No. 23-1155

IN THE

Supreme Court of the United States

PRISCILLA VILLARREAL,
Petitioner,
v.
THE CITY OF LAREDO, TEXAS, ET AL.,
Respondents.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because protection of the freedoms of expression and association, guaranteed by the First Amendment, is essential for an open and diverse society.

[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief. AFPF filed greater than ten days in advance of the deadline to file the brief, which serves as notice to counsel.

SUMMARY OF ARGUMENT

The use of qualified immunity to shield government employees from liability for intentional and slow-moving infringement of First Amendment rights creates a moral hazard that is at odds with the Constitution and The Civil Rights Act. The First Amendment prohibits government from making laws that abridge speech and the press. Section 1983 creates a cause of action for violations of civil rights under color of state law. But these protections come to nothing where state actors may purposefully infringe First Amendment rights and then rely on prolix state law to trigger qualified immunity, claiming they did not know any better. The more obscure the state law, the less likely it is that a case has been decided prohibiting its application to a certain set of facts. The result is that clear and generally applicable protections—the First Amendment and §1983—are supplanted by idiosyncratic state law.

Qualified immunity undercuts the Constitution and the Civil Rights Act by allowing state law to shield unconstitutional action by the state officials—the exact bad behavior § 1983 was designed to combat. This is especially true where the violation was intentional and opportunities to get the law right were abundant.

This is just such a case, involving a citizen journalist who asked a government employee to confirm independently-sourced information and then published it. Six months later, having taken time to think it over, local officials arrested her under an anti-corruption statute they had not used as the basis for

prosecution in its over two-decade history.[2] But no step in this journalist's saga is unprotected. No step presents a borderline question whether the First Amendment applies. Indeed, that sequence of events is so squarely within the bounds of the First Amendment that much of it is protected by two clauses: Speech and Press.

One would be justified in thinking the legal standard for silencing a journalist and arresting her for reporting double-sourced facts would be high and that she could vindicate the violation of her civil rights. Not here. Instead, she was burdened with navigating various state law exceptions to First Amendment protection just to keep her complaint from being dismissed under qualified immunity. She succeeded in her first visit to the Fifth Circuit. But on *en banc* review, the court accepted that state law conditions on the First Amendment could be used to grant qualified immunity. Thus, obvious and clear speech and press rights were forced to give way to obscure and overbroad application of state laws addressing fraud and corruption. Doing so narrowed First Amendment protections for journalists and negated the purpose of §1983—vindication of civil rights that have been infringed under color of state law.

To the extent qualified immunity serves any purpose, this is not it.

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[2] *Villarreal v. City of Laredo, Texas*, 44 F.4th 363, 368 (5th Cir.) ("*Villarreal I*")., reh'g *en banc* granted, opinion vacated, 52 F.4th 265 (5th Cir. 2022), and superseded on reh'g *en banc*, 94 F.4th 374 (5th Cir. 2024) ("*Villarreal II*").

ARGUMENT

I. QUALIFIED IMMUNITY SHOULD NOT SHIELD CONSTITUTIONAL INFRINGEMENT IN SLOW-MOVING FIRST AMENDMENT CASES.

In cases of alleged infringement of First Amendment rights, particularly where, as here, a slow-moving chain of events unfurls over a multi-month period, qualified immunity should be applied rarely, if at all. This is because, as the panel opinion correctly stated, "[t]he crucial question . . . is whether 'a reasonable official would understand that what he is doing violates [a constitutional] right.'" *Villarreal I*, 44 F.4th at 369 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In cases implicating bedrock First Amendment activity, a legal doctrine that excuses—even incentivizes—ignorance is a poor fit.

Qualified immunity allegedly serves two purposes: to ensure fair notice for the government employee before personal liability can be imposed—consistent with the constitutional due process requirement of fair notice;[3] and to promote official action recognized under the common law as necessary to society by protecting officers from lawsuits that may discourage them from doing their jobs or accepting employment that would expose them to lawsuits.[4] The societal

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[3] "Qualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful" *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (cleaned up).

[4] *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.").

justification for promoting action was explained by Cooley's Treatise on Torts:

> It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so doing, it is the established rule, that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. This rule is founded upon grounds of public policy, in order to encourage the exposure of crime[.]

1 Thomas M. Cooley, *A Treatise on The Law of Torts or The Wrongs Which Arise Independently of Contract 326* (John Lewis ed., 3d ed. 1906) (citation omitted).

Certain types of official action have long received essentially plenary immunity. For example, "legislators and judges are absolutely immune from liability under § 1983 for their official acts because that immunity was well established at common law in 1871." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J. concurring in part and concurring in the judgment) (citing *Tenney v. Brandhove*, 341 U.S. 367, 372–76 (1951) (legislators); *Pierson v. Ray*, 386 U.S. 547, 553–55 (1967) (judges)). The availability or degree of immunity for other categories of official action has varied across time and type of activity, attempting to accommodate vigorous official action

within a reasonable standard of care. In the area of policing, the Court long ago "concluded that police officers could assert 'the defense of good faith and probable cause' against the claim for an unconstitutional arrest because that defense was available against the analogous torts of 'false arrest and imprisonment' at common law." *Id.* at 1871 (Thomas, J. concurring in part and concurring in the judgment) (citing *Pierson*, 386 U.S. at 557). Thus, the Court has recognized police "under § 1983 [have] a 'good faith and probable cause' defense coextensive with their defense to false arrest actions at common law." *Imbler v. Pachtman*, 424 U.S. 409 at 418–19 (1976). While the Court has largely abandoned this approach in favor of the *Harlow* "objective," "clearly established" test, *see Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Ziglar*, 137 S. Ct. at 1866–67 (applying the objective test in § 1983 cases), it is instructive to understand the goals qualified immunity has traditionally served.

With the near elimination of the good faith test, fair notice has become largely dispositive. But the contours of fair notice have long roots, implicating due process, and turning on the availability or ambiguity of positive law, the chronology and factual similarity of clarifying court opinions, and the amount of time the state actor has to evaluate the constitutionality of the proposed course of action.

Regarding due process and the need for clarity in settled law, there is a distinction between unclear or erroneous laws for which a government actor could not reasonably be deemed to have fair notice and acts that are so clearly unconstitutional or otherwise unlawful that a government actor should be expected

to know better. On the one hand, "imagine an officer engages in conduct that has been explicitly blessed by the Supreme Court but nonetheless is sued for it, and in the course of that litigation, the Supreme Court overrules its prior decision. Presumably imposing liability on that officer would offend principles of fair notice." Aaron L. Neilson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, n.57 (2018) (cleaned up). In that case, it would be unreasonable to hold the officer to a higher standard of knowledge than the Court itself. Notably, this standard is more lenient on government officials than the standard applied to private litigants who are granted no "good faith" exception from liability when the Court recognizes a novel application of a statute.[5]

On the other hand, when the law is clear, the government actor is bound by it and may be liable even in the face of contrary commands from a superior. For example, in a case from the early days of the Republic, the Court held a ship captain responsible for the unlawful seizure of another ship even though he relied on the President's interpretation of the underlying statutory authority. *Little v. Barreme*, 6 U.S. 170, 170 (1804). It was not enough in *Little* that the error in law could be traced directly to the President's order because that order could not effect a change in the underlying law. The captain of the ship was responsible for complying with the law regardless of the President's command. *See id.* at 179 (holding "instructions cannot change the nature of the transaction, or legalize an act which

[5] *See, e,g.*, *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 662 (2020).

without those instructions would have been a plain trespass"). This approach, refusing to shield reliance on a patently invalid law has stood the test of time. *See, e.g.*, *Illinois v. Krull*, 480 U.S. 340, 355 (1987) ("A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws. Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional.").

Whether interpreted under the original understanding of § 1983, such that immunity applies if available at common law, *see Imbler*, 424 U.S. at 421, or under the "clearly established" standard where government officials are immune unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known, *see Procunier v. Navarette*, 434 U.S. 555, 565 (1978), fair notice that speech and the press are protected is readily satisfied because claims of First Amendment infringement are among the most frequently discussed and hotly asserted constitutional rights. It is thus reasonable to expect that a public official with even the most rudimentary understanding of our constitutional system would be well aware that government attempts to punish speech and the press should be met with a jaundiced eye and—at a minimum—pause and seek guidance if the lawful course of action is unclear. As the Court held in *Harlow*, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." 457 U.S. at 815–19. The alternative to this

approach would be to promote ignorance of the constitution as a shield against liability.

Moreover, in cases like this one, in which six months elapsed between a journalist's questioning of the police officer and their finding a reason to arrest her, fair notice that law enforcement was heading down an unconstitutional path would be easy to meet. This holds particularly true where, as here, the action taken was extreme: "It should be obvious to any reasonable police officer that locking up a journalist for asking a question violates the First Amendment," *Villarreal I*, 44 F.4th at 373. Six months would be more than enough time to satisfy any lingering doubt that arresting her may be unconstitutional. But even in more subtle cases, the slow-moving nature of many First Amendment conflicts raises doubt whether qualified immunity should ever apply. If so, it should be the rarity not the rule.

This issue has relevance well beyond the policing situation and is particularly acute in settings where an unconstitutional policy can be readily changed to moot a plaintiff's case either through narrow policy modifications that elude the plaintiff's specific fact pattern or through flip-flopping policies to wriggle past plaintiffs whose standing is based on a temporary status. This type of gamesmanship is familiar, for example, on university campuses where college administrators set policies that infringe the speech rights of students and faculty despite involving a slow-moving policy-making process that is amenable to legal consultation. Justice Thomas acknowledged the issue in the denial of certiorari in *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting denial of cert.) ("But why should

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

Accordingly, assuming the continuation of the doctrine of qualified immunity, its application in First Amendment cases should be rare, and, if applied at all, should be informed by the amount of time available to the state actor to ensure the proposed course of action is constitutional.

II. THE FIRST AMENDMENT IS THE FIRST MOVER BEFORE EXCEPTIONS ARE APPLIED.

The First Amendment interests in this case are straightforward and should have been vindicated easily. Prior restraints, such as those applied here, are inherently suspect and any content-based exceptions to broad First Amendment protection must satisfy strict scrutiny.

Although the Constitution is superior to state law, here state law prevailed. The rationale for elevating state law over speech and press rights was the apparently novel idea that the "perks available to citizen journalists" arising from publication are a "benefit" that can displace constitutional exercise. *Villarreal II*, 94 F.4th at 388. But the blessings of liberty cannot be stripped away by labeling them "benefits". Nor can the established expectation that one may profit from exercising constitutional rights be deemed notice that criminal liability could result unless the exercise has been pre-blessed by the state.

This case takes the opposite approach, reading a law that sounds in fraud and self-dealing to prohibit

constitutionally protected activity unless the accused proves she received no "benefit"[6,7] from the exercise of her First Amendment rights. The Texas law, which prohibits obtaining protected information and using that information for personal gain, could be constitutional in applications that do not implicate speech. For example, prohibiting backdoor access to public employees' banking information to protect against identity theft or blackmail would likely pass constitutional muster. But here, broadly reading the statute to reach millrun speech and press activity gets the Constitution-to-state law relationship backwards.

First Amendment protection must be the default unless the government can satisfy (usually) strict scrutiny. Moreover, even with lawful restraints, due process requires criminal law to provide notice that a person of ordinary intelligence could understand.[8] Neither requirement is satisfied when law enforcement officers invoke prolix interpretations of law—or invent self-serving interpretations—that contravene black letter First Amendment law in ways

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[6] Texas Penal Code § 39.06(c) ("(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.").

[7] Tex. Penal Code § 39.06(b) ("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.").

[8] "A criminal statute is therefore invalid if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (cleaned up).

that could not be anticipated by a person of ordinary intelligence—and would chill speech and press rights.

Moreover, applying qualified immunity to encourage narrow application of the First Amendment and broad imposition of criminal liability on speech and press activity creates a moral hazard in which complexity and ambiguity creates greater leeway for law enforcement to violate civil rights.

A. Make No Law is the Baseline. Private Individuals do Not Bear the Burden of Proving They Are Not Criminals for Speaking.

Applying a criminal statute to First Amendment activity and claiming people can avoid criminal liability by simply complying, gets the law backwards. The court below asserted that Ms. Villarreal "could have followed Texas law." *Villarreal II*, 94 F.4th at 381. This contention is overly optimistic and misunderstands the relationship between a speaker and the state. It may be true that speakers could avoid criminal liability for statutory speech violations if they simply stopped speaking; but that is not how the First Amendment works. Instead, the burden falls squarely on the government to rebut the presumption that discrimination against speech due to its message is unconstitutional. *See Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 828–29 (1995).

Moreover, the notion that Ms. Villarreal "could have" followed Texas law requires a leap of faith that the minefield of presumptions at play here could be navigated without special knowledge. To comply, she would, for example, have had to recognize a legally significant difference between an "LPD Officer" and an "LPD information officer" before asking for

confirmation of basic facts[9]—assuming she was even aware of the existence of two distinct titles. She would also have had to recognize that: 1) age, name, and employment information of a deceased person is protected despite a statutory presumption in favor of broad public disclosure;[10] 2) independently-sourced information could be transmogrified into secret "official information"[11] because law enforcement *also* knows it; 3) there is such a thing as an "official news

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[9] *Villarreal II*, 94 F.4th at 382.

[10] *See generally* Tex. Gov't Code §552.001 ("(a) Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy. (b) This chapter shall be liberally construed in favor of granting a request for information.). *See also* Tex. Gov't Code § 552.108 (c) ("This section does not except from the requirements of Section 552.021 information that is basic information about an arrested person, an arrest, or a crime. A governmental body shall promptly release basic information responsive to a request made under this chapter unless the governmental body seeks to withhold the information as provided by another provision of this chapter, and regardless of whether the governmental body requests an attorney general decision under Subchapter G regarding other information subject to the request.").

[11] 94 F.4th at 382.

media;"[12] 4) public interest in her reporting could be an illicit "benefit;"[13] 5) a statutory definition could limit whether blessings may lawfully flow from the exercise of constitutional rights;[14] and 6) information about real world events could be redefined as "information about the affairs of government" at the discretion of government.[15]

Even assuming, against the backdrop of nearly-ubiquitous First Amendment protection of speech and the press, a person must self-censor to resolve a conflict between the Constitution and state law, the idea that anyone could be expected to understand and comply with eccentric applications of fraud law to attempts to confirm information is fanciful—and not required before First Amendment protection applies.

"The First Amendment does not permit laws that force speakers to . . . seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 324 (2010) (cleaned up). Application of criminal law from a chapter titled "Abuse of Office"[16] against a private speaker without any associated non-speech-based offense is so far outside the norm of constitutional expectations that it gets the law backwards.

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[12] 94 F.4th at 383.

[13] *Id*. at 384.

[14] *Id*. at 386.

[15] *Id*. at 386.

[16] Texas Penal Code Ch. 39 Abuse of Office

The baseline understanding for journalists and for law enforcement must be that the First Amendment protects journalistic endeavors such as investigation and publication.

B. Prior Restraints Are Presumed to be Unconstitutional.

The prohibition against prior restraints on publishing is neither new nor obscure. It "has been generally, if not universally, considered that it is the chief purpose of the guaranty [of liberty of the press] to prevent previous restraints upon publication." *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931). The elimination of such restraints was one of the rationales motivating broad press freedom at the founding. As James Madison explained, "This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also." *Id*. at 14 (quoting *Report on the Virginia Resolutions*, Madison's Works, vol. IV, p. 543.). *See also Commonwealth v. Blanding*, 20 Mass. 304, 313–14 (1825) ("it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such previous restraints upon publications as had been practised [sic] by other governments").

"As early as 1644, John Milton, in an 'Appeal for the Liberty of Unlicensed Printing,' assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views 'without previous censure'; and declared the impossibility of finding any man base enough to accept the office of censor and at the

same time good enough to be allowed to perform its duties." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245–46 (1936). This interpretation is as valid now as it was then. *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022).

As applied here, the Texas law is an unconstitutional prior restraint by: 1) preventing a reporter from confirming her information—thus chilling the publication of independently discovered information due to uncertainty; or 2) preventing a reporter from publishing information that has been corroborated by the government by putting the label "official information" on it even if the information was already known to the reporter. Nevertheless, on appeal, the court found no established law holding "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." *Villarreal II*, 94 F.4th at 395. Of course, as the opinion explains, it is not simply the "solicitation and receipt" of the information that makes the law applicable to Ms. Villarreal, but rather the so-called "personal benefit" of publishing it. Punishing publication places this case squarely within *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curium) ("Pentagon Papers") because the First Amendment protects against government efforts to prohibit publication.

In the *Pentagon Papers*, the government sought to prevent the New York Times and the Washington Post from publishing the contents of a classified study entitled History of U.S. Decision-Making Process on Viet Nam Policy. 403 U.S. at 713–14. The Court's

opinion was succinct. "'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" 403 U.S. at 714 (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *see Near*, 283 U.S. at 713. The "Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" 403 U.S. at 714 (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)). Accordingly, the Court held the attempt to prevent publication unconstitutional. *Id*. at 713.

Justice Black, in his concurrence, went a step further, admonishing the administration:

> Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.
>
> In seeking injunctions against these newspapers and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment.

Id. at 715.

The simplicity of the analysis, coupled with decades of precedent demonstrating the presumption against prior restraints, and the vehemence of the concurrences make clear that taking action against a publisher—even in cases of confidential government

information—is not a close call. It is, in fact, well established.

C. Publishing is a Right, Not a Benefit to be Granted or Withdrawn by the State.

All fifty states guarantee freedom of the press, writing, and/or publishing.[17] Most include a caveat that the individual may be held responsible for abuse of that right or even specific limitations for libel or obscenity.[18] But none provide for weakening the right to publish because the publisher is successful in developing an audience.[19]

The rights do not turn on whether the publisher benefits from publication. It is commonplace, for example, for publishing activity to be for-profit.[20] For-profit endeavors enjoy the same constitutional protection as publication for free.

Nor can a change of labels be used to evade the First Amendment. Attempts to do so are sadly not uncommon, but this Court has steadfastly resisted the

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[17] Steven Gow Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore & Sarah E. Agudo, *Individual Rights Under State Constitutions In 2018: What Rights Are Deeply Rooted In A Modern-Day Consensus Of The States?*, Notre Dame Law Review, Vol. 94:1 p. 73 (2018)

[18] *Id*. at 74–75.

[19] Indeed, the greater the audience interest, the greater the magnitude of listeners' rights. *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (The freedoms of speech and press "embraces the right to distribute literature, . . . and necessarily protects the right to receive it.").

[20] The New York Times, for example, is a for profit entity. *See,* New York Times Corporate Governance information, available at: https://www.nytco.com/investors/corporate-governance/

attempt. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 429 (1963) ("a State cannot foreclose the exercise of constitutional rights by mere labels."). Indeed, the Pilgrims themselves were both a for-profit enterprise and aiming to exercise what would later become First Amendment freedoms.[21] And recently, the Court rebuffed Colorado's attempt to use public accommodations law to compel speech. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

Thus, the protection of expressive works provided by the First Amendment does not turn on whether the speaker or publisher receives a commercial benefit.

Rather, in examining speech-based offerings, such as movies, the Court has separated the business aspects: "production, distribution, and exhibition . . . conducted for private profit," from the speech element of the movie itself. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). Moreover, for movies, like "books, newspapers, and magazines," being "published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Id*.

The question of whether commercial trappings can be used to excuse regulation of speech has been before this Court many times. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (collecting cases illustrating that "speech does not lose its First Amendment protection because money is spent to project it"). Time and again, the

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[21] *See generally* Peggy M. Baker, *The Plymouth Colony Patent: setting the stage*, Pilgrim Society & Pilgrim Hall Museum (2007), available at: https://pilgrimhall.org/pdf/The_Plymouth_Colony_Patent.pdf.

Court has focused on the speech element and turned aside attempts to evade the First Amendment. Thus, whether "Villarreal sought to capitalize on others' tragedies to propel her reputation and career," *Villarreal II*, 94 F.4th at 381, has no legal significance. Indeed, more traditional journalists do this every day at for-profit news outlets.

Moreover, like the other provisions of the First Amendment, it should come as no surprise and make no legal difference that Villarreal may have enjoyed a psychic benefit from exercising her First Amendment rights. Like exercising any right of conscience, the rights of speech and the press may be assumed to generate joy, satisfaction, or vindication, among other psychic benefits.

Finally, expansive receipt of information by the public is wholly consistent with the purpose of the Press Clause—to inform the people of information necessary to self-government. "The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government." 403 U.S. at 717 (Black, J. concurring). It thus has no legal significance to assert that a publisher's audience has grown as a result of a publication; and Freedom of the Press cannot be abridged on the basis that only unsuccessful reporters are protected.

D. Under the Civil Rights Act, Officials "Shall be Liable."

Section 1983 should be applied based on its text—which makes liability mandatory. To wit,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, suit in equity, or other proper proceeding for redress,

42 U.S. Code § 1983 (bold added). A plain reading of the text would lead to no qualified immunity at all.

Here, it is undisputed the officers acted under color of law. *Villarreal II*, 94 F.4th at 383 ("The judge, . . ., issued two warrants for Villarreal's arrest for misuse of official information in violation of section 39.06(c) of the Texas Penal Code.").[22] And they applied the law in response to Villarreal's reporting. *Id*. Given the vast array of cases protecting publication,[23] as well as the

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[22] In *Malley v. Briggs*, the Court rejected petitioner's argument that an officer is "shielded from damages liability because the act of applying for a warrant is *per se* objectively reasonable, provided that the officer believes that the facts alleged in his affidavit are true." 475 U.S. 335, 345 (1986). Instead, the Court's "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Id*.

[23] *See, e.g.*, *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786 (2011) (sale of "violent video games" to minors); *Bartnicki v. Vopper*, 532 U.S. 514, 517 (2001) (publication of communication illegally intercepted by third party); *Florida Star v. B.J.F.*, 491 U.S. 524,

straightforward text of the First Amendment, qualified immunity should not be applied to evade constitutional rights.

III. APPLICATION OF QUALIFIED IMMUNITY EXACERBATES THE PROBLEM OF UNCONSTITUTIONAL SPEECH LAWS.

Because qualified immunity is immunity from suit, not just a defense to liability, *Pearson*, 555 U.S. at 231, it should not be applied when "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.'" *Hope v. Pelzer*,536 U.S. 730, 740 (2002) (alteration in original). This approach can be the critical difference between vindicating First Amendment rights and a pernicious cycle in which repeated dismissal of First

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526 (1989) (printing, publishing, or broadcasting the name of the victim of a sexual offense); *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983) (imposing tax that targets the press); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 (1979) (criminally forbidding newspapers to publish, without written juvenile court approval, the name of any youth charged); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978) (imposing criminal punishment of news media, for publishing truthful information regarding confidential proceedings of Judicial Inquiry and Review Commission); *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308 (1977) (enjoining the media from publishing the name or photograph of an 11-year-old boy in connection with a juvenile proceeding that reporters had attended); *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 450 (1938) (distributing 'circulars, handbooks, advertising, or literature of any kind.').

Amendment cases results in losing potential precedential value of those cases.

The anti-precedent trap was well summarized by Judge Willett in his dissent in *Zadeh v. Robinson*:

> To rebut the officials' qualified-immunity defense and get to trial, [plaintiff] must plead facts showing that the alleged misconduct violated clearly established law. . . . Controlling authority must explicitly adopt the principle; or else there must be a robust consensus of cases of persuasive authority. Mere implication from precedent doesn't suffice. . . . But owing to a legal deus ex machina—the clearly established prong of qualified-immunity analysis—the violation eludes vindication. . . . Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.

928 F.3d 457, 474, 477, 478–80 (2019) (Willett, J., concurring in part, dissenting in part).

So too where the god in the machine is helped along by complex laws to avoid a perfect match with existing precedent, thus ensuring that future

violators may be preserved from "knowing" their actions violate First Amendment rights.

This Court should not allow expansive application of the qualified immunity doctrine to shield these state officials from accountability for clear constitutional violations in this way.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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