No. 23-1155

In the
Supreme Court of the United States

PRISCILLA VILLARREAL,
Petitioner,

v.

ISIDRO R. ALANIZ, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR AMERICAN LIBERTY IN SUPPORT OF THE PETITIONER

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INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

The Center for American Liberty (CAL) is a 501(c)(3) nonprofit law firm dedicated to protecting civil liberties and enforcing constitutional limitations on government power. CAL has represented litigants in courts across the country and has an interest in application of the correct legal standard in First Amendment cases. It has also filed multiple amicus briefs in this Court on important First Amendment issues. *See, e.g., Murthy v. Missouri*, No. 23-411; *NetChoice v. Paxton*, No. 22-555; *St. John v. Jones*, No. 22-554.

CAL has a strong interest in the outcome of this case. The Fifth Circuit below upheld the constitutionality of a Texas state statute that constitutes an end run around the First Amendment's prohibition on criminalizing the publication of news as speech. Rather than directly criminalizing the publication of information as such, the statute criminalizes the solicitation and the reception of voluntarily disclosed information, regardless of whether that information is subsequently published. Incredibly, the Fifth Circuit en banc upheld this law on the ground that "[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." (Apx.35a (emphasis in original)).

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[1] No counsel for a party has authored this brief in whole or in part. No person aside from CAL has made a monetary contribution to fund this brief's preparation or submission. CAL certifies that it notified all parties of its intent to file this brief more than ten days before the due date.

Why the Fifth Circuit believed a distinction exists between information within and outside the government's exclusive control it never says, but more fundamentally the Fifth Circuit effectively held that there is no clear and obvious First Amendment problem with criminalizing the very job that journalists are supposed to do—gather information for purposes of publishing a story. Of its very nature, the right to publish newsworthy stories without fear of reprisal necessarily includes within it the right to solicit information relating to such stories. Otherwise, the First Amendment protections are an empty formality.

CAL's brief discusses how radical the Texas statute is, and how it cannot survive either First Amendment scrutiny on the merits or qualified immunity.

SUMMARY OF THE ARGUMENT

Judge Higginson put it best in his dissenting opinion—"[t]o 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 . . . to interrogate the government." (Apx.47a). Obviously, this right has limits—the government may generally decline to answer particular questions or inquiries from journalists, and there may be material of such a nature that any public interest in its disclosure is outweighed by other concerns. But the Texas statute in question goes far beyond merely imposing confidentiality requirements on certain types of information. It criminalizes journalists for *soliciting*—regardless of whether they are successful—certain types of information from public officials. And even if

public officials voluntarily provide journalists with such information, journalists commit a crime in receiving the information. Making inquiries of public officials and receiving information that such officials voluntarily provide is one of the most basic functions of a journalist. Indeed, a journalist cannot publish a professionally competent news story without making such an inquiry in the first place. The very act of making an inquiry and receiving information from a public official itself is therefore protected First Amendment expression.

The Fifth Circuit below ignored all of this. It purported to draw a distinction between *publishing* information obtained from the government and *soliciting* and *obtaining* such information. This distinction has no basis in fact or law, and if allowed to stand will make the First Amendment's protections meaningless. The activity that forms a necessary predicate to First Amendment speech is itself protected under the First Amendment. Thus, the act of recording is just as protected as the act of publishing the recording. The Fifth Circuit's opinion discards this basic premise, and in the process creates a split not only with its own precedent, but also with the precedent of the Third, Seventh, and Ninth Circuits. These circuits have recognized that activity forming a necessary predicate to protected speech must itself also be protected speech for the First Amendment to have any meaning. The Court should grant the Petition.

ARGUMENT

I. The Texas statute violates the First Amendment by forbidding journalists from inquiring into government actions or from receiving information voluntarily provided to them by government workers.

This Court has ruled that "news gathering . . . qualif[ies] for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). This ruling applies just as much to citizen journalists as it does to journalists working for larger, mainstream media corporations. *See Citizens United v. FEC*, 558 U.S. 310, 339 (2010) ("The right of *citizens* to inquire . . . is a precondition to enlightened self-government and a necessary means to protect it." (emphasis added)). Yet the First Amendment right to inquire as a part of news gathering is exactly what the Texas statute criminalizes. The Fifth Circuit upheld this law by pointing (Apx.35a) to this Court's holding—also in *Branzburg*—"that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." 408 U.S. at 684. But the Fifth Circuit's citation misses the point—what is at issue is not whether citizen journalists like Villarreal must be given automatic, unfettered access to government information. Rather, the issue is whether such citizen journalists have the right to *inquire* about such information in the first place, regardless of whether or not they succeed, and whether they have a right to *receive* such information if a government official

voluntarily provides it to them. A prosecutor's office, for example, is under no First Amendment obligation to respond to every inquiry from a reporter seeking information about a case regardless of the inquiry's nature. Such a failure to respond in no way implicates the right of journalists to make inquiries about their government. Inquiries will not always be successful, as journalists will not always find sources willing to divulge information. But outlawing the act of simply inquiring about information is a completely different situation—it makes journalists criminals for doing their job. So too does the criminalization of receiving such information from a government official who voluntarily provides it. Criminalizing the voluntary *disclosure* of such information raises no First Amendment concerns, *see Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989), but this cannot override the First Amendment rights inherent in *receiving* such information so long as it is voluntarily divulged, *see Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) ("[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.").

While the Texas statute is limited to "information that has not been made public," this limitation does not cure the statute's constitutional defects. The statute defines non-public information as "any information to which the public does not generally have access, and that is prohibited from disclosure under Chapter 552." (Apx.191a). But just because " the public does not generally have access" to certain information does not mean the information is not a matter of important public concern. Furthermore,

simply adding something to a list of items in a state statute that are prohibited from public disclosure does not mean that the matter lacks public importance.

The Fifth Circuit's opinion not only fails to take all of the above into account but it also discards these principles in such a fundamental way that it cannot be reconciled with this Court's precedent or—as discussed below—the precedent of other circuits. This makes certiorari appropriate.

II. The Fifth Circuit created a split with multiple circuits that have held the First Amendment right to publish necessarily includes with it all activities incident to such publication, including the right to inquire and receive voluntarily provided information.

In justifying its already-weak rationale for upholding the Texas statute, the Fifth Circuit concluded "[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." (Apx.35a (emphasis in original)). The Fifth Circuit thus drew a distinction between the act of publishing news and the activities that necessarily lead up to such publication and are thus inextricably intertwined with it. This distinction has no basis in the First Amendment and taken to its logical conclusion would strip it of all its protections.

The Third, Seventh, and Ninth Circuits all disagree with the Fifth Circuit's artificial distinction and have affirmed that First Amendment protection

applies just as much to the predicate acts necessary to create the speech in question as it does to the "pure speech" itself. *See Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010); *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). In *Anderson*, the Ninth Circuit held that the process of tattooing could not be separate from a tattoo as a form of expressive activity. "[N]either the Supreme Court nor our court," the court noted, "has ever drawn a distinction between a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded." *Anderson*, 621 F.3d at 1061. In other words, courts have never "attempted to disconnect the end product from the act of creation." *Id.* at 1061–62.

The Seventh Circuit followed *Anderson's* lead several years later in *Alvarez* when it invalidated a state statute prohibiting the nonconsensual audio recording of police officers performing their duties in public. 679 F.3d at 596–603. The Seventh Circuit concluded that "[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *Id.* at 596. "The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected." *Id.* As the Seventh Circuit noted, "banning photography or note-taking at a public event would raise serious First

Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes." *Id.* at 595–96. Critically, the Seventh Circuit grounded this conclusion on the fact that "the First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Id.* at 597 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)). "The freedom of speech and press 'embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.'" *Id.* (quoting *Belotti*, 435 U.S. at 767).

The Third Circuit relied on *Alvarez* in coming to a similar conclusion in *Fields*. There, the district court dismissed a First Amendment retaliation claim on the ground that the plaintiffs merely filmed the conduct of police officers but did not use that film to criticize or otherwise make any statements on the officers' conduct. 862 F.3d at 356–57, 358. The Third Circuit disagreed. "The First Amendment protects actual photos, videos, and recordings, and for this protection to have meaning the Amendment must also protect the act of creating the material." *Id.* at 358 (internal citation omitted). "There is no practical difference," in other words, "between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them." *Id.*

The Ninth Circuit applied *Anderson*, *Alvarez*, and *Fields* when it overturned a statute criminalizing the nonconsensual recording of agriculture production

facilities in *Wasden*. There, the state legislature had enacted the law to combat undercover investigative journalists from recording alleged animal abuse in such facilities. 878 F.3d at 1189–93. Investigative journalists sued, and the Ninth Circuit easily dispensed with the argument "that the act of creating an audiovisual recording is not speech protected by the First Amendment." *Id.* at 1203. "This argument," the court ruled, "is akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not." *Id.* "Because the recording process is itself expressive and is inextricably intertwined' with the resulting recording, the creation of audiovisual recordings is speech entitled to First Amendment protection as purely expressive activity." *Id.* at 1204 (quoting *Anderson*, 621 F.3d at 1062). The Ninth Circuit, in other words, made no distinction between the final form of the speech and the predicate acts that necessarily went into creating the speech. Both amounted to "speech" for purposes of the First Amendment.

Even worse, the Fifth Circuit's own precedent contradicts the notion that courts can separate between the end-product form of the speech in question and the predicate acts that are necessary to creating such speech. *See Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017). In *Turner*, the Fifth Circuit acknowledged that this Court "has long recognized that the First Amendment protects film." *Id.* at 688 (citing *Kingsley Int'l Pictures Corp. v. Regents of Univ. of State of N.Y.*, 360 U.S. 684, 688 (1959)). "A corollary to this principle," the court continued, "is that the First Amendment protects the

act of making film, as 'there is no fixed First Amendment line between the act of creating speech and the speech itself." *Id.* at 688–89 (quoting *Alvarez*, 679 F.3d at 596). The en banc opinion below took no account of this precedent.

The Fifth Circuit's opinion below simply cannot be squared with the above cases. It upheld the Texas statute primarily on the ground that, rather than criminalizing the publication of information obtained from the government, it simply criminalized the solicitation of, or reception of, such information for purposes of a personal benefit. (Apx.35a). A distinction exists, according to the Fifth Circuit, between a right to publish such information and soliciting and receiving such information. (Apx.35a). But soliciting and receiving information for a news story is inextricably intertwined from publishing the news story itself, just as the act of recording is inextricably intertwined with publishing the recording itself. Under the above precedents, both are forms of speech entitled to First Amendment protection.

The Fifth Circuit's holding, if allowed to stand, will improperly enable the government to wiggle out of the First Amendment's protections by criminalizing conduct that forms a necessary predicate to the speech in question. Consider the following scenario: there is no question that it is unconstitutional for the government to criminalize symbolic flag burning, as flag burning is a form of speech protected under the First Amendment. *See United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014). Obviously, to burn the flag one must first

purchase or otherwise obtain a flag as well as the requisite fire materials—*e.g.*, matches, gasoline, etc. Yet under the Fifth Circuit's rationale, the First Amendment's protection of symbolic flag burning would not prohibit the government from criminalizing any attempt to purchase or otherwise obtain matches, gasoline, or even the flag itself if done for the purpose of setting fire to the flag for an expressive purpose. There is no distinction between criminalizing this type of conduct and criminalizing a citizen journalist's soliciting or receiving information from a government employee. Both are inextricably intertwined with fundamental First Amendment actions and as such are themselves protected under that amendment.

III. The Texas statute cannot survive this Court's traditional qualified immunity analysis.

Qualified immunity shields government officials from suit under § 1983 unless the constitutional right in question was clearly established at the time of its violation and one "of which a reasonable person would have known." *White v. Pauly*, 580 U.S. 73, 78–79 (2017) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)). So long as existing precedent puts the matter beyond debate, qualified immunity does not apply. *Id.* at 79. A case directly on point, furthermore, is not required. *Id.*

The Fifth Circuit based its grant of qualified immunity on the fact that it was not clearly established at the time of the conduct in question that Villarreal had a right to solicit or receive nonpublic information voluntarily provided by a government worker, even though her right to publish information

was clearly established. (Apx.35a). As discussed above, this turns the First Amendment on its head. Even assuming for the sake of argument that the voluntary disclosure was unlawful, this is irrelevant given that "illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *See Bartnicki*, 532 U.S. at 535. It is a basic principle that protected First Amendment conduct necessarily extends to actions that are inextricably intertwined with the end form of the speech.

Consider again the flag burning hypothetical discussed above. So far as undersigned counsel is aware, no government has ever criminalized purchasing matches and gasoline when the intended use is for symbolic burning of a flag, and hence there is no caselaw discussing the constitutionality of such a law. But suppose that a state decided to pass such a law. Can there be any serious question that such a law would not survive qualified immunity? Even if no caselaw exists directly addressing the matter, it has long been established that the First Amendment protects the right to burn flags as a form of speech. This necessarily includes with it the right to acquire the materials required to effectuate this speech. No person of common sense would conclude otherwise, and such a law could not survive qualified immunity merely because no caselaw exists specifically interpreting such a law. If one cannot possess the materials necessary to burn the flag as a form of expression, one cannot burn the flag. Likewise, if a journalist cannot even solicit information or retain voluntarily disclosed information from a government

official in the first place, then there is no way the journalist can exercise the First Amendment right to publish such information as a form of public discourse. Qualified immunity does not apply to this situation.

CONCLUSION

This Court should grant certiorari and reverse the Fifth Circuit.

Respectfully submitted,

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