obscured by the Defendants in their affidavits so that they could mislead a magistrate to confirm probable cause for them to arrest Villarreal.

Despite this specific allegation of law enforcement "misrepresentations and omissions"—and despite significant reiteration of this allegation in the motion to dismiss hearing—the district court failed to address, much less credit, the contention that Defendants misled the magistrate whom they now offer, and our court majority accepts, as a shield behind whose probable cause finding they can hide.[2]

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2. *Compare* Transcript of Hearing on Defendant's Motion to Dismiss at 25, *Villarreal v. City of Laredo*, No. 5:19-00048 (S.D. Tex. Sep. 9, 2019), ECF No. 58 ("[I]mmunity doesn't apply if the allegations are sufficient to show. . . taint[] [a]nd that's exactly what happened with — Ms. Villarreal has alleged here, Your Honor."), *and id.* at 80 ("[T]hey selected a statute, applied it to

Of course, the manipulation of a magistrate who issues an arrest warrant, accomplished by malicious law enforcement, remains an untested allegation. But at the dismissal stage—before we, as judicial government officers, confer immunity as a matter of law on executive government officers—a comprehensive complaint that law enforcement misled a court must be taken not just as true, but in the light most favorable to the citizen-complainant. *See McLin v. Ard*, 866 F.3d 682, 689-90 & n.3 (5th Cir. 2017).

Otherwise, the "independent intermediary doctrine" would overprotect police misconduct, and even reward it. Indeed, the heart of the independent intermediary doctrine—which has strong critics, such as the Cato Institute, appearing before us here as amicus curiae[3] —depends on the assumption in its title. A judicial

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her to arrest her knowing there was no probable cause" in order to "try[] to manufacture an arrest warrant affidavit[] to give the false impression that there was."), *and id.* at 98 ("[E]ven though there's an intervening, you know, independent judicial officer where the defendants engage in acts that lead to omissions, lead to misstatements in the affidavit presented to the officer, that upsets that intervening authority. And you can't have qualified immunity as a result."), *with* Memorandum and Order at 14-15, *Villarreal v. City of Laredo*, No. 5:19-00048 (S.D. Tex. May 8, 2020), ECF No. 51 (paraphrasing paragraphs 90-93 of the first amended complaint, yet overlooking the taint allegation in paragraph 91).

3. *See also generally* Amanda Peters, *The Case for Replacing the Independent Intermediary Doctrine with Proximate Cause and Fourth Amendment Review in § 1983 Civil Rights Cases*, 48 Pepp. L. Rev. 1 (2021).

"intermediary," whose post-hoc determination will operate legally to shield police from liability for unconstitutional action, must of course be "independent" from the underlying illegality. Thus, "if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation' for the Fourth Amendment violation." *Jennings v. Patton*, 644 F.3d 297, 300-01 (5th Cir. 2011) (*quoting Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)). But this is true only "whe[n] all the facts are presented to the grand jury, or other independent intermediary[,] where the malicious motive of the law enforcement officials does not lead them to withhold *any* relevant information from the independent intermediary." *Cuadra*, 626 F.3d at 813 (citation omitted) (emphasis added). Otherwise, a malicious officer seeking to obtain a facially valid arrest warrant would "be absolved of liability simply because he succeeded." *Thomas v. Sams*, 734 F.2d 185, 191 (5th Cir. 1984) (citation omitted); *see also Wilson v. Stroman*, 33 F.4th 202, 208 (5th Cir. 2022).

This is our court's settled "taint" exception critical to our independent intermediary doctrine—in the vernacular, preventing "garbage in, garbage out"—which we have restated for over thirty years. *See Hand v Gary*, 838 F.2d 1420, 1427-28 (5th Cir. 1988) ("[T]he chain of causation is broken only where *all the facts* are presented to the grand jury, where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information . . . from the independent intermediary. *Any* misdirection of the magistrate or

the grand jury by omission or commission perpetuates the taint of the original official behavior.") (emphases added); *Winfrey v. Rogers*, 901 F.3d 483, 497 (5th Cir. 2018) (same); *see also Morris v. Dearborne*, 181 F.3d 657, 673 (5th Cir. 1999) ("[T]he question of causation is 'intensely factual' . . . A fact issue exists regarding the extent to which (if at all) Dearborne subverted the ability of the court to conduct independent decision making by providing false information, and in so doing, withholding true information.").

It is important to emphasize, again, that Villarreal may be wrong in her accusation of malice and law enforcement abuse of office. The Defendants may not have misled anyone to secure their warrants to arrest her. But when there is uncertainty, especially at the dismissal stage, *see McLin*, 866 F.3d at 689-690 & n.3, we are explicit that this judicially-created shield from liability for a false arrest "does not apply," *Winfrey*, 901 F.3d at 497. And we are equally clear that at the dismissal stage, "it is [the defendant's] burden to prove the omitted material information was presented to the [intermediary that found probable cause]." *Winfrey v. Johnson*, 766 F. App'x 66, 71 (5th Cir. 2019) (applying *Winfrey*, 901 F.3d at 497). Otherwise, police immunity would mean police impunity. *See Bledsoe v. Willis*, No. 23-30238, 2023 U.S. App. LEXIS 31326, 2023 WL 8184814, at *4-5 (5th Cir. Nov. 27, 2023) (unpublished).

II. Because Villarreal alleges her arrest was atypical, her arrestors do not get immunity without inquiry even if they had probable cause to arrest her.

When a plaintiff alleges that she was arrested in retaliation for First Amendment activity, "probable cause should generally defeat a retaliatory arrest claim." *Nieves*, 139 S. Ct. at 1727. But "when a plaintiff presents objective evidence that [s]he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been," she can prevail even if the arresting officer had probable cause. *Id.* Villarreal's first amended complaint alleges that "[Officer Defendants] selected the Statute as a pretext to target Villarreal. They did so despite knowing that LPD, WDCA, and the Webb County Sheriff had never arrested, detained, or prosecuted any person before under the Statute." This conduct falls squarely within the *Nieves* exception. In fact, there could be no better example of a crime never enforced than this one. Texas has never prosecuted it to conviction, ever. At no point in their district or appellate court briefing did Defendants contest Villarreal's allegation that law enforcement in Laredo and Webb County, or indeed, any prosecutor anywhere in Texas, had pursued anyone besides her under § 39.06(c). That fact alone—putting to the side Villarreal's detailed and so-far-untested allegations of police animus, as well as Texas courts' invalidation of the criminal offense used to arrest her[4] —means that seizing and jailing Villarreal

4. Judge Ho sets forth this state law in his dissent. *See also State v. Newton*, 179 S.W.3d 104, 107, 111 (Tex. App. 2005) (affirming the trial court's decision, which had held § 39.06(c) and

should trigger the *Nieves* atypical-arrest exception and defeat, at the motion to dismiss stage, any probable cause the majority imagines conferred immunity on Defendants.

In lieu of countering Villarreal's actual allegation, Defendants cite two cases in their briefing to us for the proposition that Texas juries in other counties had returned convictions under § 39.06, generally. However, neither of these cases concerned the *solicitation* subsection, § 39.06(c), under which Villareal was charged. Rather, both of those cases involved public corruption convictions of public servants under § 39.06(a) and (b). Moreover, neither implicated First Amendment concerns. *See Reyna v. State*, No. 13-02-00499-CR, 2006 Tex. App. LEXIS 75, 2006 WL 20772 (Tex. App. Jan. 5, 2006) (unpublished); *Tidwell v. State*, No. 08-11-00322-CR, 2013 Tex. App. LEXIS 14647, 2013 WL 6405498 (Tex. App. Dec. 4, 2013) (unpublished). In *Reyna*, the defendant was a city administrator in Los Fresnos, Cameron County, who used private information about bidding processes to award construction contracts to his affiliates, *Reyna*, 2006 Tex. App. LEXIS 75, 2006 WL 20772, at *1-2; *Tidwell* involved the Winkler County Attorney using confidential, anonymous complaints to the Texas Medical Board regarding a doctor's unethical

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(d) "void for vagueness," on statutory grounds, and not addressing constitutional ruling); *State v. Ford*, 179 S.W.3d 117, 120, 125 (Tex. App. 2005) (same). Villarreal alleges in her complaint that she filed a habeas petition on February 14, 2018, arguing that § 39.06(c) was unconstitutionally vague and violated the First Amendment, and that on March 28, 2018, Judge Monica Z. Notzon of the 111th Judicial District of Texas granted Villarreal's motion, holding from the bench that the statute was unconstitutionally vague.

behavior to initiate a malicious prosecution of the two nurses who blew the whistle on that behavior, *Tidwell*, 2013 Tex. App. LEXIS 14647, 2013 WL 6405498, at *14. Neither instance contradicts Villarreal's contention that her offense has never been prosecuted successfully in Texas, much less in Webb County, nor certainly against a journalist—exactly the kind of "circumstance[] where officers have probable cause to make arrests, but typically exercise their discretion not to do so" that requires an exception to the probable-cause rule. *Nieves*, 139 S. Ct. at 1727.

Despite *Nieves*'s applicability here, the district court dismissed in a footnote Villarreal's argument that law enforcement did not prosecute anyone under Texas Penal Code § 39.06(c) before her. The district court held that Villarreal's description in her pleading of "similarly-situated persons" as those persons who (a) "asked for or received information from local law enforcement officials" and (b) "published truthful and publicly-accessible information on a newsworthy matter" was "conclusory." Further, the district court held that she did not "appropriately define similarly situated individuals" because her description might have included people "who obtained information from LPD's public spokesperson." Therefore, the district court determined, Villarreal's complaint did not establish that she fit within the *Nieves* exception.

But the district court erred in holding that a pure factual allegation— that "LPD and WCDA had never before arrested, detained, or prosecuted any other

person under TEXAS PENAL CODE § 39.06, let alone any person similarly-situated to Villarreal, during the 23 years the operative version of the statute had been in effect"—was "conclusory" and too broad. The district court's holding that "similarly-situated persons" was not narrowly construed enough for Villarreal to state a claim sets up an unreasonable and needless hoop for a plaintiff to jump through. Her allegation is that neither the LPD nor the WCDA—nor indeed, any police officer or prosecutor in Texas—has ever arrested or charged anyone, including newsgatherers, for this offense. Such a contention surely encompasses those who "lawfully" obtained information from a press official as well as those who did not, unless we presuppose that no journalist has ever before relied on a back-channel government source to obtain information. Black's Law Dictionary defines "conclusory" as "expressing a factual inference without stating the underlying facts on which the inference is based." *Conclusory*, BLACK'S LAW DICTIONARY (11th ed. 2019). That Villarreal's factual allegation was that something had never happened—resulting in a null set of individuals never arrested or charged and cases never prosecuted—does not transform her factual allegation into an inference.[5]

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5. Although the panel majority in *Gonzalez v. Trevino*, 42 F.4th 487, 494 (5th Cir. 2022), distinguishes *Villarreal* on the ground that Priscilla Villarreal's arrest *was* a clear violation of the First Amendment, I acknowledge that I sharply differ from that majority in my interpretation of *Nieves*. Were *Gonzalez* not already before the Supreme Court, I would urge that we revisit its holding here en banc because the "comparative evidence" standard would raise an impossible bar—which is not required

This case is straightforward. Villarreal alleged in her complaint that her arrest for violating § 39.06(c) constituted a "circumstance[] where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Nieves*, 139 S. Ct. at 1727. Hence, her allegation of retaliatory police arrest falls under the exception to the probable-cause rule and survives dismissal. By continuing to overlook this law, our court compounds a constitutional error that countenances, with neither inquiry nor discovery, dismissal of an American citizen-journalist's complaint that her newsgathering led to arrest for something that Texas courts have confirmed is not a crime.

Conclusion

For the reasons discussed above, I would vacate the district court's dismissal of Villarreal's complaint. Our court errs in holding that these Defendants had probable cause to arrest her without testing the factual allegation that the magistrate who issued her arrest warrants was tainted by "misrepresentations and omissions" from her alleged antagonists. Our court further errs in failing to apply *Nieves* to test whether, even if Laredo law enforcement had probable cause to arrest her, they did so

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by the text of the *Nieves* decision— for plaintiffs. *See Gonzalez*, 42 F.4th at 503 (Oldham, J., dissenting) ("It's not clear that there will always (or ever) be available comparative evidence of jaywalkers that weren't arrested. Rather, the retaliatory-arrest-jaywalking plaintiff always (or almost always) must appeal to the commonsense proposition that jaywalking happens all the time, and jaywalking arrests happen virtually never (or never).")

in retaliation for her news reporting. In short, Villarreal's complaint requires discovery and fact-assessment, applying settled law. This court should not countenance the erosion of the First Amendment's protection of citizen-journalists from intimidation by the government officials they seek to hold accountable in their reporting.

DON R. WILLETT, *Circuit Judge*, joined by ELROD, GRAVES, HIGGINSON, HO, and DOUGLAS, *Circuit Judges*, dissenting:

For many of the reasons persuasively penned by my dissenting colleagues, I agree that the district court erred by dismissing Villarreal's claims on qualified-immunity grounds. I write separately to underscore three brief points.

First, one of the justifications so frequently invoked in defense of qualified immunity—that law enforcement officers need "breathing room" to make "split-second judgments"—is altogether absent in this case.[1] This was no fast-moving, high-pressure, life-and-death situation. Those who arrested, handcuffed, jailed, mocked, and prosecuted Priscilla Villarreal, far from having to make a snap decision or heat-of-the-moment gut call, spent *several months* plotting Villarreal's takedown, dusting off and weaponizing a dormant Texas statute never successfully wielded in the statute's near-quarter-century of existence. This was not the hot pursuit of a presumed criminal; it was the premeditated pursuit of a confirmed critic.[2] Also, while the majority says the officers could not

1. *E.g., Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) ("breathing room"); *Plumhoff v. Rickard*, 572 U.S. 765, 775, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014) ("split-second judgments").

2. Qualified immunity's presumed purpose, to ensure "fair notice" before imposing liability, seems mislaid in slow-moving First Amendment situations where government officials can obtain legal counsel. *See Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422, 210 L. Ed. 2d 996 (2021) (Thomas, J., statement respecting denial of certiorari) ("[W]hy should university officers, who have

have "predicted" that their thought-out plan to lock up a citizen-journalist for asking questions would violate the First Amendment[3] —a plan cooked up with legal advice from the Webb County District Attorney's Office, mind you—the majority simultaneously indulges the notion that Villarreal had zero excuse for not knowing that her actions might implicate an obscure, never-used provision of the Texas Penal Code.[4] In other words, encyclopedic jurisprudential knowledge is imputed to Villarreal, but the government agents targeting her are free to plead (or feign) ignorance of bedrock constitutional guarantees. In the upside-down world of qualified immunity, everyday citizens are demanded to know the law's every jot and tittle, but those charged with *enforcing* the law are only expected to know the "clearly established" ones. Turns out, ignorance of the law *is* an excuse—for government officials.[5] Such blithe "rules for thee but not for me" nonchalance is less qualified immunity than unqualified impunity. The irony would be sweet if Villarreal's resulting

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time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a spit-second decision to use force in a dangerous setting'").

3. *See ante*, at 2, 19, 20, 21.

4. *See ante*, at 2 ("Villarreal and others portray her as a martyr for journalism. That is inappropriate. She could have followed Texas law . . . .").

5. Then again, in fairness, who among us has not *checks notes* contrived a premeditated, retributive, slow-motion plan—over several months and with the benefit of 24/7 legal counsel—to criminalize free speech and routine newsgathering by imprisoning those who ask uncomfortable, truth-seeking questions of government officials?

jailtime were not so bitter, and it lays bare the "fair warning" fiction that has become the touchstone of what counts as "clearly established law."[6]

Second, just as officers can be liable for enforcing an obviously unconstitutional statute,[7] they can also be liable for enforcing a statute in an obviously unconstitutional way.[8] The majority opinion seems to rest its holding on the principle that the officers reasonably presumed that Penal Code § 39.06 was constitutional.[9] Whatever one might think of that principle or the majority's application

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6. *See, e.g., Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) ("The central concept of [qualified immunity] is that of 'fair warning' . . . ." (quoting *Hope v. Pelzer*, 536 U.S. 730, 740, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)).

7. *See, e.g., Lawrence v. Reed*, 406 F.3d 1224, 1233 (10th Cir. 2005) ("[S]ome statutes are so obviously unconstitutional that we will require officials to second-guess the legislature and refuse to enforce the unconstitutional statute—or face a suit for damages if they don't.").

8. *See id.* at 1232 ("[T]he overarching inquiry is whether, in spite of the existence of the statute, a reasonable officer should have known that his conduct was unlawful."); *see also Mink v. Knox*, 613 F.3d 995, 1009-10 (10th Cir. 2010) (officer could not rely on criminal-libel statute to arrest a student blogger).

9. *See ante*, at 19 (noting the officers' assumption that § 39.06, despite previously being invalidated, was constitutional and holding that "[t]his principle defeats Villarreal's contention"). My view is different: If a news-gathering citizen asks questions of her government—no force, no coercion, no deception—and if a government employee answers those questions outside of formal channels, the government can take it up with the employee. It cannot imprison the citizen for asking.

of it, ending the analysis there stops a half-step short. It does not account for the possibility—indeed, the real-world certainty—that government officials can wield facially constitutional statutes as blunt cudgels to silence speech (and to punish speakers) they dislike, here in a vengeful, calculated fashion, including months to consult legal counsel.[10] So while we may not impute to officers the foreknowledge of what a federal court may later say, neither should we impute to officers the ignorance of what the First Amendment already says.

Third, this case illustrates (again) the one-sidedness of the modern immunity regime. The plain text of § 1983 declares that government officials "shall be liable" for violating the Constitution if they were acting "under color of any [state] statute."[11] But in the majority's view, the officers evade liability under § 1983 precisely *because* they were acting pursuant to a state statute.[12] However erroneous that holding might be under *Monroe v. Pape*,[13] it would not be quite so discomfiting were it not for the fact that courts have also engrafted onto § 1983 assorted made-up defenses that cannot possibly be squared with the statutory text.[14] If nothing else, today's decision

10. *See, e.g., Nieves v. Bartlett*, 587 U.S. , 139 S. Ct. 1715, 1727 (2019).

11. 42 U.S.C. § 1983.

12. *Ante*, at 24.

13. 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

14. The most glaring made-up defense is the "clearly established law" test, which collides head-on with § 1983's broad and unqualified textual command. Even those who argue for *some*

underscores a striking statutory double standard: Judges

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version of qualified immunity nevertheless disavow the clearly-established-law requirement. *See, e.g.*, Scott Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1345 (2021) ("[T]he common law test for overcoming [qualified] immunity looked quite different from the Supreme Court's modern clearly-established-law doctrine."). Other recent scholarship casts doubt on qualified immunity's entire historical underpinning. Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023) (noting that § 1983's originally passed language contained a "notwithstanding clause," now missing for unknown reasons, that explicitly negated all state-law defenses, making clear that § 1983 claims are viable notwithstanding "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary"). Not all scholars are convinced, however, including a prominent academic critic of qualified immunity who suggests that the repeal of the "notwithstanding clause" was a codifier's error that Congress nevertheless "passed into law" as part of the Revised Statutes of 1874. *See* William Baude, *Codifiers' Errors and 42 U.S.C. § 1983*, VOLOKH CONSPIRACY (June 6, 2023), https://reason.com/volokh/2023/06/12/codifers-errors-and-42-u-s-c-1983/ ("This is a case where Congress itself passed a law that probably made a mistake, making substantive changes to the text when the revision was not supposed to."); *cf. Maine v. Thiboutot*, 448 U.S. 1, 4-5, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980) (holding that § 1983 can be used to enforce federal statutory rights because of its inclusion of "and laws," a phrase that might have been accidentally added through a codifier's error). But no matter where one falls on the scholarly debate surrounding the "notwithstanding clause," there really is no debate on the fundamental point that the "clearly established law" test is untethered from § 1983's text and history and nigh impossible to defend. *See Horvath v. City of Leander*, 946 F.3d 787, 800 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("Nothing in the text of § 1983—either as originally enacted in 1871 or as it is codified today—supports the imposition of a 'clearly established' requirement.").

read *out* text that is plainly there, and read *in* text that is plainly not—both for the benefit of rights-violating officials. Whatever the operative language of § 1983 says, or does not say, current judge-invented immunity doctrine seems hardwired— relentlessly so—to resolve these questions in one direction and one direction only. Counter-textual immunity is a one-way ratchet, and regrettably, today's decision inflicts yet another wrong turn.

I respectfully dissent.

JAMES C. HO, *Circuit Judge*, joined by ELROD, GRAVES, HIGGINSON, WILLETT, and DOUGLAS, *Circuit Judges*, dissenting:

If the First Amendment means anything, surely it means that citizens have the right to question or criticize public officials without fear of imprisonment. The Constitution doesn't mean much if you can only ask questions approved by the state. Freedom of speech is worthless if you can only express opinions favored by the authorities. The government may not answer or agree—but the citizen gets to ask and to speak.

As the Supreme Court has long recognized, "[t]he right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes." *Ashton v. Kentucky*, 384 U.S. 195, 199, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966) (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131 (1949)). "The right of citizens to inquire . . . is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

The right to speak freely and to inquire is precisely what's at stake in this case.

Like every American, Priscilla Villarreal holds views that are shared by some—and disliked by others. But a group of police officers and prosecutors in Laredo weren't content to simply disagree with her. They had

to weaponize the coercive powers of the criminal justice system against her.

So they charged her and jailed her for asking a police officer a question.

The majority bristles at this short-hand description. But facts are stubborn things. Just look at the majority's own recitation of the facts presented in this case:

Defendants don't like that Villarreal "frequently posts . . . content unfavorable to the Laredo Police Department, . . . the district attorney, and other local officials." *Ante*, at 3. So they "engaged in a campaign to harass and intimidate her and stifle her work." *Id.* After a months-long investigation, they settled on a strategy to "arrest Villarreal for [having] conversations with" a police officer. *Id.* at 5. They chose that strategy because, during those conversations, the officer voluntarily answered her request for the names of two decedents—one involving a traffic accident, the other, a suicide. *Id.* at 5-6. So they charged her with "soliciting information that had not yet been officially made public"—namely, "the name and condition of a traffic accident victim and the name and identification of a suicide victim." *Id.* at 2, 14. All they could find to charge her was a statute that had previously been held unconstitutional, and by all accounts has never been the basis of a successful prosecution. *Id.* at 20. But that was fine with them, because their real objective was not to convict, but to humiliate. And that's exactly how Defendants used Villarreal's time in county jail: "[M]any LPD officers . . . surrounded her, laughed at her, took

pictures with their cell phones, and otherwise showed their animus toward Villarreal with an intent to humiliate and embarrass her." *Id.* at 6 (cleaned up).

So in sum, Villarreal politely asked a question—and an officer voluntarily answered. No one forced the officer to answer. Villarreal did nothing to warrant an aggressive, coercive response by law enforcement. The actions taken here were not split-second judgments calls. No innocent lives were at stake. No violent armed criminal was at large. *Contrast, e.g., Winzer v. Kaufman County*, 940 F.3d 900 (5th Cir. 2019). Instead, this was a months-long effort to come up with something—*anything*—to make a popular local citizen-journalist pay for her unfavorable coverage of local police and prosecutors.

All that Villarreal seeks from us is the dignity of presenting her powerful allegations to a jury of her peers. We should've granted her request—or at least resolved her appeal in timely fashion (panel argument took place in February 2021, nearly three years ago). Because Villarreal convincingly alleges not one but multiple violations of our Constitution.

To begin with, the operative complaint presents two distinct theories of First Amendment liability—Villarreal alleges both a direct violation and unconstitutional retaliation. As our court has observed, "the First Amendment prohibits not only direct limitations on speech but also . . . retaliation against the exercise of First Amendment rights." *Colson v. Grohman*, 174 F.3d 498, 508-9 (5th Cir. 1999). The government can't

arrest you for engaging in protected speech. That would constitute a direct violation of your First Amendment rights. In addition, the First Amendment also prohibits the government from arresting you because it dislikes your views. That would be unconstitutional retaliation under the First Amendment.

Villarreal presents both theories. She alleges that Defendants directly interfered with her First Amendment rights by arresting her for asking questions. And she further alleges that Defendants retaliated against her because they dislike her criticisms of Laredo police and prosecutors. These are distinct theories of liability. We should examine them both. *See, e.g., Davidson v. City of Stafford*, 848 F.3d 384, 398 (5th Cir. 2017) (noting that "[t]he district court appears to have addressed only [the plaintiff's] First Amendment claim in the context of § 1983 retaliation," and failed to address his separate claim that his "arrest resulted in an as-applied violation of [his] First Amendment rights"). And she should be allowed to proceed on both.

Furthermore, Villarreal contends that this blatant misuse of law enforcement resources against a disfavored citizen presents Fourth Amendment as well as other claims that warrant trial.

In response, Defendants claim that Texas Penal Code § 39.06(c) justifies their campaign against Villarreal. But this statutory defense to liability under § 1983 is deficient in several obvious respects.

To start, there's the Supremacy Clause. U.S. CONST. art. VI, cl. 2. Federal constitutional rights obviously trump state statutes. And courts have repeatedly held § 39.06(c) unconstitutional—whether facially or as applied—both before and after Villarreal's arrest. *See State v. Newton*, 179 S.W.3d 104, 107, 111 (Tex. App.—San Antonio 2005) (observing that "[t]he trial court . . . held that subsections (c) and (d) of § 39.06 are unconstitutionally void for vagueness," and affirming on statutory grounds, while expressly reserving the constitutional question); *State v. Ford*, 179 S.W.3d 117, 120, 125 (Tex. App.—San Antonio 2005) (same). That presumably explains why no one has been able to identify a single successful prosecution ever brought under § 39.06(c)—and certainly never against a citizen for asking a government official for basic information of public interest so that she can accurately report to her fellow citizens.

It should be obvious why public officials can't enforce state laws in an obviously unconstitutional manner. The plain text of § 1983 expressly imposes liability on state actors who violate the Constitution "under color of [state law]." 42 U.S.C. § 1983. The Supreme Court has applied § 1983 accordingly. *See, e.g.*, *Myers v. Anderson*, 238 U.S. 368, 382, 35 S. Ct. 932, 59 L. Ed. 1349 (1915) ("the new statute did not relieve the new officers of their duty, nor did it interpose a shield to prevent the operation upon them of the provisions of the Constitution") (construing predecessor to § 1983); *Tanzin v. Tanvir*, 592 U.S. 43, 50, 140 S. Ct. 861, 205 L. Ed. 2d 453 (2020) (section 1983 "impos[es] liability on any person who, under color of state law, deprived another of a constitutional right")

(citing *Myers*, 238 U.S. at 379, 383). There's also broad consensus across the circuits that "some statutes are so obviously unconstitutional that we will require officials to second-guess the legislature and refuse to enforce an unconstitutional statute—or face a suit for damages if they don't." *Lawrence v. Reed*, 406 F.3d 1224, 1233 (10th Cir. 2005).

Tellingly, none of the parties disputes this principle. Only the majority flirts with the extreme notion that public officials are categorically immune from § 1983 liability, no matter how obvious the depredation, so long as they can recite some statute to justify it. *See ante*, at 21-22 (rejecting "the idea of 'obvious unconstitutionality'" as a basis for § 1983 liability). It's a recipe for public officials to combine forces with state or local legislators to do—whatever they want to do. It's a level of blind deference and trust in government power our Founders would not recognize.

What's worse, in addition to the obvious constitutional problems, Defendants fail to show that Villarreal violated § 39.06(c) in the first place.

Section 39.06(c) purports to prohibit citizens from asking a public servant for certain non-public information. It's only a crime, however, if the information meets the criterion specified by subsection (d).

Yet by all indications, Defendants were entirely unaware of subsection (d) when they used § 39.06(c) to justify Villarreal's arrest. Subsection (d) makes

clear that a citizen violates § 39.06(c) only when she asks for nonpublic information that is "prohibited from disclosure under" the Texas Public Information Act. But nowhere in their arrest warrant affidavits or charging documents do Defendants ever mention subsection (d) or its requirements—let alone identify which prohibition on disclosure Villarreal violated.

And if all that weren't enough, even counsel's belated post hoc efforts fail to identify a relevant prohibition on disclosure. Villarreal is charged with nothing more than seeking "the name and condition of a traffic accident victim and the name and identification of a suicide victim." *Ante*, at 14. The majority claims this is sensitive information about a pending criminal investigation, and therefore shielded from disclosure under § 552.108 of the Texas Government Code. But that's wrong for several reasons, the most simple of which is this: Subsection (c) of that provision *requires* the release of "basic information about an arrested person, an arrest, or a crime." It's hard to imagine anything more "basic" than a person's name. Every authority cited by the majority supports that view. *See, e.g.*, Tex. Att'y Gen. Op. ORD-127, at 9 (1976) ("the press and the public have a right of access to information concerning crime in the community and to information relating to activities of law enforcement agencies," including, among other things, "the name and age of the victim") (citing *Houston Chron. v. City of Houston*, 536 S.W.2d 559 (Tex. 1976)); *Indus. Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685, 686 (Tex. 1976) (a person's "name" and "identity" does not constitute "highly intimate or embarrassing

facts" whose release would be "highly objectionable to a reasonable person" and thus must be disclosed); *see also* Tex. Att'y Gen. Op. OR2022-36798 (2022) (citing *Indus. Found.*, 540 S.W. at 685).

So even if I accepted the majority's extreme vision where public officials and legislators can overturn federal constitutional rights at their whim—and make no mistake, I don't—Defendants fail to present a valid statutory basis for infringing on Villarreal's fundamental right to freedom of speech without fear of incarceration.

That's the executive summary. Further details are provided below. But the most important point is this: If any principle of constitutional law ought to unite all of us as Americans, it's that the government has no business imprisoning citizens for the views they hold or the questions they ask.

So it's gratifying that a diverse amicus coalition of nationally recognized public interest groups organized by the Foundation for Individual Rights and Expression—including Alliance Defending Freedom, Americans for Prosperity Foundation, the Cato Institute, the Constitutional Accountability Center, the Electronic Freedom Foundation, the First Liberty Institute, the Institute for Justice, and Project Veritas—stands firmly behind Villarreal.

I'm sure that a number of these amici disagree with Villarreal on a wide range of issues. But although they may detest what she says, they all vigorously defend her

right to say it. These organizations no doubt have many pressing matters—and limited resources. Yet they each decided that standing up to defend the Constitution in this case was worth the squeeze.

This united front gives me hope that, even in these divided times, Americans can still stand up and defend the constitutional rights of others— including even those they passionately disagree with. We all should have joined them in this cause. Because my colleagues in the majority decline to do so, I must dissent.

I.

This should've been an easy case for denying qualified immunity. The First Amendment obviously protects the freedom of speech. That protection has long been incorporated against state and local governments under the Due Process Clause. And it should go without saying that the freedom of speech includes not only the right to speak, but also the right to criticize as well as the right to ask questions.

Indeed, the First Amendment expressly protects not only "the freedom of speech" but also "the right . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. It would make no sense for the First Amendment to protect the right to speak, but not to ask questions—or the right to petition the government for a redress of grievances, but not for information.

It should be obvious, then, that citizens have the right to ask questions and seek information. *See, e.g.*, *Citizens United*, 558 U.S. at 339 (recognizing the First Amendment "right of citizens to inquire, to hear, to speak, and to use information"); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 99, 103, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979) ("The reporters . . . obtained the name of the alleged assailant simply by asking various witnesses, the police, and an assistant prosecuting attorney"—which are all "routine newspaper reporting techniques" protected by the First Amendment); *see also Villarreal v. City of Laredo*, 44 F.4th 363, 371 (5th Cir. 2022) (collecting other cases and examples).

The fact that the question or request for information happens to be directed to a police officer does not change the equation. The Supreme Court has long made clear that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462-63, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). So a law that purports to prohibit speech that "interrupts an officer" would plainly violate the First Amendment. *Id.* at 462 (cleaned up). As the Court put it, "[t]he Constitution does not allow such speech to be made a crime." *Id.* And if it's unconstitutional to prohibit a citizen from interrupting a police officer, it's *a fortiori* unconstitutional to prohibit a citizen from politely asking a police officer a question.

It should have been obvious to Defendants, then, that they were violating Villarreal's First Amendment rights when they arrested and jailed her for asking a police officer for information. And that should be devastating to their claim of qualified immunity.

The Supreme Court has made clear that public officials who commit obvious constitutional violations are not entitled to qualified immunity. In fact, the Court has repeatedly reversed circuits, including ours, for granting qualified immunity for obvious violations of constitutional rights. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); *Taylor v. Riojas*, 592 U.S. 7, 9, 141 S. Ct. 52, 208 L. Ed. 2d 164 (2020).

The majority responds that the standard articulated in *Hope* and *Taylor* doesn't apply here, because those cases arose under the Eighth Amendment, not the First Amendment. *Ante*, at 27.

But that would treat the First Amendment as a second-class right. Nothing in § 1983 suggests that courts should favor the Eighth Amendment rights of convicted criminals over the First Amendment rights of law-abiding citizens. Nothing in *Hope* or *Taylor* indicates that those decisions apply only to prison conditions. And no other circuit takes the approach urged by our colleagues in the majority. To the contrary, nine circuits have indicated that the standards articulated in *Hope* apply specifically in the First Amendment context. *See, e.g.*, *Díaz-Bigio v. Santini*, 652 F.3d 45, 50 (1st Cir. 2011); *Nagle v. Marron*, 663 F.3d 100, 115-116 (2nd Cir. 2011); *McGreevy v. Stroup*,

413 F.3d 359, 366 (3rd Cir. 2005); *Tobey v. Jones*, 706 F.3d 379, 391 n.6 (4th Cir. 2013); *MacIntosh v. Clous*, 69 F.4th 309, 399 (6th Cir. 2023); *Kristofek v. Vill. of Orland Hills*, 832 F.3d 785, 798 (7th Cir. 2016); *Galvin v. Hay*, 374 F.3d 739, 746-47 (9th Cir. 2004); *Frasier v. Evans*, 992 F.3d 1003, 1021-22 (10th Cir. 2021); *Leslie v. Hancock Cnty. Bd. of Educ.*, 720 F.3d 1338, 1345-46 (11th Cir. 2013). *See also Cheeks v. Belmar*, 80 F.4th 872, 877 (8th Cir. 2023) (applying *Hope* to the Fourteenth Amendment); *Atherton v. Dist. of Columbia Off. of the Mayor*, 706 F.3d 512, 515, 403 U.S. App. D.C. 462 (D.C. Cir. 2013) (applying *Hope* to the Fifth Amendment).

So I would apply *Hope* and *Taylor* in the First Amendment context. *See also Morgan v. Swanson*, 659 F.3d 359, 412, 414 n.30 (5th Cir. 2011) (en banc) (Elrod, J., dissenting in part) (concluding that *Hope* applies to obvious First Amendment violations).

That's what the Supreme Court did in *Sause v. Bauer*, 138 S. Ct. 2561, 201 L. Ed. 2d 982 (2018). Two police officers entered a woman's living room in response to a noise complaint. When she knelt down to pray, the officers ordered her to stop, despite the lack of any apparent law enforcement need. *Id.* at 2562. The Tenth Circuit granted qualified immunity on the ground that Sause couldn't "identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." *Sause v. Bauer*, 859 F.3d 1270, 1275 (10th Cir. 2017). But the Supreme Court summarily reversed, holding that "there can be

no doubt that the First Amendment protects the right to pray." *Sause*, 138 S. Ct. at 2562.[1]

Sause readily applies here. Just as it's obvious that Sause has the right to pray, it's equally obvious that Villarreal has the right to ask questions.

A.

I suppose it's understandable, given the obvious First Amendment violation alleged in this case, why the majority would like to avoid the First Amendment inquiry altogether. It opens by claiming that Defendants don't have to comply with the First Amendment *at all*. *Ante*, at 8.

The theory appears to go something like this: Villarreal is challenging an arrest. So she can't state a First Amendment claim unless she first establishes a Fourth Amendment claim. To quote the majority: "Because Villarreal's First Amendment free speech claim arises from her arrest," it's "inextricable from her Fourth Amendment claim"—so "liability for both [claims] rises and falls on whether the officers violated clearly established law under the Fourth Amendment." *Id. See also id.* at 26 ("Since there was no Fourth Amendment violation, the officers have qualified immunity on these grounds alone from Villarreal's First Amendment claims.").

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1. The majority suggests I'm overreading *Sause*. It claims that the decision merely "remanded for further proceedings." *Ante*, at 22. But in fact, *Sause* "revers[ed] [the] grant of qualified immunity in a case seeking damages under § 1983 based on alleged violations of free exercise rights." *Tanzin*, 592 U.S. at 50.

There are a number of problems with the majority's theory, but the simplest is this: It spells the end of the First Amendment. All the government would have to do is to enact some state statute or local ordinance forbidding some disfavored viewpoint—and then wait for a citizen to engage in that protected-yet-prohibited speech. The police would have ample probable cause for arrest under the Fourth Amendment. But it would be an indisputable violation of the First Amendment. Yet the majority would conclude that there is no First Amendment liability.

This makes no sense. It's a roadmap for destroying the First Amendment. And unsurprisingly, there is no case law to support it.

In fact, the only authority the majority cites for this proposition is, curiously, *Sause*. That's a problem for the majority, because its theory gets *Sause* backward: The whole point of *Sause* is that police actions like arrests are subject to First Amendment as well as Fourth Amendment scrutiny. As the Supreme Court has explained, *Sause* shows that "[t]here is no doubt that damages claims have always been available under § 1983 for clearly established violations of the First Amendment." *Tanzin*, 592 U.S. at 50 (citing *Sause*).

The majority cites no authority that construes *Sause* to supplant the First Amendment in favor of the Fourth Amendment whenever an arrest is involved. To the contrary, the majority's theory contradicts not only *Tanzin* but also other Supreme Court decisions that subject arrests to First Amendment scrutiny. For example, both *Lozman*

v. City of Riviera Beach, 138 S. Ct. 1945, 201 L. Ed. 2d 342 (2018), and *Nieves v. Bartlett*, 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019), hold that, even where there is probable cause to arrest under the Fourth Amendment, the First Amendment forbids a police officer from retaliating against a citizen for engaging in protected speech. *See Lozman*, 138 S. Ct. at 1949 ("the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech"); *Nieves*, 139 S. Ct. at 1727 ("it would seem insufficiently protective of First Amendment rights to dismiss . . . on the ground that there was undoubted probable cause for the arrest").[2]

The majority's misreading of *Sause* also places us in square conflict with countless circuit decisions around the country that subject police arrests to First Amendment analysis—such as cases involving peaceful protestors.

In *Davidson*, for example, the plaintiff was arrested while protesting an abortion clinic and expressing his pro-life views there. 848 F.3d at 388. Our colleagues on that panel agreed that individuals arrested while peacefully protesting are obviously "protected under the First Amendment." *Id.* at 391. Notably, it didn't matter that the officers claimed a statutory basis for arresting the plaintiff. "Reasonable officers . . . must . . . consider the balance between [the protestor's] First Amendment rights and the right of the public to have access to the Clinic." *Id.* at 393.

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2. *Lozman* and *Nieves* also rebut the majority's curious claim that "the motivation for an arrest is not relevant to its constitutionality." *Ante*, at 18 n.14.

Similarly, consider a recent ruling by the same circuit reversed in *Sause. See Jordan v. Jenkins*, 73 F.4th 1162 (10th Cir. 2023). The facts of *Jordan* are remarkably analogous to those presented here: A citizen verbally criticizes a police officer. The police officer is upset by the criticism. So he (wrongly) arrests the citizen, and finds some statute to justify the arrest. The Tenth Circuit held that the citizen's "verbal criticism was clearly protected by the First Amendment." *Id.* at 1168.[3]

B.

Forced to confront the obvious First Amendment violation presented in this case, the majority counters that a public official can't be held liable so long as the official can invoke some statutory justification—no matter how obvious the constitutional deprivation. *See ante*, at 21-23.

That's wrong on several levels. To begin with, it turns the plain text of § 1983 on its head. The whole point of § 1983 is to hold public officials accountable if they violate the Constitution "under color of any statute, ordinance, regulation, custom, or usage, of any State." To be sure, the presence of a state statute is no longer a requirement for § 1983 liability after *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). But it would get § 1983 entirely backward if the existence of a state statute is not

3. *See also, e.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011); *Abraham v. Nagle*, 116 F.3d 11, 15 (1st Cir. 1997); *Gulliford v. Pierce*, 136 F.3d 1345, 1348-1350 (9th Cir. 1998); *Mackinney v. Nielsen*, 69 F.3d 1002, 1007 (9th Cir. 1995); *Duran v. City of Douglas*, 904 F.2d 1372, 1376-77 (9th Cir. 1990).

only no longer a required element of liability, but a defense to liability altogether.

Not surprisingly, then, none of the parties dispute that public officials are liable if they've committed an obvious violation of a person's constitutional rights, regardless of whether a state statute authorizes the official's actions. A mountain of Supreme Court and circuit precedent reinforces this principle. *See, e.g.*, *Myers*, 238 U.S. at 382 ("the new statute did not relieve the new officers of their duty, nor did it interpose a shield to prevent the operation upon them of the provisions of the Constitution") (construing predecessor to § 1983); *Tanzin*, 592 U.S. at 50 (section 1983 "impos[es] liability on any person who, under color of state law, deprived another of a constitutional right") (citing *Myers*, 238 U.S. at 379, 383); *Lawrence*, 406 F.3d at 1233 ("some statutes are so obviously unconstitutional that we will require officials to second-guess the legislature and refuse to enforce an unconstitutional statute—or face a suit for damages if they don't"); *see also Guillemard-Ginorio v. Contreras-Gomez*, 490 F.3d 31, 40-41 (1st Cir. 2007); *Vives v. City of New York*, 405 F.3d 115, 118 (2nd Cir. 2005); *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 103 (2nd Cir. 2003); *Leonard v. Robinson*, 477 F.3d 347, 359 (6th Cir. 2007); *Ballentine v. Tucker*, 28 F.4th 54, 66 (9th Cir. 2022); *Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002); *Jordan*, 73 F.4th 1162; *Thompson v. Ragland*, 23 F.4th 1252, 1255-56 (10th Cir. 2022); *Lederman v. United States*, 291 F.3d 36, 47, 351 U.S. App. D.C. 386 (D.C. Cir. 2002).

The majority ignores all of this and instead claims that there is, at most, only "a *possible* exception for 'a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.'" *Ante*, at 21 (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979)). None of the parties make this argument, or cite *DeFillippo* anywhere in their briefs to support it.

So what does the majority's theory mean for this circuit? It means that public officials can engage in "obviously unconstitutional" violations all they want. They just can't commit "grossly and flagrantly unconstitutional" ones. Maybe.

Under today's ruling, then, citizens in future cases within the Fifth Circuit will have to litigate not only whether their rights have been violated, but whether the violation is merely "obvious" (and thus not actionable) or "gross and flagrant" (and therefore might be actionable).

But as for this case, it ought to be enough that arresting citizens for "speak[ing] freely" is exactly how "totalitarian regimes" behave. *Ashton*, 384 U.S. at 199. I'll leave it to the majority to explain why a totalitarian government is not as bad as a grossly and flagrantly unconstitutional one.

C.

So Defendants cannot avoid liability for obvious constitutional violations by invoking a state statute.

Moreover, § 39.06(c) of the Texas Penal Code is a particularly weak justification.

To begin with, courts have repeatedly held § 39.06(c) unconstitutional, whether facially or as applied, both before as well as after Villarreal's arrest. *See Newton*, 179 S.W.3d at 107, 111 (observing that "[t]he trial court . . . held that subsections (c) and (d) of § 39.06 are unconstitutionally void for vagueness," and affirming on statutory grounds, while expressly reserving the constitutional question); *Ford*, 179 S.W.3d at 120, 125 (same).[4]

Not surprisingly, then, no one has identified a single prosecution ever successfully brought under § 39.06(c)—and certainly not one against a citizen for requesting basic information of public interest so that she can report the information to fellow citizens.[5]

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4. The majority responds that Villarreal doesn't argue that § 39.06(c) is unconstitutionally vague under the First Amendment. *Ante*, at 20. But her complaint repeatedly alleges that Defendants arrested her under an "unconstitutionally vague" statute on which "no reasonable official would have relied," and that the statute was "vague to the average reader, and contrary to [] clearly established First Amendment right[s]." ***See*** **ROA.154 at ¶ 4; 169 at ¶ 82; 178 at ¶ 124; 202 at ¶ 256**. The First Amendment prohibits unconstitutionally vague laws—indeed, we apply "*stricter* standards of permissible statutory vagueness" to a statute that has a "potentially inhibiting effect on speech." *Smith v. California*, 361 U.S. 147, 151, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959) (emphasis added).

5. The majority claims that Villarreal is not the first to be prosecuted under § 39.06(c). But the very example the majority cites is the one that led to § 39.06(c) and (d) being held unconstitutional. *See*

But what's more, Defendants have never been able to explain how Villarreal violated § 39.06(c) to begin with.

Section 39.06(c) makes it a crime for any citizen to ask a public servant for certain non-public information. But it's only a crime if the information meets the criterion specified by subsection (d).

Subsection (d) makes clear that a citizen violates § 39.06(c) only when she asks for non-public information that is "prohibited from disclosure under" the Texas Public Information Act. But nowhere in their arrest warrant affidavits or charging documents do Defendants ever mention subsection (d) or its requirements—let alone identify which prohibition on disclosure Villarreal violated.

By all indications, Defendants were simply unaware of subsection (d) when they used § 39.06(c) to justify Villarreal's arrest.

Moreover, even after the fact, counsel has been unable to identify a relevant prohibition on disclosure.

Villarreal is charged with requesting "the name and condition of a traffic accident victim and the name and identification of a suicide victim." *Ante*, at 14. The majority contends that this is sensitive information about a pending criminal investigation and therefore shielded

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Ford, 179 S.W.3d at 120. The majority also notes that prosecutions have been brought against public servants under a different provision, § 39.06(b). It's not clear why the majority thinks this helps its cause.

from disclosure under § 552.108 of the Texas Government Code. *Ante*, at 12. But subsection (c) of that same provision *requires* the release of "basic information about an arrested person, an arrest, or a crime."

In the absence of a statutory prohibition on disclosure, the majority scrambles and identifies a small handful of other authorities. But none of the majority's authorities establish a crime by Villarreal. *Ante*, at 12-14. To the contrary, every authority cited by the majority undermines its claims.

The majority cites *Houston Chronicle*. But there the city was required to release a broad range of basic information—including "the offense committed, location of the crime, identification and description of the complainant, the premises involved, the time of the occurrence, description of the weather, a detailed description of the offense in question, and the names of the investigating officers," 536 S.W.2d at 561, as well as the property and vehicles involved. *See Houston Chron. Pub'g Co. v. City of Houston*, 531 S.W.2d 177, 187 (Tex. App.—Houston [14th Dist.] 1975).

Next, the majority cites a 1976 Texas Attorney General opinion, Tex. Att'y Gen. Op. ORD-127. But that opinion construes *Houston Chronicle* to hold that "the press and the public have a right of access to information concerning crime in the community and to information relating to activities of law enforcement agencies"—including, among other things, "the name and age of the victim." *Id.* at 9.

The majority also cites *Industrial Foundation*. But that decision holds only that "highly intimate or embarrassing facts" may be excluded from disclosure under certain circumstances. 540 S.W.2d at 685. What's more, it also holds that the release of a person's "name" and "identity" would *not* be "highly objectionable to a reasonable person," and therefore must be disclosed. *Id.* at 686.

Finally, the majority cites a 2022 Texas Attorney General opinion, Tex. Att'y Gen. Op. OR2022-36798. But that opinion observes that "the right to privacy is a personal right that lapses at death," and therefore, "information relate[d] to deceased individuals . . . may not be withheld from disclosure." *Id.* at 2-3. To be sure, the opinion also suggests that "surviving family members can have a privacy interest in information relating to their deceased relatives." *Id.* at 3 (citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004)). But that interest would not extend to basic information such as the name of the decedent. Family members have a weaker interest in privacy than the decedent. *See* 541 U.S. at 167 (family members are "not . . . in the same position as" decedent). The family's privacy right is confined to only the most sensitive matters—namely, "the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes." *Id.* (*Favish* goes on to detail the longstanding cultural sensitivities concerning "[b]urial rites or their counterparts [that] have been respected in almost all civilizations from time

immemorial." *Id.* It also relies on authorities recognizing a family privacy right in "autopsy records" and "crime scene photographs," observing that "child molesters, rapists, murderers, and other violent criminals often make FOIA requests for autopsies, photographs, and records of their deceased victims." *Id.* at 169-70.)

None of this remotely supports the conclusion that Villarreal broke the law by asking for a person's name.[6]

D.

Notwithstanding these glaring constitutional and statutory defects, the majority insists that, because a state court magistrate agreed to issue the warrants, the independent intermediary rule entitles Defendants to immunity. As the majority puts it, "[a] warrant secured from a judicial officer typically insulates law enforcement personnel who rely on it." *Ante*, at 24. "In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination." *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 921, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)).

But it should be obvious by now that this is not remotely the "typical" or "ordinary" case. According to

6. The majority also makes a modest attempt to invoke § 550.065 of the Texas Transportation Code. *Ante*, at 13. But that provision applies to the disclosure of written collision reports prepared under certain enumerated provisions of the Transportation Code. No one claims that any such report is at issue here.

the complaint, Defendants jailed Villarreal for exercising her fundamental right to ask questions and petition officials for information of public interest. Moreover, they did so without even trying to satisfy the statutory requirements enumerated in subsection (d)—presumably because their goal was to humiliate, not incarcerate.

It's precisely because of cases such as this that the Supreme Court has warned us not to place blind trust in magistrates. The Court has cautioned us about the circumstances in which "a magistrate, working under docket pressures, will fail to perform as a magistrate should." *Malley v. Briggs*, 475 U.S. 335, 345-46, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). That's why courts must "require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment." *Id.* at 346.

So courts may not allow police officers to shift responsibility to a magistrate. Instead, we must conduct an independent inquiry to determine "whether a reasonably well-trained officer . . . would have known that his affidavit failed to establish probable cause, and that he should not have applied for the warrant." *Id.* at 345. "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue." *Id.* at 341. *See also, e.g., Messerschmidt v. Millender*, 565 U.S. 535, 547, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012) (same); *United States v. Brouillette*, 478 F.2d 1171, 1175 (5th Cir. 1973) (finding warrant deficient because it lacked allegations to support "a necessary element of the . . . criminal offense").

In holding officers accountable for their warrant applications, the Court readily acknowledged that "an officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, before submitting a request for a warrant, upon whether he has a reasonable basis for believing that his affidavit establishes probable cause." *Malley*, 475 U.S. at 343. "But such reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature." *Id.*

That's precisely the problem with this case. The operative complaint presents compelling allegations that the officers here were motivated, not by considered judgment, but by malice. The officers here set aside both Villarreal's constitutional rights under the First Amendment and the statutory requirements of subsection (d)—conduct no objectively reasonable officer would have permitted. These obvious constitutional and statutory defects disentitle Defendants from the benefits of the independent intermediary rule.

E.

There's an old adage among lawyers that, if you don't have the law on your side, pound the facts. And that's just what the majority does to Villareal.

For example, the majority disparages Villarreal for revealing information that "could have severely emotionally harmed the families of decedents and interfered with ongoing investigations." *Ante*, at 2. Never

mind that Villarreal was jailed for soliciting information—not publishing it. And never mind that Defendants have presented no evidence of any emotional harm to families or interference with criminal investigations—to the contrary, the majority is actively *preventing* the parties from presenting evidence at trial.

What's worse, the majority hasn't explained how any of this provides a basis for curtailing a citizen's First Amendment rights. The threat of severe emotional distress certainly didn't stop the Supreme Court from enforcing the First Amendment in *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011), despite the enormous pain that the speech undoubtedly caused the families of the decedents. Moreover, the Supreme Court has identified a number of constitutional rights that have "'controversial public safety implications.'" *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 n.3, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022). There are no doubt citizens who would find it enormously stressful to see another citizen lawfully bearing firearms. *See, e.g.*, *Glass v. Paxton*, 900 F.3d 233 (5th Cir. 2018). But I would venture a guess that the majority would not allow that emotional hardship to justify curtailment of a citizen's Second Amendment rights. The First Amendment deserves the same respect.

The majority also criticizes Villarreal for seeking this information "to capitalize on others' tragedies to propel her reputation and career." *Ante*, at 2. It is certainly true that people often engage in behavior out of self-interest. But that too is no basis for limiting a citizen's First Amendment rights. The First Amendment doesn't turn on

why a citizen asks a question, or what she might gain by asking. Every citizen has the right to ask tough questions of their government. The Constitution is premised on the right to ask, not the need to ask. The First Amendment doesn't distinguish between altruistic and self-interested questions. There is no pro bono requirement to the freedom of speech. As the Supreme Court has repeatedly observed, "[s]peech . . . is protected even though it is . . . 'sold' for profit." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). The fact that a speaker's "interest is a purely economic one . . . hardly disqualifies him from protection under the First Amendment." *Id.* at 762. *See also, e.g.*, *Smith v. California*, 361 U.S. 147, 150, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959) (First Amendment applies to booksellers, because books are plainly covered by the First Amendment, and "[i]t is, of course, no matter that the dissemination takes place under commercial auspices"); *Thomas v. Collins*, 323 U.S. 516, 531, 65 S. Ct. 315, 89 L. Ed. 430 (1945) (rejecting contention that First Amendment rights don't apply when "the individual . . . receives compensation" for exercising those rights); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936) (applying the First Amendment to corporations).

In addition, the majority finds it contemptible that Villarreal chose to seek information, not through the formal (and often painfully slow) mechanism of a public information request, but by communicating directly with a public official she knows. The majority condemns her for using an "illicit" "backchannel source." *See, e.g.*,

ante, at 2, 16, 17. But I doubt there's a single member of this court who hasn't sought non-public information from a "backchannel source"—for example, from a Senate aide who has information about the potential scheduling or other basic information about a pending judicial nomination (perhaps their own, or that of a friend). Defendants respond that Congress could make it a crime for a federal judge to ask a Senate aide for information about a pending judicial nomination. Oral Argument at 31:00-31:30. It's a peculiar approach to the Constitution—and contrary to common sense. *See, e.g., Never Say 'Nice to Meet You' and 27 Other Rules for Surviving in D.C.*, Politico, Feb. 17, 2023 ("D.C. is a formal city; to reach people, you often have to go through official channels—a communications director, or a press secretary. But if you need to ask a real question, or if someone needs to get in touch with you about something important, texting is the way to go. There's no better way to set up a meeting—without staff—or disclose substantive information than the humble text.").

Finally, the majority attempts to diminish the injury inflicted by the police officers and prosecutors on Villarreal. It notes that Villarreal was "detained, not . . . jailed." *Ante*, at 6. It was only a "brief arrest." *Ante*, at 1. But Villarreal's complaint alleges that she was "detained at the Webb County Jail" and "released from physical detention at the Webb County Jail" on a $30,000 bond. If the majority thinks this is a material fact dispute, it's one that can be considered at trial. But more to the point, the legal analysis supporting today's grant of qualified immunity doesn't turn on what exactly happened to

Villarreal. The majority's logic would readily lead to immunity if she had been convicted and incarcerated.

F.

Today's ruling doesn't just disrespect Villarreal's rights. It disrespects the rights of every citizen in our circuit who might wish to seek information from public officials. And not just those citizens who seek information involving a crime. There are countless other exceptions to disclosure littered throughout Texas law besides § 552.108 of the Texas Government Code. Indeed, the exceptions to disclosure aren't even limited to one particular chapter of one particular code (as noted, the majority cites a provision of the Transportation Code as an alternative basis for jailing Villarreal).

So a citizen may feel compelled to hire a lawyer before daring to ask a public official for information. But even hiring a lawyer may not be enough— as en banc oral argument in this case troublingly illustrates.

Many parents, for example, are enormously concerned about our public schools. Their concerns range from curriculum to school safety. Accordingly, the consideration and selection of a new school superintendent may be of great interest to many citizens. *See, e.g.*, *Uvalde school chief plans to resign after community outrage*, AP, Oct. 22, 2022 ("Uvalde's school district superintendent announced Monday he plans to resign by the end of the academic year, following months of community outrage over the handling of the United States' deadliest school

shooting in nearly a decade."); Hannah Natanson & Justin Jouvenal, *Loudoun schools chief apologizes for district's handling of alleged assaults, promises changes to disciplinary procedures*, WASH. POST, Oct. 15, 2021 ("After news of the second assault became public—with the sheriff's office putting out a release Oct. 7—parents in the Northern Virginia district of 81,000 exploded with anger and accusations of incompetence. They questioned why a student involved in a sexual assault was transferred to another high school, enabling that student to commit a second assault. At a heated board meeting Tuesday, some speakers called on the superintendent and school board to resign.").

So what if a citizen wishes to ask for the names of those being considered for superintendent, with plenty of time to investigate and publicly debate the potential candidates? Does Texas law make it a crime to ask this question? *See* TEX. GOV'T CODE § 552.126 ("The name of an applicant for the position of superintendent of a public school district is excepted from the requirements of Section 552.021, except that the board of trustees must give public notice of the name or names of the finalists being considered for the position at least 21 days before the date of the meeting at which a final action or vote is to be taken on the employment of the person.").

When this question was asked during en banc oral argument, counsel for Defendants confidently reassured us that such questions would not be a crime. Oral Argument at 28:55-29:45.

But counsel for the Texas Attorney General's office gave precisely the opposite response. She said that it would be a crime. Oral Argument at 1:00:38-1:01:00.[7]

If the attorneys who represent and advise local Texas law enforcement officials and the attorneys who work for the Texas Attorney General can't agree on which questions can put a citizen in prison, it's no wonder that courts have repeatedly found the Texas law unconstitutionally vague.[8]

So the take-away from today's ruling is this: Any citizen who wishes to preserve her liberty should simply avoid asking public officials for information outside of the formal (and time-consuming) channel of the Public Information Act. But if you ask for public information using the wrong mechanism, you may go to prison. *See* Oral Argument at 30:20-25 ("Wrong procedure, so jail'" "Right.").

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7. The Texas Attorney General plays a significant role in interpreting and enforcing the Texas Public Information Act. *See, e.g.*, Tex. Gov't Code § 552.011.

8. Disagreements over which questions are a crime under § 39.06(c) aren't limited to attorneys. The Texas Attorney General's office also disagrees with the majority. The majority concludes that "the distinction between exceptions and outright prohibitions on disclosing information is irrelevant for purposes of section 39.06(c)." *Ante*, at 11 n.12. By contrast, the en banc brief of the Texas Attorney General's office concludes that only outright prohibitions on disclosure—and not discretionary exceptions—would trigger § 39.06(c). *See* Tex. Br. 19.

This vision of democracy will no doubt sound idyllic to bureaucrats who favor convenience to the government over service to the citizen. But it's dreadful to anyone who cherishes freedom.

II.

Villarreal also presents a claim of First Amendment retaliation. That is, separate and apart from Defendants' interference with her right to ask questions, Villarreal alleges that Defendants arrested her in retaliation for expressing viewpoints critical of local law enforcement.

I agree with, and concur in, Judge Higginson's eloquent articulation as to how Villareal has alleged a valid First Amendment retaliation claim. It seems obvious, and Villarreal's complaint amply alleges, that others have asked Laredo officials countless other questions that would violate the same offense alleged by the government here. Yet the officials only targeted Villarreal—presumably because they dislike her views. *See, e.g.*, *Villarreal*, 44 F.4th at 376 ("Villarreal's complaint sufficiently alleges that countless journalists have asked LPD officers all kinds of questions about nonpublic information. Yet they were never arrested."); *id.* (Defendants "knew that members of the local media regularly asked for and received information from LPD officials relating to crime scenes and investigations, traffic accidents, and other LPD matters."); *id.* ("Villarreal alleges, and Defendants concede, that LPD had never before arrested any person under § 39.06(c).").

The majority intimates that, under our circuit's precedents, Villarreal's retaliation claim fails as a matter of law. But if that is so, we could've used this very en banc proceeding to revisit those same precedents. Some members of this court have urged that very course in other cases, but each time, the majority has declined. *See Gonzalez v. Trevino*, 60 F.4th 906 (5th Cir. 2023); *Mayfield v. Butler Snow*, 78 F.4th 796 (5th Cir. 2023). So it's not surprising that the majority has declined to do so here.

Be that as it may, the Supreme Court recently granted certiorari to examine our circuit precedent in any event. *See Gonzalez v. Trevino*, 144 S. Ct. 325, 217 L. Ed. 2d 154 (2023).

III.

As for Villarreal's remaining claims, I would allow her Fourth Amendment claim to proceed, for the reasons already detailed above, as well as the reasons so well stated in Judge Higginson's scholarly dissent. Even putting aside the obvious First Amendment problems, there was no probable cause to arrest her, because the arrest warrants did not even bother to recite, let alone substantiate, the elements of any crime under Texas law. To excuse these deficiencies, the majority emphasizes that the probable cause standard is "nontechnical" and "practical." *Ante*, at 17 (citing *Maryland v. Pringle*, 540 U.S. 366, 370, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003)). But the case the majority cites involves officers in the field, not sitting at their desks drafting affidavits.

I would also allow Villarreal's selective enforcement claim under the Equal Protection Clause, as well as her conspiracy claim, to proceed, for the reasons previously articulated by the panel majority. *See Villarreal*, 44 F.4th at 375-77.

According to an old Russian joke, a kid comes home from school and says: "Daddy, we had a civics lesson today, and the teacher told us about the Constitution. He told us that we have a Constitution, too—just like in America. And he told us that our Constitution guarantees freedom of speech, too—just like in America."

The dad responds: "Well, sure. But the difference is that the American Constitution also guarantees freedom *after* the speech."

I agree. Our Constitution guarantees Villarreal's freedom after her speech. We should have, too. I dissent.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION, FILED MAY 8, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CIVIL ACTION NO. 5:19-CV-48

PRISCILLA VILLARREAL,

Plaintiff,

v.

THE CITY OF LAREDO, TEXAS, *et al.*,

Defendants.

MEMORANDUM AND ORDER

Before the Court are (1) Defendants City of Laredo, Claudio Treviño, Jr., Juan L. Ruiz, Deyanira Villarreal, Enedina Martinez, Alfredo Guerrero, Laura Montemayor, and Does 1-2's Motion to Dismiss Pursuant to Rule 12(b)(6) to Plaintiff's First Amended Complaint (Dkt. No. 27) (the "City Defendants' Motion"); and (2) Defendants Isidro Alaniz, Marisela Jacaman and Webb County's Motion to Dismiss for Failure to State a Claim under FRCP 12(b)(6) to Plaintiff's First Amended Complaint (Dkt. No. 26) (the "County Defendants' Motion").

This case involves the balance between Plaintiff's First Amendment rights as a citizen journalist and the legal

protections afforded to law enforcement officials for the decisions they make in their official capacities. Defendants arrested and attempted to prosecute Plaintiff under a Texas state statute later found to be unconstitutional. Plaintiff claims this was done in retaliation for previously publishing negative stories about Defendants on Facebook. Defendants have raised various legal defenses to Plaintiff's claims, including the defense of qualified immunity for the individual officials. The purpose of that doctrine is to protect "all but the plainly incompetent or those who knowingly violate the law." Plaintiff faces a high bar to overcome the defense of qualified immunity once it has been invoked by Defendants.

The Court has analyzed the parties' competing arguments in great detail. Although the Court recognizes the profound importance of the rights guaranteed to citizens, such as Plaintiff in this case, the Court has ultimately determined that Plaintiff has not been able to overcome the claims of qualified immunity and the other arguments raised by Defendants' Motions.

For the reasons set forth in this Memorandum and Order, the City Defendants' Motion (Dkt. No. 27) is **GRANTED** and the County Defendants' Motion (Dkt. No. 26) is **GRANTED**.

Appendix B

I. Background and Factual Allegations[1]

Plaintiff Priscilla Villarreal filed this action on April 8, 2019. (Dkt. No. 1). In her First Amended Complaint ("FAC") (Dkt. No. 24), Plaintiff asserts claims against the City of Laredo, Texas; Laredo's Chief of Police, Claudio Treviño ("Treviño"); several individual employees of the Laredo Police Department ("LPD"); Webb County, Texas; Webb County District Attorney ("WCDA") Isidro R. Alaniz ("Alaniz"); and Webb County Assistant District Attorney Marisela Jacaman ("Jacaman").

A. Plaintiff's Online Reporting

Since 2015, Plaintiff has operated a Facebook page, titled "Lagordiloca News Laredo Tx" ("Lagordiloca Facebook page"), where she shares video footage and live video streams of crime scenes, traffic incidents, and other events in the Laredo, Texas, area. (Dkt. No. 24 ¶¶ 24-28). The Lagordiloca Facebook page contains Plaintiff's own live and recorded video footage, recorded videos, photographs, and information from other citizens or news sources on local crime, traffic, missing persons, and fundraising events. (*Id.* ¶¶ 32-34). Plaintiff also shares information that she receives from LPD spokesman Jose Baeza ("Baeza") about local crime and public safety matters. (*Id.*).

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1. For the purpose of this analysis, the Court must accept as true Plaintiff's allegations as set forth in the First Amended Complaint. (Dkt. No. 24); *see Rosenblatt v. United Way of Greater Houston*, 607 F.3d 413, 417 (5th Cir. 2010).

In addition to news content, Plaintiff posts promotions for local businesses and is sometimes paid for those promotions. (*Id.* ¶¶ 34-35). Plaintiff has also used the Lagordiloca Facebook page to request donations for new equipment for her reporting. (*Id.*). However, Plaintiff alleges that she does not receive a regular income or other regular economic gain from the Lagordiloca Facebook page. (*Id.* ¶ 35).

The Lagordiloca Facebook page has over 120,000 followers. (*Id.*). Local residents use the page as a source of local information and also comment on local events and news. (*Id.*). Plaintiff posts her own commentary, which she describes as "colorful," and strives to provide an "authentic and real-time look at Laredo crime and safety, government conduct, and other newsworthy events in the city." (*Id.* ¶¶ 33, 39-40).

Plaintiff's activity on the Lagordiloca Facebook page frequently includes live video streams and recorded videos about activities of LPD officers. (*Id.* ¶ 42). When recording or live streaming LPD activity, Plaintiff alleges that she takes care to record only from public places and not to interfere with law enforcement activities. (*Id.* ¶ 43). Plaintiff alleges that she has posted a recorded video of police activity following a hostage and homicide situation in which LPD officers shot and killed the captor; a live video feed showing LPD officers choking and using force on an arrestee at a traffic stop; a live video feed of a police shooting; and live videos of other LPD activities, including arrests, traffic accident scenes, and crime scenes. (*Id.* ¶ 45). Sometimes Plaintiff has posted follow-up videos

with her commentary, both positive and negative, about the LPD activities depicted. (*Id.*).

Plaintiff alleges that in 2015, she posted images and commentary about a malnourished horse and alerted local law enforcement to the problem. (*Id.* ¶¶ 48-50). When officers arrived at the property, they found other animals in similar conditions. (*Id.*). Plaintiff alleges the property was owned by Patricia Jacaman, a relative of Defendant Jacaman. (*Id.*). On the Lagordiloca Facebook page, Plaintiff criticized the Webb County District Attorney's failure to prosecute Patricia Jacaman. (*Id.*).

B. Allegations of Retaliation and Interference

Plaintiff alleges that Defendants have singled out and subjected Plaintiff to a pattern of harassment, intimidation, and indifference. (*Id.* ¶¶ 51-53). Plaintiff alleges that Defendants City of Laredo and Webb County, and various officials and employees—including Defendants Treviño, Juan L. Ruiz ("Ruiz"), Deyanira Villarreal ("DV"),[2] Enedina Martinez ("Martinez"), Alfredo Guerrero ("Guerrero"), Laura Montemayor ("Montemayor"), Does 1-2, Alaniz, and Jacaman—have interfered with and retaliated against Plaintiff's efforts to (a) lawfully gather and publish information about local concern; (b) film and record police activity in public areas; and (c) criticize local officials and provide a forum for others to do so. (*Id.* ¶ 53).

2. Plaintiff refers to Defendant Deyanira Villarreal as "DV" to avoid confusion with Plaintiff. (Dkt. No. 24 ¶ 15 n.3). The Court follows the same convention in this Memorandum and Order.

Plaintiff's FAC sets forth several examples of what she alleges were "hostile, defamatory, and indifferent acts," including: (a) Martinez falsely telling other LPD officers that Plaintiff is a five-time convicted felon; (b) Montemayor threating to take Plaintiff's phone—and to keep it as evidence—while Plaintiff was using her phone to record a live video feed of the scene of a shooting from a public area; (c) Guerrero harassing and intimidating Plaintiff without justification while she was working a traffic incident for her employer; (d) LPD treating Plaintiff with indifference when she called and spoke to LPD officers about a sexual assault; (e) Defendants deliberately treating Plaintiff differently than other journalists and media members, including withholding from Plaintiff information generally released to local newspapers and broadcasters; (f) Alaniz telling Plaintiff during a closed-door meeting that he did not appreciate Plaintiff criticizing his office; and (g) members of the City of Laredo City Council (the "Laredo City Council") initially attacking and obstructing a proposal to construct and name a reading kiosk at a local park after Plaintiff's late niece. (*Id.* ¶¶ 54(a)-(g)). Plaintiff contends these acts show a policy and pattern of conduct by Defendants in retaliation for negative information and comments published by Plaintiff. (*See, e.g., id.* ¶¶ 56-57).

C. Webb County Arrest Warrants

On April 11, 2017, Plaintiff published a story on the Lagordiloca Facebook page about a man who committed suicide by jumping off a public overpass in Laredo. (*Id.* ¶ 65). Plaintiff published the name of the man and identified his employer as the United State Customs and Border Protection agency. (*Id.*). Plaintiff alleges that she

learned this information from a janitor who worked near the overpass, and that she later received corroborating information from LPD Officer Barbara Goodman ("Goodman"). (*Id.* ¶ 65).

On May 6, 2017, Plaintiff posted a live video feed of a fatal traffic accident on her Lagordiloca Facebook page. (*Id.* ¶ 66). She published the location of the accident, and information about the family involved. (*Id.*). Plaintiff first learned this information from a relative of the family who saw the live video feed on the Lagordiloca Facebook page. (*Id.*) Plaintiff later received corroborating information from Goodman. (*Id.*).

Plaintiff alleges that Ruiz, an investigator for LPD, subsequently made statements in support of two criminal complaints and affidavits in support of warrants for Plaintiff's arrest based on the April 11, 2017 and May 6, 2017 posts (collectively, the "Subject Publications"). (*Id.* ¶¶ 86-90). Ruiz's statements alleged that Plaintiff violated the Texas Misuse of Official Information statute, which provides:

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

(*Id.* ¶ 72) (citing Tex. Penal Code § 39.06(c) ("§ 39.06(c)")). The statute defines "information that has not been made public" as "any information to which the public does not generally have access, and that is prohibited from disclosure under" the Texas Public Information Act ("TPIA"). (Dkt. No. 24. ¶ 72 (citing Tex. Penal Code § 39.06(c))).

Plaintiff alleges that she had previously published posts similar to the Subject Publications, including a 2015 post about a local suicide, but she had never before been investigated for breaking any law. (*Id.* ¶ 67). Plaintiff further alleges that LPD, the Webb County District Attorney, and the Webb County Sheriff's Office ("WCSO") had never arrested, detained, or prosecuted any person under § 39.06(c). (*Id.*).

On December 5, 2017, two warrants were issued for Plaintiff's arrest (the "Arrest Warrants"). (*Id.* ¶ 95). Plaintiff alleges the Arrest Warrants were issued because of misstatements and omissions in Ruiz's affidavits (the "Arrest Warrant Affidavits"), and that no other LPD officer provided an affidavit or statement in support of the arrest warrants. (*Id.* ¶¶ 87, 95). In the Arrest Warrant Affidavits, Ruiz asserted that Plaintiff violated § 39.06(c) and that probable cause existed. (*Id.* ¶ 88). Ruiz named DV as an officer who participated in the investigation leading to the Arrest Warrant Affidavits and identified Jacaman as "signing off" on subpoenas concerning the investigation of Plaintiff. (*Id.* ¶ 88). Jacaman signed an "Arrest Warrant Approval Form," dated November 21, 2017, to which the Arrest Warrant Affidavits were attached. (*Id.*).

Ruiz alleged in the Arrest Warrant Affidavits that Plaintiff had received or solicited the name and condition of a traffic accident victim and the name and identification of a suicide victim, and that the information Plaintiff published in the Subject Publications "had not been made public." (*Id.* ¶ 89). Ruiz also alleged that an unnamed source told DV that Plaintiff received this information from Goodman, who communicated with Plaintiff. (*Id.*). Ruiz alleged that Plaintiff gained additional followers on her Lagordiloca Facebook page by publishing this news before other news outlets. (*Id.* ¶ 92).

D. Arrest, Detention, and Release of Plaintiff

After learning of the Arrest Warrants and LPD's intent to arrest her, Plaintiff turned herself in on December 13, 2017. (*Id.* ¶ 96). After Plaintiff was taken from booking, she alleges that numerous LPD officers and employees—including Martinez, Montemayor, and Guerrero—surrounded Plaintiff, as various individuals laughed at her, took pictures with their cell phones, and "otherwise show[ed] their animus toward [Plaintiff] with an intent to humiliate and embarrass her." (*Id.* ¶ 97).

After being detained at the Webb County Jail, Plaintiff posted bond and was released. (*Id.* ¶ 124). On February 14, 2018, Plaintiff filed a petition for a writ of habeas corpus in Webb County District Court. (*Id.*). On March 28, 2018, Judge Monica Z. Notzon of the 111th District Court of Webb County, Texas held, in a bench ruling, that § 39.06(c)

was unconstitutionally vague. (*Id.* ¶ 127).[3] Webb County did not appeal the ruling. (*Id.* ¶ 128).

Alaniz was subsequently quoted in a local paper stating that LPD had not dropped the "investigation" and would continue to investigate in order to identify who in the department provided Plaintiff with the information she published in the Subject Publications. (*Id.* ¶ 129).

E. Plaintiff's § 1983 Complaint

On April 8, 2019, Plaintiff filed a complaint in this Court. (Dkt. No. 1). Plaintiff filed her FAC on May 29, 2019. (Dkt. No. 24). The FAC asserts claims against the Individual Defendants pursuant to 42 U.S.C. § 1983 ("§ 1983") for retaliation and interference with Plaintiff's First Amendment-protected activity ("Count I"); unlawful arrest and detention in violation of the Fourth and Fourteenth Amendments ("Count II"); deprivation of equal protection under the Fourteenth Amendment ("Count III"); and civil conspiracy to deprive Plaintiff of constitutionally-protected rights ("Count IV"). (*Id.*). The FAC alleges a supervisory liability claim against Treviño ("Count V"); and municipal liability claims against the City of Laredo ("Count VI") and Webb County ("Count VII"). The FAC also seeks declaratory relief against all Defendants for alleged ongoing conduct to retaliate against and interfere with Plaintiff's First Amendment-protected activity ("Count VIII"). (Dkt. No. 24 at 47-54).

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3. Defendants state that no order has ever been issued on Judge Notzon's March 28, 2018 ruling. (Dkt. No. 27 at 9 n.2).

Finally, the FAC seeks injunctive relief with respect to all of Plaintiff's claims. (*Id.*).

Defendants filed the pending Motions, seeking dismissal of all of Plaintiff's claims asserted against all Defendants. (Dkt. Nos. 26, 27). Defendants City of Laredo, Treviño, Ruiz, DV, Martinez, Guerrero, Montemayor, and Does 1-2 (collectively, the "City Defendants") move for dismissal of Counts I-VI and Count VIII. (Dkt. No. 27). Defendants Webb County, Alaniz, and Jacaman (collectively, the "County Defendants") move for dismissal of Counts I-VI, Count VII, and Count VIII. The parties have fully briefed both Motions and presented oral argument on the Motions. (*See* Min. Entry dated Sept. 10, 2019). The Court ordered the parties to submit supplemental briefs on specific issues, which the Court considers as part of the pending Motions. (*Id.*; Dkt. Nos. 48-50).

II. Legal Standard

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must determine whether a plaintiff has stated a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). At the motion to dismiss stage, courts are "limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citing *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000)).

To survive a Rule 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)) (internal quotations omitted). "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 555). This does not require detailed factual allegations but does require "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. The Court must "accept as true all well-pleaded facts." *Rosenblatt*, 607 F.3d at 417. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

III. Discussion

A. Absolute Prosecutorial Immunity

Alaniz and Jacaman contend that they have absolute immunity as to all claims asserted against them individually. (Dkt. No. 26 at 7). Prosecuting attorneys have absolute immunity from liability for conduct in their prosecutorial function. *Imbler v. Pachtman*, 424 U.S. 409, 424, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). "Absolute immunity protects a prosecutor even if the prosecutor acts in bad faith or with ulterior motives, so long as he

or she acts within the scope of his or her prosecutorial functions." *Charleston v. Pate*, 194 S.W.3d 89, 91 (Tex. App.—Texarkana, 2006, no pet.). However, the actions of a prosecutor are not subject to absolute immunity merely because they are performed by a prosecutor. Absolute immunity is justified only where "any lesser degree of immunity could impair the judicial process itself." *Kalina v. Fletcher*, 522 U.S. 118, 127, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (internal citation omitted). Conversely, qualified immunity "represents the norm for executive officers, so when a prosecutor functions as an administrator rather than as an officer of the court he is entitled only to qualified immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) (internal citations omitted). The official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question. *Id.* at 268-69. Thus, a prosecutor seeking absolute immunity must prove that he was acting as an advocate for the state. *Id.* at 273-74.

Alaniz and Jacaman contend they were acting as prosecutors in every action alleged in Counts I through IV. (Dkt. No. 26 at 7). Courts apply a "functional approach" to determine whether an attorney's conduct is within the scope of an attorney's prosecutorial functions. *Buckley*, 509 U.S. at 269. The functional approach "looks to the nature of the function performed, not the identity of the actor who performed it." *Id.* (internal citation omitted). "Prosecutorial functions are those acts representing the government in filing and presenting criminal cases, as well as other acts that are 'intimately associated with the judicial process.'" *Charleston*, 194 S.W.3d at 90.

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Courts distinguish between "the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." *Buckley*, 509 U.S. at 273. "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect one and not the other." *Id.* at 273 (internal citation omitted). "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* at 274.

Plaintiff alleges Alaniz and Jacaman "manufacture[d] criminal complaints, a search warrant affidavit and approval, and arrest warrant affidavits and approvals with the intent that [Plaintiff] be arrested and detained in order to coerce her into ceasing her citizen journalism efforts." (Dkt. No. 24 ¶ 85). In addition, Plaintiff alleges:

- Alaniz, in a closed-door meeting with other city officials, rebuked [Plaintiff] for her criticism of WCDA and Jacaman's relative with the intent to intimidate her from further publishing such criticism (*id.* ¶¶ 54-55);

- Alaniz and Jacaman agreed with LPD officials to retaliate against [Plaintiff] for the exercise of her First Amendment rights, and formulated a decision to do the same, before the criminal investigation of [Plaintiff] began (*id.* ¶¶ 69, 99, 102, 190);

- Alaniz and Jacaman were instrumental in searching for and selecting a criminal statute under which to target [Plaintiff] (*id.* ¶¶ 70-71, 84, 113, 165);

- Alaniz and Jacaman participated in and directed the criminal investigation of [Plaintiff] and the causing of her arrest (*id.* ¶¶ 112, 114, 116-117);

- Alaniz and Jacaman participated in the preparation of misleading and purposefully deficient arrest warrant affidavits (*id.* ¶¶ 86, 104, 114, 165); and

- Jacaman, with Alaniz's endorsement, personally approved the Arrest Warrant Affidavits knowing they included material misrepresentations and omissions (*id.* ¶ 88).

Defendants argue in a conclusory fashion that absolute immunity bars Plaintiff's claims against Alaniz and Jacaman and assert, without citing authority, that their conduct in preparation of the Arrest Warrant Affidavits was "part of the initiating and pursuing a criminal prosecution" for which they are entitled to absolute immunity. (Dkt. No. 26 at 7) (internal citation omitted).

In their briefing and at oral argument, the County Defendants emphasize the Fifth Circuit's holding in *Ortiz v. Montgomery County*, 774 F. App'x 894 (5th Cir. 2019), an unpublished *per curiam* opinion. In *Ortiz*, the district attorney's office had allegedly applied for

a warrant to arrest the plaintiff, a referee for a school district's sporting events, based on a statute prohibiting employees of a school from committing certain sexual acts with a student enrolled at that school. *Id.* at 894. Subsequently, in an unrelated case, a Texas Court of Criminal Appeals interpreted the statute and held that certain workers are not "employees" under the statute. The district attorney then dropped its charges against the plaintiff, having determined that he was not a school "employee" under the new interpretation of the statute. *Id.* The Fifth Circuit affirmed the district court's dismissal of the complaint, finding that "the prosecutors' actions in this case fall squarely within" absolute immunity, as it is "well settled that absolute immunity applies when a prosecutor prepares to initiate a judicial proceeding, or appears in court to present evidence in support of a search warrant application." *Id.* at 895 (internal citation omitted). The Fifth Circuit also noted that the plaintiff's "only allegations to the contrary [were] conclusory and hence irrelevant." *Id.*

Here, Defendants contend Plaintiff's argument was rejected by the Fifth Circuit in *Ortiz*. (Dkt. No. 43 at 2-3). The Court finds, however, *Ortiz* does not control here. While the Fifth Circuit's unpublished opinion in *Ortiz* does not comprehensively recount the underlying factual allegations, it characterizes the prosecutors' conduct as "'prepar[ing] to initiate a judicial proceeding[ ] or appear[ing] in court to present evidence in support of a search warrant application.'" 774 F. App'x at 895 (quoting *Van de Kamp v. Goldstein*, 555 U.S. 335, 343, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009)). In contrast, there is no allegation in this case that Alaniz or Jacaman filed

charges against Plaintiff or appeared in court to present evidence in support of the Arrest Warrant Affidavits. More pertinent here is the Supreme Court's holding in *Malley v. Briggs*: "In the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity." 475 U.S. 335, 343, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).[4]

Defendants also cite a Texas Court of Appeals case, *Charleston*, 194 S.W.3d at 90, holding that an attorney was acting as a prosecutor where he "collaborated in the filing and prosecution of the aggravated robbery charge" and represented the state in three habeas corpus petitions seeking release from incarceration. (Dkt. No. 26 at 5). This is insufficient to overcome the clear holding of *Malley* that a prosecutor is entitled to qualified, but not absolute, immunity for his role in applying for a warrant. 475 U.S. at 341. Defendants are unlike the prosecutor in *Charleston*. No charges were filed against Plaintiff, nor do they contend they represented the state any judicial proceedings concerning Plaintiff. It is Defendants' burden to show entitlement to absolute immunity,[5] and Defendants'

4. The County Defendants also cite *Shipman v. Sowell*, 766 F. App'x 20 (5th Cir. 2019) in their supplemental brief, to support their absolute immunity argument. (Dkt. No. 43 at 3). The Court finds that *Shipman* does not apply here because the plaintiff in *Shipman* was indicted and it was not disputed that the prosecutor's conduct fell within his prosecutorial capacity. 766 F. App'x at 26.

5. The FAC also alleges that Alaniz and Jacaman were responsible for training, supervising, and employing individuals within the Webb County District Attorney's Office and LPD. (Dkt. No. 24 ¶ 117). The County Defendants contend the allegation

authority does not show that their alleged conduct was part of their prosecutorial functions entitled to absolute immunity. Furthermore, the Defendants' alleged conduct does not implicate "the same considerations of public policy that underlie the common-law rule" of absolute immunity. *Imbler*, 424 U.S. at 424.

Therefore, the Court finds that Alaniz and Jacaman's alleged conduct relating to advising LPD, investigating, preparing, and authorizing the Arrest Warrant Affidavits is not entitled to absolute immunity.

B. Qualified Immunity

Section 1983 provides a private right of action for the deprivation of rights, privileges, and immunities secured by the Constitution or laws of the United States. 42 U.S.C. § 1983. In a § 1983 suit, officers may be sued in their individual and/or official capacities. *See Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). A complaint against officers sued individually under § 1983 must allege that the conduct was committed by a person acting under color of state law and that the complaining parties were deprived of rights guaranteed by the Constitution or laws of the United States. *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988); *Piotrowski v. City of Houston* (*Piotrowski I*), 51

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that Alaniz or Jacaman were responsible for training local law enforcement is meritless. However, Plaintiff appears to have abandoned any allegation that Alaniz or Jacaman is liable for a failure to train officers, as she does not address this argument in her response to the County Defendant's Motion. (*See* Dkt. No. 30).

F.3d 512, 515 (5th Cir. 1995). Plaintiffs suing public officials under § 1983 must file short and plain complaints that are factual and not conclusive. *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995) (en banc).

Public officials acting within the scope of their official duties are shielded from liability under the doctrine of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Qualified immunity applies regardless of whether the government official's error was a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). "When a defendant invokes qualified immunity, the burden shifts to the plaintiff to demonstrate the inapplicability of the defense." *Club Retro LLC v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009). "A plaintiff must clear a significant hurdle to defeat qualified immunity." *Brown v. Lyford*, 243 F.3d 185, 190 (5th Cir. 2001). Qualified immunity is designed to shield from civil liability "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

The test for qualified immunity involves a "two-step analysis: (1) whether [a plaintiff has] stated a violation of their First Amendment rights; and if so, (2) whether [the defendants'] conduct was objectively reasonable in light of clearly established law." *Powers v. Northside Sch. Dist.*, 951 F.3d 298, 305-06 (5th Cir. 2020) (citing *Salas v. Carpenter*, 980 F.2d 299, 305-06 (5th Cir. 1992)). The Court may address the two steps in any order. *See id.* "The second prong of the qualified immunity test is

better understood as two separate inquiries: whether the allegedly violated constitutional rights were *clearly established at the time of the incident*; and, if so, whether the conduct of the defendant[ ] was objectively unreasonable in the light of that then clearly established law." *Id.* at 306 (citing *Hare v. City of Corinth, Miss.*, 135 F.3d 320, 326 (5th Cir. 1998)) (internal citation omitted). Thus, even if an official violates a person's civil rights, the official may still be entitled to qualified immunity if the conduct is objectively reasonable. *See id.*; *see also Sanchez v. Swyden*, 139 F.3d 464 (5th Cir. 1998).

"Objectively reasonable" means that, given the totality of the circumstances confronting the official, viewed objectively, the action was justified. *See Ashcroft v. Al-Kidd*, 563 U.S. 731, 736, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). Whether an official's conduct is objectively reasonable depends upon the circumstances confronting the official as well as clearly established law in effect at the time of the official's actions. *Sanchez*, 139 F.3d at 467. "We ask whether the circumstances, viewed objectively, justify the challenged action. If so, that action was reasonable *whatever* the subjective intent motivating the relevant officials." *Al-Kidd*, 563 U.S. at 736 (internal citations omitted). The Court may address the requirements in any order it chooses. *Tolan v. Cotton*, 572 U.S. 650, 656, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014); *Pearson*, 555 U.S. at 236.

In a qualified immunity inquiry, "whether the conduct of which the plaintiff complains violated clearly established law" is an "essentially legal question." *Pfannstiel v. City*

of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). For immunity to apply, the "actions of the officer must be objectively reasonable under the circumstances, such that a reasonably competent officer would not have known his actions violated then-existing clearly established law." *Id.* (internal citations omitted).

1. Count II: § 1983 Claim under Fourth Amendment

Because Plaintiff's claims primarily arise from her investigation and arrest under § 39.06(c), allegedly without probable cause, the Court first addresses Plaintiff's Fourth Amendment claim under § 1983 (Count II). Plaintiff alleges Alaniz, Jacaman, Treviño, Ruiz, DV, and Does 1-2,

> (a) knowingly manufactured allegations under a pretextual application of Texas Penal Code § 39.06, upon which no reasonable official would have relied under the circumstances; (b) knowingly prepared and obtained a warrant for Plaintiff's arrest under false pretenses; and (c) knowingly arrested and detained her and/or caused her arrest and detention without probable cause and against her will, based on a knowing or deliberately indifferent wrongful application of [§ 39.06(c)].

(Dkt. No. 24 ¶ 165).

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The existence of probable cause for an arrest defeats a § 1983 claim for unlawful arrest and false imprisonment. *Pfannstiel*, 918 F.2d at 1183. A reasonable person standard is used to establish probable cause. *Id.* Probable cause exists "when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Glenn v. City of Tyler*, 242 F.3d 307, 313 (5th Cir. 2001) (quoting *Spiller v. Tex. City*, 130 F.3d 162, 165 (5th Cir. 1997)); *accord Maryland v. Pringle*, 540 U.S. 366, 370-71, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003); *see also Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). "[T]here must not even 'arguably' be probable cause for the search and arrest for immunity to be lost." *Lyford*, 243 F.3d at 190 (internal citation omitted). Thus, qualified immunity shields officers from liability if, given the law and information known at the time, a reasonable officer could have believed the arrest was lawful. *Ventura v. Hardge*, No. CA 3:99-CV-1468-R, 2000 U.S. Dist. LEXIS 11204, 2000 WL 1123262, *3 (N.D. Tex. Aug. 7, 2000), *aff'd*, 248 F.3d 1143 (5th Cir. 2001); *see also Messerschmidt v. Millender*, 565 U.S. 535, 556, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012) (citing *Malley*, 475 U.S. at 341) (holding that officers were entitled to qualified immunity where the arrest warrant "was not so obviously lacking in probable cause that the officers can be considered 'plainly incompetent'").

Plaintiff contends the information contained in the Arrest Warrant Affidavits failed to satisfy the elements of the offense defined in § 39.06(c). Specifically, Plaintiff

contends the Arrest Warrant Affidavits failed to allege that Plaintiff (1) had the intent required under § 39.06, and (2) sought or received information that was not generally available to the public or that the information was excepted from disclosure under TPIA. (Dkt. No. 24 ¶¶ 90-93). Plaintiff's factual allegations with respect to the Arrest Warrant Affidavits are set forth *supra* Part I(C).

First, Plaintiff alleges the Arrest Warrant Affidavits failed to address the statute's intent requirement by failing to allege that Plaintiff "intended to enjoy an economic advantage or gain from the request for or receipt of the information in the [Subject Publications]." (Dkt. No. 24 ¶ 92). Plaintiff further alleges that "[a]ny reasonable official would have understood that the 'benefit' element of the Statute required a showing of economic gain or advantage," and that "[n]o reasonable official would have determined [Plaintiff] gathered and published the information in the [Subject] Publications with the intent of economic gain or advantage." (*Id.* ¶ 76). Under Texas Penal Code § 1.07(a)(7), "benefit" is defined as "anything reasonably regarded as economic gain or advantage." (*See id.* ¶ 74).

However, Plaintiff does not contend that she has never received any economic benefit from reporting police information on the Lagordiloca Facebook page. To the contrary, Plaintiff admits that she "sometimes enjoys a free meal from appreciative readers, and occasionally receives fees for promoting a local business [and] has used her Lagordiloca Facebook page to ask for donations for new equipment necessary to continue her

citizen journalism efforts." (Dkt. No. 24 ¶ 35).[6] Based on these admissions, the Court is unable to find that no reasonable officer would have believed Plaintiff intended to gain economically from the receipt of information from Goodman. Accordingly, the Court finds Plaintiff has not alleged plausible facts to support an inference that no reasonable officer could have found probable cause as to the benefit element of the statute.

Second, Plaintiff contends there was no probable cause as to the statute's requirement that the information sought or received "has not been made public." § 39.06(c)(2). Plaintiff acknowledges the Arrest Warrant Affidavits stated that the information she received from Goodman "had not been made public." (Dkt. No. 24 ¶ 89). However, Plaintiff contends Ruiz's statements failed to establish probable cause because the information did not meet the definition of "information that has not been made public" set forth in § 39.06(d), i.e.,: "any information to which the public does not generally have access, and that is prohibited from disclosure under" the TPIA. Tex. Penal Code § 39.06(d).

Plaintiff suggests the information she received from Goodman does not meet the statute's definition of

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6. Defendants contend the officers "had reason to believe that Plaintiff was deriving an economic benefit from her Facebook journalism in the form of sponsors." (Dkt. No. 27 at 10). In support, Defendants cite a March 10, 2019 *New York Times* article that discusses local restaurants hiring Plaintiff to advertise and promote their businesses. (*Id.*). However, as Plaintiff was arrested in 2017, the article cannot have formed the basis for probable cause, and therefore the Court affords it no weight in this analysis.

"information that has not been made public" because Plaintiff first heard the information from other individuals who were not City or County officers. Plaintiff has not pointed to any legal authority to support this interpretation of § 39.06(d). *See* § 39.06(d) (defining "information that has not been made public" as "any information to which the public does not *generally* have access") (emphasis added). And Plaintiff's interpretation misses the point. The fact that Plaintiff received the information from someone with personal knowledge of those facts—a witness or a family member for example—does not equate to the information being "made public." Instead, Plaintiff alleges that certain Defendants "deliberately did not question or attempt to question [Plaintiff] about the circumstances of her access to the information in the [Subject Publications], in furtherance of their efforts to manufacture the Arrest Warrant Affidavits and cause the arrest of [Plaintiff] without probable cause." (Dkt. No. 24 ¶ 91).

The Court finds Plaintiff has failed to support a plausible inference that no reasonable officer could have found that the information at issue was public and therefore subject to the statute. Moreover, Plaintiff has failed to show that Defendants were under an obligation to interview Plaintiff about how she obtained the information in the Subject Publications. While an officer may not ignore potentially exculpatory evidence once he has obtained evidence from a reasonably credible source, he has "no constitutional obligation to conduct any further investigation before making an arrest." *Woods v. City of Chicago*, 234 F.3d 979, 997 (7th Cir.), *cert. denied*, 534 U.S. 955 (2001).

In this case, Ruiz alleged in the Arrest Warrant Affidavits that an unnamed source, whom Plaintiff identifies "on information and belief" as Doe 1 or Doe 2, informed DV that Goodman was communicating with Plaintiff. (Dkt. No. 24 ¶ 88). Plaintiff has neither alleged the unnamed source was suspect or unreliable, nor has she alleged any other circumstances that would have required the officers to conduct further investigation into how Plaintiff received the information. To the contrary, this allegation supports an inference that Defendants reasonably believed probable cause existed. *Cf. Shipman*, 766 F. App'x at 28 (holding that an officer's affidavit demonstrated probable cause where it contained, inter alia, "the actual complaint of a person who alleged that" the defendant engaged in prohibited conduct). Further, Plaintiff has admitted that she received information about the two incidents from Goodman.[7] (*Id.* ¶¶ 65-66). Nothing in the FAC suggests that the failure to question Plaintiff about how she obtained information resulted in a false statement by Ruiz in the Arrest Warrant Affidavits or that the officers acted with reckless disregard for the truth. Plaintiff therefore has not plausibly alleged that no reasonable officer could have believed Plaintiff received "information to which the public does not generally have access" from Goodman. *See* Tex. Penal Code § 39.06(c)-(d).

Finally, Plaintiff contends Defendants lacked probable cause because the information Plaintiff received from Goodman was not "prohibited from disclosure" within the meaning of § 39.06(d). (Dkt. No. 24 ¶ 73). A Texas Court

7. Plaintiff's concedes that Jose Baeza, not Goodman, is the official LPD spokesman. (Dkt. No. 24 ¶¶ 30, 67).

of Appeals has construed "prohibited from disclosure" in § 39.06(d) to mean "the set of exceptions to disclosure listed in Subchapter C" of the TPIA. *State v. Ford*, 179 S.W.3d 117, 123 (Tex. App.—San Antonio 2005, no pet.).

Plaintiff alleges that "[t]here is no TPIA exception that permits the withholding of the information [Plaintiff] published in the [Subject Publications], and any reasonable official would have understood this." (Dkt. No. 24 ¶ 78). Texas statute provides that "basic information about an arrested person, an arrest, or a crime" is not excepted from disclosure. Tex. Gov't Code § 552.108(c). However, the City Defendants contend the TPIA does not mandate disclosure of *all* the information obtained by Plaintiff that was the subject of the Arrest Warrant Affidavits. (Dkt. No. 27 at 10-11). The City Defendants note that various provisions of Texas law that might have entitled them to withhold some or all of the information Plaintiff received from Goodman. *E.g.*, Tex. Gov't Code § 552.108 (other than certain "basic information" identified in statute, information "held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime" excepted from disclosure under the TPIA if, inter alia, "release of the information would interfere with the detection, investigation, or prosecution of crime"); Tex. Transp. Code § 550.065(c)(4) (unredacted accident reports may only be released to specific categories of persons); Tex. Fam. Code § 58.008(b) (law enforcement records concerning a child and information concerning a child that are stored by electronic means or otherwise and from which a record could be generated may not be disclosed to the public)). However, because Plaintiff did not follow the TPIA's process for requesting the information

in her reports, LPD had no opportunity to invoke these exceptions.

The Court agrees with Defendants that, under the facts alleged, a reasonable person could have believed that the information Plaintiff received from Goodman was information to which the public did not generally have access and that was prohibited from disclosure under the TPIA at the time Plaintiff received the information, pursuant to § 39.06(d). Accordingly, Plaintiff has failed to show that the Arrest Warrant was "so obviously lacking in probable cause that the officers can be considered 'plainly incompetent.'" *Messerschmidt*, 565 U.S. at 556. Because the FAC does not allege facts to plausibly show that any Defendant acted objectively unreasonably in investigating and arresting Plaintiff, each of the Individual Defendants is entitled to qualified immunity as to this claim. Accordingly, Plaintiff's Fourth Amendment § 1983 claims against the Individual Defendants (Count II) should be dismissed.

2. Count I: § 1983 Claim under First Amendment

a. Retaliation

i. Investigation and Arrest Pursuant to § 39.06(c)

Plaintiff alleges that the Individual Defendants retaliated against her in violation of her First Amendment rights by their "deliberate choice to target [Plaintiff] for investigation and arrest [her] under a pretextual

and inapplicable statute and deliberately deficient and misleading arrest warrant affidavits, while knowing that no probable cause existed to arrest or detain [Plaintiff]." (Dkt. No. 24 ¶ 132(a)). "The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) (citing U.S. Const. amend. I). "Under that Clause, a government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972)). To establish a § 1983 claim of retaliation in violation of the First Amendment, a plaintiff must show that "(1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct." *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002).

Plaintiff's alleged protected activity includes filming police activity occurring in public; lawfully gathering publicly available and truthful information; and publishing content unfavorable to LPD, WCDA, and other local officials. (Dkt. No. 24 ¶¶ 68, 80). Plaintiff alleges that Defendants' conduct caused her various injuries, including fear of continued retaliation, loss of sleep, physical ailments, restriction of her person, and reputational harm.

(*Id.* ¶¶ 145-47). Finally, Plaintiff contends that Defendants were substantially motivated to retaliate against her because Defendants showed hostility toward Plaintiff due to her criticism of LPD and WCDA. (*Id.* ¶¶ 52, 54, 115). Plaintiff contends that this hostility was demonstrated by the decision to target Plaintiff for criminal investigation and arrest despite lacking a valid basis, and by Alaniz's alleged rebuke of Plaintiff, which Plaintiff characterizes as acts done "to intimidate" her. (*E.g., id.* ¶¶ 54, 69, 102, 140; Dkt. No. 30 at 12).

Each of the Individual Defendants—LPD officers (Ruiz, DV, Does 1-2, Guerrero, Martinez, and Montemayor); police chief Treviño; and attorneys Alaniz and Jacaman—is entitled to qualified immunity unless the FAC alleges facts plausibly supporting an inference that the individual officer violated a clearly established constitutional right and that the officer's conduct was objectively unreasonable. *See Keenan*, 290 F.3d at 261. Here, the Court will first determine whether any officer's conduct was objectively unreasonable. The Court then will determine whether the FAC alleges a violation of a clearly established constitutional right. Plaintiff has alleged a First Amendment retaliation claim on two distinct bases: (1) that the Individual Defendants retaliated against her by investigating, arresting, and prosecuting her under § 39.06(c) and (2) that the Individual Defendants separately engaged in various conduct constituting retaliation and interference with her First Amendment rights, independent of their actions relating to the enforcement of § 39.06(c). The Court will discuss qualified immunity as it relates to these allegations separately.

Plaintiff has based her First Amendment claim primarily on the decision to investigate and arrest her under § 39.06(c), allegedly without probable cause. To assert a claim of retaliatory arrest against an arresting officer, a plaintiff generally must plead and prove that the arresting officer lacked probable cause for the arrest.[8] *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1727, 204 L. Ed. 2d 1 (2019); *Mesa v. Prejan*, 543 F.3d 543, 272 n.1 (5th Cir.

8. The exception to this general rule is when a plaintiff presents objective evidence that other, similarly situated individuals not engaged in the same sort of protected speech were not arrested. *Nieves*, 139 S. Ct. at 1727 (providing by way of example, that when an individual who vocally complained about law enforcement is arrested for jaywalking, a First Amendment claim for retaliation should not be dismissed even though there may be undoubtable probable cause). Here, Plaintiff pleads in a conclusory manner that Defendants did not arrest or prosecute other similarly situated, but unidentified, persons "who asked for or received information from local law enforcement officials" and "who published truthful and publicly-accessible information on a newsworthy matter." (Dkt. No. 24 ¶ 177). This description is conclusory and does not appropriately define similarly situated individuals. Plaintiff conflates persons who may have obtained information from LPD's public spokesperson, Baeza, with persons who, like Plaintiff, obtained information from a private source within the police department. This is unlike the example in *Nieves*, where there was objective evidence of individuals jaywalking. *See Nieves*, 139 S. Ct. at 1727. Plaintiff's allegation further mischaracterizes the basis for Plaintiff's arrest and prosecution under § 39.06(c) as being for the "publishing" of information, rather than for *obtaining* information. (*Compare id.* ¶ 81 *with id.* ¶ 89 (stating that Arrest Warrant Affidavits alleged that Plaintiff "received or solicited" certain information from Goodman)). For these reasons, the Court determines that Plaintiff has not sufficiently pleaded an exception to the general rule that probable cause defeats her First Amendment retaliation claim.

2008). It is clearly established that the First Amendment prohibits "adverse governmental action against an individual in retaliation for the exercise of protected speech activities." *Keenan*, 290 F.3d at 258 (citing *Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir. 1999)). However, the Fifth Circuit has considered "a situation in which law enforcement officers might have a motive to retaliate but there was also a ground to charge criminal conduct against the citizen they disliked." *Id.* at 261. The Fifth Circuit held that in this circumstance, "the objectives of law enforcement take primacy over the citizen's right to avoid retaliation." *Id.* at 261-62 (internal citation omitted). Accordingly, "If probable cause existed . . . or if reasonable police officers could believe probable cause existed, they are exonerated." *Id.* at 262 (internal citations omitted). Here, as set forth *supra* Part III(B)(1), the Court has determined that a reasonable officer could have found probable cause to arrest Plaintiff for violating § 39.06(c). Under *Keenan*, that conclusion precludes Plaintiff's First Amendment claim to the extent that it is based on the arrest. 290 F.3d at 258; *see also Nieves*, 139 S. Ct. 1715.

Although not clearly articulated under Count I, Plaintiff may also be further alleging that it was objectively unreasonable to investigate and arrest her pursuant to § 39.06(c) under the circumstances because a reasonable officer would have understood that the statute was facially unconstitutional in violation of her First Amendment rights. *See Lawrence v. Reed*, 406 F.3d 1224, 1232 (10th Cir. 2005) (holding that "where a statute authorizes conduct that is patently violative of fundamental constitutional principles, reliance on the

statute does not immunize the officer's conduct") (internal citation omitted). Plaintiff pleads that § 39.06(c) was found to be unconstitutionally vague after her arrest. (Dkt. No. 24 ¶ 127).[9]

No party has cited to Fifth Circuit precedent discussing the application of qualified immunity to law enforcement actions taken pursuant to a statute later determined to be unconstitutional. However, the Tenth Circuit's consideration of whether conduct is "patently violative of fundamental constitutional principles," *Lawrence*, 406 F.3d at 1232, seems to comport with the established qualified immunity standard of whether any reasonable law enforcement officer could have believed that his conduct did not violate a clearly established right. If no reasonable law enforcement officer could have believed that their enforcement of the statute against the Plaintiff was constitutional "then their [actions] violated clearly established law in this circuit." *Keenan*, 290 F.3d at 262; *see also Aubin v. Columbia Cas. Co.*, 272 F. Supp. 3d 828, 838 (M.D. La. 2017) (holding that a statute criminalizing non-violent threats to an officer's employment was "so patently and obviously unconstitutional, that no reasonable officer could believe it to have been valid"). The Court finds *Lawrence's* "patently violative" standard provides appropriate guidance to this case.

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9. As Defendants note, § 39.06(c) was first declared unconstitutionally vague by Judge Notzon of the 111th District Court, Webb County, Texas in Plaintiff's habeas proceeding. (Dkt. No. 29 at 12). Judge Notzon's ruling was issued from the bench, and no written order is available on the ruling.

Plaintiff pleads, "It is clearly established that the First Amendment protects the right of every citizen to gather and publish truthful information about matters of public concern that is publicly-accessible, publicly-available, or otherwise lawfully obtained." (Dkt. No. 24 ¶ 149). It is Plaintiff's burden to identify the legal precedent establishing the clearly established right. *See Keller v. Fleming*, 52 F.3d 216, 225 (5th Cir. 2020) (stating that to show a right was clearly established, "Plaintiffs must point this court to a legislative directive or case precedent that is sufficiently clear such that every reasonable official would have understood that what he is doing violates that law"). Plaintiff directs the Court to *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989), *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979), and *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976). As a general proposition, the First Amendment protects a citizen's right to publish lawfully obtained truthful information. Yet, these cases show that this principle is far from universal. Rather, courts conduct a fact-specific inquiry to determine a state's ability to prohibit publication of truthful and lawfully obtained information.

Each time the Supreme Court has addressed the scope of such right, it has narrowly tailored its ruling to the facts of the case before it. *See The Florida Star*, 491 U.S. at 530 ("[A]lthough our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a

discrete factual context."). In fact, the Supreme Court has specifically declined "to hold broadly that truthful publication may never be punished consistent with the First Amendment," recognizing that "the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Id.* at 524, 533.

In *The Florida Star*, a sheriff's department released a report of a rape incident to the public, and then attempted to prosecute the newspaper that published an article containing the name of the rape victim. *Id.* at 526-27. The Supreme Court reviewed its prior precedent—including *Daily Mail*—upholding the First Amendment right of the media to publish truthful information obtained from a governmental entity, and noted that each of the previous cases dealt with factual scenarios in which the information published by the media had previously been made public by the governmental entity. *Id.* at 530-31.

The facts of the present case are distinguishable from *The Florida Star* and the cases discussed therein because § 39.06(c) punishes the obtaining of information from a governmental entity which has *not* been released to the public. The Supreme Court recognized the government's right to forbid the nonconsensual acquisition of sensitive information. *Id.* at 534. It further noted, "To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release." *Id.*

Likewise, Plaintiff's reliance on *Houston Chronicle* is misplaced. Plaintiff relies on *Houston Chronicle* for the proposition that Texas law also recognizes the long-established "constitutional right of access to information concerning crime in the community, and to information relating to activities of law enforcement agencies." (Dkt. No. 29 at 21). In fact, *Houston Chronicle* does not support the proposition that the media has an unfettered right of access to such information. That case upheld the constitutionality of the TPIA, while also recognizing that the constitutional right of access to information *can be limited* for legitimate purposes. *Id.* at 186. While the court held that "the press and the public have a constitutional right of access to information concerning crime in the community, and to information relating to activities of law enforcement agencies" it limited the reach of this constitutional right of access, finding it "necessary to weigh and evaluate legitimate competing interests." *Houston Chronicle*, 531 S.W.2d at 186.

The question before the Court is not whether § 39.06(c) is unconstitutional but whether any reasonable law enforcement officer could have believed that their enforcement of the statute against the Plaintiff was constitutional. Based on a review of the legal precedent identified by Plaintiff, the Court determines that § 39.06(c) was not so patently or obviously unconstitutional that no reasonable law enforcement officer could have believed that their enforcement of the statute against the Plaintiff was constitutional. Plaintiff does not contend that the statute lacks any legitimate law enforcement purpose. *Cf. Keenan*, 290 F.3d at 262. Nor does Plaintiff argue that

the statute could not be valid under any circumstances. Plaintiff's allegations therefore do not evidence "patently and obviously unconstitutional" conduct vitiating the officers' entitlement to qualified immunity.

ii. Incidents of First Amendment Retaliation in Paragraphs 54(a)-(g)

A. Qualified Immunity

Apart from her arrest under § 39.06(c), Plaintiff apparently[10] seeks to assert First Amendment § 1983 retaliation claims based on the Individual Defendants' conduct as "exemplified by (but not limited to)" the acts set forth in paragraphs 54(a)-(g) of the FAC. (Dkt. No. 24 ¶ 131-32(c)). The Individual Defendants assert qualified immunity as to all claims against them. (Dkt. No. 26 at 7,

10. The Court notes that Plaintiff's FAC is inconsistent regarding whether the allegations of paragraphs 54(a)—(g) are asserted as independent acts of First Amendment retaliation by the Individual Defendants as opposed to being identified as evidence of hostile animus. Plaintiff appears to concede that these alleged acts do not stand as violations on their own. To the contrary, Plaintiff specifies that Defendants' "unlawful retaliation . . . **started with the animus-driven decision to criminally target Villarreal**, regardless of the criminal statute Defendants ultimately asserted." (Dkt. No. 29 at 12-13) (emphasis in original). Similarly, with respect to Alaniz and Jacaman, Plaintiff notes that "the key aspect of their wrongful conduct" was the investigation and arrest of Plaintiff. (Dkt. No. 30 at 14). Regardless, the Court will evaluate the allegations as allegations of independent acts of First Amendment retaliation by the Individual Defendants.

18; Dkt. No. 27 at 6). Plaintiff, who bears the burden to overcome a qualified immunity defense, fails to identify legal precedent showing that any act alleged in paragraphs 54(a)-(g) of the FAC was objectively unreasonable or violated a clearly established right. Therefore, Plaintiff fails to overcome qualified immunity as to each of these independent acts of First Amendment retaliation. *See Keller*, 52 F.3d at 225.

In her responses to the Motions, Plaintiff addresses the second prong of the qualified immunity analysis—whether a constitutional right was clearly established—with broad, sweeping strokes. (Dkt. No. 29 at 18-19; Dkt. No. 30 at 19-21). However, the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Al-Kidd*, 563 U.S. at 742; *see also Kinney v. Weaver*, 367 F.3d 337, 367 (5th Cir. 2004) ("The First Amendment right to free speech was of course clearly established in general terms long before the events giving rise to this case. In order to defeat the [defendants'] claim of qualified immunity, however, [the plaintiffs] must show that [t]he contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right."). While there need not be a case "directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015) (quoting *Al-Kidd*, 563 U.S. at 741); *see also Turner v. Lieutenant Driver*, 848 F.3d 678, 687 (5th Cir. 2017). In other words, there must be "controlling authority—or a robust consensus of persuasive authority—that defines the contours of the

right in question with a high degree of particularity." *Morgan*, 659 F.3d 359, 371-72 (5th Cir. 2011) (en banc) (internal citation omitted).

As a threshold issue, Plaintiff has not pleaded dates on which any of the incidents occurred. The significance of such deficiencies will be further discussed *infra* Part III(C)(2); but with regard to a qualified immunity analysis, these allegations are insufficient for the Plaintiff to meet her burden to show that a constitutional right was clearly established at the time each incident occurred. In addressing the "clearly established rights" prong of Defendants' qualified immunity defense, Plaintiff's argument focuses on the Defendants' conduct of the investigation, arrest, detention, and prosecution of Plaintiff under § 39.06(c). Plaintiff also fails to address the conduct described in paragraphs 54(a)—(g).

Paragraph 54(c) of the FAC, for example, alleges that Officer Guerrero "harass[ed] and intimidate[ed] [Plaintiff] without justification." (Dkt. No. 24 ¶ 54(c)). This language is conclusory, and Plaintiff has identified no legal precedent illustrating the "contours" of the First Amendment right to show that "harassing" or "intimidating" conduct violates any clearly established First Amendment right. Paragraph 54(d) alleges that "LPD treat[ed] [Plaintiff] with indifference" when she called to report a sexual assault she endured at a business. (*Id.* ¶ 54(d)). Plaintiff fails to provide any details of the conduct constituting indifference and neglects to identify any named Defendant responsible for this alleged First Amendment violation. *See Harvey v. Montgomery County,*

Tex., 881 F. Supp. 2d 785, 807 (S.D. Tex. 2012) ("To the extent Plaintiff states a claim for retaliation, Plaintiff's allegations concern individuals who are not a part of this lawsuit."). This allegation is therefore inadequate to show a violation of a clearly established First Amendment right by any Individual Defendant in this suit. For similar reasons, Plaintiff's allegations that unidentified persons treated Plaintiff differently from other journalists and members of the media is deficient. (Dkt. No. 24 ¶ 54(e))

Plaintiff also describes a meeting she attended, during which Alaniz "openly declared to [Plaintiff] that he did not appreciate her criticizing his office." (*Id.* ¶ 54(f)). Plaintiff fails to address whether this conduct violated a clearly established constitutional right. It is not enough for Plaintiff to assert that Alaniz was motivated to retaliate against Plaintiff as a result of previous negative reporting. Additionally, it is not enough for Plaintiff to restate broad propositions of law such as "government retaliation against a private citizen for exercise of First Amendment rights cannot be objectively reasonable"; "citizens . . . have a First Amendment right to film police activity in public"; or "state actors cannot punish speakers on the basis of viewpoint." (Dkt. No. 30 at 19-20). Plaintiff simply fails to address whether Alaniz's conduct, described only as openly declaring that "he did not appreciate her criticizing his office," violates a clearly established right. This is true for each of the Individual Defendants' conduct described in paragraphs 54(a)-(g).[11]

11. The remaining allegations are similarly inadequate in failing to allege a clearly established right: (1) that Martinez knowingly made a false representation to other officers that Plaintiff

Based on the foregoing, the Court concludes that Plaintiff has failed to meet her burden to demonstrate that the Individual Defendants are not entitled to qualified immunity as to the allegations set forth in paragraphs 54(a)-(g).

B. Sufficiency of Allegation in Paragraphs 54(a)-(g)

Although the Court has determined that the Individual Defendants are entitled to qualified immunity as to the First Amendment retaliation claims asserted in paragraphs 54(a)-(g), the Court will address, in the alternative, whether those allegations would otherwise survive a 12(b)(6) analysis. The Court agrees with the City Defendants that each of the acts alleged in paragraphs 54(a)-(g) of the FAC fail to support an independent First Amendment retaliation claim. (Dkt. No. 27 at 8 (citing *Keenan*, 290 F.3d at 259)).

To the extent the separate incidents described in paragraphs 54(a)-(g) are pleaded as independent First Amendment violations, the majority of those allegations

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was a five-time felon (Dkt. No. 24 ¶ 54(a)); see *Siegert v. Gilley*, 500 U.S. 226, 231-34, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991) (holding that the right against defamation is not a constitutionally protected liberty interest); (2) that Montemayor threatened to take Plaintiff's phone as evidence while she was recording the scene of a shooting (Dkt. No. 24 ¶ 54(b)); see *Turner*, 848 F.3d at 687 (finding that "there was no clearly established First Amendment right to record the police at the time of [Plaintiff's] activities"); and (3) that members of the Laredo City Council "initially attack[ed] and obstruct[ed]" the naming of a reading kiosk after Plaintiff's deceased niece (*id.* ¶ 54(g)) (failing to name an individual Defendant).

are conclusory and vague. As noted in *supra* Part III(B)(2)(a)(ii), the allegation in paragraph 54(c) that Officer Guerrero "harass[ed] and intimidate[ed] [Plaintiff] without justification" (Dkt. No. 24 ¶ 54(c)) is vague and conclusory. The allegation in paragraph 54(d) that "LPD treat[ed] [Plaintiff] with indifference" when she called to report a sexual assault she endured at a business (Dkt. No. 24 ¶ 54(d)) is conclusory. Plaintiff fails to provide any details of the conduct constituting indifference and neglects to name any Defendant as being responsible for this alleged First Amendment violation. These allegations are therefore inadequate to support a reasonable inference that any Individual Defendant caused any "injury that would chill a person of ordinary firmness from continuing to engage in that activity." *Keenan*, 290 F.3d at 258; *Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999) (holding that mere conclusory allegations of retaliation are insufficient, and that plaintiff must allege more than his personal belief that he has been the victim of retaliation).

Likewise, the allegation that Alaniz stated that "he did not appreciate [Plaintiff] criticizing his office" (*id.* ¶ 54(f)) is insufficient to establish that a person of ordinary firmness would feel threatened by his statement, or that it suggested any type of harm to Plaintiff if she continued her reporting. Based only on the description of the Alaniz's statement in paragraph 54(f), Plaintiff has not sufficiently pleaded that Alaniz's conduct would rise to the level of chilling the speech of a reasonably firm person.

The allegation in paragraph 54(g) that Laredo City Council members *initially* attacked and obstructed a

proposal to build a reading kiosk named after Plaintiff's niece does not allege conduct by an Individual Defendant named in this lawsuit. Even if it did identify an Individual Defendant, this reference to "initial" "attacking" and "obstructing" is a conclusory description and further fails to describe any "injury that would chill a person of ordinary firmness from continuing to engage in that activity." Accordingly, and for the additional reasons stated in *supra* fn.11, the allegations in paragraphs 54(a)-(g) do not state independent First Amendment violations of retaliation.

b. Interference

Plaintiff contends she can also assert a First Amendment claim for interference with the exercise of First Amendment rights, separate and distinct from her First Amendment retaliation claim. (*See, e.g.*, Dkt. No. 24 ¶ 137). Plaintiff's purported interference claim is based on (1) Montemayor threatening to take Villarreal's phone as "evidence"; (2) Guerrero "harassing and intimidating" Plaintiff "without justification"; and (3) Plaintiff's arrest and detention pursuant to the Arrest Warrants. (Dkt. No. 29 at 10).

As explained *supra* Part III(B)(1), the Court has found that Plaintiff's arrest under § 39.06(c) was supported by objective probable cause. Thus, Plaintiff has failed to satisfy her burden to overcome qualified immunity as to a First Amendment interference claim based on her arrest and detention. With respect to the other two incidents, Plaintiff has not cited case law showing that

the alleged conduct violated a clearly established right. The Fifth Circuit has made clear that the right to record police activity is not absolutely protected under the First Amendment. *Turner*, 848 F.3d at 687 (noting that at the time of the alleged conduct, such right was not clearly established sufficiently to "place[ ] . . . the constitutional question *beyond debate*"). Notably, the right to "film[ ] the police may be subject to reasonable time, place, and manner restrictions." *Id.* (internal citation omitted).

Plaintiff cites *Colson v. Grohman*, 174 F.3d at 508-09, to support her First Amendment interference claim. The court in *Colson* affirmed the dismissal of a city council member's First Amendment retaliation claim and noted that "[a]s a general rule, the First Amendment prohibits not only direct limitations on speech but also adverse government action against an individual because of her exercise of First Amendment freedoms." *Id.* at 508 (citing examples). However, the examples of retaliation noted in *Colson* are so distinguishable from the present case that it provides little guidance as to whether Plaintiff has properly alleged a claim of interference with her protected First Amendment activity.[12]

As the Court has already discussed, Plaintiff must allege more than a general violation of a right. Accordingly,

12. *Reed*, another case cited by Plaintiff, is similarly unavailing. 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). In *Reed*, the Supreme Court applied strict scrutiny to a town's sign ordinance and determined that it violated the First Amendment; however, there was no § 1983 claim at issue. *Id.* Plaintiff does not allege a prior restraint comparable to that in *Reed* and provides no explanation of how *Reed* applies to her claim.

the Court finds that Plaintiff has failed to show the alleged interference by the Individual Defendants violated any clearly established right existing at the time of each of the incidents. Moreover, as set forth *supra* Part III(A)(2)(a)(ii)(A), Plaintiff has not alleged facts sufficient to draw an inference that Montemayor's threat to take her phone or Guerrero's "harassing and intimidating" conduct was objectively unreasonable. Accordingly, Plaintiff has not met her burden to overcome qualified immunity with respect to First Amendment interference claim. And as discussed *supra* Part III(A)(2)(a)(ii)(B), the allegation that Guerrero engaged in "harassing and intimidating" conduct, without further description, is too conclusory to constitute a well pleaded fact and survive dismissal.

Accordingly, the Court finds that the FAC does not state a plausible interference claim under the First Amendment. Thus, Plaintiff's First Amendment § 1983 claims against the Individual Defendants (Count I) should be dismissed.

C. Count III: § 1983 Selective Enforcement Claim Under Fourteenth Amendment Equal Protection Clause

Count III of the FAC asserts a § 1983 claim based on the equal protection clause of the Fourteenth Amendment against the Individual Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and Does 1-2, in their individual capacities. Plaintiff alleges that those Defendants "intentionally and arbitrarily singled [Plaintiff] out in a selective enforcement of [§ 39.06(c)]" by "their wrongful

criminal investigation of [Plaintiff], and knowingly causing her arrest and detention." (Dkt. No. 24 ¶ 175).

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (internal citation omitted). The Fifth Circuit recognizes a claim for selective enforcement where an official allegedly used their powers selectively against a single party. *Bryan v. City of Madison, Miss.*, 213 F.3d 267, 277 n.17 (5th Cir. 2000) (explaining that "[o]ur cases have recognized successful equal protection claims brought by a 'class of one'")). Thus, at the time of Defendants' alleged conduct relating to Plaintiff, it was clearly established that selective enforcement of a statute violates the equal protection clause.

"Generally, to establish an equal protection claim the plaintiff must prove that similarly situated individuals were treated differently." *Wheeler v. Miller*, 168 F.3d 241, 252 (5th Cir. 1999); *see also Lacey v. Maricopa County*, 693 F.3d 896, 920 (9th Cir. 2012) (internal quotations omitted) ("To prevail on an equal protection claim under the Fourteenth Amendment, a plaintiff must demonstrate that enforcement had a discriminatory effect . . . ."). To support a plausible inference that a plaintiff was treated differently than other similarly situated individuals, the plaintiff must "allege some facts, either anecdotal

or statistical, demonstrating 'that similarly situated defendants . . . could have been prosecuted, but were not.'" *Lacey*, 693 F.3d at 920 (quoting *United States v. Armstrong*, 517 U.S. 456, 469, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996)). To allege a selective enforcement claim based on a "class of one," a plaintiff must also allege that a defendant was "motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right." *Madison*, 213 F.3d at 277 (citing *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) and *Stern v. Tarrant County Hosp. Dist.*, 778 F.2d 1052, 1058 (5th Cir. 1985)).

The Court first considers whether the FAC plausibly alleges that Plaintiff was treated differently from other, similarly situated persons. Plaintiff alleges that "similarly-situated persons" include "those who had asked for or received information from local law enforcement officials." (*Id.* ¶ 177). However, this allegation ignores the grounds for probable cause to arrest Plaintiff. As explained *supra* Part III(B)(1), Defendants had objectively reasonable grounds to find probable cause that Plaintiff violated § 39.06(c).

Plaintiff fails to allege any facts indicating that Defendants failed to enforce § 39.06(c) against any other person where a similar situation existed. The FAC alleges that Plaintiff, "like most local media, requested and received law enforcement information from LPD spokesman Baeza and other LPD officials." (*Id.* ¶ 178). However, as set forth in the FAC, the allegations in the Arrest Warrant Affidavit concerned Plaintiff's receipt

of information *not* from Baeza, but from *Goodman*. (*Id.* ¶¶ 88-89).[13] Plaintiff does not allege that other journalists solicited or received information from Goodman or some other unofficial or unsanctioned source of information within the police department, as Plaintiff undisputedly did. Plaintiff also fails to allege that other journalists sought or received information that Defendants reasonably believed had not been made public within the meaning of the statute. Thus, accepted as true for the purpose of a motion to dismiss, Plaintiff's allegation that other "persons . . . asked for or received information from local law enforcement officials" is insufficient to establish that any other person was similarly situated to Plaintiff. (*Id.* ¶ 177).

Next, Plaintiff alleges that other similarly situated persons "published truthful and publicly-accessible information on a newsworthy matter." (*Id.*). However, as

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13. Plaintiff also alleges that she had previously published "similar posts" based on information she received from Baeza and was not investigated at that time. (Dkt. No. 24 ¶ 67). To the extent Plaintiff suggests that her earlier posts were "similarly situated" incidents, that argument fails for the same reason. Although not expressly alleged in the FAC, the most plausible inference from Plaintiff's allegations is that Goodman was not authorized to release information that had not been made public. Therefore, Plaintiff's receipt of information from Baeza, an official LPD spokesperson, is materially different from allegedly obtaining nonpublic information from a private or unofficial source within LPD, as alleged in the Arrest Warrant Affidavits. (*See id.* ¶ 88 ("Ruiz also alleged that an unnamed source (on information and belief, one of the Doe Defendants) informed Defendant DV that Goodman was communicating with [Plaintiff]."). *See also supra* Part III(B)(2) n.9.

set forth *supra* Part III(B)(1), an objectively reasonable officer could have determined that the information Plaintiff obtained from Goodman included information that had *not* been made public. Plaintiff does not allege that any other media members or journalists had solicited or received information from someone other than the Baeza that had not been made public, or that could objectively be viewed as qualifying for a TPIA exception. Therefore, the fact that other persons published "truthful and publicly-accessible information on a newsworthy matter" does not establish a reasonable inference that any other person was similarly situated to Plaintiff here. (*Id.*)

Finally, Plaintiff alleges in broad terms that (a) Defendants intentionally treated her differently than other journalists and media outlets (*see id.* ¶ 54); (b) Defendants had never enforced § 39.06(c) (*see id.* ¶¶ 177, 182, 194); (c) the alleged difference in treatment had no rational basis (*id.* ¶ 182); and (d) the enforcement of § 39.06(c) against Plaintiff was in retaliation against her criticism of LPD and WCDA. (*Id.* ¶¶ 53-55, 57, 101). However, the only "anecdotal or statistical" *fact* set forth above is the allegation that Defendants had never enforced § 39.06(c). *See Lacey*, 693 F.3d at 920. Assuming as true that Defendants had never before sought to enforce the statute, that fact by itself does not give rise to an inference of discriminatory effect because it does not establish that other similarly situated persons "could have been prosecuted, but were not." *Id.* Rather, it would be equally plausible to infer that Defendants had never before encountered circumstances giving rise to potential prosecution under the statute. *Cf. Ballentine v. Las Vegas*

Metro Police Dep't, No. 2:14-CV-01584-APG, 2015 U.S. Dist. LEXIS 54720, 2015 WL 2164145, at *2 (D. Nev. Apr. 27, 2015) (citing *Freeman v. City of Santa Ana*, 68 F.3d 1180 (9th Cir. 1995), *as amended on denial of reh'g and reh'g en banc* (Dec. 29, 1995) (noting that "[t]he goal of identifying a similarly situated class . . . is to isolate the factor allegedly subject to impermissible discrimination"). Plaintiff's remaining allegations concerning persons "similarly situated" are vague and conclusory, and therefore fail to meet *Olech*'s requirement to allege "that [Plaintiff] has been intentionally treated differently from others similarly situated [with] no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564.

Because Plaintiff has not plausibly alleged that she was treated differently than other similarly situated persons, it is not necessary to determine whether the FAC alleges sufficient facts to satisfy the "improper motive" element of a § 1983 claim based on equal protection. Plaintiff's failure to allege facts that plausibly satisfy the "similarly situated" element alone precludes her selective-enforcement claim. Accordingly, Plaintiff's Fourteenth Amendment § 1983 claim (Count III) should be dismissed.

D. Count IV: § 1983 Civil Conspiracy Claim

Plaintiff asserts a claim for conspiracy under § 1983 against each of the Individual Defendants. (Dkt. No. 24 ¶ 188). Plaintiff alleges that the Individual Defendants "conspired with the intent to deprive [Plaintiff] her constitutionally-protected rights, including those arising under the First, Fourth, and Fourteenth Amendments."

(*Id.* ¶¶ 188, 191). All the Individual Defendants assert qualified immunity as to the conspiracy claim. (Dkt. No. 26 at 13; Dkt. No. 27 at 11).

To allege a civil conspiracy under § 1983, a plaintiff must establish "(1) the existence of a conspiracy involving state action and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy." *Pfannstiel*, 918 F.2d at 1187; *see also Jabary v. City of Allen*, 547 F. App'x 600, 610 (5th Cir. 2013). "The proper order of review is *first* whether [Plaintiffs] have alleged a constitutional violation that is objectively unreasonable in light of clearly established Fourth Amendment law, and *only if that is the case* should the court then consider whether Plaintiffs have alleged a conspiracy." *Morrow v. Washington*, 672 F. App'x 351, 355 (5th Cir. 2016). In other words, a court must first determine whether a plaintiff has alleged a deprivation of civil rights before considering, if necessary, whether a plaintiff sufficiently pleaded the existence of a conspiracy. *See id.; see also Pfannstiel*, 918 F.2d at 1187; *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995). If all defendants alleged to have violated a plaintiff's rights are entitled to qualified immunity, a conspiracy claim is not actionable. *Morrow*, 672 F. App'x at 354 (internal citations omitted); *see also Hale*, 45 F.3d at 920-21 (finding that a conspiracy claim was not actionable against state actors who were entitled to qualified immunity on the First Amendment claim).

For the reasons set forth *supra* Part III(B)(1), the Court finds that Defendants' conduct relating to the investigation and arrest of Plaintiff was objectively

reasonable. In addition, the Court finds that the Individual Defendants are entitled to immunity against each of Plaintiff's underlying § 1983 claims. *Supra* Part III(B)(2)-3). Thus, under clearly established Fifth Circuit precedent, Plaintiff cannot maintain a civil conspiracy claim under § 1983 as to the Individual Defendants. *Pfannstiel*, 918 F.2d at 1187. It is therefore unnecessary to determine whether the FAC pleads the existence of an agreement among Defendants sufficient to satisfy the first element of a conspiracy claim. Accordingly, Plaintiff's § 1983 conspiracy claim (Count IV) should be dismissed.

E. Count V: § 1983 Supervisory Liability Claim against Treviño under First, Fourth, and Fourteenth Amendments

Count V of the FAC asserts a supervisory liability claim against Treviño in his individual capacity for violations under the First, Fourth, and Fourteenth Amendments. (Dkt. No. 24 ¶¶ 200-13). A claim for supervisory liability must allege that "(1) the supervisor either failed to supervise or train the subordinate officer; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights, and (3) the failure to train or supervise amounts to deliberate indifference." *Davidson v. City of Stafford, Texas*, 848 F.3d 384, 397 (5th Cir. 2017), *as revised* (Mar. 31, 2017) (quoting *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452-53 (5th Cir. 1994) (en banc)). Plaintiff asserts supervisory liability on theories of both failure to train and failure to supervise.

As an initial matter, a claim for supervisory liability must adequately allege an underlying constitutional

violation. *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 425 (5th Cir. 2006) ("It is facially evident that this test [for supervisory liability] cannot be met if there is no underlying constitutional violation."). The Court has determined that Plaintiff failed to state a claim for violations under the First Amendment with respect the retaliation claims in paragraphs 54(a)-(g) of the FAC and Fourteenth Amendment equal protection. *Supra* Part II(B)(2)(ii)(B), II(B)(3). Thus, there can be no claims for supervisory liability premised on such violations. However, with respect to the First and Fourth Amendment violations stemming from Plaintiff's arrest, the Court found that the Individual Defendants were entitled to qualified immunity. *Supra* Part III(B)(1). Accordingly, the Court will analyze Plaintiff's supervisory liability claim against Treviño, assuming *arguendo* that Plaintiff has alleged an underlying constitutional violation under the First and Fourth Amendment with respect to Plaintiff's arrest.

1. Failure to Train

The claim against Treviño for failure to train is premised solely on First Amendment violations. While the Court found that the Individual Defendants were entitled to qualified immunity as to Plaintiff's First Amendment claims, this does not preclude a potential claim for supervisory liability premised on the same allegations. *See Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005) (stating that a jury's findings of qualified immunity on behalf of a subordinate officer are "neither inconsistent nor preclusive" to a finding of supervisory liability for the chief of police).

Plaintiff alleges that Treviño inadequately trained LPD officers with respect to citizens' First Amendment rights. (Dkt. No. 24 ¶ 204). Plaintiff contends that by failing to train the LPD officers, Treviño ratified and approved a pattern of retaliation by LPD officers against Plaintiff. (*Id.*). The City Defendants argue that Plaintiff is required to "prove that the deficiency in the training actually caused the police officer's indifference" to Plaintiff's rights. (Dkt. No. 27 at 13).

To plead a plausible claim for failure to train, Plaintiff must allege facts that enable the court to draw the reasonable inference that (1) the training procedures were inadequate; (2) the city's policymaker was deliberately indifferent in adopting the training policy; and (3) the inadequate training policy directly caused Plaintiff's injury. *See Carnaby v. City of Houston*, 636 F.3d 183, 189 (5th Cir. 2011).

In a failure to train claim, "the focus must be on the adequacy of the training program in relation to the tasks the particular officers must perform." *Roberts*, 397 F.3d at 293 (internal citation omitted). Specifically, a plaintiff must allege "*with specificity* how a particular training program is defective." *Id.; Boggs v. Krum Indep. Sch. Dist.*, 4:17-CV-583, 2018 U.S. Dist. LEXIS 92800, 2018 WL 2463708, at *6 (E.D. Tex. June 1, 2018)). In *Roberts*, the Fifth Circuit was careful to advise plaintiffs that they "cannot prevail by styling their complaints about the specific injury suffered as a failure to train claim," noting that "the Supreme Court specifically warned against this type of artful pleading." *Id.* (citing *City v. Canton*, 489

U.S. 378, 391, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)). Additionally, to satisfy the second prong, Plaintiff must generally show "a pattern of similar violations arising from the training that is so clearly inadequate as to be obviously likely to result in a constitutional violation." *Id.* (internal quotations marks omitted).

With respect to the first prong, Plaintiff alleges that Treviño failed to train "LPD officers and staff regarding the clearly-established First Amendment rights of citizens, including (1) the right to film and record police activity in public; (2) the right to criticize and challenge police activity; (3) the right to lawfully gather and report truthful information on matters of public concern; and (4) the right [to] exercise one's First Amendment rights free of retaliation from law enforcement." (Dkt. No. 24 ¶ 204). The Court views these allegations to be the type of "artful" pleading advised against in *Canton*. It appears that Plaintiff merely repackages alleged constitutional violations—what she terms a "pattern of . . . retaliatory action"—as deficiencies in the training of LPD officers. (*Id.* ¶ 204). The Court finds this insufficient.[14]

14. Plaintiff concedes in her response to the City Defendants' Motion that Treviño underwent an open records training program mandatory for appointed public officials. (Dkt. No. 29 at 29) (citing Tex. Gov. Code § 555.012). It appears to the Court, though it is not explicit in Plaintiff's argument, that Plaintiff references this training program to underscore Treviño's deliberate indifference when training his own employees. In other words, Plaintiff suggests that, because Treviño received this training, he was put on notice that he should similarly train his employees. Thus, any violation by his subordinates that stemmed from a failure to train should be attributed to Treviño. Plaintiff misconstrues the concept of notice in a

In *Connick v. Thompson*, the Supreme Court stated that a claim for failure to train requires the plaintiff to prove "that a particular *omission* in their training program causes city employees to violate citizens' constitutional rights." 563 U.S. 51, 61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011) (emphasis added). Here, Plaintiff fails to allege any *facts* supporting an inference that Treviño employed a deficient training program. *See Wilson v. City of Hattiesburg*, 396 F. Supp. 3d 711, 717 (S.D. Miss. 2019) (dismissing a failure to train claim where the plaintiff only alleged that the city "failed to train its employees properly to prevent the violations of his rights," because the plaintiff "did not identify a training program or specifically allege how any training program was deficient") (internal citation omitted). In *Williams v. City of Cleveland, Mississippi*, 736 F.3d 684, 687 (5th Cir. 2013), the plaintiff alleged isolated incidents of constitutional violations—that an officer utilized a chokehold and that officers cycled tasers simultaneously—but the court rejected his claim for failure to train because the complaint "fail[ed] to specify *how* the City of Cleveland's training program treated these issues or specifically *how* the training program regarding these issues is defective." *Id.* (emphases added). Plaintiff's allegations as to the first prong in a failure to train claim are deficient.

Plaintiff's FAC also fails to demonstrate a *pattern* of violations with respect to the second prong of a failure to

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failure to train claim. In a failure to train claim, notice is provided by alleging "a pattern of similar constitutional violations by untrained employees." *Connick*, 563 U.S. at 62. Thus, the supervisor can be held liable for the specific constitutional violations arising from training deficiencies of which he was put on notice. *Id.*

train claim. Plaintiff must allege "the existence of a pattern of tortious conduct by inadequately trained employees" to adequately demonstrate that there was a failure to train employees. *Bd. of the County Comm'rs of Bryan County v. Brown* (*Brown I)*, 520 U.S. 397, 407-08, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). Plaintiff points to the incidents in paragraphs 54(a)-(g) of the FAC as evidence that Treviño had actual or constructive knowledge of a pattern of retaliation. (Dkt. No. 24 ¶ 203). However, as discussed *supra* Part III(B)(2)(ii)(B), paragraphs 54(a)-(g) contain either conclusory allegations or isolated incidents,[15] all of which pertain solely to Plaintiff and not to other persons in the community. Paragraphs 54(a)-(g) do not establish that LPD officers had a pattern of violating First Amendment rights. Moreover, paragraphs 54(a)-(g) do not demonstrate that Treviño had knowledge of violations such that he can be held liable for failing to train LPD officers.[16] And

15. The Court found that the allegations in paragraphs 54(a)-(g) are insufficient to state a claim for retaliation in violation of the First Amendment. Consistent with Fifth Circuit precedent, there can therefore, be no failure to train claim premised on these allegations.

16. Plaintiff asserts, "As chief of police, Treviño knew of the various LPD acts of retaliation specified in paragraphs 54(a)-(g), or was willfully blind to the same. Treviño took no action to remedy the acts of retaliation against [Plaintiff]'s exercise of her First Amendment rights by LPD officers, and encouraged the same." (Dkt. No. 24 ¶ 61). Plaintiff further states that she "reported on her Facebook page about several of the incidents detailed in Paragraph 54." (*Id.* ¶ 62). Plaintiff states, "[T]he Laredo City Manager and Laredo City Council members regularly accessed [Plaintiff]'s Facebook page, or were routinely advised about the same." (*Id.*). The Court finds these conclusory allegations do not state sufficient facts to allege that Treviño was aware of any action by LPD officers. First, Plaintiff does not provide information about *what* she posted

by failing to adequately allege "a pattern of conduct or a continued adherence to a program [,] . . . [Plaintiff] has not pled the deliberate indifference" requisite to establish the second prong in a failure to train claim. *See Howard v. Del Castillo*, No. CIV. A. 00-3466, 2001 U.S. Dist. LEXIS 15186, 2001 WL 1090797, at *3 (E.D. La. Sept. 17, 2001) (finding that, absent a pattern of conduct, "the only connection between the alleged acts of the officers and [the police superintendent was] the fact of their employment" which was insufficient to establish a failure to train claim).

2. Failure to Supervise

Plaintiff further alleges that Treviño had "oversight and approval of" and "supervised" the criminal investigation of Plaintiff; the preparation, issuance, and execution of the Arrest Warrants; and Plaintiff's arrest and detention. (*Id.* ¶¶ 206-07). Plaintiff contends that Treviño's alleged failure to supervise caused violations of Plaintiff's First, Fourth, and Fourteenth Amendment rights. (*Id.* ¶ 206). The City Defendants move to dismiss because Plaintiff has failed to allege that Treviño was *personally* involved in any constitutional deprivation or that Treviño acted with deliberate indifference. (Dkt. No. 27 at 13). Further, the City Defendants argue that

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on Facebook. Specifically, Plaintiff does not state that she included in her Facebook posts any instances of LPD officers singling out Plaintiff, retaliating against Plaintiff, or infringing upon Plaintiff's First Amendment Rights. Moreover, even if Plaintiff's general conclusions about Facebook posts were sufficient, she only alleges that the Laredo City Manager and Laredo City Council accessed her Lagordiloca Facebook page. She makes no similar assertion regarding Treviño.

immunity shields Treviño for enforcing a penal code provision that was constitutional at the time. (*Id.*).

As an initial matter, the City Defendants seek dismissal of this supervisory claim because "enforcing a penal code provision that was valid at the time of enforcement is not an objectively unreasonable action that would waive immunity." (Dkt. No. 27 at 13). The Court construes this statement, as well as the City Defendants' argument that Treviño is "entitled to qualified immunity for Counts I-V" as an assertion of qualified immunity for supervisory liability. (*Id.* at 13, 16).

The Fifth Circuit has recognized the "difficulty in reconciling the deliberate indifference standard [for supervisory liability] with the objective reasonableness standard used in addressing qualified immunity." *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011) (citing *Hare*, 135 F.3d at 327-28). The Fifth Circuit has established that an official is entitled to qualified immunity unless his actions "amount to deliberate indifference." *Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005). Similarly, a failure to supervise claim requires a plaintiff to allege that (1) the supervisor failed to supervise a subordinate officer; (2) a causal link exists between the failure to supervise and the violation of the plaintiff's rights, and (3) the failure to supervise amounts to deliberate indifference. *Davidson*, 848 F.3d at 397 (citing *Doe*, 15 F.3d at 452-53).

"Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Davidson*,

848 F.3d at 397 (quoting *Estate of Davis*, 406 F.3d at 381). "Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference." *Id.; see also Brown v. Callahan*, 623 F.3d 249, 255 (5th Cir. 2010) ("Deliberate indifference is more than mere negligence or even gross negligence."). Deliberate indifference generally requires a showing of more than a single instance of the lack of supervision causing a violation of constitutional rights. *Brumfield v. Hollins*, 551 F.3d 322, 329 (5th Cir. 2008). A plaintiff must demonstrate *at least* a pattern of similar violations arising from training or supervising that is so clearly inadequate as to be obviously likely to result in a constitutional violation. *Id.* The Fifth Circuit has "stressed that a single incident is usually insufficient to demonstrate deliberate indifference," but rather the plaintiff must "demonstrate a *pattern* of violations." *Estate of Davis*, 406 F.3d at 383 (emphasis added). In particular, the pattern must demonstrate "similar incidents in which the citizens were injured." *Id.* (quoting *Sydney v. Trepagnier*, 142 F.3d 791, 798- 99 (5th Cir. 1998) (internal citation omitted)).

In this case, Plaintiff seeks to hold Treviño liable for his supervision of LPD officers with respect to the investigation and arrest of Plaintiff. However, Plaintiff does not point to a single incident, aside from Plaintiff's, where an individual was investigated and arrested in violation of the First and Fourth Amendment, let alone an incident in which Treviño was the supervisor. In fact, Plaintiff repeatedly draws the Court's attention to the fact that she was the first individual arrested under § 39.06(c). (*See id.* ¶¶ 177, 182, 194).

The Fifth Circuit has identified a single incident exception to supervisory liability, where a single act of retaliation can give rise to supervisory liability. *See Davidson*, 848 F.3d at 397. Plaintiff cites to *Aubin*, 272 F. Supp. 3d. at 834-35, to support the use of the single incident exception in this case. In *Aubin*, the plaintiff alleged that the County Sheriff had "an official policy that his deputies may arrest anyone who makes threats against their jobs." *Id.* at 834. The court determined, "Considering these allegations it is plausible that [the Sheriff] officially adopted and promulgated the policy in question because two supervisors allegedly confirmed the same policy to [their subordinate]." *Id.* The *Aubin* court found the Sheriff's policy to be facially unconstitutional without consideration of whether a single incident exception could prove deliberate indifference. *Id.* ("[A]n unconstitutional official policy renders a municipality culpable under § 1983, without any need to consider deliberate indifference.") (internal citation omitted).

Aubin is distinguishable from this case. As Plaintiff alleges, she was the first individual to be arrested under § 39.06(c). Thus, unlike in *Aubin*, there was no generally applicable policy that resulted in Plaintiff's arrest under the statute. In addition, the allegations in paragraphs 54(a)-(g) are deficient as allegations of a pattern or policy of First Amendment retaliation. For example, because Plaintiff neglects to provide any dates for the Defendants' conduct alleged in these paragraphs, it is impossible to discern when they occurred in relation to Plaintiff's publishing of negative articles about the Defendants or

even in relation to each other.[17] Moreover, only three of the allegations of paragraphs 54(a)-(g) reference LPD officers, and only two allegations mention the name of the officer.

The Court finds *Davidson* instructive in this case. 848 F.3d at 384. In *Davidson* the plaintiff alleged that his constitutional rights were infringed upon based on an arrest made pursuant to a Texas statue. *Id.* at 392. The court found that the arrest was made without probable cause and violated plaintiff's First and Fourth Amendment rights. *Id.* In that case, the chief of police reviewed the plaintiff's arrest and determined that there was no violation from which to discipline the officers who arrested the plaintiff. *Id.* at 395. The plaintiff also pointed to various other arrests made under the same statute, two of which the Court concluded also violated individuals' constitutional rights. *Id.* Nevertheless, the *Davidson* court refused to find the chief of police individually liable for failure to supervise. *Id.* at 398. The plaintiff in *Davidson* put forth a similar argument to Plaintiff's in this case—that the chief of police endorsed an unconstitutional interpretation of a statute that caused a pattern of constitutional violations, and that the plaintiff's arrest was the obvious consequence of the chief of police's misinterpretation. *Id.* at 397-98. In *Davidson*, the plaintiff failed to show a pattern of deliberate indifference, or

17. For § 1983 purposes, "A pattern requires similarity and specificity . . . [and also requires] 'sufficiently numerous prior incidents.'" *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 851 (5th Cir. 2009). Thus, if any incident in paragraphs 54(a)-(g) occurred *after* her arrest or was significantly different than Plaintiff's arrest, it would not demonstrate a pattern that could put a municipality or a municipal actor, like Treviño on notice. *Id.* at 858.

that the plaintiff's injury was the "highly predictable consequence" of the chief of police's understanding of the statute. *Id.* at 398.

Like the *Davidson* court, the Court finds that Treviño was not deliberately indifferent because the violations that Plaintiff alleges were not the highly predictable consequences of Treviño's supervision of LPD officers. Unlike the chief of police in *Davidson*, the Court has determined in *supra* Part III(B)(2) that § 39.06(c) was not so patently or obviously unconstitutional that no reasonable law enforcement officer could have believed that their enforcement of the statute against the Plaintiff was constitutional. Plaintiff's alleged injury was not the "highly predictable consequence" of Treviño's supervision of LPD officers who were enforcing the statute. Thus, Plaintiff's allegations do not demonstrate the deliberate indifference standard requisite for supervisory liability.

Accordingly, Plaintiff's § 1983 supervisory liability claim against Treviño (Count V) should be dismissed.

F. *Monell* Claims against Municipal Defendants

1. Standard for *Monell* Claims

Counts VI and VII allege municipal liability claims pursuant to *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978), against the City of Laredo and Webb County, respectively. To successfully claim municipal liability under *Monell*, Plaintiff must allege three elements: "(1) an official policy (or custom), of which (2) a policymaker can be charged with actual or constructive

knowledge, and (3) a constitutional violation whose 'moving force' is that policy or custom." *Valle v. City of Houston*, 613 F.3d 536, 541-42 (5th Cir. 2010) (quoting *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002)).

The first element, the existence of an official policy or custom, can be established in several ways. First, a policy may be "officially adopted and promulgated" by the municipality or by an official with policymaking authority. *Burge v. St. Tammany Parish*, 336 F.3d 363, 369 (5th Cir. 2003). Second, a "persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Id.* Third, a "single decision by a policy maker may, under certain circumstances, constitute a policy for which a [municipality] may be liable." *Valle*, 613 F.3d at 542 (alteration in original) (quoting *Brown v. Bryan County* (*Brown II)*, 219 F.3d 450, 462 (5th Cir. 2000)). Lastly, "[t]he failure to provide proper training may fairly be said to represent a policy for which [a municipality] is responsible, and for which the [municipality] may be held liable if it actually causes injury." *Id.* at 544 (quoting *Brown II*, 219 F.3d at 457).

To establish the second element of a *Monell* claim, a plaintiff must identify an official policymaker with actual or constructive knowledge of the constitutional violation. *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 167 (5th Cir. 2010). A policymaker is "one who takes the place of the governing body in a designated area of city administration." *Id.* (quoting *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984)). "The policymaker must have final policymaking authority." *Davis v. Tarrant*

County, 565 F.3d 214, 227 (5th Cir. 2009). "Whether a particular official has 'final policymaking authority'" is a question of state and local law. *Id.* (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989)).

To satisfy the third "moving force" element, "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Valle*, 613 F.3d at 542 (quoting *Brown I*, 520 U.S. at 404). A municipality is culpable under § 1983 if (1) an official policy is unconstitutional or (2) a facially innocuous policy was "promulgated with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result." *Piotrowski v. City of Houston* (*Piotrowski II)*, 237 F.3d 567, 579 (5th Cir. 2001) (quoting *Brown I*, 520 U.S. at 407). "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown I*, 520 U.S. at 410.

2. Count VII: *Monell* Liability as to Webb County

a. Plaintiff's Allegations Against Webb County

Count VII alleges that acts taken pursuant to official Webb County policy constituted impermissible state action that deprived Plaintiff of rights under the First, Fourth, and Fourteenth Amendment. (Dkt. No. 24 ¶ 242). In support of her *Monell* claim, Plaintiff alleges

that Webb County maintained a policy to "intimidate, retaliate against, and punish" Plaintiff for recording and publishing about law enforcement activities and other matters of public concern. (*Id.* ¶ 236). Plaintiff further describes Webb County's policy as "a decision to restrict and interfere with [Plaintiff]'s citizen journalism" to curb Plaintiff's gathering and publishing of unfavorable information. (*Id.* ¶ 237). Plaintiff alleges that "[t]he official county policy was developed, ratified, enforced, and continues to be enforced through and by officials vested with final policymaking authority either by law or delegation, including at least Defendant Alaniz and the Webb County Sheriff." (*Id.* ¶ 241). Plaintiff further alleges that "[t]he County's official policy were [*sic]* the moving force behind the deprivation of [Plaintiff]'s constitutional rights as alleged herein, as they contributed to and caused the wrongful arrest of [Plaintiff] done in retaliation for her exercise of First Amendment rights." (*Id.* ¶ 245).

b. Analysis

In the County Defendants' Motion, the County Defendants contend the FAC fails to state a plausible *Monell* claim. (Dkt. No. 26 at 13-17). The County Defendants contend Plaintiff has not adequately alleged a final policymaker or a policy requisite for a *Monell* claim. (*Id.* at 14, 16-17).

i. Official Policymaker

The County Defendants contend that, as a matter of law, a district attorney is not a final policymaker for a municipality for *Monell* liability. (*Id.* at 16). Rather, the

County Defendants argue that the District Attorney is a state official for purposes of liability arising out of his prosecutorial decisions. (*Id.*). The County Defendants cite *Esteves v. Brock*, 106 F.3d 674 (5th Cir. 1997), *cert. denied*, 522 U.S. 828 (1997), in which the Fifth Circuit held a district attorney, acting in his prosecutorial capacity, is an agent of the state, not an agent of the county in which the case is prosecuted. (Dkt. No. 26 at 16).

The Court disagrees with the County Defendants' argument that Alaniz acted solely in a prosecutorial capacity for the conduct alleged in the FAC. The Court has already determined *supra* Part III(A) that the investigative actions of Alaniz and Jacaman were not taken in their capacity as advocates for the state, and therefore Alaniz and Jacaman are not entitled to the absolute immunity afforded to prosecutors representing the state. The Court finds *Esteves* does not compel a different conclusion with respect to *Monell* liability. In *Esteves*, the Fifth Circuit explained that the determination of whether a district attorney is acting on behalf of the state or county is determined by state law *and* by an analysis of the duties alleged to have caused the constitutional violation. 106 F.3d at 677. Thus, the Court must analyze the role of the district attorney in his conduct as alleged by Plaintiff.

The Court's analysis of Alaniz's duties for the purposes of determining whether Alaniz is entitled to prosecutorial immunity applies equally to the analysis of Webb County's municipal liability. *See Brown v. City of Houston*, 297 F. Supp. 3d 748, 765 (S.D. Tex. 2017) ("Both municipal liability and Rizzo's prosecutorial immunity turn on the scope of Rizzo's prosecutorial duties. Those

arguments are addressed under [the defendant's] motion to dismiss based on his absolute prosecutorial immunity."). Plaintiff alleges that Alaniz's conduct was outside the scope of his prosecutorial duties, and therefore Alaniz was not acting as a state agent in relation to Plaintiff's claims. *See, e.g., Crane v. State of Tex.*, 766 F.2d 193, 195 (5th Cir. 1985) (determining that the district attorney was "properly viewed as a county official" regarding allegations of a policy of issuing arrest warrants without probable cause); *Wooten v. Roach*, 377 F. Supp. 3d 652, 667 (E.D. Tex. 2019) (finding that the district attorney was the policymaker for the county regarding a policy of "pursuing wrongful arrests and prosecution without probable cause and without due process" because it fell outside the district attorney's role as a prosecutor in one case). Under the standard of Rule 12(b)(6), Plaintiff has sufficiently alleged that Alaniz is a policymaker for Webb County.[18]

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18. The Fifth Circuit in *Groden v. City of Dallas, Texas* made clear that it is the Court's role to determine the policymaker as a matter of law. 826 F.3d 280, 285-286 (5th Cir. 2016). For the reasons stated above, the Court finds that, as a matter of law, the Webb County District Attorney was the policymaker for Webb County with respect to his investigative actions. Thus, the Court need not delve into the allegations as they relate to the Webb County Sheriff. However, for the sake of completeness, the Court finds that even if the Webb County Sheriff were a policymaker for the circumstances in question, Plaintiff failed to allege *any* deliberate decision attributable to the Webb County Sheriff that would rise to the level of an official policy. Plaintiff merely makes the conclusory assertion that the Webb County Sheriff "participated in the selective arrest." (Dkt. No. 24 ¶ 239).

ii. Official Policy or Custom

The Court next considers whether Plaintiff has adequately alleged an official policy or custom of Webb County under *Monell*. The County Defendants correctly note that Webb County cannot be liable on a theory of *respondeat superior*. (*Id.* at 14); *Monell*, 436 U.S. at 691.

Plaintiff does not contend the alleged policy was "officially adopted and promulgated" by Webb County's lawmaking officers. Rather, she alleges that Webb County implemented a policy targeting her and only her. (Dkt. No. 24 ¶ 231). However, Plaintiff offers no authority for her assertion that "a policy against one is still a policy." (Dkt. No. 30 at 30). Similarly, Defendants fail to provide authority in support of their contention that a single-plaintiff policy *cannot* be a policy for purposes of municipal liability.

Nonetheless, the Supreme Court's opinion in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986), and subsequent Fifth Circuit cases provide guidance on this issue. *See, e.g., Webb v. Town of Saint Joseph*, 925 F.3d 209 (5th Cir. 2019); *Cherry Knoll, L.L.C. v. Jones*, 922 F.3d 309 (5th Cir. 2019). In *Pembaur*, the Court considered whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy the requirement of an official municipal policy. 475 U.S. at 481. In that case, the county prosecutor had told the assistant prosecutor to instruct the deputy sheriffs to "go in and get [the witnesses]" by serving capiases at the petitioner's clinic. *Id.* at 473. The

court of appeals held that the plaintiff, by only showing that the sheriff decided to force entry on *one* occasion, failed to prove the existence of a county policy. *Id.* at 476-77. The Supreme Court reversed this holding and found that, "a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations." *Id.* at 481. The Court further reasoned, "If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood." *Id.*

The Fifth Circuit expanded upon *Pembaur* in *Webb*, 925 F.3d at 215. The Fifth Circuit held that, in addition to (1) an official policy and (2) a widespread practice or custom, a plaintiff may also demonstrate a municipal policy a third way—in "rare circumstances when the official or entity possessing final policymaking authority for an action performs the specific act that forms the basis of the § 1983 claim." *Id.* (internal citations omitted). The Fifth Circuit reasoned that a municipal policy can be proven by "[a] final decisionmaker's adoption of a course of action tailored to a particular situation and not intended to control decisions in later situations." *Id.* (quoting *Pembaur*, 475 U.S. at 481). However, the Fifth Circuit made clear that this third method requires a "deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* (internal citation and emphasis omitted).

Appendix B

In *Cherry Knoll*, the Fifth Circuit applied *Pembaur* to find that the plaintiffs sufficiently alleged a municipal policy where they alleged the city council "made the deliberate decision . . . to file the Subdivision Plats over Cherry Knoll's objection and to use the filed plats as leverage in its land-acquisition effort." 922 F.3d at 317. The plaintiffs in *Cherry Knoll* alleged that these decisions were "expressly ratified" in a public meeting and pointed to various facts including admissions by the city council that it was "aware" of the plaintiffs' objections. *Id.*

Applying *Pembaur* and its progeny, the Court finds that Plaintiff has not pleaded a policy for municipal liability. In this analysis, the "critical question is generally to decide who is the final policymaker." *Webb*, 925 F.3d at 215 (internal citation omitted). The Court has answered this question *supra* Part III(D)(2)(b)(i). In the circumstances alleged, the Webb County's final decisionmaker is the district attorney, Alaniz. The Court then looks to Plaintiff's allegations to determine if this is one of those "rare circumstances" where Alaniz "perform[ed] the specific act that forms the basis" of Plaintiff's § 1983 claim. *Id.* Plaintiff's claim against Defendant County consists of "state action intended to restrict and interfere with [Plaintiff]'s First Amendment activity, and to retaliate against [Plaintiff] for the same. (Dkt. No. 24 ¶ 235). Plaintiff states that Defendant County made decisions to "intimidate, retaliate against, and punish [Plaintiff]" and also to "restrict and interfere with [Plaintiff]'s citizen journalism." (*Id.* ¶¶ 236, 237). Plaintiff alleges that this official policy is "reflected in the deliberate acts and decisions of Alaniz." (*Id.* ¶ 238). However, based on the

specific allegations provided in Plaintiff's FAC, the Court disagrees.

As discussed, this third avenue to prove the existence of a policy is reserved for "rare occurrences" and must demonstrate that the final policymaker *performed* the acts resulting in the deprivation of Plaintiff's rights. Plaintiff states, in a conclusory fashion, that Alaniz participated in, approved of, and supervised the investigation and arrest of Plaintiff. (*Id.* ¶ 238). She further broadly asserts that Alaniz developed, ratified, and enforced the policy. (*Id.* ¶ 240). These general and conclusory allegations are supported only by the single factual allegation that Alaniz performed a "closed-door rebuke of [Plaintiff]" (*Id.* ¶ 238), which did not occur in connection with Plaintiff's arrest and prosecution. These allegations do not suffice to hold Webb County responsible for the "deliberate choices" of Alaniz.

Allegations of approval, supervision, ratification, and enforcement are distinguishable from the deliberate acts of the decisionmakers in *Webb* and *Cherry Knoll*. In *Webb*, the plaintiff had a judgment rendered against him and the city attempted to collect on that judgment. 925 F.3d at 212. The plaintiff believed that the collection process violated his rights. *Id.* In particular, the plaintiff alleged that the decisions of the mayor constituted a policy for municipal liability. *Id.* at 213. In that case, the mayor, the final decisionmaker, had sent a letter to the plaintiff stating that the plaintiff's wages would be withheld until payment on the judgment. *Id.* at 218. In *Cherry Knoll*, the plaintiffs alleged that the decisions made by the city council constituted a policy that violated

its rights to due process and equal protection. 922 F.3d at 317. In that case, the plaintiffs alleged that the city council made the decision to record certain land plats without the plaintiff's consent and over their objections. *Id.* The plaintiffs supported this with factual allegations such as statements made at a public meeting by the city council, emails from city council representatives stating their decision, and the city council's admission that it was aware of the plaintiffs' opposition. *Id.* The court found that these "well-pleaded factual allegations [made] it plausible that the City Council" itself performed the deliberate decision. *Id.*

Plaintiff does not allege any "deliberate decisions" made by Alaniz. *See Cherry Knoll*, 922 F.3d at 317. In fact, allegations of approval and supervision, without suggesting a policy of inadequate supervision, read remarkably close to a theory of *respondeat superior* prohibited by *Monell*. Furthermore, the alleged "ratification" suggests limited involvement, *unlike* the involvement of decisionmakers in *Webb* and *Cherry Knoll*.[19] Notably absent from Plaintiff's

19. Municipal liability based on ratification requires a plaintiff to plead *facts* sufficient to show that the final policymaker ratified a subordinate's conduct. *Groden*, 826 F.3d at 286. In *Groden*, the plaintiff pleaded that the city spokesperson gave media interviews announcing a city policy, which—for a motion to dismiss—were sufficient factual allegations that the city had ratified the policy. *Id.* The Fifth Circuit has stated that ratification "is necessarily cabined" to "prevent the ratification theory from becoming a theory of *respondeat superior*, which theory *Monell* does not countenance." *Milam v. City of San Antonio*, 113 F. App'x. 622, 627 (5th Cir. 2004). "Policymakers alone can create municipal liability, and so any violation must be causally traceable to them, not just to their subordinates." *Id.*

claim are specific *factual* allegations of conduct by Alaniz, such as those in *Cherry Knoll*. Plaintiff's single factual allegation of the closed-door rebuke does not support Alaniz' involvement in the investigation of the criminal charges against her. But, assuming *arguendo* that this constituted a deliberate decision to infringe on Plaintiff's rights, it was certainly not the moving force behind the alleged constitutional violations. *See Webb*, 925 F.3d at 220 (finding that, while the plaintiffs "have painted a picture of poor decisions and bureaucratic dysfunction," the decision of the mayor to withhold the plaintiffs' wages to secure payment for a judgment was not the moving force behind the violation of any constitutional right). Absent a well-pleaded policy of Webb County, the Court finds that Plaintiff has not sufficiently pled a *Monell* claim against Defendant Webb County. Accordingly, Plaintiff's *Monell* claim against Defendant Webb County (Count VII) should be dismissed.

3. Count VI: Municipal Liability as to City of Laredo

a. Plaintiff's Allegations Against City of Laredo

Count VI alleges that acts taken pursuant to official City of Laredo policy constituted impermissible state action that deprived Plaintiff of rights under the First, Fourth, and Fourteenth Amendments. (Dkt. No. 24 ¶¶ 215, 229). Plaintiff's claim for municipal liability against the City of Laredo is appropriately analyzed under the *Monell* framework. Accordingly, Plaintiff must allege three elements: "(1) an official policy (or custom), of which (2) a

policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy or custom." *Valle*, 613 F.3d at 541 (quoting *Pineda*, 291 F.3d at 328).

Plaintiff alleges the City of Laredo maintained a policy "to intimidate, retaliate against, and punish" Plaintiff for her recording and publication of law enforcement activities and matters of public interest. (Dkt. No. 24 ¶ 216). Plaintiff adds that the City's policy "also was and remains a decision to restrict and interfere with [Plaintiff]'s citizen journalism." (*Id.* ¶ 217). Plaintiff states that Treviño, the Laredo City Manager, and the Laredo City Council were final policymakers responsible for this policy. (*Id.* ¶ 225). Plaintiff further alleges that "[t]he official city policy or custom was the moving force behind the investigation, arrest, and detention of [Plaintiff], as evidenced (for example and without limitation) by Treviño's participation in, approval of and supervision of these acts, as detailed herein." (*Id.* ¶ 221). On the other hand, the City Defendants contend the FAC fails to state a claim against the City of Laredo because Plaintiff has not alleged an official policy or custom that may form the basis for a plausible *Monell* claim. (*Id.* at 13-15).

b. Analysis

i. Official Policymaker

In the City Defendants' Motion, the City Defendants do not address whether Treviño, the Laredo City Council, or the Laredo City Manager were final policymakers for the City of Laredo. (Dkt. No. 27). However, the

determination of the policymaker is a question of law to be decided by the Court and is requisite to the analysis of a municipality's policy. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988); *Groden*, 826 F.3d at 285.

"State law, including valid local ordinances and regulations, 'will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business.'" *Dallas Police Ass'n v. City of Dallas*, No. 3:03-cv-0584-D, 2004 U.S. Dist. LEXIS 20651, 2004 WL 2331610, at *4 (N.D. Tex. Oct. 15, 2004) (quoting *Praprotnik*, 485 U.S. at 125)). A governing body may delegate policymaking authority to a city official in one of two ways: (1) by an express statement, job description, or formal action; or (2) "by its conduct or practice, encourag[ing] or acknowledg[ing] the agent in a policymaking role." *Bennett v. City of Slidell*, 728 F.2d 762, 769 (5th Cir. 1984). As such, the Court must "consider state and local positive law as well as evidence of [the City of Laredo's] customs and usages in determining which City official or bodies had final policymaking authority over the policies at issue." *Gros v. City of Grand Prairie*, 181 F.3d 613, 616 (5th Cir. 1999). Plaintiff bears the burden "to identify the positive law or evidence of custom demonstrating that" the Chief of Police, the Laredo City Council, and the Laredo City Manager were policymakers. *Dallas Police*, 2004 U.S. Dist. LEXIS 20651, 2004 WL 2331610, at *4 (citing *Bass v. Parkwood Hosp.*, 180 F.3d 234, 244 (5th Cir. 1999) and *Macias v. Raul A. (Unknown), Badge No. 153*, 23 F.3d 94, 99 (5th Cir. 1994)).

Plaintiff has not met that burden. Plaintiff asserts only that "Treviño is a duly appointed official of the City of Laredo . . . and is a final policymaker for the City of Laredo," (Dkt. No. 24 ¶ 12), and that the Laredo City Council and Laredo City Manager were "vested with final policymaking authority either by law or delegation." (*Id.* ¶ 225). Plaintiff cites the Laredo City Charter as authority for these propositions.

However, the Laredo City Charter and local ordinances do not support Plaintiff's contention that Treviño is a final policymaker. The City of Laredo ordinances state that while "[t]he police chief shall have management of the department as authorized under civil service law . . . [t]he police chief *shall report directly to the city manager* or deputy city manager." Laredo, Tex., Code of Ordinances ch. 26, art. II, § 26-22 (2020) (emphasis added). The City of Laredo Charter also identifies the Laredo City Manager as the chief administrative and executive officer of the City. Laredo, Tex., City Charter art. III, § 3.05 (2020). The Laredo City Charter further states that as the head of a Council-Manager government, the "City Manager . . . shall execute the laws and administer the government of the City." *Id.* art. I, § 1.04. Thus it is clear that while the Chief of Police may be a decisionmaker, he is not the City's *final* policymaker for purposes of municipal liability.[20] *See*

20. District courts within the Fifth Circuit have consistently held that while the chief of police may be a decisionmaker, they are not a *final* policymaker when they are under supervision of the city manager. *See, e.g., Pinedo v. City of Dallas, Tex.*, No. 3:14-CV-0958-D, 2015 U.S. Dist. LEXIS 5272, 2015 WL 221085, at *5 (N.D. Tex. Jan. 15, 2015) ("consider[ing] . . . language from

Praprotnik, 485 U.S. at 145-46 (Brennan, J., concurring) ("While these officials may well have policymaking authority, that hardly ends the matter; the question before us is whether the officials . . . were final policymakers."); *Jett v. Dallas Indep. Sch. Dist.*, 7 F.3d 1241, 1246-47 (5th Cir. 1993) ("Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion.").

While the Laredo City Charter clearly delegates administrative and executive authority to the Laredo City Manager, the Charter limits *policymaking* authority to the Laredo City Council. The City Charter states, "City Council . . . shall enact local legislation, adopt budgets, determine policies, and appoint the Laredo City Manager."

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the City Charter and conclud[ing] that the delegation it contains demonstrates that the Chief of Police is not the final policymaker for the Dallas Police Department because he is at all times subject to the rules and supervision of the City Manager."); *Mosser v. Haney*, No. CIV.A.3:03CV2260-B, 2005 U.S. Dist. LEXIS 48758, 2005 WL 1421440, *4 (N.D. Tex. June 17, 2005) ("Thus, the Chief of Police is not the policymaker for Dallas's police department, as he remains subject to the rules and supervision of the City Manager."). As the *Arevalo of City of Farmers Branch, Texas* court explained, "Courts that have determined that chiefs of police are final policymakers have done so because the particular government body has provided the chief of police with policymaking authority. . . Other government entities, such as the City of Dallas, do not delegate final policymaking to their chief of police." No. 3:16-CV-1540-D, 2017 U.S. Dist. LEXIS 45145, 2017 WL 1153230, *6 (N.D. Tex. Mar. 28, 2017).

City. Laredo, Tex., City Charter art. I, § 1.02 (2020). In *Bolton v. City of Dallas, Texas*, the Fifth Circuit held that, while a local charter may give broad discretion to a city manager, including executive and administrative decision-making power, in the absence of a local law explicitly giving the city manager responsibility to set *policy*, under Texas state law the municipality's "governing body" is the final policymaker. 541 F.3d 545, 550 (5th Cir. 2008). In this case, as in *Bolton*, the Laredo City Charter expressly assigns final policymaking authority to the Laredo City Council.

ii. Official Policy or Custom

For the purpose of Rule 12(b)(6), a plaintiff may allege a municipal policy under *Monell* by alleging any of the following: (1) an official policy; (2) a persistent, widespread practice that is so common as to constitute a custom; or (3) deliberate acts taken by a final policymaker. *See Webster*, 735 F.2d. at 841; *Pembaur* 475 U.S. at 483. Plaintiff appears to allege a City of Laredo policy under each of these categories.

An "[o]fficial policy is ordinarily contained in duly promulgated policy statements, ordinances or regulations." *Piotrowski II*, 237 F.3d at 579. While the FAC states that the City of Laredo had an "official City Policy" to retaliate against Plaintiff and interfere with the exercise of her First Amendment rights, it fails to allege facts showing that any such official policy exists. (Dkt. No. 24 ¶ 215). Therefore, the Court finds that Plaintiff has not sufficiently alleged an official policy pursuant to the first method.

Alternatively, a plaintiff may allege a "persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Piotrowski II*, 237 F.3d at 579. Here, Plaintiff's claim against the City of Laredo alleges the same "policy against one" the Court has found inadequate to state a *Monell* claim against Webb County. (Dkt. No. 24 ¶ 218); *see supra* Part III(D)(2)(b)(ii). As the Court has determined the Laredo City Council is the final policymaker, Plaintiff must allege that the Laredo City Council "perform[ed] the specific act that forms the basis" of Plaintiff's § 1983 claim. *Webb*, 925 F.3d at 215. Plaintiff alleges that the City of Laredo's "final policy making officials . . . knowingly influenced, directed, participated in, and encouraged LPD and [WCDA]" in the investigation and arrest of Plaintiff. (Dkt. No. 24 ¶ 220). However, the FAC has not alleged any specific conduct by the Laredo City Council. Accordingly, Plaintiff has not plausibly alleged the "rare circumstances" in which the Court may find a "custom" of the City of Laredo. *See Webb*, 925 F.3d at 215.

Alternatively, Plaintiff contends that Treviño's actions of investigating and causing Plaintiff's arrest indicate a "deliberate choice" by Treviño that establishes a City of Laredo policy. (Dkt. No. 24 ¶ 238.). However, the Court has found that the Laredo City Council—not Treviño—is the final policymaker for the City of Laredo. A city may be liable under the *Pembaur* method only for decisions by a *final policymaker. Webb*, 925 F.3d at 215. For the reasons stated above, Treviño is not a final policymaker with respect to the allegations against the City of Laredo.

Treviño's alleged actions therefore cannot form the basis of municipal liability under *Pembaur*. *See* 475 U.S. at 481-81.

In this case, to plausibly allege a policy under the *Pembaur* approach, Plaintiff would need to show that the Laredo City Council "perform[ed] the specific act that forms the basis of the § 1983 claim." *See Webb* 925 F.3d at 215. Plaintiff makes no such allegations. With respect to the Laredo City Council, Plaintiff only alleges that they "initially attack[ed] and obstruct[ed]" a proposal to name a park reading kiosk after her late niece (Dkt. No. 24 ¶ 54(g)), and that the Laredo City Manager and the Laredo City Council regularly accessed Plaintiff's Lagordiloca Facebook page, and thus knew about "several of" paragraphs 54(a)-(g)'s allegations. (*Id.* ¶ 62). The Court finds that these allegations do not evidence a policy by the Laredo City Council. Specifically, declining to name a kiosk located at a park after Plaintiff's niece is not a deliberate act by the Laredo City Council which could, even in the most liberal construction, be construed as a policy to deprive Plaintiff of her rights as a journalist. Moreover, merely having access to Plaintiff's Lagordiloca Facebook page does not constitute a policy taken by the Laredo City Council for purposes of municipal liability.[21]

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21. In *Estate of Davis*, the Fifth Circuit outlined the strict standard that a plaintiff must meet to show that a municipality's awareness rose to the level of actionable deliberate indifference.

> [D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. For an official to act with deliberate indifference, the official

Even assuming *arguendo* that the Laredo City Manager was a final policymaker, Plaintiff's allegations against the Laredo City Manager are equally inadequate. Plaintiff's factual allegations with respect to the Laredo City Manager are limited to the following: "the Laredo City Manager . . . knew of the pattern of retaliation against [Plaintiff]'s exercise of her First Amendment rights, or [was] willfully blind to the same" and "the Laredo City Manager . . . regularly accessed [Plaintiff]'s Facebook page." (Dkt. No. 24 ¶ 62). None of these allegations point to actions taken by the Laredo City Manager which could be evidence of a policy by the City of Laredo. Finally, while the Court finds that Plaintiff failed to allege a policy, her claim would nevertheless fail as her allegations also fail to allege the moving force element for municipal liability.[22] Accordingly, Plaintiff's *Monell* claim against Defendant City of Laredo (Count VI) should be dismissed.

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must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

406 F.3d at 381 (internal citations omitted). Plaintiff's allegations that the Laredo City Manager and the Laredo City Council were "aware" of the Lagordiloca Facebook page do not rise to the level of deliberate indifference.

22. A municipality's failure to remedy a situation must be the moving force and "result in the specific injury suffered." *Davidson*, 848 F.3d at 386. Plaintiff makes no allegations that the Laredo City Manager and the Laredo City Council's awareness of her Lagordiloca Facebook page were the moving force behind a constitutional violation.

G. Count VIII: Declaratory Relief

Plaintiff seeks a declaratory judgment against all Defendants under Count VIII of the FAC. (Dkt. No. 24 ¶¶ 234-57). The Declaratory Judgment Act provides that, "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). A federal declaratory judgment action requires an actual case or controversy. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007) ("Our decisions have required that the dispute be 'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' . . . ."). "Neither absolute nor qualified personal immunity extends to suits for injunctive or declaratory relief under § 1983." *Chrissy F. by Medley v. Mississippi Dep't of Pub. Welfare*, 925 F.2d 844, 849 (5th Cir. 1991); *see also Singleton v. Cannizzaro*, No. 19-30197, 2020 U.S. App. LEXIS 12784, 2020 WL 1922377, at 4 n.3 (5th Cir. Apr. 21, 2020).

Plaintiff contends she has alleged facts showing "a definite and real controversy between [Plaintiff] and Defendants, including the threat of future retaliatory acts." (Dkt. No. 29 (citing Dkt. No. 24 ¶¶ 54, 129, 147, 157, 160, 235-237, 240, 248)). Plaintiff contends that because "Alaniz was quoted in a local publication stating that the criminal investigation would continue," Plaintiff "has no reason to believe that Defendants will

refrain from attempting to suppress or retaliate against her protected expressive activities in the future, or selectively and arbitrarily attempt to enforce the law against her." (*Id.* ¶ 256). In addition, Plaintiff alleges that Defendants' actions "continue to cause [Plaintiff] to constantly fear further interference and retaliation from LPD, [WCDA], and other city and county officials against her protected citizen journalism efforts[,]" and that "[c]onstantly operating under this fear hindered and curtailed [Plaintiff's] ability to exercise her protected First Amendment rights." (*Id.* ¶ 147).

The Court finds these allegations do not establish a genuine case or controversy warranting declaratory relief. In order to meet the standing requirements under the Declaratory Judgment Act, Plaintiff must establish "actual present harm or a significant possibility of future harm." *Peoples Rights Org. v. City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998). "An actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003).

According to Plaintiff's allegations, Defendants' attempted prosecution of Plaintiff ended on March 28, 2018, over two years ago, when the state district court ruled that § 39.06(c) was unconstitutionally vague. (Dkt. No. 24 ¶ 127). Plaintiff acknowledges that the Defendants did not appeal the state district judge's ruling. (*Id.* ¶ 128). Since dismissal of the criminal case, Plaintiff does not allege any actions against her by anyone from Webb County or the City of Laredo, much less the named

Defendants. Plaintiff alleges that Alaniz was quoted as saying "the LPD was refusing to drop the investigation, and would continue to look into *who in the department* supplied [Plaintiff]" with the information she published. (*Id.* ¶ 129) (emphasis added). Although Plaintiff interprets Alaniz's statement as a threat of further investigation of her, the Court disagrees with Plaintiff's interpretation. The stated intent was to investigate the person within the police department who provided the information to Plaintiff, and therefore the statement does not constitute a threat of any type against Plaintiff. Moreover, as set forth *supra* Part III(D)(2)-(3), Plaintiff has failed to allege plausibly that the City of Laredo or Webb County has a policy or custom of violating her constitutional rights.

For the foregoing reasons, Plaintiff has not alleged facts establishing a significant possibility of future harm. Accordingly, Plaintiff's claim for declaratory relief against all Defendants (Count VII) should be dismissed.

H. Injunctive Relief

Plaintiff seeks injunctive relief from all Defendants.[23] With respect to the Individual Defendants, Plaintiff contends that she is entitled to injunctive relief because, "Their acts of targeting [Plaintiff] under the color of state

23. Plaintiff's FAC lists an injunctive claim in her *Monell* claim against Webb County (Count VII). However, Plaintiff's prayer for relief seeks injunctive relief from *all* Defendants. The prayer for relief in Plaintiff's FAC does not provide paragraph numbers, thus the Court cites to pagination designated by the Court's electronic filing system, CM/ECF.

law for engaging in activity protected under the First and Fourteenth Amendment [are] likely to continue absent injunctive relief."[24] (Dkt. No. 24 ¶ 159). Plaintiff similarly seeks injunctive relief against the municipal Defendants for their "[policies] or custom[s] of targeting [Plaintiff] for engaging in activity protected under the First and Fourth Amendment." (Dkt. No. 24 ¶ 231). Defendants seek dismissal of Plaintiff's claims for injunctive relief.

A plaintiff seeking an injunction must satisfy a four-factor test by demonstrating (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury to the plaintiff outweighs any damage the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest. *DSC Communications Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996) (citing *Plains Cotton Co-op. Ass'n v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256, 1259 (5th Cir.), *cert. denied*, 484 U.S. 821 (1987)). "[F]or an injunction to issue based on a past violation, [plaintiff] must establish that there is a 'real or immediate threat that he will be wronged again.'" *Residents Against Flooding*

24. Plaintiff specifically requests that the Court enjoin the Individual Defendants from "engaging in acts intended to harass and intimidate [Plaintiff] and interfere with her citizen journalism efforts" including: "harassing, threatening, suppressing, interfering with constitutionally protected rights to (i) record and publish law enforcement activities occurring in or viewable from public spaces, (ii) inquire about, gather, and publish accurate information on matters of public concern, (iii) express viewpoints that are critical of or unfavorable to Defendants, and (iv) facilitate commentary about matters of public concern from other citizens." (Dkt. No. 24 at 52).

v. Reinvestment Zone No. Seventeen, City of Houston, Tex., 260 F. Supp. 3d 738, 776 (S.D. Tex. 2017), *aff'd sub nom. Residents Against Flooding v. Reinvestment Zone No. Seventeen*, 734 F. App'x. 916 (5th Cir. 2018) (quoting *Hainze v. Richards*, 207 F.3d 795, 802 (5th Cir. 2000)).

As an initial matter, Plaintiff's claims for injunctive relief, though directed at all Defendants, are based exclusively on alleged constitutional violations of her First and Fourteenth Amendment rights. The Court finds that Plaintiff has failed to show a substantial likelihood of success on the merits. The Court is mindful that qualified immunity has no relevance when injunctive relief is sought. *Mangaroo v. Nelson*, 864 F.2d 1202, 1208 (5th Cir. 1989). However, the Court has determined, assuming *arguendo*, that even if the Individual Defendants were not entitled to qualified immunity, Plaintiff still has failed to state a claim for retaliation under the First Amendment or selective enforcement under the Fourteenth Amendment. *Supra* Parts III(B)(2)(ii), III(C). Because Plaintiff has failed to state viable causes of action for violations of her First and Fourteenth Amendment rights, Plaintiff has not demonstrated a substantial likelihood of success on the merits. *See Sahara Health Care, Inc. v. Azar*, 349 F. Supp. 3d 555, 579 (S.D. Tex. 2018) (finding that the court's "analysis of Defendants' motion to dismiss for failure to state a claim" was "sufficient to show there is no substantial likelihood Plaintiff will prevail on the merits"). Similarly, the Court has determined, *supra* Parts III(E)-(F), that Plaintiff has failed to sufficiently allege a policy on behalf the City of Laredo or Webb County. Accordingly, Plaintiff has not met the first factor in demonstrating a substantial

likelihood of success on the merits of her claims against municipal Defendants.

Additionally, for the same reasons Plaintiff failed to establish an "actual present harm or significant possibility of future harm," *supra* Part III(G), the Court determines that Plaintiff is also unable to establish a "real or immediate threat that [she] will be wronged again." *See Residents Against Flooding*, 260 F. Supp. 3d at 776. Accordingly, Plaintiff's claims for injunctive relief against all Defendants should be dismissed.

IV. Conclusion

For the reasons set forth in this Memorandum and Order, the City Defendants' Motion (Dkt. No. 27) is **GRANTED**; the County Defendants' Motion (Dkt. No. 26) is **GRANTED**; and Counts I-VIII asserted in the First Amended Complaint (Dkt. No. 24) are **DISMISSED** with **PREUDICE**. The Court determines that further amendment would be futile as Plaintiff has failed to cure the pleading deficiencies addressed in the first motion to dismiss. (Dkt. No. 21). A separate judgment will be entered forthwith.

It is so **ORDERED**.

SIGNED on May 8, 2020.

/s/ John A. Kazen
John A. Kazen
United States Magistrate Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED OCTOBER 28, 2022

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-40359

PRISCILLA VILLARREAL,

Plaintiff—Appellant,

versus

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.

Appeal from the United States District Court for the Southern District of Texas. USDC No. 5:19-CV-48.

ON PETITIONS FOR REHEARING EN BANC AND PETITION FOR REHEARING

(Opinion November 1, 2021,
5 CIR., 2021, 17 F.4th 532, withdrawn).
(Opinion August 12, 2022, 5 CIR., 2022, 44 F.4th 363).

Appendix C

October 28, 2022, Filed

Before RICHMAN, Chief Judge, and JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, Circuit Judges.

PER CURIAM:

A member of the court having requested a poll on the petitions for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs. Pursuant to 5th Circuit Rule 41.3, the panel opinion in this case dated August 12, 2022, is VACATED.

IT IS FURTHER ORDERED that the petition for rehearing filed September 9, 2022, is DENIED AS MOOT.

APPENDIX D — RELEVANT STATUTORY PROVISIONS

1. Texas Penal Code Section 39.06(c)-(d)

Misuse of Official Information

(c) A person commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he solicits or receives from a public servant information that:

(1) the public servant has access to by means of his office or employment; and

(2) has not been made public.

(d) In this section, "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 Chapter 552, Government Code.

2. Texas Penal Code Section 1.07

Definitions

In this code:

(7) "Benefit" means anything reasonably regarded as economic gain or advantage, including

benefit to any other person in whose welfare the beneficiary is interested.

APPENDIX E — FIRST AMENDED COMPLAINT IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION, FILED MAY 29, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Laredo Division

PRISCILLA VILLARREAL,

Plaintiff

vs.

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

Defendants.

No. 5:19-cv-48

JURY TRIAL DEMANDED

Appendix E

PLAINTIFF'S FIRST AMENDED COMPLAINT[1]

I. Introduction

1. Citizen journalism—the gathering and publication of newsworthy information by those who are not professional journalists—is essential to the vigor of modern self-governance and the democratic process. The evolution of information and communications technology has enabled citizens to take a more active role in adding to the public discourse and holding elected officials accountable. Today, citizen journalists provide a candid and highly-accessible view of newsworthy events, often equipped with only a smartphone, a social media account, and gumption.

2. The First Amendment rights of citizens to gather and publish information on matters of public concern are clear. "State action to punish the publication of truthful information seldom can satisfy constitutional standards," particularly "about a matter of public significance." *Bartnicki v. Vopper*, 532 U.S. 514, 527-28 (2001) (quotation omitted). And as the Supreme Court recently confirmed, First Amendment protections extend to users of social media, because social media platforms

> for many are the principal sources for knowing current events, checking ads for employment,

1. Plaintiff is filing her First Amended Complaint as a matter of course under Fed. R. Civ. P. 15(a)(1)(B). This First Amended Complaint is filed within 21 days after service of Defendant Webb County, Alaniz, and Jacaman's motion to dismiss under Fed. R. Civ. P. 12(b)(6), which was served on May 8, 2019 [Dkt. 17].

> speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to become a town crier with a voice that resonates farther than it could from any soapbox.

Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (internal quotation omitted).

3. Plaintiff Priscilla Villarreal ("Villarreal") is the epitome of such a modern-day "town crier." For several years, Villarreal has used her Facebook page to provide residents of Laredo, Texas with unfiltered access to matters of local public concern. Equipped with only a smartphone and an old pickup truck, "Lagordiloca" (as Villarreal is well-known) publishes livestreams, videos, and photographs of newsworthy events in and around Laredo to her over 120,000 Facebook followers. As The New York Times observed, "[Villarreal] is arguably the most influential journalist in Laredo. . . ."[2]

4. But Villarreal's efforts have come at a price. Defendants have engaged in numerous acts to harass and intimidate Villarreal and interfere with her citizen

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2. *La Gordiloca: The Swearing Muckraker Upending Border Journalism*, New York Times Online, Mar. 10, 2019 *available at* https://www.nytimes.com/2019/03/10/us/gordiloca-laredo-priscilla-villarreal.html.

journalism efforts. Defendants went so far as to arrest and detain Villarreal simply because she received and published truthful information of interest to the public. Defendants did so without probable cause and under the auspices of a vague statute upon which no reasonable official would have relied.

5. The First Amendment forbids state actors from abusing their power to retaliate against and chill a citizen's efforts to investigate and publish the truth, comment on local government affairs, and provide a forum for other citizens to do the same. Defendants' unconstitutional conduct, if left unchecked, could ensnare and chill any journalist—professional or citizen—who lawfully gathers newsworthy information and happens to disseminate it before government officials do the same. The Constitution demands that such conduct be deterred.

6. Defendants' conduct deprived Villarreal of her clearly established rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution. She is entitled to actual and punitive damages, declaratory and injunctive relief, and a recovery of attorneys' fees and costs as a result.

II. Parties

7. Plaintiff is an individual and is a resident of Webb County in the State of Texas.

8. Defendant City of Laredo is a municipality organized under the laws of Texas. Defendant City of

Laredo may be served through service upon the City of Laredo Secretary, Jose A. Valdez, Jr., at 1110 Houston Street, Laredo, Texas 78040. Defendant City of Laredo is subject to liability pursuant to 42 U.S.C § 1983, as set forth in *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978), and as alleged further herein.

9. Defendant Webb County is a governmental entity under the laws of the State of Texas. Defendant Webb County may be served through service upon the Webb County Judge, the Honorable Tano Tijerina at 1000 Houston Street, Third Floor, Laredo, Texas 78040. Defendant Webb County is subject to liability pursuant to 42 U.S.C § 1983 as set forth in *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978), as alleged further herein.

10. Defendant Isidro R. Alaniz is the Webb County District Attorney and a resident of Webb County, Texas. Defendant Alaniz may be served at his principal place of business at 1110 Victoria Street, Suite 401, Laredo, Texas 78040. Defendant Alaniz acted under color of state law at all times with respect to the allegations made herein, and is a person subject to liability under 42 U.S.C. § 1983. Defendant Alaniz is a duly elected official of Webb County, administers and oversees the Webb County Office of the District Attorney ("WCDA"), and is a final policymaker for Webb County. Defendant Alaniz is being sued in his individual and official capacities.

11. Defendant Marisela Jacaman is the Chief Assistant Webb County District Attorney and a resident of Webb

County, Texas. Defendant Jacaman may be served at her principal place of business at 1110 Victoria Street, Suite 401, Laredo, Texas 78040. Defendant Jacaman acted under color of state law at all times with respect to the allegations made herein, and is a person subject to liability under 42 U.S.C. § 1983. Defendant Jacaman is being sued in her individual and official capacities.

12. Defendant Claudio Treviño Jr. is the Chief of Police for the Laredo Police Department ("LPD") and a resident of Webb County, Texas. Defendant Treviño may be served at his principal place of business at 4712 Maher Avenue, Laredo, Texas 78041. Defendant Treviño acted under color of state law at all times with respect to the allegations made herein, and is a person subject to liability under 42 U.S.C. § 1983. Defendant Treviño is a duly appointed official of the City of Laredo, administers and oversees the LPD, and is a final policymaker for the City of Laredo. Defendant Treviño is being sued in his individual and official capacities.

13. Defendant Juan L. Ruiz is an investigator for LPD and a resident of Webb County, Texas. Defendant Ruiz may be served at his principal place of business at 4712 Maher Avenue, Laredo, Texas 78041. Defendant Ruiz acted under color of state law at all times with respect to the allegations made herein, and is a person subject to liability under 42 U.S.C. § 1983. Defendant Ruiz is being sued in his individual and official capacities.

14. Defendant Enedina Martinez is an officer for LPD and a resident of Webb County, Texas. Defendant Martinez

may be served at her principal place of business at 4712 Maher Avenue, Laredo, Texas 78041. Defendant Martinez acted under color of state law at all times with respect to the allegations made herein, and is a person subject to liability under 42 U.S.C. § 1983. Defendant Martinez is being sued in her individual and official capacities.

15. Defendant Alfredo Guerrero is an officer for LPD and a resident of Webb County, Texas. Defendant Guerrero may be served at his principal place of business at 4712 Maher Avenue, Laredo, Texas 78041. Defendant Guerrero acted under color of state law at all times with respect to the allegations made herein, and is a person subject to liability under 42 U.S.C. § 1983. Defendant Guerrero is being sued in his individual and official capacities.

16. Defendant Laura Montemayor is an officer for LPD and a resident of Webb County, Texas. Defendant Montemayor may be served at her principal place of business at 4712 Maher Avenue, Laredo, Texas 78041. Defendant Montemayor acted under color of state law at all times with respect to the allegations made herein, and is a person subject to liability under 42 U.S.C. § 1983. Defendant Montemayor is being sued in her individual and official capacities.

17. Defendant Deyanira Villarreal ("DV")[3] is an officer for LPD and a resident of Webb County, Texas. Defendant DV may be served at her principal place of business at

3. To avoid confusion, Defendant Deyanira Villarreal will be referred to throughout this Complaint as "DV."

4712 Maher Avenue, Laredo, Texas 78041. Defendant DV acted under color of state law at all times with respect to the allegations made herein, and is a person subject to liability under 42 U.S.C. § 1983. Defendant DV is being sued in her individual and official capacities.

18. The true names and capacities of the Defendants named as Does 1-2 ("Doe Defendants") currently are unknown to Villarreal, and therefore, Villarreal sues them by fictious names. Villarreal will amend this Complaint to reflect the true names and capacities of the Doe Defendants when the same is fully ascertained after a reasonable opportunity for investigation and discovery.

19. On information and belief, the Doe Defendants were at all times relevant officials or employees of the City of Laredo or Webb County. On further information and belief, the Doe Defendants took part in the unconstitutional acts alleged herein, and acted under color of state law at all times with respect to the allegations. Thus, it is believed the Doe Defendants are persons subject to liability under 42 U.S.C. § 1983.

III. Jurisdiction and Venue

20. This Court has original subject matter jurisdiction under the United States Constitution, 42 U.S.C. §§ 1983 and 1985, and 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

21. This Court has personal jurisdiction over Defendant City of Laredo because it is a local government entity of the State of Texas and is located in this judicial district.

22. This Court has personal jurisdiction over Defendant Webb County because it is a local government entity of the State of Texas and is located in this judicial district.

23. This Court has personal jurisdiction over Defendants Alaniz, Jacaman, Treviño, Ruiz, Martinez, Guerrero, Montemayor, DV, and the Doe Defendants (collectively the "Individual Defendants") because they reside in the state of Texas and in this judicial district.

IV. FACTUAL ALLEGATIONS

A. Villarreal embarks on a mission of citizen journalism.

24. Since early 2015, Villarreal has gathered and published information about matters of local public concern in and around Laredo, Texas.

25. One afternoon in March 2015, Villarreal awoke to police sirens speeding down her street in Laredo. Curious, Villarreal got in her truck and followed the sirens, where she discovered a hostage situation at a local residence. After hearing gunshots, she discovered that officers from LPD had shot and killed the captor, after the captor had already shot the two hostages.

26. Villarreal turned on her phone and recorded footage from the scene, including officers removing bodies from the scene. She then posted three short clips of the recording to her Facebook page.

27. Over the next few hours, thousands viewed the videos. Many viewers engaged in discussion about the videos in the comments section of Villarreal's Facebook post and elsewhere. The discussion ranged from a man wanting to pay for the funerals, to others questioning Villarreal's choice to post raw footage of a grim scene. One thing was clear—Villarreal's footage brought people together to talk about a matter of local public concern.

28. The response to the videos motivated Villarreal to capture more footage of local crime scenes and traffic incidents, and post it onto her Facebook page to share with other citizens. After Facebook launched its "Facebook Live" feature, Villarreal began live-streaming crime scenes, traffic incidents, and other events of local concern. Villarreal occasionally added commentary. But she mostly let the footage speak for itself.

29. Villarreal's following grew quickly. She also begin to get texts, phone calls, and other messages from local residents with tips about matters of local public interest.

30. Starting in 2015, Villarreal also begin to regularly receive information about local crime and public safety matters from LPD spokesman Jose Baeza. The information Baeza provided was occasionally in real-time, allowing Villarreal to act upon it and provide live feeds and real-time commentary about law enforcement activity.

31. Villarreal goes by the nickname "Lagordiloca," ("The big crazy lady"). She is well-known locally and nationally by that nickname, and operates her Facebook page under the same.

B. Villarreal's influential role in the Laredo community.

32. Villarreal uses her Facebook page—"Lagordiloca News Laredo Tx"[4] —to publish live feeds, recorded footage, and photographs of local crime scenes, traffic incidents, local fundraisers, and other newsworthy events in Laredo. She also shares information from other news sources on her Facebook page as part of her efforts as a citizen journalist serving the Laredo community.

33. Villarreal sometimes provides commentary—often colorful—about the newsworthy events she covers, including issues concerning local government officials and activities.

34. She also posts information and photographs she receives from local citizens about missing persons and people or organizations in need. She occasionally promotes a local business on her Facebook page at the request of a business owner.

35. Villarreal does not generate regular revenue or other regular economic gain from her citizen journalism. She sometimes enjoys a free meal from appreciative readers, and occasionally receives fees for promoting a local business. She also has used her Facebook page to ask for donations for new equipment necessary to continue her citizen journalism efforts.

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4. Villarreal's "Lagordiloca" Facebook page can be accessed at https://www.facebook.com /lagordiloca956/

36. "Lagordiloca" has used her Facebook page and increasing influence and readership to successfully organize events that support Laredo and other communities in Texas. For example, Villarreal used her Facebook page to organize a relief drive for Hurricane Harvey victims. Villarreal's relief drive outpaced even the official relief drive sponsored by the local government. Villarreal has never received any monetary or other economic benefit for her altruistic efforts.

37. Many Laredo residents consider Villarreal as a principal source of information about local matters, including crime, traffic, and government. Over 120,000 Facebook users follow Villarreal's Facebook page.

38. Local residents have and continue to use the comments section of Villarreal's Facebook posts and live feeds as a forum for discussing matters of local public concern with other citizens. Villarreal's published news and commentary also generate similar discussions in other places online and in establishments and gatherings across Laredo.

39. Many Facebook users and others familiar with Villarreal's citizen journalism have praised her efforts to provide an authentic and real-time look at Laredo crime and safety, government conduct, and other newsworthy events in the city. Her readers have frequently commented that Villarreal provides a candid view of local matters that other media outlets often do not provide. Her citizen journalism has been featured in publications including *Texas Monthly*, *The New York Times*, and the *Los Angeles Times*.

40. And given her gritty style of journalism and often colorful commentary, Villarreal has her share of critics.

41. Villarreal's citizen journalism has heightened public discourse in Laredo and increased transparency on critical issues like local crime and safety, the welfare of Laredo citizens, and local government conduct.

C. Villarreal's reporting on local government.

42. Villarreal publishes on her Facebook page live feeds, recorded video, and commentary about LPD activities.

43. When doing live feeds or recording law enforcement activity, Villarreal takes care to record only from public places and not cross crime or accident scene perimeters set up by law enforcement. Villarreal has proactively met with LPD officials on to make clear that she does not want to be a disruption to or interfere with law enforcement activities when she records law enforcement activities.

44. Several of Villarreal's live feeds and recorded videos have shown authentic views of LPD members in difficult, and sometimes controversial, situations.

45. These have included, for example: (1) recorded video of police dealing with the aftermath of a hostage and homicide scene where Laredo officers shot and killed the captor; (2) a live feed of Laredo officers choking and using force on an arrestee at a traffic stop; (3) a live feed of Laredo officers working the scene of a drive-by shooting;

(4) a live feed of a police shooting; and (5) other live feeds and recordings of LPD officers arresting citizens and working traffic accident and crime scenes.

46. Villarreal occasionally has posted follow-up feeds or videos with commentary on the video of LPD activities she published. Villarreal's commentary about LPD has been both praiseworthy and critical.

47. Villarreal has also posted information and commentary about other Laredo government affairs. Such information and commentary has been both praiseworthy and critical of Laredo officials and local government conduct.

48. As an example, in 2015, Villarreal posted images of and commentary on a malnourished horse at a property in Laredo. She and others managed to relocate the horse to a local ranch, and alerted local law enforcement to the problem.

49. When local law enforcement arrived at the property where Villarreal found the malnourished horse, they discovered other animals suffering a similar fate.

50. The property was owned by Patricia Jacaman, a close relative of Defendant Jacaman. On her Facebook page, Villarreal openly criticized the Webb County District Attorney's ("WCDA") decision to recall the arrest warrant for Patricia Jacaman and not prosecute her for animal cruelty charges, and instead enter into a nominal civil settlement.

D. City and county officials and employees embark on a campaign of harassment, intimidation, and interference against Villarreal because of her citizen journalism.

51. Several city officials and employees have acted with hostility toward Villarreal's candid journalism, because it provides a truthful and unfiltered depiction of law enforcement and other activities in the city, often before law enforcement and other officials arrive on the scene. Villarreal's reporting often provides an accurate look at events that many local officials do not want the public to know.

52. This hostility from these local government officials is also a response to Villarreal's citizen journalism that publishes information and content unfavorable to or critical of the local government, which in turns generates criticism and discussion of government conduct from her readers on Villarreal's Facebook page and in the community.

53. As a result of this hostility, Villarreal has been singled out and subjected to a pattern of harassment, intimidation, and indifference from several members of LPD and WCDA, and other Laredo officials and employees. These officials and employees have acted to interfere with and retaliate against Villarreal's efforts to (a) lawfully gather and publish information about matters of local concern; (b) film and record police activity in public areas; and (c) criticize local officials and provide others a forum to do the same.

54. These hostile, defamatory, and indifferent acts and efforts were intended to intimidate and chill Villarreal's protected First Amendment rights, and include, for example and without limitation:

a. Officer Martinez willfully and falsely exclaiming to a group of fellow LPD officers that Villarreal is a five-time convicted felon, when Martinez knew that Villarreal has never been convicted of a felony.

b. Officer Montemayor threatening to take Villarreal's phone as "evidence" while Villarreal was using her phone to record a live feed of a shooting scene. Villarreal was recording from a public area and behind the yellow-tape perimeter police had set up. Montemayor did not threaten to take the equipment of any other media members also at the scene.

c. Officer Guerrero harassing and intimidating Villarreal without justification while she was working a traffic incident for her employer Orozco Crane and Towing, and continuing to arbitrarily harass her and force her away from her jobsite after he verified with Villarreal's boss that she was on the job, and after Villarreal began to record Guerrero's acts with her cell phone camera. His harassment and intimidation induced Villarreal to have a panic attack that required a trip to the hospital;

d. LPD treating Villarreal with indifference when she called and spoke to Laredo police officers about a sexual assault she endured at a business in Laredo, forcing Villarreal to call the Webb County sheriff;

e. Deliberately treating Villarreal differently than other journalists and media members, including withholding information from Villarreal generally released to local newspapers and broadcasters;

f. Holding a closed door meeting between Villarreal and several city and county officials, during which Defendant Alaniz openly declared to Villarreal that he did not appreciate her criticizing his office, including her criticism of his office for withdrawing the arrest warrant for Patricia Jacaman; and

g. Laredo city council members initially attacking and obstructing a proposal to construct a local park reading kiosk named after Villarreal's late niece, which Villarreal published to her readers and helped introduce into the city council. The hostility from various city council members was motivated solely out of malice towards Villarreal's past criticism of the city council, and was demeaning toward Villarreal's late niece.

55. These exemplary acts show a pattern of conduct intended to retaliate against and chill Villarreal's publication of unfavorable information and commentary on

her Facebook page, and to deprive citizens of a forum to discuss local government officials and conduct. These acts were also intended to retaliate against and chill Villarreal from recording police activity from public areas.

56. Defendants performed these acts with malice toward and/or knowing indifference to Villarreal's First Amendment rights.

57. On information and belief, Defendants' pattern of wrongful acts were done pursuant to an agreement to retaliate against Villarreal for the exercise of her First Amendment rights, with the goal of intimidating her from further exercising those rights. The contentions in this paragraph are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

58. These acts are also reflective of an official City of Laredo policy or custom intended to retaliate against and punish Villarreal for investigating, gathering, and publishing fair and truthful information about newsworthy local matters and commentary on the same, including information and commentary unfavorable to or critical of city government officials and operations.

59. Defendant City of Laredo ratified this official policy or custom with animus toward Villarreal's protected expressive activity and with the intent to intimidate Villarreal, so that (a) she stop recording police activity in view of the public; (b) that she stop gathering and publishing information and commentary on newsworthy

events in Laredo—including information and commentary unfavorable to or critical of the Laredo city government; and (c) that she stop facilitating citizen discussion about on the same.

60. The City of Laredo developed, ratified, endorsed, and enforced and continue to enforce this official policy or custom through its officials having final policy-making authority over law enforcement issues, including but not limited to at least Defendant Treviño in his position as chief of police, the Laredo City Council, and the Laredo City Manager.

61. As chief of police, Treviño knew of the various LPD acts of retaliation specified in Paragraph 54, or was willfully blind to the same. Treviño took no action to remedy the acts of retaliation against Villarreal's exercise of her First Amendment rights by LPD officers, and encouraged the same.

62. The Laredo City Manager and the Laredo City Council knew of the pattern of retaliation against Villarreal's exercise of her First Amendment rights, or were willfully blind to the same. For example, Villarreal reported on her Facebook page about several of the incidents detailed in Paragraph 54. On information and belief, the Laredo City Manager and Laredo City Council members regularly accessed Villarreal's Facebook page, or were routinely advised about the same. The contentions in this paragraph are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery

63. The City, its officials, and employees carried out and continue to maintain this official policy or custom despite the clearly established First Amendment protections afforded to Villarreal's citizen journalism efforts, including: (1) a clearly-established right to record and film police activity in public; (2) a clearly-established right to challenge law enforcement action and criticize government officials; (3) a clearly established right to provide a forum for others to criticize government officials; and (4) a clearly-established right to gather and publish truthful information on matters of public concern.

E. Defendants wrongfully arrest and detain Plaintiff for her protected First Amendment activity.

64. As part of their intent to retaliate against, punish and intimidate Villarreal in response to her citizen journalism, Defendants planned, directed, and caused the wrongful arrest and detention of Villarreal. Defendants did so without probable cause, and did so under a pretextual statute that Defendants had never applied to or enforced against any other person and that no reasonable government official would apply to Villarreal or otherwise rely upon under the circumstances.

65. On April 11, 2017, Villarreal published a story on her Facebook page about a man who committed suicide by jumping off a public overpass in Laredo. She published the name of the man who committed suicide and indicated that he was employed by the United States Customs and Border Protection agency. Villarreal first learned of the man's identity and occupation from a janitor who

worked at or near the overpass. She later received some corroborating information about the man's identity and occupation from LPD Officer Barbara Goodman.

66. On May 6, 2017, Villarreal posted a live feed on her Facebook page of a fatal traffic accident. She published the location of the accident, that a family involved was from Houston, and the family's last name. Villarreal first learned facts about the family's identity from a relative of the family who saw the live feed on Villarreal's Facebook page. She later received some corroborating information about the accident from Officer Goodman.

67. Villarreal had made similar posts in the past, including one in 2015 publishing information about a local suicide that she had received directly from LPD spokesman Baeza. She was not investigated for breaking any law after she published the information she received from Baeza in 2015.

68. Between 2015 and 2017, Villarreal continued to engage in protected First Amendment activity with which Defendants disagreed and disliked, including filming LPD activities in public, publishing information and commentary unfavorable to Defendants, and providing a forum for other citizens to do the same.

69. In late 2017, agreed to intimidate Villarreal into ceasing the exercise of her First Amendment rights, LPD and WCDA, including Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants, determined that Villarreal should be arrested and detained for

her Facebook posts of April 11, 2017 and May 6, 2017 ("Targeted Publications").

70. Specifically, after searching for a pretextual criminal statute with which to target Villarreal, they deliberately determined to investigate, arrest and detain Villarreal under Tex. Penal Code 39.06(c), "Misuse of Official Information" ("the Statute").

71. Neither LPD, WCDA, nor the Webb County Sheriff's Office had ever arrested, detained, or prosecuted any person under the Statute prior to wrongfully targeting Villarreal under the Statute. On information and belief, neither LPD, WCDA, nor the Webb County Sheriff's office had ever initiated an investigation into any person under the Statute prior to wrongfully targeting Villarreal under the Statute.

72. The Statute provides that a person commits a Class 3 felony if:

> "with intent to obtain a benefit or with intent to harm or defraud another, he solicits or receives from a public servant information that:
>
> > (1) the public servant has access to by means of his office or employment; and
> >
> > (2) has not been made public."

Tex Penal Code 39.06(c).

73. The Statute further defines "information that has not been made public" as "any information to which the public does not generally have access, and that is prohibited from disclosure under Chapter 552, Government Code," which is the Texas Public Information Act ("TPIA"). Tex Penal Code 39.06(c)

74. The Texas Penal Code defines "benefit" as "anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested." Tex. Pen. Code 1.07(a)(7)).

75. Any reasonable official would have understood there was no probable cause to arrest and detain Villarreal under the Statute in relation to the Targeted Publications.

76. There was no probable cause because Villarreal did not receive or solicit information with "intent to obtain" a benefit. Any reasonable official would have understood that the "benefit" element of the Statute required a showing of economic gain or advantage. No reasonable official would have determined Villarreal gathered and published the information in the Targeted Publications with the intent of economic gain or advantage.

77. There also was no probable cause because the information Villarreal received and published in the Targeted Publications was generally accessible by the public, as Villarreal's initial receipt of the information from two non-government individuals demonstrates. Any reasonable official would have understood the Statute

required a showing that the information at issue be that to which public does not generally have access. And any reasonable official would have understood that the information in the Targeted Publications did not meet this element.

78. Any reasonable official also would have understood that the Statute's essential element of "information that has not been made public" required the information to qualify for an exception under the TPIA. There is no TPIA exception that permits the withholding of the information Villarreal published in the Targeted Publications, and any reasonable official would have understood this.

79. Moreover, any reasonable official would have understood that gathering and disseminating publicly-accessible and truthful information related to a matter of public concern is First Amendment activity protected from criminal penalty.

80. Thus, any reasonable official would have understood that applying the Statute to Villarreal under the facts was unconstitutional. Villarreal lawfully gathered publicly-accessible and truthful information from various sources, and accurately published the same, before LPD released it.

81. While it may have been embarrassing to LPD to have Villarreal beat them to the punch, Villarreal's gathering and publication of the information was not probable cause supporting an investigation, arrest, and detention under the Statute or any other law. No

reasonable official would have chosen to apply or rely upon the Statute to investigate and arrest any citizen for merely asking for or receiving from an official information on a matter of public concern, or for publishing the same.

82. It also would have been evident to any reasonable official that the Statute was facially unconstitutional, being vague to the average reader, and contrary to the clearly established First Amendment right to lawfully gather and publish truthful information on newsworthy issues. Indeed, that the Statute made it a felony simply to ask a public official for information would have been understood as unconstitutional by any reasonable person, let alone any reasonable law enforcement officer.

83. Yet Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants proceeded to act as a reasonable official would not.

84. Lacking a valid basis to arrest Villarreal, but desperate to cause her arrest in an attempt to chill her First Amendment activity, they selected the Statute as a pretext to target Villarreal. They did so despite knowing that LPD, WDCA, and the Webb County Sheriff had never arrested, detained, or prosecuted any person before under the Statute.

85. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants proceeded to manufacture criminal complaints, a search warrant affidavit and approval, and arrest warrant affidavits and approvals with the intent that Villarreal be arrested and detained in order

to coerce her into ceasing her citizen journalism efforts. They did so with knowledge that (a) there was no probable cause to support any arrest and (b) the application of the Statute under the facts would infringe on Villarreal's protected First Amendment rights to gather and publish truthful and newsworthy information.

86. Defendant Ruiz, under the supervision and direction of Defendants Treviño, Alaniz, and Jacaman, willingly provided statements in support of two criminal complaints and two affidavits in support of arrest warrants targeting Villarreal ("Arrest Warrant Affidavits").

87. No other LPD officer provided an affidavit or other statement in support of the arrest warrants.

88. Ruiz's statements alleged that Villarreal violated the Statute and that probable cause existed to support the same. In his statements, Ruiz named DV as an officer participating in the investigation leading to the Arrest Warrant Affidavits, and named Defendant Jacaman as "signing off" on subpoenas related to the investigation of Villarreal. Defendant Jacaman signed two documents titled "Arrest Warrant Approval Form" that were dated November 21, 2017, and to which Ruiz's statements were attached. Ruiz also alleged that an unnamed source (on information and belief, one of the Doe Defendants) informed Defendant DV that Officer Goodman was communicating with Villarreal.

89. In his statements, Ruiz alleged that the information Villarreal published in the Targeted Publications was

received from Officer Goodman and that it "had not been made public." Ruiz alleged that Villarreal had received or solicited the name and condition of a traffic accident victim and the name and identification of a suicide victim.

90. Ruiz knew or should have known that the Statute required a showing that the information at issue not be generally available to the public and that it be excepted from disclosure under the TPIA. And Ruiz knew or should have known that the information Villarreal published was not subject to a TPIA exception and was generally accessible to the public. But Ruiz failed to mention or discuss these essential elements of the Statute in the Arrest Warrant Affidavits. He also failed to disclose that the information Villarreal received or published was generally accessible to the public and not subject to a TPIA exception. On information and belief, Ruiz's misrepresentations and omissions were deliberate.

91. Despite knowing that the information in the Targeted Publications was publicly-accessible information, Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants deliberately did not question or attempt to question Villarreal about the circumstances of her access to the information in Targeted Publications, in furtherance of their efforts to manufacture the Arrest Warrant Affidavits and cause the arrest of Villarreal without probable cause.

92. Ruiz also knew or should have known that the Statute required a showing that Villarreal intended to enjoy an economic advantage or gain from the request for

or receipt of the information in the Targeted Publications. But Ruiz failed to recite this essential element of the Statute in the Arrest Warrant Affidavits, and failed to state how or why Villarreal intended to enjoy an economic gain or advantage from the information. Ruiz alleged only that Villarreal's release of the information before other news outlets gained her popularity in Facebook. On information and belief, Ruiz's misrepresentations and omissions were deliberate.

93. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants were aware or should have been aware that at all times leading up to Villarreal's arrest, Villarreal did not use her Facebook page as a means of economic gain.

94. Ruiz's statements in the Arrest Warrant Affidavits did not address Villarreal's intent or knowledge in receiving or using the information, despite this being required by the statute. The affidavits also did not address whether Villarreal knew she was asking for or receiving non-publicly accessible information from an official source. On information and belief, Ruiz's omissions were deliberate.

95. Two warrants for Villarreal's arrest—for each of the Targeted Publications—were issued on December 5, 2017 ("Arrest Warrants"). The Arrest Warrant issued as a result of the knowing or reckless misrepresentations and omissions of key elements and facts Arrest Warrant Affidavits.

96. Villarreal learned of the Arrest Warrants and LPD's plan to execute them. She posted a live feed to her Facebook page on the evening of December 12, 2017 informing her readers of the Arrest Warrants. Villarreal turned herself in on the morning of December 13, 2017.

97. Upon turning herself in and being taken from booking, Villarreal found herself surrounded by numerous LPD officers and employees, who were laughing at Villarreal, taking pictures of her in handcuffs with their cell phones, and otherwise showing their animus toward Villarreal with an intent to humiliate and embarrass her. On information and belief, these officers included Defendants Martinez, Montemayor and Guerrero.

98. When a local reporter outside booking asked to speak to Villarreal, she was denied the opportunity, and instead was left only with the impression of LPD officers mocking Villarreal.

99. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants formulated, supervised, approved, and carried out the decision to investigate, arrest, and detain Villarreal under the Statute.

100. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants formulated, supervised, and approved department-wide advance notice of Villarreal's arrest with the intent that LPD officers and other government officers and employees show *en masse* to mock, photograph, and humiliate Villarreal during the arrest process.

Appendix E

101. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants knowingly initiated and participated in the investigation, arrest, and detention of Villarreal with the exclusive goals of retaliating against Villarreal for the exercise of her First Amendment rights and intimidating her from further exercising those rights.

102. On information and belief, Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants knowingly initiated and participated in the investigation, arrest, and detention of Villarreal under the Statute, as detailed herein, pursuant to an agreement to retaliate against Villarreal for the exercise of her First Amendment rights and to intimidate her from further exercising those rights. The contentions in this paragraph are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

103. At all times relevant, Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants knew or should have known that there was no probable cause to investigate and arrest Villarreal under the Statute. They knew or should have known that the information in the Targeted Publications was publicly-accessible and not subject to an exception under TPIA. And they knew that at all times relevant, Villarreal did not use her Facebook page as a means for economic gain or economic advantage.

104. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants knew of and expressly or tacitly endorsed the misrepresentations and omissions in the Arrest Warrant Affidavits, or were willfully blind to the same, at all times relevant.

105. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants knew or should have known there was no basis for criminally investigating, arresting, and prosecuting a citizen for simply asking for or receiving publicly-accessible information, or for publishing the same, and that doing so would be unconstitutional.

106. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants knew or should have known the request or receipt of such information from an LPD official and truthful publication of the same is protected First Amendment activity. These Defendants also knew that members of the local media regularly asked for and received information from LPD officials relating to crime scenes and investigations, traffic accidents, and other LPD matters.

107. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants knew or should have known that applying the Statute to those who publish information on matters of public concern to gain more readers would unlawfully subject every media outlet, blogger, and other publisher to criminal liability.

108. No reasonable official would have so selectively, maliciously, and arbitrarily misapplied the Statute in such a way to Villarreal. For these reasons, Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants also knew or should have known that applying the Statute to Villarreal under the facts was unconstitutional.

109. Defendant Treviño, having supervisory authority over LPD, knowingly and directly contributed to the

violation of Villarreal's constitutional rights, as he initiated, directed, supervised, participated in, approved, and caused (a) the deliberate choice to single out and investigate Villarreal for her newsgathering, publishing, and commentary; (b) the willful selection of a pretextual and inapplicable statute under which to arrest and detain Villarreal; (c) the preparation and execution of the Arrest Warrant Affidavits and Arrest Warrants without probable cause; and (d) the arrest and detention of Villarreal against her will and without probable cause.

110. Defendant Treviño was deliberately indifferent to Villarreal's rights because of his hostility toward Villarreal's coverage and criticism of LPD, including but not limited to her recording of LPD activities in public that was sometimes unfavorable to LPD. Treviño participated in, encouraged, and supervised LPD's retaliatory investigation and arrest of Villarreal despite having actual or constructive knowledge that (a) the Arrest Warrant Affidavits contained misstatements and omissions of essential facts and legal elements, (b) there was no probable cause to arrest Villarreal under the Statute, and (c) that Villarreal had engaged in First Amendment-protected activity.

111. At all relevant times, Defendant Treviño was responsible for training, supervising, and employing individuals within LPD.

112. Defendants Alaniz and Jacaman, having supervisory authority over WCDA and LPD, knowingly and willingly participated in the investigatory and arrest phases of the criminal process as to Villarreal. In doing so,

they knowingly and directly contributed to the violation of Villarreal's constitutional rights, as they initiated, directed, supervised, participated in, approved, and caused (a) the deliberate choice to single out and criminally investigate Villarreal for her newsgathering, publishing, and commentary; (b) the preparation and execution of the Arrest Warrant Affidavits without probable cause and with material misrepresentations and omissions; and (c) the arrest and detention of Villarreal against her will and without probable cause.

113. On information and belief, Defendants Alaniz and Jacaman willfully participated with LPD and directed the search for and selection of a pretextual statute under which to investigate and arrest Villarreal, despite knowing that, as a result of their legal training, (a) the First Amendment protected Villarreal asking for, receiving, and publishing truthful and publicly-accessible information and (b) no probable cause existed to arrest Villarreal under the Statute. The contentions in this paragraph are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

114. Defendants Alaniz and Jacaman also willingly advised, instructed, and assisted Ruiz, Treviño, DV, and other LPD members on the investigation of Villarreal and the preparation of the retaliatory Arrest Warrant Affidavits, further contributing to the violation of Villarreal's constitutional rights. For example, Defendant Jacaman, with the knowing endorsement of Defendant Alaniz, personally approved Defendant Ruiz's Arrest Warrant Affidavits, with knowledge that the affidavits contained misstatements and omissions of essential facts

and legal elements, and with knowledge that there was no probable cause to arrest Villarreal under the Statute. In addition, Defendant Jacaman, with the knowing endorsement of Defendant Alaniz, personally approved investigatory subpoenas related to the investigation of Villarreal—including a subpoena directed at Villarreal's cellular phone—with actual or constructive knowledge that the investigation was purposefully targeting Villarreal's protected First Amendment activity.

115. Defendants Alaniz and Jacaman were deliberately indifferent to Villarreal's constitutional rights, because of their hostility toward Villarreal's coverage and criticism of WCDA, LPD, and Defendant Jacaman's relatives. This hostility is reflected, for example and without limitation, by Defendant Alaniz's closed-door rebuke of Villarreal for criticizing WDCA, as detailed in Paragraph 54. Villarreal's criticism of WDCA was the motivating factor behind Defendant Alaniz's and Jacaman's willing participation in the events leading to Villarreal's retaliatory and wrongful arrest.

116. Defendants Alaniz and Jacaman willingly engaged in the above acts outside of the judicial phase of the criminal process, having actual or constructive knowledge that there was no probable cause to support the investigation and Arrest Warrants. Defendant Alaniz and Jacaman, being trained in and practicing law, also knew or should have known that Villarreal had engaged in constitutionally-protected activity, and that applying the Statute to Villarreal under the circumstances was unconstitutional.

117. At all relevant times, Defendants Alaniz and Jacaman were responsible for training, supervising, and employing individuals within WCDA and LPD. At all relevant times, Defendant Alaniz was Defendant Jacaman's direct supervisor.

E. Villarreal is detained.

118. After her arrest and booking, Villarreal was detained at the Webb County Jail, which is under the exclusive control of the Webb County Sheriff's Office ("WCSO"), the exclusive law enforcement department for Defendant Webb County. WCSO was aware of, participated, in, and approved the arrest and detention of Villarreal despite knowing or having reason to know there was no probable cause to arrest and detain her, and knowing or having reason to know that Villarreal's arrest was in retaliation for exercising her First Amendment rights.

119. Despite knowing there was no probable cause to arrest Villarreal under the Statute, and despite that no reasonable officer would apply the Statute under the circumstances, Defendants carried out their plan to arrest Villarreal as retaliation and punishment for Villarreal's constitutionally-protected citizen journalism. Defendants did so with the intent that it dissuade Villarreal from engaging in further journalism efforts, including recording and publishing video of law enforcement operations in public; for publishing information and commentary unfavorable to local government officials and operations; and for encouraging and facilitating public criticism of local government officials and conduct.

120. Villarreal's investigation, arrest and detention under the Statute were done in furtherance of the above-detailed official City policy or custom ratified and intended to retaliate against and punish Villarreal for publishing accurate accounts of and commentary on newsworthy local matters, including those concerning government operations and city officials.

121. Villarreal's unconstitutional arrest and detention under the Statute were also done in furtherance of an official Webb County policy intended to retaliate against and punish Villarreal for publishing authentic accounts of and commentary on newsworthy local matters, including those unfavorable to Defendants Alaniz and Jacaman, and to the WCDA generally.

122. The Webb County official policy was developed, endorsed, and approved by final-policy making officials for Webb County for matters of law enforcement, including but not limited to the Webb County Sheriff and Defendant Alaniz. On information and belief, Defendants Alaniz and Jacaman encouraged WCSO into ratifying, adopting, and enforcing this official Webb County policy, because of their desire to intimidate Villarreal into stopping any criticism of WDCA, as evidenced by the closed door meeting between Villarreal and Alaniz and other officials described in Paragraph 54. The contentions in this paragraph are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery

123. WCSO's willing detention of Villarreal, knowing it was without probable cause and under an inapplicable statute, was an act fairly attributable to the Webb County policy of retaliation against Villarreal for the exercise of her First Amendment rights.

F. Villarreal defeats the criminal charges.

124. After Villarreal posted bond and was released from physical detention at the Webb County Jail, Villarreal filed a petition for a writ of habeas corpus in the Webb County District Court on February 14, 2018. Villarreal argued that the Statute was facially unconstitutional because it (a) was unconstitutionally vague and (b) violated the free speech and free press clauses of the First Amendment and Article 1, Section 8 of the Texas Constitution.

125. In its response to Villarreal's petition, WCDA construed the Statute as requiring that the accused "must know that the information is private information from a public-official source."

126. Nothing in the Arrest Warrants or Ruiz's statements indicated that Villarreal knew the basic information about the persons identified in the April 11 and May 6 Posts was private. On information and belief, Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants knew at all times relevant that Villarreal did not believe, let alone know, the information in the Targeted Publications was private. Nor could she have, given that the information was publicly-accessible and not exempt from TPIA disclosure.

127. On March 28, 2018, Judge Monica Z. Notzon of the 111th Judicial District of Texas issued a bench ruling on Villarreal's habeas petition, and held the Statute unconstitutionally vague.

128. Webb County did not appeal Judge Notzon's ruling.

129. Yet after the ruling, Defendant Alaniz was cited by a local paper as stating that the LPD was refusing to drop the investigation, and would continue to look into who in the department supplied Villarreal with the publicly-accessible information she published in the Targeted Publications.

V. Causes of Action

Count I:

Direct and Retaliatory-Based Violations of Free Speech and Freedom of the Press – U.S. Const. Amends. I and XIV, and 42 U.S.C. § 1983

(Defendants Alaniz, Jacaman, Treviño, Ruiz, Martinez, Guerrero, Montemayor, DV, and the Doe Defendants in their individual capacities)

130. Villarreal fully incorporates by reference herein the allegations in each of the foregoing paragraphs.

131. Defendants Alaniz, Jacaman, Treviño, Ruiz, Martinez, Guerrero, Montemayor, DV, and the Doe

Defendants ("Individual Defendants") willfully acted to intimidate, defame, and harass Villarreal in retaliation for Villarreal's exercise of her First Amendment rights.

132. The Individual Defendants' acts are exemplified by (but not limited to):

a. the deliberate choice to target Villarreal for investigation and arrest under a pretextual and inapplicable statute and deliberately deficient and misleading arrest warrant affidavits, while knowing that no probable cause existed to arrest or detain Villarreal;

b. causing the arrest and detention of Villarreal without probable cause; and

c. the retaliatory acts detailed in Paragraph 54.

133. The Individual Defendants also willfully acted to interfere directly with Villarreal's gathering and publication of information and commentary about matters of public concern, as exemplified by (but not limited to) the arrest and detention of Villarreal, and by the acts detailed in Paragraph 54.

134. Each of the Individual Defendants' acts, as alleged herein, were undertaken at all times under the color of law.

135. Each of the Individual Defendants' interfering and retaliatory acts were undertaken with actual or constructive knowledge that Villarreal was engaging

in protected First Amendment activity, including (a) gathering and publishing truthful information about local newsworthy matters, including information critical of or otherwise unfavorable to city and county officials and their conduct; (b) video recording and streaming law enforcement activities occurring in public areas; (c) encouraging citizen engagement and providing through her Facebook page a forum for discussion on matters of local public concern, including citizen criticism of local government officials and conduct; and (d) publishing commentary critical of or otherwise unfavorable to Defendants, their activities, and their policies.

136. The Individual Defendants acted with the purpose of coercing and intimidating Villarreal into ceasing her protected First Amendment activity. Thus, each of the Individual Defendants' retaliatory acts, as detailed herein, was substantially motivated against Villarreal's exercise of the protected First Amendment rights.

137. For example and without limitation, each of the Individual Defendants' acts of harassing, defaming, and singling out Villarreal, including but not limited to those acts detailed in Paragraph 54, were substantially in response to Villarreal engaging in protected First Amendment activity, and were substantially intended to intimidate Villarreal into ceasing her lawful public recording of, sharing of, reporting on, and speaking on matters of public concern. A reasonable law enforcement officer would have known that these acts would have interfered with Villarreal's First Amendment rights and deprived her of the same, and would not have undertaken such acts of interference and retaliation.

138. As further example and without limitation, the Individual Defendants' intended for the arrest and detention of Villarreal to coerce her, under the force of state action, into ceasing her lawful public recording of, sharing of, reporting on, and speaking on matters of public concern, including information and commentary unfavorable to Defendants.

139. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants intentionally investigated, arrested, and detained Villarreal without probable cause, or acted to cause the same, in response to Villarreal engaging in protected-First Amendment activity.

140. But for their animus toward Villarreal's filming of police, newsgathering, and publication efforts that often were critical of or otherwise unfavorable to LPD, WDCA, and other local government officials and conduct, Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants would not have wrongfully investigated, arrested, and detained Villarreal as detailed herein, or acted to cause the same.

141. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants made the decision to target Villarreal under Texas Penal Code § 39.06(c), despite knowing that neither LPD, WCDA, nor the Webb County Sheriff had before arrested, detained, or prosecuted a person under that statute during the 23 years the operative version of the statute had been in effect.[5]

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5. Tex. Legis. Acts 1993, 73rd Leg., ch. 900 (S.B. 1067), § 1.01 (effective Sept. 1, 1994).

142. No reasonable law enforcement officer would have investigated, arrested, and detained Villarreal, or caused the same, knowing that gathering and publishing accurate and publicly-accessible information is protected under the First Amendment.

143. In addition, no reasonable law enforcement officer would have relied upon TEXAS PENAL CODE § 39.06 to investigate, arrest, or detain Villarreal. A reasonable law enforcement officer would have known that no probable cause existed to target, arrest, and detain Villarreal under the statute, and would not have manufactured and presented the deficient and misleading arrest warrant affidavits detailed herein.

144. And a reasonable law enforcement officer would have understood that a retaliatory investigation and arrest under a pretextual application of the statute and without probable cause would have interfered with Villarreal's First Amendment rights and deprived her of the same, and further, would have been an unconstitutional application of the statute.

145. The Individual Defendants' actions injured Villarreal in a way likely to chill a person of ordinary firmness from further participation in First Amendment protected activity, including the protected activity in which Villarreal engaged.

146. The retaliatory acts detailed in Paragraph 54, the wrongful investigation and arrest of Villarreal, and the events surrounding the same caused Villarreal physical,

emotional, and reputational harm, such as loss of sleep, physical illnesses, and restriction of her person under her arrest release bond. These harms hindered and curtailed Villarreal's exercise of her protected First Amendment rights.

147. These retaliatory acts have also caused and continue to cause Villarreal to constantly fear further interference and retaliation from LPD, WDCA, and other city and county officials against her protected citizen journalism efforts. Constantly operating under this fear hindered and curtailed Villarreal's ability to exercise her protected First Amendment rights.

148. The Individual Defendants' actions violated Villarreal's clearly established rights under the First and Fourteenth Amendments to the United States Constitution, of which a reasonable official would have been aware.

149. It is clearly established that the First Amendment protects the right of every citizen to gather and publish truthful information about matters of public concern that is publicly-accessible, publicly-available, or otherwise lawfully obtained.

150. It is clearly established that the First Amendment protects the right of every citizen to ask for information from a police officer or other official, as for example, is routine by members of the press or those seeking information under the Texas or Federal Freedom of Information Acts.

Appendix E

151. It is clearly established that the First Amendment protects every citizen's right to record and photograph law enforcement activities carried out in public.

152. It is clearly established that the First Amendment prohibits any individual acting under the color of state law from retaliating against a speaker based on the viewpoint expressed, including speech that criticizes police and other government officials and conduct.

153. It is clearly established that government officials may not retaliate against a citizen for exercise of First Amendment rights, including arresting a citizen without probable cause in response to that citizen's exercise of First Amendment rights.

154. The First Amendment also clearly protects the right of a citizen to create a platform to encourage engagement and discussion from other citizens on matters of public concern.

155. No reasonable official would have so unlawfully, willingly, and arbitrarily retaliated against and restricted speech on matters of public concern in the same manner as Defendants have.

156. The Individual Defendants have knowingly and willfully harassed, intimidated, interfered with, and arrested Villarreal with a reckless and callous disregard for, and deliberate indifference to, her First Amendment rights.

157. As a direct and proximate cause of The Individual Defendants' unlawful acts, as alleged herein, Villarreal has been deprived of her rights under the First and Fourteenth Amendments to the United States Constitution, and suffered damage to her reputation, wrongful incarceration, legal and other costs, and fear of further retaliation from Defendants. The Individual Defendants' acts have caused Villarreal to suffer further injuries, including financial hardship, physical and mental anguish, emotional distress, humiliation, and public embarrassment.

158. Plaintiff is entitled to actual, compensatory, and punitive damages against the Individual Defendants under 42 U.S.C. §1983 in an amount to be proven at trial.

159. Plaintiff is also entitled to preliminary and permanent injunctive relief against each of the Individual Defendants. Their acts of targeting Villarreal under the color of state law for engaging in activity protected under the First and Fourteenth Amendment is likely to continue absent injunctive relief.

160. Villarreal has and will continue to suffer considerable and irreparable harm without injunctive relief. Villarreal is entitled to be free of fear of retaliation for engaging in protected First Amendment activity, including asking for and publishing information on local public matters, and criticizing local officials and their actions. There is no adequate remedy available at law sufficient to redress Villarreal's injuries and prevent further harm to her and journalism.

161. Villarreal is likely to succeed on the merits of her claims set forth herein. Moreover, there is substantial public interest in ensuring that Defendants cease engaging in acts intended to harass and intimidate Villarreal and interfere with her citizen journalism efforts.

Count II:

Wrongful Arrest and Detention – U.S. Const. Amends. IV and XIV and 42 U.S.C. § 1983

(Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants, in their individual capacities)

162. Villarreal fully incorporates by reference herein the allegations in each of the foregoing paragraphs.

163. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants, acting at all times under color of state law, knowingly arrested and detained Villarreal, or knowingly acted to cause the same, against her will and without probable cause, in deprivation of Villarreal's rights under the Fourth and Fourteenth Amendments.

164. Defendants' acts, as alleged herein, were undertaken at all times under the color of law.

165. Lacking a valid basis to arrest Villarreal, Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants (a) knowingly manufactured allegations under a pretextual application of Texas Penal Code § 39.06, upon which no reasonable official would have relied under

the circumstances; (b) knowingly prepared and obtained a warrant for Villarreal's arrest under false pretenses; and (c) knowingly arrested and detained her and/or caused her arrest and detention without probable cause and against her will, based on a knowing or deliberately indifferent wrongful application of TEXAS PENAL CODE § 39.06.

166. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants willfully arrested and detained Villarreal, or willfully caused and directed her arrest and detention, with malice and/or a reckless and callous disregard for, and deliberate indifference to, her constitutional rights.

167. It is clearly established that an official or another acting under the color of state law cannot deprive a person of due process and seize and detain her person without probable cause.

168. It is also clearly established that an official or another acting under the color of state law cannot deprive a person of due process and seize her person in response to that person engaging in constitutionally-protected activity, including gathering information about matter of public concern and reporting on the same.

169. It would have been clear to any reasonable law enforcement officer that no probable cause existed to arrest and detain Villarreal under TEXAS PENAL CODE § 39.06.

170. No reasonable official would have relied upon the statute to so unlawfully, willingly, and arbitrarily

act to cause the arrest and detention of a citizen based on Villarreal's constitutional-protected activities. It also would have been clear to a reasonable official that applying the statute to Villarreal under the circumstances was unconstitutional.

171. As a direct and proximate cause of the actions of Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants, Villarreal was deprived of her rights guaranteed by the Fourth and Fourteenth Amendments of the Constitution of the United States, and suffered damage to her reputation, wrongful incarceration, legal and other costs, and fear of further retaliation from these Defendants. These Defendants' acts have caused Villarreal to suffer further injuries, including financial hardship, physical and mental anguish, emotional distress, humiliation, and public embarrassment.

172. Plaintiff is entitled to actual, compensatory, and punitive damages against Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants under 42 U.S.C. §1983 in an amount to be proven at trial.

Count III:

Selective Enforcement– Equal Protection under U.S. Const. Amend. XIV and 42 U.S.C. § 1983

(Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants in their individual capacities)

173. Plaintiff fully incorporates by reference herein the allegations in each of the foregoing paragraphs.

174. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants violated Villarreal's right to equal protection under the Fourteenth Amendment.

175. Specifically, through their wrongful criminal investigation of Villarreal, and knowingly causing her arrest and detention, Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants intentionally and arbitrarily singled Villarreal out in a selective enforcement of TEXAS PENAL CODE § 39.06.

176. These Defendants' acts, as alleged herein, were undertaken at all times under the color of law.

177. LPD and WCDA had never before arrested, detained, or prosecuted any other person under TEXAS PENAL CODE § 39.06, let alone any person similarly-situated to Villarreal, during the 23 years the operative version of the statute had been in effect.[6] These similarly-situated persons include (a) those who had asked for or received information from local law enforcement officials, and (b) persons who published truthful and publicly-accessible information on a newsworthy matter. Examples include local professional newspaper journalists, local professional broadcast journalists, and citizens who published on matters of local public concern.

178. Defendants knew or should have known that Villarreal, like most local media, requested and received

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6. Tex. Legis. Acts 1993, 73rd Leg., ch. 900 (S.B. 1067), § 1.01 (effective Sept. 1, 1994).

law enforcement information from LPD spokesman Baez and other LPD officials.

179. Yet Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants, because of their animus toward Villarreal's particular style of newsgathering and publication, willfully investigated Villarreal and arrested or caused her to be arrested and detained her under a pretextual and inapplicable statute. Defendants knew their investigation and arrest of Villarreal was based on an improper and unconstitutional use of the statute.

180. A reasonable official would have understood that selectively enforcing a criminal statute, including enforcing it without probable cause, was clearly established as unconstitutional.

181. And any reasonable official would have understood Villarreal was engaging in lawful and constitutionally-protected activity in relation to the Targeted Publications on her Facebook Page. No reasonable official would have relied upon Texas Penal Code §39.06 to investigate and arrest Villarreal under the circumstances known to Defendants. Defendants' unlawful application of Texas Penal Code § 39.06 would subject to investigation, arrest, detention, and prosecution any media member who simply asked for information from an official; received newsworthy information from an official; or published newsworthy information to a wider audience.

182. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants had no rational basis for singling

out Villarreal, as there was no legitimate purpose for applying § 39.06 to Villarreal, while never having applied it to any other person similarly-situated.

183. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants had motive for, and exhibited, animosity and ill will toward Villarreal for her newsgathering, reporting and commentary. As a result, Defendants levied a false and vindictive pre-arrest investigation and arrest under TEXAS PENAL CODE § 39.06 against Villarreal.

184. Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants selectively enforced the statute against Villarreal in retaliation for her citizen journalism, with which they subjectively disagreed and disliked. They did so with the improper intent and desire to deprive her of exercising her First Amendment rights, including the right to criticize local officials; the right to record police activity in public; and the right to gather and publish truthful information on matters of public concern.

185. As a direct and proximate cause of these Defendants' unlawful acts, as alleged herein, Villarreal has been deprived of her constitutional rights and suffered damage to her reputation, wrongful incarceration, legal and other costs, and fear of further retaliation from Defendants. Defendants' acts have caused Villarreal to suffer further injuries, including financial hardship, physical and mental anguish, emotional distress, humiliation, and public embarrassment.

186. Plaintiff is entitled to actual, compensatory, and punitive damages against Defendants Alaniz, Jacaman,, Treviño, Ruiz, DV, and the Doe Defendants under 42 U.S.C. §1983 in an amount to be proven at trial.

Count IV:

Civil Conspiracy to Deprive Constitutional Rights —42 U.S.C. § 1983

(Defendants Alaniz, Jacaman, Treviño, Ruiz, Guerrero, Martinez, and Montemayor, DV, and the Doe Defendants in their individual capacities)

187. Plaintiff fully incorporates by reference herein the allegations in each of the foregoing paragraphs.

188. All or some of the Individual Defendants conspired with the intent to deprive Villarreal her constitutionally-protected rights, including those arising under the First, Fourth, and Fourteenth Amendments.

189. The Individual Defendants' relevant acts, as alleged herein, were undertaken under the color of law and constitute state action.

190. Defendants Alaniz and Jacaman, at all times relevant, acted outside of the judicial phase of the criminal process in conspiring to deprive Villarreal of her constitutional rights. They both willingly participated in and agreed to take action to cause the wrongful criminal investigation, arrest, and detention of Villarreal, as detailed herein.

191. All or some of the Individual Defendants agreed and conspired to harass, intimidate, and defame Villarreal with the intent of retaliating against Villarreal for exercising clearly established First Amendment rights, and to deprive her of the same, including (1) the right to criticize and challenge public officials and law enforcement; (2) the right to film and record police activity in public; and (3) the right to gather and publish truthful information on matters of public concern. All or some of the Individual Defendants also agreed and conspired to purposely interfere with and deprive Villarreal's First Amendment-protected activity of newsgathering, publication, and commentary on matters of public concern.

192. As detailed herein, and including but not limited to the examples detailed in Paragraph 54, each of the Individual Defendants did in fact engage in an act in furtherance of the deprivation of Villarreal's First Amendment rights, including the clearly-established rights detailed herein. On information and belief, the Individual Defendants acted pursuant to an express or tacit agreement intended to deprive Villarreal of those rights.

193. As also detailed herein, Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants knowingly conspired to selectively investigate and cause the arrest and detention of Villarreal, with the intent to (a) deprive her of equal protection under the laws and her right to be free from arbitrary and selective enforcement of the law under the Fourteenth Amendment, (b) deprive her of her right to be free from unlawful arrest and

detention under the Fourth Amendment; and (c) deprive her of her right to be free from a malicious investigation and unlawful arrest in retaliation the exercise of her First Amendment rights.

194. On information and belief, at least two of Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants agreed to (a) find a statute to serve as a pretext for selectively investigating and arresting Villarreal and (b) initiate, oversee, cause and carry out the unlawful investigation, arrest and detention of Villarreal. These Defendants made this agreement with actual or constructive knowledge that no Laredo or Webb County law enforcement official had ever enforced Texas Penal Code § 39.06 against any person, let alone any person similarly situated to Villarreal.

195. In entering such an agreement, Defendants Alaniz, Jacaman, Treviño, Ruiz, DV, and the Doe Defendants knew or should have known that there was no probable cause to arrest and detain Villarreal. All were aware or should have been aware that Villarreal had engaged in First Amendment-protected activity, and that applying Texas Penal Code § 39.06 to the facts was improper and unconstitutional. The agreement was made and carried out with the intent to retaliate against and chill Villarreal's exercise of her protected First Amendment rights.

196. Defendants Alaniz, Jacaman, Treviño, Ruiz, and DV conspired with actual or constructive knowledge that the selective and wrongful arrest and detention of Villarreal would deprive her of equal protection of the

law and her First, Fourth, and Fourteenth Amendment rights. As detailed herein, the unlawful investigation, arrest, and detention of Villarreal subjected her to and caused a deprivation of her First, Fourth, and Fourteenth Amendment rights,

197. No reasonable official would have so unlawfully, willingly, recklessly and/or arbitrarily conspired to deprive Villarreal of her constitutional rights.

198. As a direct and proximate cause of the Individual Defendants' unlawful acts, as alleged herein, Villarreal has been deprived of her constitutional rights and suffered damage to her reputation, wrongful incarceration, legal and other costs, and fear of further retaliation from the Individual Defendants. The Individual Defendants' acts have caused Villarreal to suffer further injuries, including financial hardship, physical and mental anguish, emotional distress, humiliation, and public embarrassment.

199. Plaintiff is entitled to actual, compensatory, and punitive damages against the Individual Defendants under 42 U.S.C. § 1983 in an amount to be proven at trial.

Count V:

Supervisory Liability – U.S. Const. Amend. I, IV, and XIV, and 42 U.S.C. § 1983

(Defendant Treviño, in his individual capacity)

200. Plaintiff fully incorporates by reference herein the allegations in each of the foregoing paragraphs.

201. Defendant Treviño, at all times relevant, had supervisory duties over all LPD officers and other employees.

202. At all relevant times, Defendant Treviño was responsible for training, supervising, and employing individuals within LPD.

203. Defendant Treviño, with actual or constructive knowledge, approved and ratified a pattern of retaliation by LPD officers against Villareal's exercise of her First Amendment rights, including but not limited to those incidents detailed in Paragraph 54. All of these incidents and the overarching pattern of retaliatory conduct by LPD directly contributed to the violation of Villarreal's First Amendment rights.

204. These incidents and pattern of a retaliatory action are a result of and caused by Defendant Treviño's failure to train LPD officers and staff regarding the clearly-established First Amendment rights of citizens, including (1) the right to film and record police activity in public; (2) the right to criticize and challenge police activity; (3) the right to lawfully gather and report truthful information on matters of public concern; and (4) the right exercise one's First Amendment rights free of retaliation from law enforcement.

205. Defendant Treviño was deliberately indifferent to the First Amendment rights of Villarreal and other citizens. For example, Defendant Treviño had actual or constructive knowledge of the LPD retaliatory acts

incidents detailed in Paragraph 54, but took no action to remedy his officers' deprivation of Villarreal's First Amendment rights, or train his officers to prevent similar incidents in the future.

206. Defendant Treviño's deliberate indifference is also illustrated by his knowing oversight and approval of and participation in in the events leading to (a) the criminal investigation of Villarreal under a pretextual statute; (b) the preparation, issuance, and execution of the Arrest Warrants and supporting statements without probable cause; and (c) Villarreal's selective arrest and detention. All of these directly contributed to the violation of Villarreal's First, Fourth, and Fourteenth Amendment rights.

207. Defendants Treviño supervised, directed, and participated in, and approved the investigation of Villarreal and the preparation, issuance, and execution of the Arrest Warrants and supporting statements by his subordinates. He did so with actual or constructive knowledge that (a) there was no probable cause to arrest Villarreal under Texas Penal Code 39.06; (b) that Texas Penal Code 39.06 was inapplicable to Villarreal under the circumstances and in light of clearly-established First Amendment protections for Villarreal's citizen journalism activities; and (c) that the investigation and arrest of Villarreal targeted and would interfere with her constitutionally-protected activity.

208. Defendants Treviño acted with malice and/or deliberate indifference to Villarreal's rights, because

of his hostility toward Villarreal's citizen journalism and criticism of LPD, WCDA, and other government operations.

209. Defendant Treviño acted at all times under color of law in undertaking the supervisory acts and omissions detailed herein.

210. At all times relevant to the allegations herein, Defendant Treviño knew or should have known that the acts of his subordinates, which he knowingly supervised and approved, were unconstitutional. It is clearly established that an official (a) cannot restrict, interfere with, or punish the lawful gathering of information and publication of information on matters of public concern; (b) cannot restrict, interfere with, or punish the video recording of government activities in or from public places; and (c) cannot restrict, interfere with, or punish speech based on the viewpoint expressed.

211. No reasonable official with supervisory duties would so have knowingly directed, authorized, participated in, and/or approved the deprivation of Villarreal's constitutional rights in the same manner as Defendant Treviño did.

212. As a direct and proximate cause of Defendant Treviño's unlawful supervisory acts and omissions, as alleged herein, Villarreal has been deprived of her constitutional rights and suffered damage to her reputation, wrongful incarceration, legal and other costs, and fear of further retaliation from Defendants.

These acts and omissions have caused Villarreal to suffer further injuries, including financial hardship, physical and mental anguish, emotional distress, humiliation, and public embarrassment.

213. Plaintiff is entitled to actual, compensatory, and punitive damages against Defendant Treviño under 42 U.S.C. § 1983 in an amount to be proven at trial.

Count VI:

Municipal Liability - U.S. Const. Amend. I, IV, XIV, and 42 U.S.C. § 1983

(Defendant City of Laredo)

214. Plaintiff fully incorporates by reference herein the allegations in each of the foregoing paragraphs.

215. At all times relevant to the allegations made herein, Defendant City of Laredo developed, ratified, enforced, and continues to enforce an official city policy and/or custom that constitutes impermissible state action intended to restrict and interfere with Villarreal's First Amendment activity, and to retaliate against Villarreal for the same.

216. Specifically, the City's unconstitutional policy was and remains a decision to intimidate, retaliate against, and punish Villarreal for (a) recording and publishing law enforcement activities occurring in public and (b) lawfully gathering and publishing accurate information

and commentary about matters of local public interest, including that critical of or otherwise unfavorable to city government affairs and city officials.

217. The City's unconstitutional policy also was and remains a decision to restrict and interfere with Villarreal's citizen journalism, with the intent that (a) she stop gathering and publishing information and commentary critical of or otherwise unfavorable to the Laredo government, and (b) she stop encouraging and providing a forum for other citizens to do the same.

218. The City's unconstitutional policy, in addition or alternatively, is reflected is a persistent and widespread practice of City officials and employees engaging in retaliatory acts against Villarreal for her exercise of First Amendment rights, including (a) recording and publishing law enforcement activities occurring in public; and (b) publishing accurate information and commentary about matters of local public interest, including that critical of or otherwise unfavorable to Laredo government affairs and city officials.

219. Acts reflective of the City's policy include those several acts detailed in Paragraph 54 herein, and the unlawful investigation and arrest of Villarreal detailed herein.

220. In furtherance of its official policy or custom, City officials, including its final-policy making officials, knowingly influenced, directed, participated in, and encouraged LPD and WDCA to selectively investigate,

arrest, and detain Villarreal under a pretextual statute, knowing that there was no probable cause to arrest and detain Villarreal, and knowing that Villarreal had engaged in First Amendment-protected activity to which the application of the statute would be unconstitutional. In addition or alternatively, City officials, including its final-policy making officials, had knowledge of the decision to selectively and wrongfully investigate, arrest, and detain Villarreal, and approved and ratified the same in furtherance of its official policy or custom.

221. The official city policy or custom was the moving force behind the investigation, arrest, and detention of Villarreal, as evidenced (for example and without limitation) by Defendant Trevino's participation in, approval of and supervision of these acts, as detailed herein.

222. In furtherance of its official policy or custom, City officials, including its final-policy making officials, knowingly influenced, directed, and encouraged LPD, WDCA, and other government officials and employees to harass, defame, and intimidate Villarreal in retaliation for exercising her First Amendment rights, as detailed herein, including but not limited to the acts listed in Paragraph 54. In addition or alternatively, City officials, including its final-policy making officials, had knowledge of these acts and approved and ratified the same in furtherance of its official policy of custom.

223. The official city policy or custom was the moving force behind these retaliatory acts, as evidenced (for

example and without limitation) by the participation of LPD officers in several of the acts listed in Paragraph 54 (doing so under Defendant Treviño's supervision), and the participation of city council members and other city officials in several of the acts listed in Paragraph 54.

224. This unconstitutional official city policy and/or longstanding custom, as alleged herein, was developed, ratified, and enforced, and continues to be enforced, under the color of law.

225. The official city policy and/or longstanding custom was developed, ratified, enforced, and continues to be enforced through and by officials vested with final policymaking authority either by law or delegation, including at least Defendant Treviño (by law or by lawful delegation, including under the Laredo City Charter), the Laredo City Council, and the Laredo City Manager.

226. Defendant Treviño's unconstitutional acts and omissions, as detailed herein (*see, e.g.*, ¶¶ 98-108), further establish the approval, adoption, and enforcement of the City's official policy or custom.

227. At all times relevant to the allegations herein, Defendant City of Laredo and its policymakers were or should have been aware that the official policy and/or longstanding custom as alleged was unconstitutional. Villarreal's rights to record law enforcement activities from public areas, gather and publish truthful information on matters of public concern, and engage in commentary on matters of public concern regardless of the viewpoint expressed were clearly established.

228. No local government or reasonable official with final policy-making authority would so unlawfully, willingly, and arbitrarily have developed, ratified and enforced the unconstitutional official county policy and/or longstanding custom alleged herein.

229. As a direct and proximate cause of Defendants' unconstitutional official policy and/or longstanding custom, Villarreal was deprived of her rights guaranteed by at least the First, Fourth, and Fourteenth Amendments of the Constitution of the United States, and has suffered damage to her reputation, wrongful incarceration, legal and other costs, and fear of further harassment, retaliation, and other adverse actions from City officials and employees. Defendants' acts have caused Villarreal to suffer further injuries, including financial hardship, physical and mental anguish, emotional distress, humiliation, and public embarrassment.

230. As a result, Plaintiff is entitled to actual and compensatory damages against Defendant City of Laredo under 42 U.S.C. § 1983, in an amount to be proven at trial.

231. Plaintiff is also entitled to preliminary and permanent injunctive relief against Defendant City of Laredo and its continued enforcement of the unconstitutional official county policy and/or longstanding custom detailed herein. The policy or custom of targeting Villarreal for engaging in activity protected under the First and Fourteenth Amendments is likely to continue absent injunctive relief.

232. Villarreal has and will continue to suffer considerable and irreparable harm without injunctive relief. Villarreal is entitled to be free of fear of retaliation for engaging in protected activity. There is no adequate remedy available at law sufficient to redress Villarreal's injures and prevent further harm to her and journalism.

233. Villarreal is likely to succeed on the merits of her claims set forth herein. Moreover, there is substantial public interest in ensuring that Defendants cease engaging in acts intended to harass and intimidate Villarreal and interfere with her citizen journalism efforts.

Count VII:

***Monell* Claim for Damages and Injunctive and Declaratory Relief—U.S. Const. Amend. I, IV, XIV, and 42 U.S.C. § 1983**

(Defendant Webb County)

234. Plaintiff fully incorporates by reference herein the allegations in each of the foregoing paragraphs.

235. At all times relevant to the allegations made herein, Defendant Webb County developed, ratified, enforced, and continues to enforce an official city policy and/or custom that constitutes impermissible state action intended to restrict and interfere with Villarreal's First Amendment activity, and to retaliate against Villarreal for the same.

236. Specifically, the County's unconstitutional policy was and remains a decision to intimidate, retaliate against, and punish Villarreal for (a) recording and publishing law enforcement activities occurring in public; and (b) publishing accurate information and commentary about matters of local public interest, including that critical of or otherwise unfavorable to Laredo government affairs and city officials.

237. The County's unconstitutional policy also was and remains a decision to restrict and interfere with Villarreal's citizen journalism, with the intent that (a) she stop gathering and publishing information and commentary critical of or otherwise unfavorable to WDCA, and (b) she stop encouraging and providing a forum for other citizens to do the same.

238. The County's official policy is reflected in the deliberate acts and decisions of Defendant Alaniz, who at all times relevant was an official final policymaker for Webb County with respect to criminal investigation and prosecutorial matters. These acts include Defendant Alaniz's deliberate participation in, approval of, and supervision of the unconstitutional investigation and arrest of Villarreal, as detailed herein (see, e.g, ¶¶ 98-105, 109-114). Defendant Alaniz's closed-door rebuke of Villarreal for her criticism of WDCA, as detailed in Paragraph 54, is further evidence of Defendant Alaniz's animus toward Villarreal's exercise of her First Amendment rights and a deliberate choice to single out Villarreal for arrest and detention.

239. In furtherance of the County's official policy, the Webb County Sheriff's Office (WCSO), the duly authorized law enforcement arm of Webb County, participated in the selective arrest of Villarreal and detained Villarreal against her will, under the pretext of an inapplicable and facially-unconstitutional statute, Texas Penal Code § 39.06. WCSO did so with actual or constructive knowledge that there was no probable cause to arrest and detain Villarreal. WCSO also did so with actual or constructive knowledge that Villarreal had engaged in First Amendment-protected activity, or acted with deliberate indifference to the same, in violation of Villarreal's Fourth Amendment rights.

240. This unconstitutional official Webb county policy, as alleged herein, was developed, ratified, and enforced, and continues to be enforced, under the color of law.

241. The official county policy was developed, ratified, enforced, and continues to be enforced through and by officials vested with final policymaking authority either by law or delegation, including at least Defendant Alaniz and the Webb County Sheriff.

242. Defendant Webb County's acts taken pursuant to the official county policy, as alleged herein, was impermissible state action that deprived Villarreal of her First, Fourth, and Fourteenth Amendment rights.

243. At all times relevant to the allegations herein, Defendant Webb County and its policymakers knew or should have known that the official policy as alleged

were unlawful. Villarreal's rights to record and gather information from public areas, publish truthful information on matters of public concern, and engage in commentary on matters of public concern regardless of the viewpoint expressed were clearly established, as was her right to be free from arrest and detention without probable cause and deliberately selective enforcement of the law.

244. No local government or reasonable official with final policy-making authority would so unlawfully, willingly, and arbitrarily have developed, ratified and enforced the unconstitutional official county policy and/or longstanding custom alleged herein.

245. The County's official policy were the moving force behind the deprivation of Villarreal's constitutional rights as alleged herein, as they contributed to and caused the wrongful arrest of Villarreal done in retaliation for her exercise of First Amendment rights.

246. As a direct and proximate cause of Defendants' unconstitutional official policy, Villarreal was and continues to be deprived of her rights guaranteed by at least the First, Fourth, and Fourteenth Amendments of the Constitution of the United States, and has suffered damage to her reputation, wrongful incarceration, legal and other costs, and fear of further harassment, retaliation, and other adverse actions from County officials and employees. This policy and the acts undertaken pursuant to the policy have caused Villarreal to suffer further injuries, including financial hardship, physical and mental anguish, emotional distress, humiliation, and public embarrassment.

247. As a result, Plaintiff is entitled to actual and compensatory damages against Defendant Webb County under 42 U.S.C. § 1983, in an amount to be proven at trial.

248. Plaintiff is also entitled to preliminary and permanent injunctive relief against Defendant Webb County and its continued enforcement of the unconstitutional official county policy detailed herein. The policy or custom of targeting Villarreal for engaging in activity protected under the First and Fourteenth Amendments is likely to continue absent injunctive relief.

249. Villarreal has and will continue to suffer considerable and irreparable harm without injunctive relief. Villarreal is entitled to be free of fear of retaliation for engaging in protected activity. There is no adequate remedy available at law sufficient to redress Villarreal's injuries and prevent further harm to her and journalism.

250. Villarreal is likely to succeed on the merits of her claims set forth herein. Moreover, there is substantial public interest in ensuring that Defendants cease engaging in acts intended to harass and intimidate Villarreal and interfere with her citizen journalism efforts.

Count VIII:

Declaratory Judgment

(All Defendants)

251. Plaintiff fully incorporates by reference herein the allegations in each of the foregoing paragraphs.

252. Villarreal seeks declaratory relief against the Defendants.

253. A justiciable controversy involving the continuing deprivation of Villarreal's rights under the First Amendment to the United States Constitution, to gather and publish newsworthy information and comment on matters of public concern, free of retaliation and acts of interference from the Defendants acting under color of state law and/or pursuant to an official City policy, exists between the parties.

254. A justiciable controversy involving the continuing deprivation of Villarreal's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, to be free of arbitrary and selective enforcement of the law, exists between the parties.

255. Villarreal continues to gather newsworthy information and publish the same on her "Lagordiloca" Facebook page, including recording government activity in public places. She continues to engage in commentary on matters of public concern, and to provide a forum for others to do the same on her Facebook page.

256. Villarreal has no reason to believe that Defendants will refrain from attempting to suppress or retaliate against her protected expressive activities in the future, or selectively and arbitrarily attempt to enforce the law against her. As alleged, even after a Webb County district judge held TEXAS PENAL CODE § 39.06 to be

unconstitutionally vague, Defendant Alaniz was quoted in a local publication stating that the criminal investigation would continue.

257. A declaratory judgment will serve to further resolve and clarify the dispute between the parties, thaw any speech-chilling effects of the Defendants' acts and policies, and ensure that Villarreal and other citizens may participate in citizen journalism free from fear of retaliation from Defendants and other local government officials.

VI. JURY DEMAND

Pursuant to Fed. R. Civ. P. 38 and Civ. L.R. 38-1, Villarreal demands a trial by jury on all issues so triable.

VII. PRAYER

Plaintiff requests that Defendants be cited to appear and answer the allegations herein, and that this Court grant Plaintiff the following relief:

A. Entry of judgment holding Defendants liable for their unlawful conduct;

B. Actual damages in an amount to be proved at trial;

C. Compensatory damages in such amount as may be found, or otherwise permitted by law;

D. Punitive damages against the Individual Defendants in such amount as may be found, or otherwise permitted by law, for the Individual Defendants' retaliatory and malicious intent toward Villarreal and their callous disregard for her exercise of clearly established constitutional rights;

E. Injunctive relief enjoining the Individual Defendants and their agents, servants, officers, and persons in concert with Defendants from harassing, threatening, suppressing, or interfering with Villarreal's constitutionally-protected rights to (i) record and publish law enforcement activities occurring in or viewable from public spaces, (ii) inquire about, gather, and publish accurate information on matters of public concern, (iii) express viewpoints that are critical of or unfavorable to Defendants, and (iv) facilitate commentary about matters of public concern from other citizens;

F. Injunctive relief enjoining Defendant City of Laredo from enforcing any policy or custom directed at harassing, threatening, suppressing, or interfering with Villarreal's constitutionally-protected rights to (i) record and publish law enforcement activities occurring in or viewable from public spaces, (ii) inquire about, gather, and publish accurate information on matters of public concern, (iii) express viewpoints that are critical of or unfavorable to Defendants, and (iv) facilitate commentary about matters of public concern from other citizens;

G. Injunctive relief enjoining Defendant Webb County from enforcing any policy or custom directed at

harassing, threatening, suppressing, or interfering with Villarreal's constitutionally-protected rights (i) record and publish law enforcement activities occurring in or viewable from public spaces, (ii) inquire about, gather, and publish accurate information on matters of public concern, (iii) express viewpoints that are critical of or unfavorable to Defendants, and (iv) facilitate commentary on her Facebook page from other citizens about matters of public concern.

H. For a declaratory judgment that the retaliatory and selective investigation, arrest, and detention of Villarreal violated the First Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment;

I. For a declaratory judgment that the Individual Defendants' pattern of harassment of Villarreal and interference with her recording, gathering, and publishing publicly-available information or other information on matters of public concern violated the First Amendment to the United States Constitution;

J. For a declaratory judgment that the City of Laredo's policy or custom related to harassment and intimidation of Villarreal, and interference with her ability to record, gather, and publish content regarding matters of public concern and to criticize government officials, violates the First Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment;

K. For a declaratory judgment that Webb County's policy or custom related to harassment and intimidation of Villarreal, and interference with her ability to record, gather, and publish content regarding matters of public concern and to criticize government officials, violates the First Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment;

L. For attorneys' fees, statutory fees, and costs under 42 U.S.C. § 1988;

M. For such other and further relief as the Court may deem just and proper.

Dated: May 29, 2019

Respectfully submitted,

/s/ JT Morris

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Attorneys for Plaintiff Priscilla Villarreal

Appendix E

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2019, I electronically filed the foregoing with the Court using CM/ECF, and served on the same day all counsel of record via the CM/ECF notification system.

/s/JT Morris
JT Morris