No. 23-1155

In the Supreme Court of the United States

PRISCILLA VILLARREAL,
Petitioner,
v.
ISIDRO R. ALANIZ, ET AL.

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

BRIEF OF PROJECT FOR PRIVACY AND SURVEILLANCE ACCOUNTABILITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTION, SUMMARY AND INTEREST OF *AMICUS CURIAE*[1]

This Court has been clear that the First Amendment includes the right not only to publish, but also to seek out information and engage in newsgathering. And the most basic means for journalists and citizens to seek out information about government activities is to ask government officials questions. But when Priscilla Villarreal asked a police officer a question and published his answer, she was arrested.

That arrest was a clear violation of the First Amendment. And it was also a violation of Ms. Villarreal's Fourth Amendment rights. This Court has been clear that the exercise of constitutional rights cannot be the motivation for prosecution. Nor can it serve as the basis for probable cause for an arrest, as the circuit courts have repeatedly recognized. The Fifth Circuit granted qualified immunity on the theory that the officers reasonably believed they had probable cause to arrest Ms. Villarreal because she sought and obtained non-public information from a government official, in violation of Texas law. Pet. 11a. But that was error, because any reasonable officer would have known that arresting Ms. Villarreal for the mere act of routine newsgathering was unconstitutional. Only this Court can reverse that error, which will have serious adverse

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members and its counsel, made any monetary contribution toward the preparation or submission of this brief. All parties received notice of *amicus*'s intent to file more than ten days before this filing.

consequences throughout the Fifth Circuit and in any other jurisdictions that follow that Circuit's analysis.

Protection of constitutional rights—especially Fourth Amendment rights—is a key mission of *amicus curiae* Project for Privacy and Surveillance Accountability, Inc. (PPSA), a nonprofit, nonpartisan organization dedicated to protecting privacy rights and guarding against an expansive surveillance state. PPSA urges this Court to grant certiorari and make clear that the exercise of constitutional rights, including the right to newsgathering, cannot serve as probable cause for an arrest.

STATEMENT

Priscilla Villarreal is a citizen-journalist in Laredo, Texas known for her Facebook reporting about local crime and misconduct by police and prosecutors. Pet. 3a. She published stories about a public suicide and a fatal car accident, based on information that a Laredo Police Department officer confirmed to her. Pet. 4a.

Laredo officers then arrested Priscilla, alleging she had violated Texas Penal Code Section 39.06(c), a Texas statute that has never been enforced by local law enforcement in the 23 years it has been on the books. Pet. 7a. The statute makes it a felony to solicit or receive nonpublic information from a public servant with the intent to benefit from it. Texas Penal Code § 39.06(c).

Villarreal sued Laredo police officers and other government officials under § 1983 for violating her First Amendment rights. Pet. 8a. After the district court dismissed her case, a panel of the Fifth Circuit reversed in part and held that the defendants were not entitled to qualified immunity because the arrest was

"obviously" unconstitutional. Pet. 8a-9a. The en banc majority disagreed because, "[a]t the time of Villarreal's arrest, no final decision of a state court had held section 39.06(c) unconstitutional." Pet. 23a.

REASONS FOR GRANTING THE PETITION

I. Newsgathering Is Fundamental to the Freedom of the Press.

Freedom of the press inherently includes the right to newsgathering, as this Court has long recognized. After all, "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg* v. *Hayes*, 408 U.S. 665, 681 (1972). Newsgathering thus "is not without its First Amendment protections," and "reporters remain free to seek news from any source by means within the law." *Id.* at 681-682, 707. And there is no more basic element of newsgathering than the right to ask questions.

1. The right to newsgathering is particularly important when citizens seek information regarding the activities of government. After all, as this Court has explained, "many governmental processes operate best under public scrutiny." *Press-Enter. Co.* v. *Superior Court,* 478 U.S. 1, 8 (1986). And, as this Court and many others have recognized, "[e]nsuring the public's right to gather information about their officials" thus "not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally." *Glik* v. *Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2011) (citing *Gentile* v. *State Bar*, 501 U.S. 1030, 1034-1035 (1991); *Press-Enter. Co.* 478 U.S. at 8).

To be sure, the right to newsgathering does not give the press a special right of access to confidential

government information, and the government has no duty to make information available to journalists that it does not make available to the public. But a journalist is generally "free to seek out sources of information not available to members of the general public," and "the government cannot restrain the publication of news emanating from such sources." *Pell* v. *Procunier*, 417 U.S. 817, 834 (1974) (citations omitted). The government may choose to keep some information confidential. But simply asking for such information is First Amendment-protected speech, not a crime.

In other words, the Laredo police were not required to answer Villarreal's questions. But they could not punish her for her press activity of simply asking questions about any information it had not yet made public, nor for publishing the answers they voluntarily gave her, without running afoul of the First Amendment.

2. Moreover, as one scholar explained, "Just as the right to receive information is an 'inherent corollary' to the freedom of speech, the right to gather information is a necessary corollary to the freedom of the press."[2] And "[p]rotecting newsgathering activities that are directly linked to expression (publication)" thus "respects the original meaning and textual limitations of the First Amendment, while also fulfilling

[2] Mallory B. Rechtenbach, *More Than Mere "Constitutional Window Dressing": Why the Press Clause Should Protect A Limited Right to Gather Information*, 98 Neb. L. Rev. 188, 210 (2019) (quoting *Bd. of Educ.* v. *Pico*, 457 U.S. 853, 867 (1982) (plurality opinion)).

the underlying goals of facilitating debate and informing the public."[3]

That First Amendment protection is vital. As the First Circuit has stated, "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik*, 655 F.3d at 82 (quoting *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966)). And the Fifth Circuit itself has recognized that "[t]he first amendment's broad shield for freedom of speech and of the press is not limited to the right to talk and to print. The value of these rights would be circumscribed were those who wish to disseminate information denied access to it, for freedom to speak is of little value if there is nothing to say." *In re Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982).

Yet in this case, the Fifth Circuit shielded officers from liability for infringing Ms. Villarreal's right to seek such information because her conduct fell within Texas Penal Code § 39.06(c), and "no final decision of a state court had held the law unconstitutional at the time of the arrest." Pet. 22a. But because that law restricts the most routine newsgathering activity—simply asking government officials a question about any information that has not yet been made public—that law is obviously unconstitutional. This Court should grant certiorari and make clear that citizens cannot be punished for exercising their right to gather news and ask questions of public officials.

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[3] *Id.* at 212.

II. Protected Speech Cannot Be Criminalized, and Thus Does Not Provide Probable Cause for an Arrest for the Crime of Engaging in Such Speech.

The Fifth Circuit's en banc decision is incorrect and warrants this Court's attention for a second and equally important reason: Ms. Villarreal was arrested for engaging in First Amendment-protected speech, and the law is clear that such speech cannot be criminalized and thus does not provide the probable cause for an arrest required by the Fourth Amendment. As this Court has held, "the 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, 462-463 (1987). And, just as "the decision to prosecute may not be deliberately based upon *** the exercise of protected statutory and constitutional rights," neither can the decision to *arrest* be based upon the exercise of those rights. *See Wayte* v. *United States*, 470 U.S. 598, 608 (1985) (internal quotation marks omitted).

Several circuit courts have already recognized this reality and held that protected speech cannot be criminalized and thus does not provide probable cause for an arrest for the crime of engaging in such speech. For example, in *Gainor* v. *Rogers*, a plaintiff alleged "that he was merely walking around the country with his cross and preaching the Gospel of Jesus" on Good Friday when police arrested him. 973 F.2d 1379, 1386 (8th Cir. 1992) (internal quotation marks and citation omitted). The Eighth Circuit correctly held that such protected speech "does not give rise to reasonable suspicion of criminal conduct," and that "a reasonable

officer, in making the arrest, would or should have known that he was violating clearly established law." *Id.* at 1386-1387. And it rightly recognized that it is "fundamental" that "a lawful arrest may not ensue where the arrestee is merely exercising his First Amendment rights." *Id.* at 1387 (citing *Houston* v. *Hill*, 482 U.S. 451 (1987); *Hess* v. *Indiana*, 414 U.S. 105 (1973); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Cohen* v. *California,* 403 U.S. 15 (1971); *Street* v. *New York,* 394 U.S. 576 (1969)).

Similarly, the Seventh Circuit denied qualified immunity to an officer who arrested an individual with whom he had a verbal dispute after the individual questioned whether the officer had shot his dog. *Bailey* v. *Andrews*, 811 F.2d 366, 371 (7th Cir. 1987). As the court recognized, that question and the subsequent dispute with the officer were speech protected by the First Amendment, and therefore, if the officer "arrested Bailey in response to Bailey's speech, the arrest would violate Bailey's first amendment right to speak freely and petition an agent of the government for redress of grievances." *Id.* at 372.

Likewise, the Sixth Circuit has repeatedly recognized that "[a]n officer may not base his probable-cause determination on speech protected by the First Amendment." *Swiecicki* v. *Delgado*, 463 F.3d 489, 498 (6th Cir. 2006) (abrogated on other grounds by *Wallace* v. *Kato*, 549 U.S. 384 (2007)). The officer must have reason, at the time of the arrest, to believe that the arrestee "had committed or was committing an offense"—and protected speech cannot be that offense. *Id.* The Sixth Circuit has thus denied qualified immunity to officers whose arrests were made on the basis of protected speech, including cursing at a group of

pro-life demonstrators, *Sandul* v. *Larion,* 119 F.3d 1250, 1255-1256 (6th Cir. 1997), and heckling at a baseball game, *Swiecicki*, 463 F.3d at 502. See also *Leonard* v. *Robinson*, 477 F.3d 347, 358 (6th Cir. 2007) (discussed at Pet. 29).

The Second Circuit also denied qualified immunity to officers who arrested protesters. The court explained that, if the "motive for the arrest was message suppression rather than content-neutral law enforcement, no reasonable officer could think his actions did not violate the First Amendment[.]" *Zalaski* v. *City of Hartford*, 462 F. App'x 13, 15 (2d Cir. 2011). Similarly, the Third Circuit recognized that protected speech "may not be relied upon to support a probable cause finding." *Muraveva* v. *Toffoli*, 709 F. App'x 131, 133 n. 4 (3d Cir. 2017).

Finally, the Ninth Circuit has also recognized that officers cannot arrest individuals to deter protected speech. In *Duran* v. *City of Douglas*, an officer arrested a man who had spewed epithets at him. 904 F.2d 1372, 1375-1376 (9th Cir. 1990). Relying on this Court's holding in *Hill*, the court stated that, "while police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment." *Id.* at 1378. "As such, it fell squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech—such as stopping or hassling the speaker—is categorically prohibited by the Constitution." *Id.* There was thus no probable cause for detention, and the officer was not entitled to qualified immunity—"[w]hether or not [he] was aware of the fine

points of First Amendment law"—because any reasonable officer "ought to have known that he was exercising his authority in violation of well-established constitutional rights." *Id.*

In sum, the circuit courts have repeatedly recognized that protected speech cannot be criminalized and cannot be the grounds for an arrest consistent with the Fourth Amendment. That understanding is consistent with this Court's precedents. Certiorari is warranted to correct the Fifth Circuit's error in holding that Laredo officers reasonably believed they had probable cause to arrest Ms. Villarreal based on her constitutionally protected speech.

CONCLUSION

Seeking information on government affairs is a core speech and press freedom protected by the First Amendment. The government may choose to keep some information confidential. But it cannot punish journalists simply for asking for any non-public information. And the exercise of First Amendment rights cannot logically or legally provide the probable cause for arrest that the Fourth Amendment requires. *Amicus* urges this Court to grant certiorari and make clear that government officials cannot be shielded from liability when they punish citizens for the mere act of asking questions.

Respectfully submitted,

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