No. 23-1155

In the Supreme Court of the United States

PRISCILLA VILLARREAL, PETITIONER

v.

ISIDRO R. ALANIZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF STATE OF TEXAS IN OPPOSITION

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QUESTION PRESENTED

For half a century, this Court has held that States may, consistent with the First Amendment, limit access to certain information held by the government and apply those limits to members of the media seeking to report on government activities. *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality op.); *id.* at 16 (Stewart, J., concurring in the judgment); *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972). And for decades, Texas has made it a crime to solicit a leak of nonpublic information from a public official for personal gain. Tex. Penal Code § 39.06(c). "Police are charged to enforce [such] laws until and unless they are declared unconstitutional"—"with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979).

At least before this Court, Priscilla Villarreal—a self-described "citizen journalist" who posts prolifically on Facebook—does not contend that section 39.06(c) is flagrantly unconstitutional. Nor does she deny that officers acted pursuant to a facially valid warrant when they arrested her for soliciting nonpublic information regarding two deaths from a backchannel source within the Laredo Police Department. Nevertheless, she argues that any reasonable officer would have known the First Amendment precluded her arrest for her journalistic activities. The question presented is:

Whether qualified immunity protects an officer's reliance on a properly issued warrant or whether he must anticipate a previously unrecognized, as-applied First Amendment defense to a facially constitutional statute.

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INTRODUCTION

Relying more on rhetoric than precedent, the petition repeatedly decries how Priscilla Villarreal was supposedly arrested just for asking questions—a framing the Fifth Circuit called "clever but misleading." Pet.App.11a. After all, this Court has repeatedly held that when it comes to solicitation, questions can be a crime—whether it be solicitation of another crime, *United States v. Hansen*, 599 U.S. 762, 771 (2023); of improper campaign contributions, *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 437 (2015); or even of legal clients, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978). Because the First Amendment often permits States to enforce such laws, the petition runs afoul of this Court's "repeated[]" command "not to define clearly established law at a high level of generality" when considering qualified immunity. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

Here, Respondents reasonably believed—indeed, demonstrated to a neutral judge that there was probable cause to believe—that Villarreal's "questions" were for the purpose of soliciting a leak of nonpublic information to benefit herself in violation of Texas Penal Code section 39.06(c). On its face, section 39.06(c) is in line with this Court's precedent that permits States to limit access to government information. *Houchins*, 438 U.S. at 14 (plurality op.); *id.* at 16 (Stewart, J., concurring in the judgment). And enforcement of it against Villarreal accords with this Court's rule that the press has no special privilege to violate generally applicable laws in the name of newsgathering. *Branzburg*, 408 U.S. at 683.

Villarreal nevertheless insists that the Fifth Circuit's decision—that her First Amendment claim fails to overcome the officers' qualified immunity—demands this

Court's attention. To the contrary, as one commentator put it, so long as "*retention* of [the relevant] information is itself unlawful, and … the reporters are being punished not for the act of publication itself, but for the unlawful gathering of secret information, it is *impossible* to find any precedent in [this] Court's jurisprudence that would recognize a First Amendment defense." Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219, 234 (2007) (second emphasis added). That should have ended the qualified-immunity inquiry. Instead, Villarreal tries (and fails) to show a conflict with this Court's precedent regarding the right to publish lawfully obtained information (which section 39.06(c) does not prohibit) and the right against unreasonable search and seizure (which the officers did not violate).

Villarreal's claim of a circuit split fares no better. The cases she identifies all concern laws that themselves had been held unconstitutional or whose unconstitutionality was the natural outgrowth of existing precedent. Not one addresses an arrest pursuant to a facially valid warrant for violating a facially constitutional law.

Even if there were a conflict, this would be a poor vehicle to resolve it as several alternative grounds exist to support the judgment. And Villarreal's hyperbolic assertions that her inability to obtain damages would spell the end of the First Amendment ignore that other branches of both the state and federal governments are presumed to understand and undertake in good faith their obligation to act consistent with the federal Constitution. And if they do not, the federal courts provide a remedy. Such a remedy is not available in *this* case because Villarreal has not plausibly alleged anything more than a

"mistake[] in judgment" on behalf of law-enforcement personnel. *Butz v. Economou*, 438 U.S. 478, 507 (1978). And qualified immunity protects officers from liability for such mistakes "whether the mistake is one of fact or one of law." *Id.* The Court should deny the petition for certiorari.

STATEMENT

I. Statutory Background

A. For decades, it has been Texas's policy—embodied in its Public Information Act (PIA)—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." Tex. Gov't Code § 552.001(a). This policy stems from "the fundamental philosophy of the American constitutional form of representative government that … government is the servant and not the master of the people." *Id.* To effectuate that policy, the PIA defines "public information" broadly and requires it to be produced promptly upon request. *Id.* §§ 552.002(a), .221(a).

At the same time, the PIA "recognizes that public interests are best advanced by shielding some information from public disclosure." *Paxton v. City of Dallas*, 509 S.W.3d 247, 249-50 (Tex. 2017). As provided by the PIA, "[i]nformation is excepted" from public disclosure "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Tex. Gov't Code § 552.101. To that end, the PIA itself includes over sixty categories of information that are excepted from disclosure, ranging from attorney-client communications to law-enforcement investigations to records of crime victims. *Id.* §§ 552.101-.163. Exceptions to disclosure can also be found outside of the PIA, including, for example, information in cybersecurity reports and

abortion-reporting data. *Id.* § 2054.0591(b); Tex. Health & Safety Code § 245.011(d).

Anyone may request that a governmental entity produce public information. Tex. Gov't Code §§ 552.003(6), .021. But if the governmental entity believes some or all of the information is excepted from disclosure, it may seek an opinion from the Attorney General regarding whether the information must be disclosed. *Id.* § 552.301(a). Either the requestor or the government agency may then challenge the Attorney General's decision in court. *Id.* §§ 552.321, .324.

B. Helping to ensure that certain information held by the government remains nonpublic, Texas Penal Code section 39.06(c) makes it an offense to "solicit[] or receive[] 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." To prevent citizens from running afoul of the law simply by asking questions, section 39.06(c) is a specific-intent crime: The solicitor must have acted "with intent to obtain a benefit or with intent to harm or defraud another." *Id.* A "benefit" is "anything reasonably regarded as economic gain or advantage." *Id.* § 1.07(7).

For purposes of this statute, "information that has not been made public" means "any information to which the public does not generally have access, and that is prohibited from disclosure under" the PIA. *Id.* § 39.06(d). Texas state courts have held that information "prohibited from disclosure" refers to the exceptions to disclosure in the PIA. *Tidwell v. State*, No. 08-11-00322-CR, 2013 WL 6405498, at *12 (Tex. App.—El Paso Dec. 4, 2013); *State v. Ford*, 179 S.W.3d 117, 123 (Tex. App.—San Antonio 2005).

The State has been unable to find any precedential decision holding section 39.06(c) unconstitutional either facially or on facts similar to these. To the contrary, not unlike federal courts, Texas courts "start with the presumption that the rest of the government, no less than the judiciary, intends to comply with the Constitution"—state and federal—and "when presented with competing plausible interpretations of a statutory text," they will adopt the "construction that steers clear of such constitutional difficulties." *Borgelt v. Austin Firefighters Ass'n, IAFF Loc. 975*, 692 S.W.3d 288, 303 (Tex. 2024) (quotation marks omitted) (citing, *inter alia*, *Paxton v. Longoria*, 646 S.W.3d 532, 539 (Tex. 2022)). Consistent with those principles, although two Texas trial courts have concluded that section 39.06(c) is unconstitutionally vague, the subsequent appeals were resolved on alternative grounds. *Ford*, 179 S.W.3d at 125; *State v. Newton*, 179 S.W.3d 104, 111 (Tex. App.—San Antonio 2005.

II. Factual Background

Villarreal, known locally as "Lagordiloca," is a prolific vlogger who covers the news in Laredo using her cell phone and a Facebook account with over 120,000 followers.[1] Pet.App.3a, 195a. Although unaffiliated with any news organization, the *New York Times* has nonetheless called her "arguably the most influential journalist in Laredo." Pet.App.195a. Her admirers treat her to free meals, and she occasionally receives fees for promoting local businesses on her Facebook account. Pet.App.4a. She has also used her account to solicit donations for new equipment. Pet.App.4a.

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[1] *See* https://www.facebook.com/lagordiloca956/.

In 2017, using Laredo Police Officer Barbara Goodman as a backchannel source, Villarreal published the name and occupation of a suicide victim. Pet.App.4a, 6a. Several weeks later, she posted a live feed of a fatal traffic accident and again revealed the last name of a decedent. Pet.App.4a, 7a. At the time of her reports, the information had not been made public by the Laredo Police Department. Pet.App.7a.

Receiving a tip that Officer Goodman had secretly been communicating with Villarreal, LPD investigated and discovered extensive communications between the two—sometimes multiple times a day. Pet.App.5a-6a (noting about 72 calls per month). After retrieving text messages Officer Goodman had tried to delete, LPD suspended Goodman for twenty days. Pet.App.6a.

An officer with LPD also prepared probable-cause affidavits for Villarreal's arrest for violations of Texas Penal Code section 39.06(c). Pet.App.6a-7a. They quoted Villarreal's text exchanges with Officer Goodman about the suicide and accident victims, noting the information had not previously been made public, and that Villarreal gained popularity on Facebook. Pet.App.7a, 30a. The affidavits were approved by an assistant district attorney, and a justice of the peace issued the warrants. Pet.App.7a.

Villarreal voluntarily surrendered and was released on bond the same day. Pet.App.7a. A Texas judge granted her pretrial habeas petition, finding section 39.06(c) unconstitutionally vague. Pet.App.8a. The district attorney opted not to appeal. Pet.App.8a.

III. Procedural History

A. Following the dismissal of the charges, Villarreal sued two members of the Webb County District Attorney's office and multiple members of LPD ("Respondent

Officials"). Pet.App.8a. As relevant to the only claim presented here, Villarreal asserted that her arrest violated the First Amendment because it was done in retaliation for her reporting and because her text messages with Officer Goodman were protected speech. Pet.App.230a-238a. Although Villarreal does not currently appear to seek facial invalidation of section 39.06(c), Pet.App.262a-265a, she does allege that it would have been evident to "any reasonable official that the Statute was facially unconstitutional," Pet.App.217a.

The district court dismissed the complaint under Rule 12(b)(6) based on qualified immunity. Pet.App.8a, 101a-188a. At no time before the district court entered its judgment did Villarreal inform Texas's Attorney General, as required by 28 U.S.C. § 2403(b), that her complaint challenged the constitutionality of a state statute.

B. On appeal, a divided panel of the Fifth Circuit reversed, *Villarreal v. City of Laredo* (*Villarreal I*), 17 F.4th 532, 536 (5th Cir. 2021), noting that a dissenting opinion was forthcoming. *Id.* at 536 n.* The majority concluded that it should have been "patently obvious to any reasonable police officer" that arresting Villarreal violated her constitutional rights, *id.* at 540—in large part because it concluded that section 39.06(c) was "grossly and flagrantly unconstitutional," *id.* at 541. Because the Texas Attorney General *still* had not been notified that the constitutionality of a state law was at issue, however, the panel withheld the mandate for sixty days. *Id.* at 546-47.

Without taking a position on the wisdom of prosecuting Villarreal under these facts, Texas's Attorney General intervened to defend the constitutionality of section 39.06(c) and the availability of qualified immunity when an officer has relied on a facially valid warrant. *See*

Cameron v. EMW Women's Surgical Ctr., PSC, 595 U.S. 267, 277 (2022) (noting a sovereign's inherent interest "in the continued enforceability of its own statutes").

After the Attorney General's intervention, the panel issued a new opinion, which concluded that section 39.06(c) was *not* "obviously unconstitutional." *Villarreal v. City of Laredo* (*Villarreal II*), 44 F.4th 363, 372 (5th Cir. 2022). Although the panel still held that qualified immunity was unavailable, it did so based on its view that no officer could have concluded that Villarreal intended to receive a "benefit" from her conduct—she was motivated, not by economic gain, but by good journalism. *Id.* at 372-73.

Chief Judge Richman dissented with respect to the First Amendment ruling, arguing that the independent-intermediary doctrine protected Respondent Officials and that Villarreal's arrest was based, not on protected speech, but on violations of a facially constitutional statute. *Id.* at 390-91 (Richman, C.J., dissenting in relevant part).

Because the State has never taken a position on whether Villarreal's conduct met the statute's standards as a matter of *fact*, the State did not seek en banc rehearing of the revised opinion. Respondent Officials did, however, seek and obtain such review, Pet.App.189a-190, placing the constitutionality of section 39.06(c) back at issue, Pet.App.217a, and the State's interests back in play, *Cameron*, 595 U.S. at 277. *Contra* Pet. 4 (implying that the State was effectively a volunteer in the en banc proceedings).

C. Although there were a number of separate writings, the en banc court held (9-7) that Respondent Officials were entitled to qualified immunity. Pet.App.3a. As the majority summarized, "Villarreal was arrested on

the defendants' reasonable belief, confirmed by a neutral magistrate, that probable cause existed based on her conduct in violation of a Texas criminal statute that had not been declared unconstitutional." Pet.App.11a. Because no controlling precedent put Respondent Officials on notice that section 39.06(c) or its application to Villarreal violated the Constitution, qualified immunity was appropriate. Pet.App.11a.

Specifically, the court first held that Respondent Officials reasonably believed that Villarreal violated section 39.06(c), pointing to precedent, statutes, and Attorney General opinions making certain information about accident victims and investigations confidential. Pet.App.15a-17a; *e.g.*, *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 679 (Tex. 1976) (discussing a right to privacy over personal information); Tex. Transp. Code § 550.065(f)(2)(A) (prohibiting release of personal information in collision report); Tex. Att'y Gen. OR2022-36798, 2022 WL 17552725, at *2 (2022) (recognizing a privacy interest in information regarding deceased relatives). Examining the warrant affidavits, the majority found they sufficed to show probable cause that state law had been violated. Pet.App.17a-21a.

The court expressly rejected that section 39.06(c) was "obviously unconstitutional" as applied to Villarreal and therefore could not be relied on by Respondent Officials. Pet. App.22a-32a. The court reasoned that (1) statutes are presumptively constitutional, (2) no state court had held section 39.06(c) *un*constitutional, and (3) the independent-intermediary doctrine shielded Respondent Officials from liability under such circumstances. Pet.App.22a-32a.

The majority also considered the precedent identified by Villarreal and rejected that it was sufficient to

overcome qualified immunity under this Court's test. Pet.App.34a-38a. Those cases, the court explained, concern the right to publish, which "is different" from seeking personal gain from soliciting and receiving information that may or may not later be published. Pet.App.35a. Further, the majority noted that the First Amendment does not guarantee journalists special access to information and that States are allowed to protect nonpublic information from being released. Pet.App.35a-37a (citing, *inter alia*, *Branzburg* and *Houchins*).

Without addressing—let alone distinguishing—this Court's holding that governments can protect information disclosure, the principal dissent adopted Villarreal's theme that asking questions to government officials is so obviously constitutionally protected that Respondent Officials should have known it. Pet.App.67a-75a.

REASONS TO DENY THE PETITION

I. The Fifth Circuit's Decision Does Not Conflict with Precedent from Either This Court or Another Court of Appeals.

"Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *DeFillippo*, 443 U.S. at 36. Whether that arrest entitles Villarreal to damages depends, in turn, on whether it violated a "legal principle [that] clearly prohibit[s] the officer's conduct in the *particular circumstances* before him." *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (emphasis added). And those circumstances must be defined with a "high 'degree of specificity.'" *Id.* (quoting *Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (per curiam)). That is particularly so in areas where "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine"—here, the First Amendment's impact on

crimes of solicitation—"will apply to the factual situation the officer confronts." *Id.* at 12.

To prevail under this standard, Villarreal must show that Respondent Officials (1) violated a First Amendment right to *obtain* information that (2) would have been apparent to any reasonable official at the time the Respondent Officials acted. *al-Kidd*, 563 U.S. at 735. Villarreal has failed to show either for the same basic reason: Although this Court has held that the First Amendment protects the right of the press to *publish* information, it has never held the First Amendment guarantees the right to ask a government official to *leak* that information. *See* Vladeck, *supra* at 234. Nor have the circuit courts that Villarreal identified in her petition.

A. The Fifth Circuit correctly applied this Court's precedent to the facts before it.

Rather than identify a case from this Court that applied the First Amendment to invalidate statutes criminalizing the leak of confidential information, Villarreal cites various cases regarding the right to publish lawfully obtained information and the requirements for warrants. Neither is implicated here. Nor can Villarreal create a certworthy issue by invoking the last resort of section 1983 plaintiffs facing a qualified-immunity defense: *Hope v. Pelzer*, 536 U.S. 730 (2002), and its limited rule that obvious constitutional violations are compensable even without factually analogous precedent. Even *Hope* requires consideration of the particular circumstances of the case. And Villarreal has not shown that every reasonable official would have known that (1) the First Amendment provided an as-applied defense to her violation of section 39.06(c), and (2) he must disregard a facially valid warrant given that defense.

1. Texas law does not prohibit merely asking questions.

Apart from offering a paean to the press, Villarreal spends much of her argument blurring two distinct concepts: the right to publish information and the ability to obtain information for potential publication. To be sure, "the press is not only an important, critical, and valuable asset to society, but it is not easily intimidated." *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978). But that's not the only societal value at stake. Society cannot function if the government cannot keep certain information confidential. To balance those competing interests, this Court has consistently upheld the right to publish information the press has lawfully obtained, *e.g.*, *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104 (1979), but refused to exempt the press from those generally applicable laws, *Branzburg*, 408 U.S. at 683. Only the latter interest is relevant to this case because section 39.06(c) prohibits certain forms of *access*—namely "solicit[ing] or receiv[ing] from a public servant"—certain nonpublic information for certain corrupt motives.

Villarreal assumes without discussion—let alone citation—that "solicits," as used in section 39.06(c), includes merely asking questions. But as this Court has repeatedly stated, a properly conducted First Amendment analysis starts with "assess[ing] the state laws' scope[:] What activities, by what actors, do the laws prohibit or otherwise regulate?" *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2398 (2024). Although "solicit" *can* mean to "elicit" information, as Villarreal seems to suggest, that is generally considered a mistake, *see* Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 816 (2d ed. 1995) (describing this use of "solicit" as a malapropism). Moreover, like this Court, *Hansen*, 599 U.S. at 775-78,

Texas courts are likely to take the narrower, more specialized interpretation drawn from criminal law—particularly where doing so may be necessary to avoid any potential constitutional problems, *e.g.*, *Longoria*, 646 S.W.3d at 539 (citing with favor *Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019)); *Page v. State*, 492 S.W.2d 573, 576 (Tex. Crim. App. 1972).

In the criminal context, solicitation is more akin to incitement. *See, e.g.*, *Hansen*, 599 U.S. at 772. Under the Texas Penal Code, a person is criminally responsible for an offense committed by another if, among other things, "acting with intent to promote or assist the commission of the offense, he *solicits*, encourages, directs, aids, or attempts to aid the other person to commit the offense." Tex. Penal Code § 7.02 (emphasis added). The Model Penal Code uses the terms "commands" and "encourages" in its definition of criminal solicitation, Model Penal Code § 5.02 (2001), while *Black*'s defines the term as the "criminal offense of urging, advising, commanding, or otherwise inciting another to commit a crime," *Solicitation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

This narrow understanding of "solicit" is further underscored by section 39.06's statutory context. Specifically, it defines nonpublic information with respect to Texas's PIA, Tex. Penal Code § 39.06(d), which *encourages* individuals to ask for information. *See supra* pp.3-4. Given that context, it highly unlikely that a Texas court would conclude that merely asking for information that ultimately cannot be released is a crime. *See, e.g.*, *Steger & Bizzell, Inc. v. Vandewater Constr., Inc.*, 811 S.W.2d 687, 693 (Tex. App.—Austin 1991) (explaining that "solicit" is best understood to "imp[ly] personal petition and

importunity addressed to a particular individual to do some particular thing").[2]

True, the conduct prohibited by section 39.06 is often verbal in nature—as with any bar to solicitation. *Hansen*, 599 U.S. at 771 ("Neither solicitation nor facilitation requires lending physical aid; for both, words may be enough.").[3] But "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

With these principles in mind, the Fifth Circuit's conclusion that Villarreal has not alleged a violation of a clearly established First Amendment right does not conflict with this Court's precedent.[4]

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[2] At other stages of this litigation, Villarreal also contested whether she received a "benefit" and whether the information was nonpublic. Pet.App.17a-20a. Villarreal does not question the majority's interpretation as a matter of state law, Pet. 22-23, and if she did, the proper course would have been to certify the question to the Texas Court of Criminal Appeals to "ensure that any conflict in this case between state law and the First Amendment is not purely hypothetical." *McKesson v. Doe*, 592 U.S. 1, 6 (2020). Villarreal has never sought such relief.

[3] Section 39.06(c) also prohibits "receiv[ing]" nonpublic information, which is *not* expressive conduct by the recipient.

[4] By mentioning it only in a footnote (at 36 n.10), and not including it in her question presented, Villarreal has forfeited any claim that she was arrested in retaliation for *publishing* the information. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (per curiam). In any event, this case is a poor vehicle to resolve that issue. *See infra* pp.30-31.

2. This Court has recognized a right to publish information lawfully obtained, not to obtain information unlawfully.

a. Barely referenced by Villarreal is this Court's precedent that holds "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). To the contrary, because "[t]he Constitution itself is n[ot] a Freedom of Information Act," this Court has repeatedly held that there is no First Amendment right to "have access to particular government information." *Houchins*, 438 U.S. at 14 (plurality op.) (quoting Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975)); *id.* at 16 (Stewart, J., concurring in the judgment); *see also LAPD v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999). As a result, "the government retains ample means of safeguarding significant interests upon which publication may impinge." *Fla. Star v. B.J.F.*, 491 U.S. 524, 534 (1989).

At most, the Court has recognized a right to "gather news 'from any source *by means within the law*.'" *Houchins*, 438 U.S. at 11 (plurality op.) (quoting *Branzburg*, 408 U.S. at 681-82 (emphasis added)). That is, the press does not have "special immunity from the application of general laws." *Branzburg*, 408 U.S. at 683 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)). Thus, "[a]lthough stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news." *Id.* at 691. Indeed, just one Term after the Court famously permitted the publication of the Pentagon Papers, *see N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam), *Branzburg* said it would be

"frivolous" to claim that "the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws." 408 U.S. at 691.

b. Texas Penal Code section 39.06(c) is such a "valid criminal law[]," *id.*, and represents how Texas's "political institutions" have "weigh[ed] the interests in privacy with the interests of the public to know and of the press to publish," *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975). As this Court explained nearly 50 years ago, "[t]he enactment of [such] a law forecloses speculation by enforcement officers concerning its constitutionality," and "[p]olice are charged to enforce [it] until and unless" it is "declared unconstitutional." *DeFillippo*, 443 U.S. at 38. As a result, an officer is "excus[ed] … from liability" under section 1983 "for acting under a statute that he reasonably believed to be valid" even if it is "later held unconstitutional on its face or as applied." *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

The only "possible exception" to this general rule is "a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *DeFillippo*, 443 U.S. at 38. Villarreal's question presented does not try to meet this high standard, and for good reason.[5] Any claim that section 39.06(c) is facially unconstitutional would impose a heavy burden on Villarreal, *Moody*, 144 S. Ct. at 2397—let alone a claim that it is "flagrantly" so, *DeFillippo*, 443 U.S. at 38. Villarreal cannot meet that burden here because this Court

[5] Although split in two pieces, Villarreal's question presented reflects a single inquiry: whether the Respondent Officials' alleged violation of the First Amendment was so obvious that they are not entitled to immunity even absent binding case law from this Court or the Fifth Circuit. *See* Pet. i.

has specifically stated that its prior caselaw has "impl[ied] nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records." *Cox Broad. Corp.*, 420 U.S. at 496 n.26.

Because there is "no controlling precedent" that section 39.06(c) is unconstitutional, and Villarreal's conduct violated the "presumptively valid" statute, Respondent Officials "should not have been required to anticipate that a court would later hold the [law] unconstitutional." *DeFillippo*, 443 U.S. at 38.

That rule applies with even greater force to Villarreal's repeated assertion (*e.g.*, at i, 2, 29) that officials should be held liable for enforcing statutes "in ways" that violate the Constitution. In substance, this argument asks this Court to require officials, upon pain of losing qualified immunity, to correctly predict as-applied constitutional defenses to valid statutes. But if officers are not required to predict when a *law* will be held unconstitutional, *DeFillippo*, 443 U.S. at 37-38, they cannot be held to predict when an *application* will be held unconstitutional—a question that, by its definition, depends on "the factual situation the officer confronts," *Mullenix*, 577 U.S. at 12. The Court should not limit qualified immunity as Villarreal suggests when no appellate court has held section 39.06(c) unconstitutional either on its face or in factually analogous circumstances. As the Court has stated, "[s]ociety would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *DeFillippo*, 443 U.S. at 38.

c. Villarreal attempts to obscure the issue by asserting (at 16-17) a right to engage in "routine newspaper reporting techniques" based on case law addressing the

press's First Amendment right to *publish* information it *lawfully obtained*. But this Court has recognized the distinction between "cases where information has been acquired *unlawfully* by a newspaper or by a source," and cases involving the "ensuing publication." *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001). Because the cases upon which Villarreal relies turn entirely on the "ensuing publication," they are inapposite to whether the State could punish her when the "information has been acquired unlawfully." *Id.* (emphasis omitted).

For example, *Daily Mail*—upon which Villarreal relies extensively—concerned a law that prohibited "publish[ing]," without a written court order, the name of a child involved in certain court proceedings. 443 U.S. at 98-99 (quoting W. Va. Code § 49–7–3). The Court found the law unconstitutional, holding that "[i]f the information is *lawfully obtained* … the state may not punish its publication except when necessary to further an interest more substantial than is present here." *Id.* at 104 (emphasis added). The Court explicitly limited its holding to that fact pattern, stating "[t]here is no issue before us of unlawful press access to confidential judicial proceedings." *Id.* at 105.

Florida Star reiterated this principle, punctuating that "where a newspaper publishes truthful information *which it has lawfully obtained*, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." 491 U.S. at 541 (emphasis added). The same is true for *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311 (1977) (per curiam) (permitting publication where there is "no evidence that petitioner acquired the information unlawfully"); *Cox Broadcasting*, 420 U.S. at 496 ("[T]he First and Fourteenth Amendments will not allow exposing the

press to liability for truthfully publishing information released to the public in official court records."); and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978) ("We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it.").

If anything, Villarreal's remaining authority is even more off-point as section 39.06(c) has nothing to do with interrupting a police officer in the performance of his duties, *City of Houston v. Hill*, 482 U.S. 451, 466-67 (1987); writing editorials, *Bridges v. California*, 314 U.S. 252, 270 (1941); or inflicting emotional distress, *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). That each of these cases involves the First Amendment does not establish a route around qualified immunity because a near-Byzantine maze of overlapping doctrines and varying standards of scrutiny have developed around the First Amendment over the last century.[6] Because "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established,'" *Mullenix*, 577 U.S. at 12, Villarreal cannot avoid closer scrutiny of her claim merely by invoking the First Amendment as a talisman.

d. If there were any question that Villarreal's abstract framing is too broad, it is put to rest by this Court's decision in *Sause v. Bauer*, 585 U.S. 957 (2018) (per curiam). There, Sause alleged that officers prevented her from praying. *Id.* at 958. Acknowledging there was "no doubt that the First Amendment protects

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[6] *See, e.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (responding to this Court's difficulty in defining obscenity with "I know it when I see it"); *accord Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 49 (2017) (Breyer, J. concurring) (finding the speech/conduct distinction unhelpful).

the right to pray," the Court nevertheless recognized that "there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place." *Id.* at 959. And without knowing those circumstances, the Court concluded it was "impossible to analyze petitioner's free exercise claim." *Id.* at 960.

So too here. Admittedly, this analysis is complicated by the fact that Villarreal never actually identifies the specific speech that she claims is protected, instead referring generally to her text messages without describing their content. Pet.App.212a-213a. Fortunately, the Court not need undertake that analysis because apart from reciting Judge Higginson's concern that the magistrate may have been misled, Pet. 12, Villarreal does not actually challenge the Fifth Circuit's conclusion that the warrant was factually accurate, Pet. 16 (asserting that "the arrest warrant affidavits confirm[]" her account). The Court must thus presume that conclusion to be correct when determining whether the Fifth Circuit's decision correctly applied the First Amendment. *See Yee v. City of Escondido*, 503 U.S. 519, 537 (1992).

The circumstances of Villarreal's arrest—namely, that she was arrested in accordance with a facially constitutional statute pursuant to a facially valid warrant—preclude her from overcoming qualified immunity. As commenters have noted for 30 years, "there is simply no precedent for the proposition that the First Amendment provides any defense to illicit acts of *gathering* the news." Vladeck, *supra* at 227; *see also* Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 928 (1992) ("[T]he Court has yet to explicitly afford special protections to the newsgathering process.").

3. Villarreal has not shown a violation of the Court's warrant precedent.

Villarreal next relies (at 18-21) on a trio of cases concerning Fourth and Fourteenth Amendment requirements for warrants to seize material arguably protected by the First Amendment. But Villarreal has not pressed any Fourth or Fourteenth Amendment claim in this Court, presenting questions that concern only the First Amendment. Pet. i. Her theory instead requires the Court to create a new rule by analogizing to these cases. But (1) a new rule is, by definition, not clearly established for purposes of qualified immunity, and (2) to the extent the Court wishes to draw the analogy, Respondent Officials complied with the Fourth and Fourteenth Amendment requirements identified.

a. Villarreal's first two cases address whether a warrant is required and what information it must contain before an officer can seize allegedly obscene material in accordance with the Fourth and Fourteenth Amendments. *Marcus v. Search Warrants of Prop. at 104 E. Tenth St.*, 367 U.S. 717 (1961); *Roaden v. Kentucky*, 413 U.S. 496 (1973). They stand for the proposition—which Texas does not dispute—that where material to be seized may or may not be protected by the First Amendment, a warrant must describe the material in sufficient detail so that a judge can make a preliminary determination that there is probable cause to think the material falls on the unprotected side of the First Amendment line. *Roaden*, 413 U.S. at 506.

In *Marcus*, the Court invalidated warrants to seize allegedly obscene material that were issued "on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene," and

"left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted obscene publications." 367 U.S. at 731-32 (cleaned up). The Court held that these procedures "lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled." *Id.* at 731. In short, a warrant for the seizure of allegedly obscene material may not be issued "on the conclusory opinion of a police officer that the books sought to be seized [are] obscene." *Roaden*, 413 U.S. at 502 (describing *Marcus*).

In *Roaden*, the Court extended *Marcus* to warrantless seizures of allegedly obscene material—specifically, a sheriff's warrantless seizure of a film that he determined to be obscene based on his observations at a drive-in theater. *Id.* at 497-98. Because "[t]he seizure proceeded solely on a police officer's conclusions that the film was obscene," without "afford[ing] a magistrate an opportunity to 'focus searchingly on the question of obscenity,'" the Court held the warrantless seizure unreasonable under the Fourth Amendment. *Id.* at 506.

Villarreal concedes (at 19-20) that these precedents are not directly applicable because they addressed only the seizure of *papers*. Thus, to even be relevant, the Court would have to *extend* them to the seizure of *persons*. But "[t]he relevant inquiry is whether *existing* precedent placed the conclusion that [Respondent Officials] acted unreasonably in these circumstances 'beyond debate.'" *Mullenix*, 577 U.S. at 13-14 (quoting *al-Kidd*, 563 U.S. at 741 (emphasis added)). Accordingly, it would not reflect a conflict between the Fifth Circuit's decision and this Court's precedent on the question of qualified immunity. Sup. Ct. R. 10(a); *accord Pearson v. Callahan*, 555 U.S. 223, 234 (2009).

These cases go from distinguishable to borderline irrelevant when one considers an additional fact: As the en banc majority noted—and Villarreal does not seem to contest—unlike in *Roaden*, Respondent Officials obtained warrants for her arrest. Pet.App.6a-7a. And, unlike in *Marcus*, the warrants were supported by eight-page affidavits that quoted the allegedly First Amendment protected conversations between Villarreal and Officer Goodman, permitting the neutral magistrate to "focus searchingly" on the speech at issue, *Roaden*, 413 U.S. at 506, and whether it crossed the legal line to solicitation, Pet.App.30a. At *most*, the state-court judge who reviewed the warrant application made "a reasonable mistake" regarding where to draw that line—not the type of "unacceptable error indicating gross incompetence or neglect of duty" that would give notice to a police officer that he should not rely upon the magistrate's judgment. *Malley v. Briggs*, 475 U.S. 335, 346 n.9 (1986).

b. If anything, Villarreal's third case (at 19-20), *Stanford v. Texas*, is more off point, as it concerned a warrant "of a kind which it was the purpose of the Fourth Amendment to forbid—a general warrant." 379 U.S. 476, 480 (1965). The warrant authorized the search for and seizure of what amounted to any document concerning the Communist Party or its operations. *Id.* at 478-79. After discussing the English monarchy's abuse of search and seizure powers to suppress publications, *id.* at 481-85, the Court held that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." *Id.* at 485.

This Court has questioned whether there can *be* a general warrant for the arrest of a person. *See al-Kidd*,

563 U.S. at 742-43. Assuming such a thing could exist, Villarreal would at minimum need to directly challenge the breadth of the arrest warrants by specifying how the language of the warrant was overbroad in her pleadings. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (requiring "allegations plausibly suggesting (not merely consistent with)" liability). But she did not. Pet.App.193a-266a. The arrest warrants did not violate *Stanford* or its underlying principles, and Villarreal still has not shown a conflict with this Court's precedent.

4. *Hope* won't save Villarreal's claim as there is no obvious constitutional violation.

Stuck with the fact that "none of the [Court's] cases squarely governs the case here," *Mullenix*, 577 U.S. at 13 (cleaned up), Villarreal opts for repeatedly declaring her right to ask questions and asking this Court to find that right obvious under *Hope*, 536 U.S. 730, and *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam). But *Hope* will not save Villarreal's claim because any constitutional violation is far from legally obvious.

Hope creates a narrow exception to the general rule that a plaintiff seeking monetary damages for a constitutional tort must cite on-point precedent to defeat qualified immunity. 536 U.S. at 741. It recognizes the common-sense principle that because qualified immunity ultimately turns on notions of "fair notice," and "general statements of the law are not inherently incapable of giving fair and clear warning," there are some circumstances 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." *Id.* at 740-41. To prevent the exception from swallowing the rule, *Hope* itself made clear that the

obviousness of the application must be determined based on "the specific conduct in question." *Hope*, 536 U.S. at 741 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

Here, that "specific conduct" is arresting Villarreal, not for asking questions in the abstract, but for soliciting and receiving nonpublic information in violation of Texas law. As discussed above, this Court's precedent in *Houchins* and *Branzburg*, among others, renders any potential First Amendment violation far from "obvious" when a member of the press has obtained information in violation of a law that is presumed constitutional and has never been held to be *un*constitutional. *See supra* pp.15-16. To the contrary, Professor Vladeck—hardly Texas's biggest fan—has recognized there is "a colorable argument that a reporter may be prosecuted … for soliciting the unlawful removal of classified governmental information." Vladeck, *supra* at 231. Although the nature of the government's interests may vary, the same argument would apply outside the national security context to allow a State to protect against the leak of other confidential government information. *See Branzburg*, 408 U.S. at 683. Because any constitutional violation was far from "beyond debate," the Fifth Circuit's conclusion that Respondent Officials were entitled to qualified immunity does not conflict with this Court's caselaw. *Mullenix*, 577 U.S. at 14 (quoting *al-Kidd*, 563 U.S. at 741).

B. The Fifth Circuit's ruling does not conflict with decisions from other circuits.

Villarreal is also wrong (at 28-32) that the Fifth Circuit's decision conflicts with those of other circuits. Not one of those cases involved a statute regulating access to government data or found a police officer liable for monetary damages because he relied on a facially valid

warrant based on a facially constitutional statute. As a result, none demonstrates a split between the Fifth Circuit and another court of appeals "on the same important matter." Sup. Ct. R. 10(a).

1. The Sixth Circuit's decision in *Leonard v. Robinson* concerned a public utterance alleged to violate laws that were "either facially invalid, vague, or overbroad when applied to speech (as opposed to conduct)." 477 F.3d 347, 356 (6th Cir. 2007). Specifically, a citizen was arrested for violating state laws prohibiting obscenity, blasphemy, and disorderly conduct when he uttered the phrase "G-d damn" at a township board meeting. *Id.* at 351. Considering a subsequent Fourth Amendment claim, the Sixth Circuit held that (1) one law had already been declared unconstitutionally vague, *see People v. Boomer*, 655 N.W.2d 255, 257 (Mich. Ct. App. 2002); (2) another applied only to conduct and would be "flagrantly unconstitutional" if extended to speech; and (3) the application of the third to the conduct at hand was unconstitutional under *Cohen v. California*, 403 U.S. 15, 26 (1971). *Leonard*, 477 F.3d at 358-60.

To support her claim of a circuit split, Villarreal cherry picks language from the Sixth Circuit's analysis of the final statute, which prohibited "mak[ing] or excit[ing] any disturbance or contention" at a public meeting. *Id.* at 360. In holding that no reasonable officer could have believed uttering "G-d damn" disturbed the peace, the Sixth Circuit cited six cases from this Court reversing convictions for disturbing or breaching the peace based on protected speech. *Id.* at 360-61. In particular, the Court relied on *Street v. New York*, where a protestor stated, "We don't need no damn flag," after setting fire to a flag in an outdoor protest, 394 U.S. 576, 591-92 (1969); and *Cohen*, where a protestor wore a jacket

saying "Fuck the Draft" in an indoor protest, 403 U.S. at 26. Although *Leonard* involved the word "damn" in an indoor setting, the Sixth Circuit concluded that distinction made no constitutional difference. 477 F.3d at 359 (noting the "milder profanity" at issue).

Leonard is of little use from the outset because as already discussed, section 39.06(c) regulates access to data—not publication (or public utterance) of that data. *Supra* pp.15-19. Nor can the Court derive a broader principle about the obviousness of constitutional violations because there is no body of caselaw analogous to *Cohen* and its progeny upon which the Fifth Circuit could have drawn, *supra* pp.16-19.

2. The Eighth Circuit's decision in *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014), and two of the Tenth Circuit decisions involved specific applications of state statutes that had already been held unconstitutional. In *Snider*, a citizen was arrested for desecrating an American flag. *Id.* at 1154. True, the officers obtained a warrant before making the arrest. *Id.* at 1157. But there was a body of case law dating back decades that would have given a reasonable officer cause to question the validity of that warrant. *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989). Indeed, this case law was so clear that the court found it "fairly inexplicable" that neither the prosecutor nor the magistrate who issued the warrant recognized it. *Snider*, 752 F.3d at 1157. No such caselaw exists in this case. *Supra* pp.15-19.

Two of the cases Villarreal cites from the Tenth Circuit also fall into that same category. In *Jordan v. Jenkins*, the Court denied qualified immunity because the plaintiff was arrested for criticizing a police officer—conduct this Court had already held to be constitutionally

protected. 73 F.4th 1162, 1168-72 (10th Cir. 2023) (relying on *Hill*, 482 U.S. at 453-54). And *Mink v. Knox*, involved writing a parody rather than criticizing a cop, but the principle was the same: Because such expression had already been held to be constitutionally protected, the defendant was not entitled to qualified immunity. 613 F.3d 995, 1005-06 (10th Cir. 2010) (relying on, *inter alia*, *Hustler Magazine*, 485 U.S. at 51).

3. Finally, in *Lawrence v. Reed*, the defendant *admitted* that he violated clearly established law when he towed 70 of plaintiff's vehicles to a landfill without a warrant or hearing. 406 F.3d 1224, 1229-30 (10th Cir. 2005). Nevertheless, he argued that qualified immunity was appropriate because a local ordinance authorized such a seizure. *Id.* at 1231-33. The Tenth Circuit rejected that argument, holding that the ordinance was "obviously unconstitutional" because it provided for no hearing at all—a fundamental requirement of due process of which government officials should be aware. *Id.* at 1233. But again, Villarreal has not argued that section 39.06(c) is obviously unconstitutional, so the Fifth Circuit's decision is consistent with *Lawrence* as well as the other authorities upon which Villarreal's claim of a circuit split rests.

II. This Case Is Not a Good Vehicle To Resolve Any Hypothetical Conflict Because Other Grounds Support the Judgment.

Even if there were a conflict between the Fifth Circuit and either this Court or any other circuit regarding whether a State can constitutionally punish the recipient as well as the perpetrator of a government leak, this is far from an "ideal vehicle" to resolve it. *Contra* Pet. 32. This Court has repeatedly emphasized that it "review[s] judgments of the lower courts, not statements in their opinions," *Amgen, Inc. v. Sanofi*, 598 U.S. 594, 615 (2023)

(citing *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)), and that "[c]ourts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" *al-Kidd*, 563 U.S. at 735 (quoting *Pearson*, 555 U.S. at 236-37).

Because there are at least three additional "ground[s] upon which to dispose of this case," the "prudent exercise of this Court's jurisdiction" suggests that it should decline to resolve Villarreal's constitutional claims. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)).

First, section 39.06(c) prohibits "solicit[ing] *or receiv[ing]*" nonpublic information with the intent to benefit oneself. (Emphasis added). By Villarreal's own admission, she received nonpublic information, Pet.App.212a-213a, which does not implicate her First Amendment rights, *see* Vladeck, *supra*, at 234 (finding no precedential support for a First Amendment defense to the unlawful retention of classified information). Thus, Respondent Officials had grounds to arrest her under section 39.06(c) that did not allegedly infringe the First Amendment.

Second, as the Fifth Circuit explained, the independent-intermediary doctrine represents an alternative ground for judgment. Pet.App.29a-32a. Arising from the Fourth Amendment context, the doctrine provides that "the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012). As noted above, *Marcus* and *Roaden* already import the same concept into claims

sounding in the First Amendment. *See supra* pp.21-23. Having found evidence that the Respondent Officials complied with the doctrine's prerequisites, Pet.App.30a, the Fifth Circuit properly held that the Respondent Officials were entitled to the protection the doctrine affords, Pet.App.31a.[7]

Third, to the extent that Villarreal has properly preserved her retaliation claim, *but see supra* p.14 n.4, she fails to rebut the Fifth Circuit's reasons for rejecting it. Pet.App.39a. She cannot. As this Court has reaffirmed, a retaliation plaintiff "must plead and prove the absence of probable cause for the arrest," *Nieves v. Bartlett*, 587 U.S. 391, 402 (2019), or provide "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been," *id.* at 407. This Court recently held that it would be improper to "demand … virtually identical and identifiable comparators" to demonstrate retaliation, but it emphasized that the *Nieves* exception remained "slim." *Gonzalez v. Trevino*, 144 S. Ct. 1663, 1667 (2024) (per curiam).

Here, Villarreal fails to bring herself within that exception because the paragraphs from her complaint to which she points (at 36 n.10) do not reflect "circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Trevino*, 144 S. Ct. at 1667 (quoting *Nieves*, 587 U.S. at 406). Specifically, those pages allege only that section

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[7] For similar reasons, Villarreal is wrong (at 1, 18-19) that the Fifth Circuit's decision means that courts do not have to consider First Amendment rights at all. The issues are intertwined precisely because a First Amendment violation would vitiate the probable cause necessary to support a Fourth Amendment seizure. *E.g.*, *Snider*, 752 F.3d at 1157.

39.06(c) has never been enforced Pet.App.223a, 233a, 242a-243a, even though Respondent Officials "knew that members of the local media regularly asked for and received information from LPD officials," Pet.App.223a; *see also* Pet.App.241a. Conspicuously absent are allegations that officers failed to prosecute when they knew local media "solicit[ed]" the leak of *nonpublic* information. Without that additional element, there has been no crime: There has been a PIA request, which Texas law encourages. *Supra* pp.3-4.

Moreover, under Fifth Circuit precedent, a retaliation plaintiff must show that the defendant's actions "would chill a person of ordinary firmness from continuing to engage in that activity." *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). The Fifth Circuit concluded Villarreal had not made that showing, Pet.App.39a, and she has not challenged that conclusion here. Even if she had, the issue would present nothing more than a fact-bound request for error correction of the type that this Court declines to review. Stephen M. Shapiro et al., SUPREME COURT PRACTICE 508-09 (10th ed. 2013).

III. Courts Can Protect First Amendment Rights While Respecting Qualified Immunity.

Finally, echoing the Fifth Circuit dissents, Villarreal's petition is sprinkled (*e.g.*, at 2) with hyperbolic assertions that this decision "spells the end of the First Amendment." Courts are not powerless to enforce First Amendment rights, even if qualified immunity prohibits damages in this case.

In particular, the dissents invite the Court to speculate that the legislative and executive branches of Texas's state government will conspire to limit the First Amendment rights of citizens by passing and enforcing viewpoint discriminatory laws, Pet.App.80a, or that

officials will wield constitutional laws as "cudgels" to silence speech, Pet.App.64a. But this Court will not presume bad faith on the part of the other branches of government, either at the federal, *Clark v. Martinez*, 543 U.S. 371, 381 (2005), or state levels, *e.g.*, *Illinois v. Krull*, 480 U.S. 340, 351 (1987). If anything, Villarreal's account of how journalism has continued in Texas unimpeded for a quarter century despite section 39.06 suggests that this presumption is well founded. Pet.App.241a-242a.

Moreover, in the doomsday scenario predicted by the dissents and adopted by Villarreal, courts are still able to protect the First Amendment. After all, "grossly and flagrantly" unconstitutional laws will provide no protection to government officials. *DeFillippo*, 443 U.S. at 38. Nor will the presumption of constitutionality immunize an official's application of a facially valid law when that application has been declared unconstitutional. *Jordan*, 73 F.4th at 1168-72. And retaliation claims remain a viable option for those arrested for their speech even if application of the law to those circumstances might otherwise be deemed permissible. *Gonzalez*, 144 S. Ct. 1663.

Nor are damages the only option. Declaratory-judgment actions can provide guidance on whether a law is constitutional or being constitutionally applied. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). And *Ex parte Young* suits can restrain officials from taking unconstitutional actions. *E.g.*, *Book People, Inc. v. Wong*, 91 F.4th 318 (5th Cir. 2024); *Freedom From Religion Found. v. Abbott*, 955 F.3d 417 (5th Cir. 2020).

Finally, Villarreal's related argument (at 25) that it is unfair that officials will not be held responsible for First Amendment violations unless a state court has held the governing statute unconstitutional is nothing more than a request to create narrower qualified-immunity rules

for First Amendment claims. But this Court has repeatedly held that "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 563 U.S. at 743; *see also Heien v. North Carolina*, 574 U.S. 54, 57 (2014) (finding no Fourth Amendment violation when officer makes a reasonable mistake of law). And Villarreal has pointed to reason to cabin that breathing room to non-First Amendment lawsuits—let alone a reason sufficient to overcome the effects of *stare decisis*.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Similar considerations defeat Villarreal's statutory argument (at 26) that section 1983 makes an official liable if he deprives someone of a constitutional right "under color of any statute."