NO. 23-1155

IN THE
Supreme Court of the United States

PRISCILLA VILLARREAL,
Petitioner,

v.

ISIDRO R. ALANIZ, IN HIS INDIVIDUAL CAPACITY; ET AL.,
Respondents.

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

BRIEF OF YOUNG AMERICA'S FOUNDATION AND MANHATTAN INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Young America's Foundation ("YAF") is a national nonprofit organization committed to ensuring that increasing numbers of young Americans understand and are inspired by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. YAF's National Journalism Center trains budding journalists to be truth-seekers who are ethical and bold in exercising their First Amendment rights.

YAF leads the Conservative Movement on campuses throughout the country by sponsoring campus lectures and other activities, which often results in conflict with university leaders who disagree with YAF's messages and ideas. Often, those conflicts result in First Amendment litigation in which qualified immunity plays a major role. *E.g.*, *Young America's Found.* v. *Kaler*, 482 F. Supp. 3d 829, 856–66 (D. Minn. 2020), *vacated by Young America's Found.* v. *Kaler*, 14 F.4th 879 (8th Cir. 2021). YAF has a significant interest in ensuring that officials who commit obvious violations of the First Amendment do not obtain qualified immunity.

YAF's strong interest in this case is magnified by its National Journalism Center. Over the last 45 years, the Center has trained over 2,250 journalists to combat bias in the mainstream media. YAF also has

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Supreme Court Rule 37.2.

a significant interest in protecting those journalists' First Amendment rights.

The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting the rule of law and opposing government overreach, including in the marketplace of ideas.

Amici file this brief to emphasize that, regardless of where anyone stands on the larger debate over qualified immunity, this doctrine was never intended to shield government officials who violate clear-cut First Amendment rights.

SUMMARY OF THE ARGUMENT

Qualified immunity should not be used to shield plainly unconstitutional behavior from redress. This Court has never required a factually analogous case to overcome the defense of qualified immunity, and the en banc Fifth Circuit's requirement of such in this case is dramatically out of step with this Court and lower courts' precedents.

Journalists and citizens' First Amendment right to ask questions of their government officials have been clearly established for over 50 years. It was plainly unconstitutional for Defendants to attempt to bar Ms. Villarreal from using standard journalistic techniques to uncover and report news. This Court should grant certiorari to clarify that qualified immunity does not allow a free pass for government officials to flagrantly flout established constitutional rights just because no one has committed the same egregious constitutional violation before.

ARGUMENT

I. Qualified immunity was not intended to shelter government actors who violate clearly established rights.

Qualified immunity doctrine requires a plaintiff to prove that the defendant infringed a legal principle that was "clearly established" at the time the alleged violative conduct occurred. *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009). A legal principle is clearly established when it has "a sufficiently clear foundation in then-existing precedent" and qualifies as "'settled law.'" *District of Columbia* v. *Wesby*, 583 U.S. 48, 63 (2018) (quoting *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam)). If reasonable officials in the

same position would "have known" or "*predicted*" that their actions were unlawful, the law is clearly established and qualified immunity does not apply. *Ziglar* v. *Abbasi*, 582 U.S. 120, 152 (2017) (emphasis added). "There is no doubt that damages claims have always been available under § 1983 for clearly established violations of the First Amendment." *Tanzin* v. *Tanvir*, 592 U.S. 43, 50 (2020).

This Court's qualified immunity precedent has never required a plaintiff to prove that "the very action in question has previously been held unlawful." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Quite the opposite, this Court has held repeatedly that a plaintiff need not provide "'a case directly on point'" to prove a clearly established right. *Rivas-Villegas* v. *Cortesluna*, 595 U.S. 1, 5 (2021) (per curiam) (quoting *White* v. *Pauly*, 580 U.S. 73, 79 (2017) (per curiam)). Cases which discuss constitutional rights "at a high level of generality" can still "'clearly establish' [a legal right], even without a body of relevant case law" providing guidance. *Id.* at 6 (citation omitted). In other words, "general statements of the law" may still "giv[e] fair and clear warning to officers" that their conduct violates a plaintiff's constitutional rights. *Kisela* v. *Hughes*, 584 U.S. 100, 105 (2018) (per curiam) (quoting *White*, 580 U.S. at 79).

A. Ms. Villarreal's free-speech and free-press rights have been clearly established for decades.

This Court's precedent "makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances."

Hope v. *Pelzer*, 536 U.S. 730, 741 (2002); accord, *e.g.*, *Taylor* v. *Riojas*, 592 U.S. 7, 9 (2020) (per curiam). "[T]he very action in question" need not be the subject of a court decision for a right to be clearly established. *Anderson*, 483 U.S. at 640. So long as "[t]he contours of the right [are] sufficiently clear," then government officials have been sufficiently put on notice that their conduct violates a clearly established legal principle, no matter how novel the situation may be. *Ibid.* Under this flexible standard, there is no "requirement that previous cases be 'fundamentally similar.'" *Hope*, 536 U.S. at 741.

Ms. Villarreal's First Amendment rights were obvious at the time of her arrest. Free-speech and free-press rights have remained largely consistent throughout our nation's history due to their foundation in English common law. See *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 713–14 (1931) ("Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press …." (quoting 4 William Blackstone, *Commentaries* *151, *152)). By nature, these rights are not as abstract or case specific as the Fourth Amendment's "reasonableness" standard, the main focus of courts' qualified-immunity decisions. *E.g.*, *Rivas-Villegas*, 595 U.S. at 5–6; *Kisela*, 584 U.S. at 104.

This case fits squarely in that long tradition. There is no question the First Amendment protects the "right of citizens to inquire, to hear, to speak, and to use information." *Citizens United* v. *FEC*, 558 U.S. 310, 339 (2010). These rights extend to "news gathering," which "qualif[ies] for First Amendment protection" to prevent "freedom of the press" from

being "eviscerated." *Branzburg* v. *Hayes*, 408 U.S. 665, 681 (1972); accord *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 576 (1980). Together, the First Amendment's text and this Court's decisions made four legal principles abundantly clear at the time of Ms. Villarreal's arrest.

First, the First Amendment protects "routine newspaper reporting techniques," such as asking questions of individuals—including government officials—to gather information from willing sources for publication. *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979); accord *Fla. Star* v. *B.J.F.*, 491 U.S. 524, 538 (1989). That means journalists are "free to seek out" and request information from "public officials[ ] and [government] personnel," including police officers. *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion); accord *id.* at 32 (Stevens, J., dissenting) (positing even greater constitutional "protection for the acquisition of information about the operation of public institutions").

Second, journalists' "use of confidential sources … is not forbidden or restricted." *Branzburg*, 408 U.S. at 681. Reporters are "free to seek out sources of information not available to members of the general public." *Pell* v. *Procunier*, 417 U.S. 817, 834 (1974). They are not limited to official channels. Indeed, "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Smith*, 443 U.S. at 104; accord *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 783 (1978) (government cannot "limit[ ] the stock of information from which members of the public may draw").

Third, it makes no difference that reporters may derive financial benefit from breaking news. Journalists' "[s]peech … is protected even though it is carried in a form that is 'sold' for profit." *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council*, 425 U.S. 748, 761 (1976). The same is true of books, newspapers, and journals. "[T]he degree of First Amendment protection is not diminished" whether "speech is sold" or "given away." *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988).

Last, government has ample tools to prevent leaks. But if those measures fail, it generally cannot punish journalists for seeking, receiving, or publishing information. *Fla. Star*, 491 U.S. at 533–34; *Smith*, 443 U.S. at 103–04; *Landmark Commc'ns, Inc.* v. *Virginia*, 435 U.S. 829, 837 & n.10 (1978). Few government interests will outweigh journalists' right to speak and the public's right to receive "information and ideas [that] are published." *Pell*, 417 U.S. at 832. The government's remedy is to punish the leaker—not the journalist. *Fla. Star*, 491 U.S. at 534–35; *Landmark*, 435 U.S. at 837.

The Fifth Circuit en banc majority ignored these First Amendment pillars. It allowed city officials to punish Ms. Villarreal for engaging in routine reporting techniques, *Villarreal* v. *City of Laredo*, 94 F.4th 374, 388 (5th Cir. 2024) (en banc); going outside of official police channels, *id.* at 381–82, 385, 388; potentially deriving meager financial rewards from her reporting, *id.* at 388; and targeting a citizen journalist who merely asked questions, rather than a police officer who leaked information, *id.* at 388–89. All of this violates the First Amendment's text and this Court's established precedent. Because officials

had clear notice that arresting Ms. Villarreal under a moribund law because they disliked her speech violates the First Amendment, qualified immunity does not apply—especially at the pleadings stage where courts must accept Ms. Villarreal's alleged facts and draw all inferences in her favor. *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

The situation in *Sause* v. *Bauer*, 585 U.S. 957 (2018) (per curiam), was broadly similar and this Court's ruling instructive. There, two police officers allegedly responded to a noise complaint, entered Ms. Sause's apartment, then engaged "in a course of strange and abusive conduct," including ordering her to stop kneeling and praying. *Id.* at 958. The Tenth Circuit said qualified immunity applied because Ms. Sause could not "identify a single case in which [the Tenth Circuit], or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." *Sause* v. *Bauer*, 859 F.3d 1270, 1275 (10th Cir. 2017).

This Court reversed and remanded because "[t]here can be no doubt that the First Amendment protects the right to pray." *Sause*, 585 U.S. at 959. This was so even though the plaintiff pointed to no particular case that applied that right-to-pray rule to substantially analogous facts as those alleged in *Sause*.

The same principle applies here. No reasonable official would doubt Ms. Villarreal's constitutional right to engage in routine journalism concerning local police matters. Just as in *Sause*, this Court should reverse and remand so that Ms. Villarreal may

engage in discovery to substantiate her First and Fourteenth Amendment claims.

B. This Court should grant certiorari to make clear that qualified immunity does not apply to obvious as-applied violations of the First Amendment.

Some applications of laws are so "obvious[ly]" unconstitutional, *Rivas-Villegas*, 595 U.S. at 6, or "egregious," *Taylor*, 592 U.S. at 9, that qualified immunity dissolves without a factually analogous case on the books. Often this principle is associated with *Hope* v. *Pelzer*, 536 U.S. at 741, where this Court said "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." Accord, *e.g.*, *Anderson*, 483 U.S. at 640 (rejecting the notion "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful").

The Fifth Circuit en banc majority avoided this conclusion by throwing out the obviousness exception to "normal" qualified-immunity rules in the free-speech and free-exercise context. *Villarreal*, 94 F.4th at 395. It refused to accept that "the 'obvious' violation exception applies broadly to arrests that may impinge on First Amendment rights." *Id.* at 392. Obviousness, the majority said, is "no more than a *possible* exception," *ibid.*, or one narrowly confined to "Eighth Amendment cases," *id.* at 395.

This dispelling of the obviousness exception is mistaken. Eighth Amendment precedent has its oddities but qualified immunity isn't one of them.

Nothing in *Hope* or *Taylor* suggests that the exception applies only to claims of cruel and unusual punishment. Nor does confining the obviousness exception to that narrow context make sense. Freedoms of speech, press, and religion are among our proudest liberties, not "second-class right[s]." *Villarreal*, 94 F.4th at 413 (Ho, J., dissenting).

What's more, the Court has often raised the obviousness exception in Fourth Amendment cases. *E.g.*, *Rivas-Villegas*, 595 U.S. at 6; *Kisela*, 584 U.S. at 105; *White*, 580 U.S. at 79–80; *Brosseau* v. *Haugen*, 543 U.S. 194, 199–200 (2004). If the exception were an Eighth Amendment peculiarity, that wouldn't be true. *Sause* also refutes any suggestion that the obviousness exception doesn't apply to free-exercise claims. 585 U.S. at 959. Yet the Fifth Circuit en banc majority said, quite inexplicably, that *Sause* proves the opposite. *Villarreal*, 94 F.4th at 395.

The en banc majority also drew an arbitrary line between *inquiring* about information and *publishing* that information. *Id.* at 396. But the "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); accord *Branzburg*, 408 U.S. at 681–82. If a journalist cannot be penalized for publishing non-public information, then she cannot be punished for requesting that information in the first place. Freedom of speech and of the press cannot "meaningfully exist unless journalists are allowed to seek non-public information from the government." *Villarreal*, 94 F.4th at 399 (Graves, J., dissenting). Indeed, the en banc majority's ruling seemingly leaves even journalists in Texas who "request

information in good faith from official channels" in "fear of reprisal." *Id.* at 401 (Graves, J., dissenting).

Critically, the en banc majority's attempt to obliterate the obviousness exception in the First Amendment context isn't merely wrong, it directly conflicts with rulings by nine other circuits. *Id.* at 413 (Ho, J., dissenting) (citing contradictory rulings by the First, Second, Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits). Only this Court can resolve that conflict and protect First Amendment rights from egregious invasion not only in Ms. Villarreal's case, but across the board in Louisiana, Mississippi, and Texas—home to over 37 million people.

Officials' care and deliberation in plotting to jail Ms. Villarreal deserve special mention. Qualified-immunity jurisprudence is typically conceived as protecting law enforcement officers making split-second decisions in the heat of the moment. *E.g.*, *Lozman* v. *City of Riviera Beach*, 585 U.S. 87, 98 (2018) ("In deciding whether to arrest, police officers often make split-second judgments."); *Graham* v. *Connor*, 490 U.S. 386, 397 (1989) (explaining law enforcement are often involved in "circumstances that are tense, uncertain, and rapidly evolving"). But there was no exigency nor split-second decision here. Rather, Defendants spent *six months* formulating a scheme to punish Ms. Villareal for her speech, choosing to leverage a never-before-used provision to achieve their unconstitutional ends. No justification exists for granting officials "who have time to make calculated choices about … [their] unconstitutional" actions "the same [qualified-immunity] protection as a police officer who makes a split-second decision to use force in a dangerous setting." *Hoggard* v. *Rhodes*,

141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting the denial of certiorari).

According to the complaint, this was a calculated, premeditated attack on Ms. Villareal's citizen reporting. Yet, the Fifth Circuit's qualified-immunity analysis ignored this salient point. Finding qualified immunity for officials here—where their scheme flies in the face of decades of constitutional jurisprudence—runs counter to the stated purposes of qualified-immunity doctrine. Left undisturbed, the Fifth Circuit's ruling provides dangerous license for government actors to flagrantly violate the Constitution without recourse, even against the most established rights, simply because they invoke a novel factual situation never before specifically addressed by the courts.

II. This Court should grant certiorari to clarify the scope of the *Nieves* exception for retaliatory arrests and enforce *Malley*'s requirement that officials seeking warrants exercise reasonable professional judgment.

"'[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech." *Nieves* v. *Bartlett*, 587 U.S. 391, 398 (2019) (quoting *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006). In *Nieves*, this Court identified the proper test for analyzing speech-retaliation claims involving arrests. Generally, "[t]he plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." *Id.* at 402. But *Nieves* created an exception for situations where "officers have probable cause to make arrests, but typically

exercise their discretion *not* to do so." *Id.* at 406 (emphasis added). This exception seeks to address the "risk that some police officers may exploit the arrest power as a means of suppressing speech." *Lozman*, 585 U.S. at 99. Accordingly, a plaintiff like Ms. Villarreal is exempt from showing a lack of probable cause when she "presents objective evidence that [s]he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves*, 587 U.S. at 407.

Ms. Villarreal's allegations fit squarely within the *Nieves* exception. As the Fifth Circuit en banc majority acknowledged, there have been no other prosecutions for the violation of Texas Penal Code § 39.06(c) in the statute's 23 years of existence. *Villareal*, 94 F.4th at 398. Not one. In fact, "[a]t no point in their district or appellate court briefing did Defendants contest Villarreal's allegation that law enforcement in Laredo and Webb County, or indeed, any prosecutor anywhere in Texas, had pursued anyone besides her under § 39.06(c)." *Id.* at 404 (Higginson, J., dissenting). That is "objective evidence" that Ms. Villarreal was arrested when other journalists were not. *Nieves*, 587 U.S. at 407. Because officials exploited their arrest power to suppress Ms. Villarreal's speech, the presence, or absence, of probable cause is irrelevant.

Yet the en banc majority essentially wrote the *Nieves* exception out of existence, requiring Ms. Villarreal to specifically "identify"—at the pleadings stage—"'similarly situated individuals' who … were not prosecuted." *Villarreal*, 94 F.4th at 398. *Nieves*' objective-evidence rule doesn't require such a cut-and-dried showing, and this Court should grant

certiorari to say so. Otherwise, officials may levy moribund state or local laws to arrest journalists for newsgathering in blatant violation of the First Amendment and get off scot-free. Contra *Grossman* v. *City of Portland*, 33 F.3d 1200, 1209 n.19 (9th Cir. 1994); *Roska ex rel. Roska* v. *Peterson*, 328 F.3d 1230, 1253 (10th Cir. 2003) (qualified immunity doesn't protect officials who rely on moribund laws). Ms. Villarreal's case is an egregious example, as the Fifth Circuit "countenance[d], with neither inquiry nor discovery, dismissal of an American citizen-journalist's complaint that her newsgathering led to arrest for something that Texas courts have confirmed is not a crime." *Villarreal*, 94 F.4th at 406 (Higginson, J., dissenting).

Additionally, probable cause for arrest is based on "the standpoint of an objectively reasonable [official]" and "the totality of the circumstances." *Wesby*, 583 U.S. at 56–57 (quotation omitted). No reasonable official would conclude there was probable cause to arrest Ms. Villarreal here. Officials arranging the "appl[ication] for [a] warrant" must "minimize th[e] danger [of mistaken approval] by exercising reasonable professional judgment." *Malley* v. *Briggs*, 475 U.S. 335, 346 (1986). The Fifth Circuit en banc majority cited *Malley* repeatedly but ignored this key requirement. *Villarreal*, 94 F.4th at 385, 393–94.

The magistrate who found probable cause to arrest Ms. Villarreal was entirely *unaware* that officials were using § 39.06(c)—a statute never enforced—as a pretext to chill and punish her speech. But those seeking the warrants are a different story. No official "of reasonable competence" would have schemed to retaliate against Ms. Villarreal for her journalism, let alone perfected that scheme by

"request[ing] the warrant[s]." *Malley*, 475 U.S. at 346 n.9. That is doubly true when supporting affidavits failed to fully establish Ms. Villarreal's alleged crimes. *Villarreal*, 94 F.4th at 411 (Ho, J., dissenting) ("[N]owhere in their arrest warrant affidavits or charging documents do Defendants ever mention subsection (d) or its requirements—let alone identify which prohibition on disclosure Villarreal violated.").

The en banc majority was not just "insufficiently protective" but outright dismissive of Ms. Villarreal's "First Amendment rights." *Nieves*, 587 U.S. at 407; *e.g.*, *Villarreal*, 94 F.4th at 391–93. This Court's review is urgently needed to clarify the *Nieves* exception and enforce *Malley*'s requirement that officials seeking warrants exercise reasonable judgment.

CONCLUSION

Whatever anyone thinks about qualified immunity, the doctrine was never intended to shield government officials who infringe on obvious First Amendment rights. For all the above reasons and those presented by the petitioner, the Court should grant the petition.

Respectfully submitted,

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MAY 2024