No. 23-1155

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

BRIEF OF THE LAW ENFORCEMENT ACTION PARTNERSHIP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

APRATIM VIDYARTHI
GIBSON, DUNN & CRUTCHER LLP
200 Park Ave.
New York, N.Y. 10166

DAVID DEBOLD
Counsel of Record
JEFF LIU
CHRISTIAN DIBBLEE
ANDREW EBRAHEM
JESSE SCHUPACK
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
DDebold@gibsondunn.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTEREST OF *AMICUS CURIAE* [1]

The Law Enforcement Action Partnership ("LEAP") is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, LEAP's speaker's bureau today numbers more than 300 criminal justice professionals advising on police-community relations, incarceration, harm reduction, drug policy, and global issues. Through speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

This case presents an important opportunity to ensure that officers who abuse their power to engage in premeditated retaliatory arrests are held accountable. That accountability is essential to maintaining the integrity of law enforcement, building trust in the police, and ultimately keeping the public safe. LEAP and its members thus have an interest in ensuring that remedies are available to victims of police misconduct and that individuals enjoy robust protections against retaliation for exercising their constitutional rights.

---

[1] Pursuant to Supreme Court Rule 37.2, *Amicus* provided timely notice to all parties of its intent to file this *amicus* brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* or its counsel made a monetary contribution to this brief's preparation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Priscilla Villarreal is a well-known citizen-journalist who has critically examined local affairs in the border city of Laredo, Texas. Like any journalist, she developed her own sources in local government and published information provided by those sources. But her journalistic activities embarrassed local prosecutors and police officers. To punish her, those officials conspired to arrest and jail her under a public-disclosure statute never before enforced in its twenty-three-year history—a statute that, as applied here, criminalized a citizen-journalist's mere request of a police officer for information. That is a blatant violation of the First Amendment. Yet a slim majority of the en banc Fifth Circuit—over seven dissenting votes—held that the local officials were entitled to qualified immunity and dismissed Villarreal's complaint at the threshold.

This Court has consistently held that *obvious* violations of bedrock constitutional guarantees are not protected by qualified immunity. And it "should have been obvious to Defendants … that they were violating Villarreal's First Amendment rights when they arrested and jailed her for asking a police officer for information." Pet. App. 77a (Ho, J., dissenting). The Fifth Circuit nonetheless granted the defendants here qualified immunity because Villarreal had failed to cite a judicial precedent identifying the First Amendment violation on "materially identical facts." *Id.* at 33a. As Petitioner explains, that holding flouts this Court's precedent and conflicts with the decisions of other federal courts of appeals.

The Fifth Circuit's imposition of an on-point-precedent requirement is particularly perplexing under

the circumstances of this case. Qualified immunity gives officers breathing room to make "split-second judgments" free from fear of liability. *Plumhoff* v. *Rickard*, 572 U.S. 765, 775 (2014). But that justification for immunity disappears when government officials act under a plainly "premeditated plan to intimidate" a plaintiff in retaliation for her First Amendment activities. *Lozman* v. *City of Riviera Beach*, 585 U.S. 87, 100 (2018). Here, Laredo officials engaged in a months-long campaign to find a way to arrest Villarreal and send her to jail—simply for asking her sources to provide information. "This was not the hot pursuit of a presumed criminal" or any similar scenario where officials were presented with split-second judgments. Pet. App. 61a (Willett, J., dissenting). Instead, officials deliberately targeted Villarreal for punishment, all for engaging in activities that are obviously protected by the First Amendment. There is no justification for granting qualified immunity in these circumstances.[2]

Finally, the implications of the Fifth Circuit's qualified immunity holding are stark. Thanks to an ever-growing list of criminal offenses, government officials have great flexibility to arrest anyone engaged in First Amendment activities. That arresting discretion is particularly dangerous to disfavored speak-

---

[2] *Amicus* agrees with Petitioner that this Court should grant review to address whether asking government officials questions and publishing the information they volunteer violates the First Amendment. Pet. i. But *Amicus* focuses on the second, equally important question presented here: whether qualified immunity is available for *obvious* First Amendment violations, regardless of whether there exists a state statute purporting to authorize the violation or a Supreme Court precedent identifying the First Amendment violation on materially identical facts.

ers—like citizen-journalists—and members of minority communities, who are especially likely to face official retaliation. Because two cases will rarely involve pretextual enforcement of similar state statutes, the Fifth Circuit's requirement of a materially identical case will routinely immunize defendants from liability—and leave victims of First Amendment retaliation without a remedy. See Pet. App. 33a (demanding that Villarreal identify a case finding a First Amendment violation where officers were enforcing "a statute that prohibits solicitation and receipt of nonpublic information from the government for personal benefit"). Depriving victims of a valuable tool to hold bad actors accountable will, in turn, decrease public trust in law enforcement, undercut police-community relationships, and harm public safety. And it will chill First Amendment activity, as individuals will think twice before exercising their rights out of fear that vindictive government officials will throw them in jail.

These dangers underscore that the judiciary must prevent government actors from using moribund statutes "as blunt cudgels to silence speech (and to punish speakers) they dislike." Pet. App. 64a (Willett, J., dissenting). This Court should grant certiorari and reverse.

ARGUMENT

I. QUALIFIED IMMUNITY IS UNAVAILABLE FOR OBVIOUS CONSTITUTIONAL VIOLATIONS.

The Fifth Circuit held that Villarreal could defeat qualified immunity only by citing a case that has found a First Amendment violation "on materially identical facts"—meaning one that has held it unconstitutional "to arrest a person … upon probable cause for violating a statute that prohibits solicitation and

receipt of nonpublic information from the government for personal benefit." Pet. App. 33a. The Fifth Circuit acknowledged this Court's cases holding that qualified immunity does not apply to "obvious" constitutional violations, but brushed them aside as offering only a "narrow … exception" to the materially-identical-facts rule for "Eighth Amendment cases" involving "deliberate indifference to unconstitutional prison conditions." *Ibid.* (distinguishing *Hope* v. *Pelzer*, 536 U.S. 730 (2002), and *Taylor* v. *Riojas*, 141 S. Ct. 52 (2020) (per curiam)).

The Fifth Circuit's qualified immunity holding directly flouts this Court's precedents, creates an open conflict in the courts of appeals, and relegates the First Amendment to second-class status. And if left intact, the Fifth Circuit's holding would substantially diminish the constitutional protections properly afforded journalists and other concerned citizens.

1. State actors are entitled to qualified immunity if the allegedly violated right was not "'clearly established' at the time of the [violation]." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 735 (2011). Qualified immunity, however, does not lie if the law gives the defendants "fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope*, 536 U.S. at 741. Although qualified immunity insulates officials from liability for reasonable mistakes, it does not protect officials who commit "obvious" constitutional violations. *Ibid.* And constitutional violations can be obvious without any "case directly on point." *al-Kidd*, 563 U.S. at 741.

This Court settled that issue almost three decades ago in *United States* v. *Lanier*, 520 U.S. 259 (1997). There, a state judge sexually assaulted five women, some of whose cases were before him. *Id.* at 261-262.

The judge was convicted under 18 U.S.C. § 242 for violating the women's constitutional rights, but "[t]he Sixth Circuit reversed his convictions on the ground that the constitutional right in issue had not previously been identified by [the Supreme Court] in a case with fundamentally similar facts." *Id.* at 261.

This Court reversed. The Court held that "this standard of notice" was unwarranted, and that the proper standard under § 242 should be the same as "the 'clearly established [law]' immunity standard" for § 1983 liability—a standard that can be met without any "case with fundamentally similar facts." 520 U.S. at 261, 270-271. The Court underscored that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *Id*. at 271.

The Court applied the *Lanier* standard in a § 1983 case in *Hope*. There, prison guards handcuffed an inmate shirtless to a hitching post in the sweltering Alabama sun for eight hours. 536 U.S. at 733-735. The guards did not provide bathroom breaks and offered water only once or twice. *Ibid*. The Eleventh Circuit granted the guards qualified immunity because the inmate could not adduce "earlier cases with 'materially similar' facts." *Id.* at 733.

But this Court reversed. The Court reasoned that the "Eighth Amendment violation is obvious," and the "cruelty inherent in this practice should have provided respondents with some notice" of the constitutional violation. 536 U.S. at 738, 745. In so holding, the *Hope* Court explained that *Lanier* "makes clear that officials can still be on notice that their conduct

violates established law even in novel factual circumstances." *Id.* at 741. Neither "fundamentally similar" nor "materially similar" facts are "necessary." *Ibid.*

Most recently, in *Taylor*, 141 S. Ct. at 53, the Court confronted a case involving a prison inmate who had been confined to an unsanitary cell with fecal matter, no place to sleep, no toilets, and no insulation for six days. The Fifth Circuit held that the defendant prison officials were entitled to qualified immunity because no case had "held that a time period so short [six days] violated the Constitution." *Taylor* v. *Stevens*, 946 F.3d 211, 222 (5th Cir. 2019). This Court summarily reversed. Citing no on-point precedent, the Court reasoned that "[c]onfronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution." 141 S. Ct. at 54.

This Court has applied the same standard in the First Amendment context. See *Sause* v. *Bauer*, 138 S. Ct. 2561, 2562 (2018) (reversing grant of qualified immunity on First Amendment claim in absence of comparable case because "[t]here can be no doubt that the First Amendment protects the right to pray"). And before the decision below, the courts of appeals had uniformly done the same.

In *Bennett* v. *Hendrix*, for example, plaintiffs alleged that defendant police officers carried out a campaign of police harassment and retaliation after plaintiffs supported a county referendum opposed by the sheriff. 423 F.3d 1247, 1248 (11th Cir. 2005), *cert denied*, 549 U.S. 809 (2006). Denying qualified immunity, the Eleventh Circuit noted that the principle that "state officials may not retaliate against private citizens because of the exercise of their First Amendment rights" provided "obvious clarity" and adequately

served as fair warning for the officers. *Id*. at 1255-1256.

Similarly, in *Irizarry* v. *Yehia*, the Tenth Circuit held that a police officer violated a clearly established First Amendment right by driving his car at a person for "filming police conduct in public." 38 F.4th 1282, 1297 (10th Cir. 2022). The court reasoned that it is "*obvious* to a reasonable officer" that "driving a police car at [the plaintiff] in response to that filming would infringe First Amendment protected activity and chill its exercise." *Ibid.* (emphasis added); see also Pet. App. 77a-80a (Ho, J., dissenting) (collecting cases and noting that "nine circuits have indicated that the standards articulated in *Hope* apply specifically in the First Amendment context").

At bottom, qualified immunity is not a shield from liability for conduct so patently unconstitutional that no court has yet had an opportunity to address it. *Lanier*, 520 U.S. at 271 ("The easiest cases don't even arise. There has never been ... a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages … liability.").

2. The Fifth Circuit's qualified immunity holding disregards these precedents and makes no sense on its own terms.

The court below began by reciting the purported principle that "existing precedent" must "squarely gover[n] the specific facts at issue." Pet. App. 32a (quoting *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam)). The Fifth Circuit thus inferred a "requirement that 'clearly established law' be founded *on materially identical facts*." *Id.* at 33a (emphasis added). And "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." *Ibid.*

The Fifth Circuit acknowledged this Court's decisions in *Hope* and *Taylor*, but held that those decisions established only a "decidedly narrow, obviousness exception" for "Eighth Amendment cases … for deliberate indifference to unconstitutional prison conditions." Pet. App. 33a. "[I]n this context"—*i.e.*, cases involving "First Amendment free exercise rights"—the Fifth Circuit asserted that *Hope* is an "inappropriate templat[e]," and the plaintiff *must* "offer … similar cases to prove that an officer should have been on notice that his conduct violated the Constitution." *Id.* at 34a.

That rationale revives the very rule that *Hope* and its progeny laid to rest. By requiring Villarreal to show a case with "materially identical facts," the Fifth Circuit repeated the exact same error *Hope* condemned: "requir[ing] that the facts of previous cases be ' "materially similar" to [the plaintiff's] situation.' " 536 U.S. at 739. And "[n]othing in *Hope* or *Taylor* indicates that those decisions apply only to prison conditions." Pet. App. 77a (Ho, J., dissenting).[3]

The Fifth Circuit's rationale is also unsupportable as a matter of first principles and common sense. As Judge Ho persuasively explained, limiting the *Hope*

---

[3] The Fifth Circuit misread this Court's decision in *Kisela* to require "[p]recedent involving similar facts," when *Kisela* instead reinforces the point that such a showing is necessary only "*outside* an obvious case." 138 S. Ct. at 1153 (emphasis added) (cleaned up).

standard to the Eighth Amendment context "would treat the First Amendment as a second-class right." Pet. App. 77a. And "[n]othing in § 1983 suggests that courts should favor the Eighth Amendment rights of convicted criminals over the First Amendment rights of law-abiding citizens." *Ibid.* Unsurprisingly, therefore, the Fifth Circuit's holding conflicts with every other court of appeals to consider the issue. See *supra* 7-8; see Pet. 28-32; Pet. App. 77a (Ho, J., dissenting) (explaining that court's ruling conflicts with holdings of "nine circuits").

For the reasons Petitioner and the dissenting opinions below explain, that error was dispositive in this case because Laredo officials blatantly violated Villarreal's First Amendment rights. Pet. 21-24; Pet. App. 43a-46a (Graves, J., dissenting) (right to newsgathering); *id.* at 57a-59a (Higginson, J., dissenting) (focusing on First Amendment retaliation claim); *id.* at 75a-77a (Ho, J., dissenting). The analysis does not change merely because a state statute purports to authorize the unconstitutional conduct. Pet. 28-32 (collecting cases in First Amendment context); Pet. App. 83a (Ho, J., dissenting) (collecting "[a] mountain of Supreme Court and circuit precedent" for this principle); *e.g.*, *Myers* v. *Anderson*, 238 U.S. 368, 382 (1915) ("the new statute did not … interpose a shield to prevent the operation upon [the state officers] of the provisions of the Constitution of the United States").

Ultimately, "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." Pet. App. 64a (Willett, J., dissenting). The Fifth Cir-

cuit's error in expanding the scope of qualified immunity alone is reason to grant certiorari or summarily reverse.

II. THE POLICY CONSIDERATIONS USED TO JUSTIFY QUALIFIED IMMUNITY DO NOT APPLY HERE.

The Fifth Circuit's grant of qualified immunity—and its requirement of a "materially identical" case—was especially improper here, where officials undertook a deliberate, months-long campaign to violate the First Amendment rights of a journalist.

The policy behind qualified immunity is that officers who must make judgments "in circumstances that are tense, uncertain, and rapidly evolving" should not be subject to liability for reasonable mistakes. *Kingsley* v. *Hendrickson*, 576 U.S. 389, 399 (2015) (cleaned up). So qualified immunity offers "officials breathing room" to make "split-second judgments." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011) ("breathing room"); *Plumhoff* v. *Rickard*, 572 U.S. 765, 775 (2014) ("split-second judgments"). Where officers must make on-the-spot judgments "without clear guidance from legal rulings," they are immune from damages under § 1983. *Pasco ex rel. Pasco* v. *Knoblauch*, 566 F.3d 572, 582 (5th Cir. 2009); see also, *e.g.*, *Stanton* v. *Sims*, 571 U.S. 3, 10 (2013) (per curiam) (granting qualified immunity to an officer who "made his split-second decision" when the law was not clearly established).

But that rationale evaporates when a defendant undertakes a "premeditated plan to intimidate [the plaintiff] in retaliation for his criticisms of city officials." *Lozman* v. *City of Riviera Beach*, 585 U.S. 87, 100 (2018). When officers "make the deliberate and

considered decision to trample on a citizen's constitutional rights, they deserve to be held accountable." *Wearry* v. *Foster*, 52 F.4th 258, 259 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc). Qualified immunity is meant to protect only officials who make "mistaken judgments," *Messerschmidt* v. *Millender*, 565 U.S. 535, 553 (2012), not officials "who knowingly violate the law," *City of Tahlequah* v. *Bond*, 595 U.S. 9, 12 (2021).

Courts therefore routinely deny qualified immunity when "no 'split-second' decisions [were] made." *Reedy* v. *Evanson*, 615 F.3d 197, 224 n.37 (3d Cir. 2010); *e.g.*, *Intervarsity Christian Fellowship/USA* v. *Univ. of Iowa*, 5 F.4th 855, 867 (8th Cir. 2021) (refusing to extend qualified immunity because university officers had time to make calculated choices about infringing on the First Amendment rights of religious student organizations). As Justice Thomas recently asked, "why should … officers, who [had] 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?" *Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2421-2422 (2021) (Thomas, J., statement respecting the denial of certiorari). There is no logic to that "one-size-fits-all" approach. *Ibid.*

Here, Villarreal's arrest was a result of deliberate planning, "cooked up with legal advice from the Webb County District Attorney's Office." Pet. App. 62a (Willett, J., dissenting). For months, the Laredo officials looked for an excuse to arrest Villarreal because of her journalism criticizing local government affairs. And they found one: arresting Villarreal under a Texas statute that had never been used once in the 23 years of its existence. Why? Because she asked a Laredo

officer to verify one of her stories, and the officer provided her with information. The underlying retaliatory purpose was clear, as Villarreal was arrested for routine newsgathering months after she had published the articles at issue. This was not an arrest that required "quick decisions in circumstances that are tense, uncertain, and rapidly evolving." *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1725 (2019) (internal quotation marks omitted).

Given the ample time Respondents had to reflect on whether to engage in conduct that obviously violated the First Amendment, qualified immunity is unwarranted. This case is an ideal vehicle for the Court to reconsider its one-size-fits-all approach to qualified immunity.

III. THE FIFTH CIRCUIT'S RULE WOULD NEGATIVELY AFFECT LAW ENFORCEMENT AND THE PUBLIC.

The dramatic expansion of criminal codes across the country has made it easier than ever for a law enforcement officer who wishes to punish a person for engaging in protected First Amendment activity to find probable cause for *some* criminal violation on which to base an arrest. Civil lawsuits against officers who are engaged in premeditated, retaliatory arrests serve as a critical check on this kind of misconduct.

Unless this Court intervenes, however, the Fifth Circuit's decision will insulate officers from accountability in many cases of deliberate, premeditated retaliation. Allowing that shield to stand will in turn undermine public trust in law enforcement, making it harder for the vast majority of honest officers to do their job and keep their communities safe. It will also chill First Amendment-protected speech and activity,

especially among journalists and those who hold views disfavored by government actors. These dangers underscore why the decision below cannot stand.

A. Barring Civil Liability Will Deprive The Public Of A Key Deterrent Against The Growing Threat Of Retaliatory Arrests.

Retaliatory arrests have become an increasingly common occurrence. See *Gonzalez* v. *Trevino*, 60 F.4th 906, 907 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc) (the risk of retaliatory arrests "has never been more prevalent than today"); Amanda D'Souza et al., *Federal Investigations of Police Misconduct: A Multi-City Comparison*, 71 Crime, L., & Soc. Change 461, 474 (2019) ("[a] troublesome finding in all [federal investigations over the past two decades] was officers' retaliatory actions against citizens"). This trend is a byproduct of the ever-growing size of modern criminal codes. See GianCarlo Canaparo et al., Heritage Found., *Count the Code: Quantifying Federalization of Criminal Statutes* 3 (2022), bit.ly/3Lcpve2 (showing that the number of statutory provisions creating a federal crime increased by 36% between 1994 and 2019); James R. Copland & Rafael A. Mangual, Manhattan Inst., *Overcriminalizing America* 4 (2018), bit.ly/41CLNfT ("common problems in state criminal law" include "[t]oo many crimes on the books"); see generally @CrimeADay, Twitter.

An officer who may be inclined to punish a disfavored speaker—such as a journalist, as here—can therefore readily find a minor offense they committed and use that to justify an arrest. See *Lozman* v. *City of Riviera Beach*, 585 U.S. 87, 99 (2018) ("[T]here is a risk that some police officers may exploit the arrest

power as a means of suppressing speech."). For instance, this Court recently observed that jaywalking is "endemic but rarely results in arrest." *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1727 (2019). But an officer seeking to punish, for example, "an individual who has been vocally complaining about police conduct" can exercise his discretion and arrest that person if they jaywalk. *Ibid.*

Broad arresting powers in the wrong hands can be used to disproportionately burden disfavored groups. Public officials acting in bad faith can use their law-enforcement discretion to arrest a journalist because "her newsgathering and reporting activities annoyed them," Pet. App. 47a (Higginson, J., dissenting), or a citizen who merely "ask[s] for a person's name," *id.* at 89a (Ho, J., dissenting) —even though "informed public opinion is the most potent of all restraints upon misgovernment," *Grosjean* v. *Am. Press Co.*, 297 U.S. 233, 250 (1936). See also Pet. App. 46a (Graves, J., dissenting) ("a democracy functions properly only when the citizenry is informed"). As Petitioner highlights, these dangers are far from hypothetical—and Priscilla Villarreal's experience is hardly an outlier. See Pet. 33-34 (collecting real-world examples). And the ill effects of retaliatory arrests are especially likely to fall on individuals in minority communities. See Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 Am. Univ. L. Rev. 1061, 1065 (2021) (observing that overcriminalization "provides increased choices to prosecutors," which "can result in disparities, especially to poor and minority members of society").

Civil lawsuits are a vital check against police officers engaging in premeditated retaliatory arrests. Indeed, this Court has repeatedly recognized that civil

suits help "to hold public officials accountable when they exercise power irresponsibly." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009); *accord Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982) (acknowledging "the importance of a damages remedy to protect the rights of citizens"). This element of accountability ensures that the "government will respond to the will of the people." *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 301 (1964) (Goldberg, J., concurring in the result); cf. *Harris* v. *Pittman*, 927 F.3d 266, 282-283 (4th Cir. 2019) (Wilkinson, J., dissenting) ("Police officers do overreach. And when they do, the law must hold them to account.").

The Fifth Circuit's rule would close the courthouse doors on many deserving plaintiffs who are deliberately punished for exercising their First Amendment rights by officers who—despite having probable cause for an arrest—clearly acted on retaliatory animus. By requiring that the plaintiff show even a prior case violating First Amendment rights through enforcement of a similar *state law*, Pet. App. 33a, the Fifth Circuit effectively makes qualified immunity "unqualified impunity," *id.* at 62a (Willett, J., dissenting). Given the variety of state criminal codes, rarely will different plaintiffs be subject to retaliatory enforcement under similar laws.

That result will only further contribute "to the deep deficit in police accountability throughout our country." Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 312 n.8, 313 (2020). And the lack of accountability would harm police departments, too: Exposure to civil liability provides incentives to improve police performance and reduce constitutional violations; allows departments to gather information about misconduct and illegal uses

of force; and helps gather data that fills gaps in internal reporting systems, such as unearthing more conclusive evidence in excessive-force lawsuits. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841, 845-846 (2012).

Other consequences for rogue officers—such as internal discipline—are inadequate alone to stamp out bad-faith, unconstitutional behavior. See Schwartz, 33 Cardozo L. Rev. at 862-874; *Crouse* v. *Town of Moncks Corner*, 848 F.3d 576, 589 (4th Cir. 2017) (Motz, J., concurring in the judgment) ("Serious allegations of misconduct sometimes go unanswered, and officers who abuse their power sometimes go undisciplined."). Allowing the Fifth Circuit's ruling to stand would deprive many individuals of a crucial way to hold accountable officers who retaliate against them for engaging in constitutionally protected behavior.

B. The Fifth Circuit's Decision Will Undermine Trust In The Police And Interfere With Public Safety.

Allowing officers who carry out deliberate, premeditated retaliatory arrests to avoid liability will diminish the public's trust in and cooperation with good-faith law enforcement efforts. Trust in the police has declined over the past two decades, reaching its lowest level in recent years, especially in minority communities. See Emily Washburn, *America Less Confident In Police Than Ever Before: A Look At The Numbers*, Forbes (Feb. 3, 2023), bit.ly/3UJci1j. But police officers are supposed to "occupy positions of great public trust and high public visibility." *Gilbert* v. *Homar*, 520 U.S. 924, 932 (1997). If those who violate that trust are not held responsible, that will only exacerbate existing tensions between law-abiding police officers and their communities. Rising tensions, in

turn, will undermine law enforcement's ability to maintain public safety. This case presents that concern in sharp relief, because Respondents ginned up prosecution of a private journalist who simply asked for governmental information while taking no action against the officer who supposedly violated the law by giving that information to her.

"Effective police work, including the detection and apprehension of criminals, requires that the police have the trust of [their] community" and that the public believes that police departments "will use [their] powers responsibly and adequately discipline officers who do not." *Reynolds* v. *City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002) (Posner, J.); *Crouse*, 848 F.3d at 589 (Motz, J., concurring in the judgment). Members of the public need to believe in the good faith of officers so they feel comfortable calling on law enforcement to help in emergencies and aiding police investigations. See *Duncan* v. *Becerra*, 970 F.3d 1133, 1161 (9th Cir. 2020) (noting that "some people, especially in communities of color, do not trust law enforcement and are less likely ... to call 911 even during emergencies"). And to effectively do their job, police officers need to feel trusted by the people they serve. See *Hernandez* v. *City of Phoenix*, 43 F.4th 966, 981 (9th Cir. 2022) ("Police departments also have a strong interest in maintaining a relationship of trust and confidence with the communities they serve"); *Harris*, 927 F.3d at 286-287 (Wilkinson, J., dissenting).

Those police-community relations fray, however—and the public's trust is diminished—when officers engage in misconduct without facing any consequences. Even the bad acts of a small number of officers will hinder community trust in the police, the vast majority of whom carry out their jobs with dignity and

honor. U.S. Dep't of Just., *Building Trust Between the Police and the Citizens They Serve* 17 (2009), bit.ly/3LwqCGS. By shielding from liability officers who "exploit the arrest power as a means of suppressing [First Amendment conduct]," *Lozman*, 585 U.S. at 99, the Fifth Circuit's rule will further undermine trust in the police and officers' ability to fulfill their duties to the public.

This loss of trust will have major downstream effects. If people do not feel comfortable calling on the police in a crisis, that will threaten public safety. Andrew Goldsmith, *Police Reform and the Problem of Trust*, 9 Theoretical Criminology 443, 443 (2005) ("Without public trust in police, 'policing by consent' is difficult or impossible and public safety suffers."). And if community members are less likely to cooperate in police investigations, police officers will find it harder to conduct their duties in the future. See, *e.g.*, David S. Kirk et al., *The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety?*, 641 Annals of Am. Acad. of Pol. & Soc. Sci. 79, 79 (2012) (lawless actions by officers "undermine[] individuals' willingness to cooperate with the police and engage in the collective actions necessary to socially control crime"). These costs are likely to be significant: A lack of trust in the police is correlated with an increase in gun violence, which in turn fuels a cycle of over-enforcement of minor misdemeanors, further eroding trust in the police and fueling violence. See *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence*, Giffords L. Ctr. to Prevent Gun Violence (Sept. 9, 2021), bit.ly/4bFbD80. A qualified immunity rule that promotes accountability for the minority of

bad-faith actors in law enforcement, by contrast, promotes public confidence in the integrity of the criminal justice system.

C. Failing To Prohibit Premeditated Retaliatory Arrests Will Chill First Amendment-Protected Activity.

The Fifth Circuit's holding is likely to have a chilling effect on activity protected by the First Amendment. Individuals may choose to abstain from conducting newsgathering activities—or speaking, petitioning the government, or engaging in religious exercise—if they fear that law enforcement may punish them with impunity for exercising their constitutional rights.

When the government takes adverse action based on an individual's First Amendment activity, their "exercise of [protected] freedoms" is "in effect ... penalized and inhibited." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). And "[t]o state that arresting someone in retaliation for their exercise of free speech rights is sufficient to chill speech is an understatement." *Lacey* v. *Maricopa Cnty.*, 693 F.3d 896, 917 (9th Cir. 2012) (en banc) (cleaned up) (citations omitted); see also Pet. App. 100a (Ho, J., dissenting) ("[T]he American Constitution also guarantees freedom *after* the speech.").

The free exchange of ideas will also be hampered unless individuals know they can exercise their First Amendment rights free from government penalty—and that if they are punished, they will have legal recourse against it. Open and active discussion of matters of public import is "a fundamental principle of our constitutional system," *Stromberg* v. *California*, 283

U.S. 359, 369 (1931), but it cannot flourish if government actors can stomp out disfavored voices, see *Matal* v. *Tam*, 582 U.S. 218, 253-254 (2017) (Kennedy, J., concurring in part and concurring in the judgment) ("A law that ... can be turned against minority and dissenting views" works "to the detriment of all.").

It therefore "falls on the judiciary" to "make certain that law enforcement officials exercise their significant coercive powers to combat crime—not to police political discourse." *Gonzalez*, 60 F.4th at 907-908 (Ho, J., dissenting from denial of rehearing en banc). The First Amendment demands nothing less.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

APRATIM VIDYARTHI
GIBSON, DUNN & CRUTCHER LLP
200 Park Ave.
New York, N.Y. 10166

DAVID DEBOLD
Counsel of Record
JEFF LIU
CHRISTIAN DIBBLEE
ANDREW EBRAHEM
JESSE SCHUPACK
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
DDebold@gibsondunn.com

Counsel for Amicus Curiae

May 23, 2024