RECORD NO. 20-40359

In The
United States Court of Appeals
For The Fifth Circuit

PRISCILLA VILLARREAL,
Plaintiff-Appellant,

v.

THE CITY OF LAREDO, TEXAS; WEBB COUNTY, TEXAS; ISIDRO R. ALANIZ; MARISELA JACAMAN; CLAUDIO TREVIÑO, JR.; JUAN L. RUIZ; DEYANIRA VILLARREAL; ENEDINA MARTINEZ; ALFREDO GUERRERO; LAURA MONTEMAYOR; DOES 1–2,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Laredo Division, No. 5:19-cv-48, Honorable George P. Kazen, Presiding

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those listed in the parties' briefs, have an interest in the outcome of this case.

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Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amicus curiae* Institute for Justice is not a publicly held corporation and does not have any parent corporation, and that no publicly held corporation owns 10 percent or more of any corporation's stock.

Dated: September 8, 2020

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TABLE OF CONTENTS

Page

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES............i

TABLE OF AUTHORITIES............iv

INTEREST OF *AMICUS CURIAE*............1

BACKGROUND AND SUMMARY OF ARGUMENT............1

ARGUMENT............5

I. The district court's holding is dangerous to a free society because it permits the government to make itself the gatekeeper and arbiter of newsworthiness............5

II. As the majority of circuits recognize, qualified immunity cannot shield officers who enforce a patently unconstitutional statute or use a statute in an egregiously unconstitutional manner............7

A. Historically, the individual defendants woud be liable for arresting Villarreal in reliance on an unconstitutional statute............9

B. This Court should not grant qualified immunity for reliance on Section 39.06(c), because the statute is patently unconstitutional and because the defendants used it in an egregiously unconstitutional manner............12

1. This Court should join its sister circuits and hold that patently unconstitutional statutes cannot justify qualified immunity............12

2. Section 39.06(c) is patently unconstitutional because it criminalizes asking government officials for information............17

3. Any reasonable official would know—based on fundamental First Amendment principles and fair warning from on-point caselaw—that using Section 39.06(c) in Villarreal's circumstances was egregiously unconstitutional....................................... 19

4. The district court's analysis absurdly imputes obscure statutory knowledge to Villarreal while permitting the government-official defendants to plead ignorance of the First Amendment.................. 22

III. *Nieves* does not require the absence of probable cause for a premeditated arrest based solely on protected speech; but even if it does, an arrest for everyday newsgathering falls within *Nieves*'s explicit exception. 23

A. *Nieves* does not apply to cases involving the criminalization of speech directly, especially in circumstances without split-second decision-making. 24

B. *Nieves*'s explicit exception for commonly unpunished conduct applies because the complaint plausibly alleges that the defendants have only ever arrested Villarreal under Section 39.06(c), even though common sense dictates that journalists and others ask for non-public information all the time. 28

CONCLUSION 34

CERTIFICATE OF SERVICE 35

CERTIFICATE OF COMPLIANCE 36

TABLE OF AUTHORITIES

Cases **Page(s)**

Anderson v. Valdez,
845 F.3d 580 (5th Cir. 2016) 11, 21

The Apollon,
22 U.S. (1 Wheat.) 362 (1824) 10

Aubin v. Columbia Cas. Co.,
272 F. Supp. 3d 828 (M.D. La. 2017) 13, 15, 16

Bledsoe v. Ferry Cty.,
No. 2:19-cv-227, 2020 WL 376611 (E.D. Wash. Jan. 23, 2020) 30

Branzburg v. Hayes,
408 U.S. 665 (1972) 5, 21

Carey v. Nev. Gaming Control Bd.,
279 F.3d 873 (9th Cir. 2002) 14, 16

Cohen v. Cowles Media Co.,
501 U.S. 663 (1991) 21

Cooper v. Dillon,
403 F.3d 1208 (11th Cir. 2005) 14

Dep't of Commerce v. New York,
139 S. Ct. 2551 (2019) 33

First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 5

Florida Star v. B.J.F.,
491 U.S. 524 (1989) 7, 17, 20

Grossman v. City of Portland,
33 F.3d 1200 (9th Cir. 1994) 19

Guillemard-Ginorio v. Contreras-Gómez,
490 F.3d 31 (1st Cir. 2007) 14, 16

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 11

Henneberry v. City of Newark,
No. 13-cv-05238, 2019 WL 4194275 (N.D. Cal. Sept. 4, 2019) 31

Herrington v. Gautreaux,
No. 13-cv-650, 2014 WL 811584 (M.D. La. Feb. 28, 2014) 19

Houchins v. KQED, Inc.,
438 U.S. 1 (1978) 3, 17, 21

Jamison v. McClendon,
No. 3:16-cv-595, 2020 WL 4497723 (S.D. Miss. Aug. 4, 2020) 10

Johnson v. McCarver,
942 F.3d 405 (8th Cir. 2019) 28

Keenan v. Tejeda,
290 F.3d 252 (5th Cir. 2002) 20

Lawrence v. Reed,
406 F.3d 1224 (10th Cir. 2005) 13, 14, 16

Lederman v. United States,
291 F.3d 36 (D.C. Cir. 2002) 14

Leonard v. Robinson,
477 F.3d 347 (6th Cir. 2007) 14, 15, 20

Lozman v. City of Riviera Beach,
138 S. Ct. 1945 (2018) 27

Lull v. Cty. of Sacramento,
No. 2:17-cv-1211, 2019 WL 6908046 (E.D. Cal. Dec. 19, 2019) 30

Lund v. City of Rockford,
956 F.3d 938 (7th Cir. 2020) 29

Michigan v. DeFillipo,
443 U.S. 31 (1979) 13

Myers v. Anderson,
238 U.S. 368 (1915) 10

N.Y. Times Co. v. United States,
403 U.S. 713 (1971) 6

Nieves v. Bartlett,
139 S. Ct. 1715 (2019) .... *passim*

Novak v. City of Parma,
932 F.3d 421 (6th Cir. 2019) 25, 26, 27

Parea v. Baca,
817 F.3d 1198 (10th Cir. 2016) 11

Poindexter v. Greenhow,
114 U.S. 270 (1885) 11, 12

Ratzlaf v. United States,
510 U.S. 135 (1994) 22

Reichle v. Howards,
566 U.S. 658 (2012) 26, 28

Riley v. City of Chester,
612 F.2d 708 (3d Cir. 1979) 17

Roy v. City of Monroe,
950 F.3d 245 (5th Cir. 2020) 33

Russell v. Collins,
998 F.2d 1287 (5th Cir. 1993)..33

Seals v. McBee,
898 F.3d 587 (5th Cir. 2018)..18

Smith v. Daily Mail Publ'g Co.,
443 U.S. 97 (1979)..17, 20, 21

Turner v. Driver,
848 F.3d 678 (5th Cir. 2017)...3, 17, 20

United States v. Rodgers,
461 U.S. 677 (1983)...33

Vives v. City of New York,
405 F.3d 115 (2d Cir. 2005) 14

Williams v. Aguirre,
965 F.3d 1147 (11th Cir. 2020)...27

Codes and Statutes

42 U.S.C. § 1983 ....10, 23

Tex. Penal Code Ann. § 39.06(c)... *passim*

Tex. Penal Code Ann. § 39.06(d) 17

Other Authorities

David E. Engdahl,
Immunity and Accountability for Positive Governmental Wrongs,
44 U. Colo. L. Rev. 1 (1972) 9

James E. Pfander & Jonathan L. Hunt,
Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic, 85 N.Y.U. L. Rev. 1862 (2010) 10

Joseph Story,
Commentaries on the Constitution § 1671 (1833) 9, 12

Paul Farhi & Elahe Izadi,
Journalists Are Reexamining Their Reliance on a Longtime Source: The Police, Wash. Post (June 30, 2020), https://wapo.st/2ECJ1la 6

William Baude,
Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45 (2018) 10

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I .... *passim*

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1991, the Institute for Justice ("*amicus*") is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. *Amicus* litigates First Amendment, governmental accountability, and qualified immunity cases around the country, including in this Court.

BACKGROUND AND SUMMARY OF ARGUMENT

Plaintiff-Appellant Priscilla Villarreal is a prominent citizen-journalist in Laredo, Texas. She livestreams and documents newsworthy events on her "Lagordiloca" Facebook page, which has over 120,000 followers. That makes her one of Laredo's most popular news sources. But she is also a well-known critic of Laredo's government. And that makes her unpopular with police and other officials, including the individual defendants in this case. ROA.160–162.

[1] Pursuant to Fed. R. App. P. 29(a)(2), counsel for *amicus* states that counsel for Appellant have consented to the filing of this brief. Counsel for Appellees do not consent to the filing of this brief. *See* Motion for Leave to File. No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund preparing or submitting this brief. No person—other than *amicus*—contributed money intended to fund preparing or submitting this brief.

So, after Villarreal asked a governmental source (Officer Goodman) to corroborate some facts for two of her news stories, the defendants arrested Villarreal under the Texas Misuse of Official Information Statute, Penal Code § 39.06(c), which criminalizes "solicit[ing] or receiv[ing] … any information to which the public does not generally have access[] and that is prohibited from disclosure." This was part of a pattern of the defendants' hostile acts against her. ROA.162–168.

The district court's countenancing of that arrest for routine newsgathering is dangerous to a free society. It assumes that the government can choose proper and improper channels for newsgathering—indeed, that the government can decide what is and is not newsworthy. But journalists and others are increasingly skeptical of the credibility of "official" police and other governmental reports. A constitutional rule that subjects people to arrest for seeking information from governmental sources other than designated gatekeepers will chill First Amendment activity and leave us all less informed.

And any reasonable official would know that Section 39.06(c) is patently unconstitutional because it criminalizes routine newsgathering, like Villarreal's. Indeed, controlling precedent had already said as much.

See Turner v. Driver, 848 F.3d 678, 688 (5th Cir. 2017) ("[t]here is 'an undoubted right to gather news from any source by means within the law'" (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978))). The defendants' reliance on the statute cannot shield them from Villarreal's retaliatory-investigation, -arrest, and -detention claims (collectively, "retaliatory-arrest claims").[2]

Nevertheless, the district court dismissed those claims based on a fundamental error that permeated its entire First Amendment analysis.

Villarreal premised her retaliatory-arrest claims in part on Section 39.06(c)'s facial and as-applied unconstitutionality under the First Amendment. ROA.169, ¶¶ 81–82. But the district court simply assessed the existence of probable cause, based on the statute's terms, to grant qualified immunity. Even assuming that assessment was factually sound, the fact remains that probable cause to criminalize routine newsgathering is not probable cause at all. It cannot form the basis for qualified immunity.

[2] *Amicus* focuses on Villarreal's retaliatory-arrest claims against the individual defendants. These arguments may also be relevant to and aid the Court's analysis of her other claims.

So—consistent with the historic judicial role—even if officials point to a statute to justify their actions, at least seven circuits will deny qualified immunity if the statute is "patently violative" of a constitutional right or if the officials enforced it in an "egregious manner." This Court should join them, hold that these rules apply to Villarreal's claims, and reverse the district court's grant of qualified immunity.

Because the district court erroneously found probable cause in the criminalization of Villarreal's routine newsgathering, it proceeded to analyze her retaliatory-arrest claims under *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019). There too, it erred.

First, *Nieves* does not apply when the sole basis for probable cause is protected speech—rather than a mix of protected speech and unprotected criminal conduct. Relatedly, the *Nieves* inquiry differentiates between split-second decisions against random suspects and decisions arising from premeditated plans to arrest a person for her journalism, especially by local officials who have a history of targeting her because of her journalism. *See* ROA.163, 167. Moreover, even if *Nieves* applies, the district court misapplied *Nieves*'s "jaywalking exception."

This Court should clarify these constitutional standards and reverse the dismissal of Villarreal's retaliatory-arrest claims.

ARGUMENT

I. The district court's holding is dangerous to a free society because it permits the government to make itself the gatekeeper and arbiter of newsworthiness.

The district court's holding rests on a dangerous premise that undergirds its legal analysis. The district court reasoned that if a person asks for and receives newsworthy information from a government official who is not the government's designated spokesperson (except through the Public Information Act process), she can be arrested and prosecuted—even if the only thing she did was ask for and receive facts. *See* ROA.439–442, 442 n.8. That holding erodes the ability of the press—and everyone else—to learn facts that some government officials may not want us to know. *See Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972) ("The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news *from any source* by means within the law." (emphasis added)); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to *prohibit government from*

limiting the stock of information from which members of the public may draw." (emphasis added)).

This concern is not hypothetical. Journalists are expressing increased skepticism and doubt about the credibility and reliability of official police accounts and official reports regarding acts of police violence and descriptions of crime scenes and suspects. *See generally* Paul Farhi & Elahe Izadi, *Journalists Are Reexamining Their Reliance on a Longtime Source: The Police*, Wash. Post (June 30, 2020), https://wapo.st/2ECJ1la.

A constitutional rule that subjects journalists—or anyone—to arrest for seeking information from officers or other governmental sources who are not the government's designated informational gatekeepers threatens to chill core First Amendment activity and make us all less knowledgeable and worse off. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The press was to serve the governed, not the governors. … The press was protected so that it could bare the secrets of government and inform the people.").

This Court should repudiate the district court's holding that the individual defendants were within their rights to arrest Villarreal for the

temerity to speak with Officer Goodman, instead of seeking out the police department's public spokesperson or filing and awaiting the results of a Public Information Act request. If Officer Goodman—a government employee—violated protocol by providing Villarreal the information she sought, the government can take it up with Officer Goodman. What it cannot do—the Constitution tells us—is punish Villarreal for asking. *See Florida Star v. B.J.F.*, 491 U.S. 524, 538 (1989) ("Where, as here, the government has failed to police itself in disseminating information, it is clear … that the imposition of damages against the press for its subsequent publication [violates the First Amendment].").

II. As the majority of circuits recognize, qualified immunity cannot shield officers who enforce a patently unconstitutional statute or use a statute in an egregiously unconstitutional manner.

Historically, the U.S. judiciary simply assessed liability and refused to immunize officials who enforced unconstitutional statutes. Under the modern qualified immunity doctrine, courts sometimes permit officials to shield themselves from liability by pointing to a statute for their unconstitutional conduct.

But this Court should join seven of its sister circuits and hold that even under the qualified immunity regime, officials are not shielded from

liability when they point to a statute that any reasonable official would know is patently unconstitutional, or when they use a statute in an egregiously unconstitutional manner.

Both of those limitations on immunity are present in Villarreal's case, where the individual defendants punished her under Section 39.06(c) just for exercising the foundational First Amendment right of newsgathering.

First, Section 39.06(c) is patently unconstitutional. It criminalizes asking government officials for information, which is not only purely protected speech, but also a fundamental newsgathering technique. Any reasonable official without a bone to pick would understand that—which may explain why Villarreal was the first person arrested, detained, or prosecuted under the statute by the City of Laredo or Webb County in the statute's 23 years of existence. ROA.181–182, ¶ 141. This Court should say so, join its seven sister circuits in holding that qualified immunity does not shield officials who enforce a patently unconstitutional statute, and deny qualified immunity to the defendants.

Second, under this "patently violative" rule, the same result holds if the Court assesses the particular circumstances in which the

defendants invoked the statute against Villarreal. Qualified immunity does not shield officials who use a statute in an egregiously unconstitutional manner, as the defendants did here by criminalizing the asking of questions. Nowhere in Villarreal's arrest affidavit or warrant was there any indication that the defendants were arresting her for doing anything except asking for and receiving facts from Officer Goodman—without coercion, force, or subterfuge.

A passing familiarity with the First Amendment and with on-point caselaw would have stopped any reasonable official in their tracks before seeking an arrest warrant for what Villarreal did.

A. Historically, the individual defendants woud be liable for arresting Villarreal in reliance on an unconstitutional statute.

From the founding until the mid-Twentieth Century, U.S. courts held public officials "strictly accountable for their [unconstitutional] acts." David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 27, 77 (1972).

This ensured that government officials, "like every other violator of the laws, respond[ed] in damages." Joseph Story, *Commentaries on the Constitution* § 1671 (1833). And it honored the balance of power between

the judicial and legislative branches. James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1870 (2010); *see, e.g.*, *The Apollon*, 22 U.S. (1 Wheat.) 362, 366–67 (1824).

This was the law of the land when Congress enacted the statute now codified at 42 U.S.C. § 1983, which was designed to provide remedies for constitutional violations in the post-war South by granting individuals a cause of action against any person who, under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws." Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983; *see Jamison v. McClendon*, No. 3:16-cv-595, 2020 WL 4497723, at *8–10 (S.D. Miss. Aug. 4, 2020). Congress included no exceptions in the text, and it was well-established that none existed. William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55–58 (2018).

Even when officials acted pursuant to a statute, they were liable if the court held that the statute was unconstitutional. *See, e.g.*, *Myers v. Anderson*, 238 U.S. 368, 377–79, 382 (1915) (affirming judgment against Maryland election officials who prevented three black men from voting

pursuant to an unconstitutional law; rejecting a plea for immunity based on good-faith reliance on the statute); *Poindexter v. Greenhow*, 114 U.S. 270, 297 (1885) (holding official personally liable for acting under a Virginia law later declared to violate the Contracts Clause).

But in 1982, the Court created the qualified immunity doctrine in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), converting liability from the general rule to a limited exception. Now, government officials are immune from suit unless their victims can show a violation of "clearly established law." *Id.* Too often, this means the judicial inquiry devolves into a "scavenger hunt" for factually identical cases. *Parea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016).

Qualified immunity, however, has limits. The crucial question remains whether "a *reasonable* official would understand that *what he is doing* violates [the constitutional] right" in question. *Anderson v. Valdez*, 845 F.3d 580, 600 (5th Cir. 2016) (emphases added; citation omitted). And the "central concept is that of 'fair warning.'" *Id.* (citations omitted). As explained below, those limits require denying qualified immunity in this case under the "patently violative" rule adopted by the majority of this Court's sister circuits.

B. This Court should not grant qualified immunity for reliance on Section 39.06(c), because the statute is patently unconstitutional and because the defendants used it in an egregiously unconstitutional manner.

This Court should join its sister circuits in recognizing that qualified immunity does not shield officials who (1) rely on a statute that is "patently violative of fundamental constitutional principles," or (2) enforce any statute "in a particularly egregious manner, or in a manner which a reasonable officer would recognize exceeds the bounds of the ordinance." Applying those standards, this Court should hold that any reasonable official would know that relying on Section 39.06(c) to criminalize routine newsgathering violates the First Amendment.

1. This Court should join its sister circuits and hold that patently unconstitutional statutes cannot justify qualified immunity.

The district court's grant of qualified immunity to the individual defendants highlights the outrageous consequences when officers enforce unconstitutional laws but "judicial tribunals are forbidden to visit penalties upon [them]." *Poindexter*, 114 U.S. at 291. Allowing those officials to "shelter themselves … from due responsibility," Story, § 1671, under modern qualified immunity doctrine creates the situation that early American courts sought to avoid with strict liability: unredressed

deprivations of rights. *E.g.*, *Aubin v. Columbia Cas. Co.*, 272 F. Supp. 3d 828, 838 (M.D. La. 2017) ("Normally, if an officer relies on a statute to make an arrest that is later declared unconstitutional, she is shielded from liability.").

But an echo of the historical liability rule remains: reliance on "a statute [that] authorizes conduct that is patently violative of fundamental constitutional principles … does not immunize the officer's conduct." *Lawrence v. Reed*, 406 F.3d 1224, 1232 (10th Cir. 2005) (citation omitted); *see also Michigan v. DeFillipo*, 443 U.S. 31, 38 (1979) (arrest made in good-faith reliance on statute is unlawful if statute is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws").

In other words, a reasonable officer should know better than to enforce an obviously unconstitutional statute, and a plaintiff need not point to a factually identical case. *See Lawrence*, 406 F.3d at 1232–33 ("[O]fficers are not always entitled to rely on the legislature's judgment that a statute is constitutional" because "some statutes are so obviously unconstitutional that we will require officials to second-guess the

legislature and refuse to enforce an unconstitutional statute—or face a suit for damages if they don't.").

At least seven circuits recognize some form of this "patently violative" rule for rejecting qualified immunity based on officials' reliance on an unconstitutional statute. *See, e.g.*, *Guillemard-Ginorio v. Contreras-Gómez*, 490 F.3d 31, 40–41 (1st Cir. 2007); *Leonard v. Robinson*, 477 F.3d 347, 359, 361 (6th Cir. 2007); *Lawrence v. Reed*, 406 F.3d 1224, 1232 (10th Cir. 2005); *Cooper v. Dillon*, 403 F.3d 1208, 1220–21 (11th Cir. 2005); *Vives v. City of New York*, 405 F.3d 115, 117–19 (2d Cir. 2005); *Lederman v. United States*, 291 F.3d 36, 47 (D.C. Cir. 2002); *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002).

Courts have applied this rule to the criminalization of speech, *see Leonard*, 477 F.3d at 361, and have held that "an officer need not understand the niceties of [constitutional caselaw] to know that [a statute] is unconstitutional," *Lawrence*, 406 F.3d at 1233.

So, for example, courts have held that:

- a police officer who enforced a "public intimidation" statute—which "criminalize[d] entirely non-violent threats to an officer's employment"—against a person who threatened to have the

officer fired was not entitled to qualified immunity because no reasonable officer would rely on that statute, "[b]ased on the Supreme Court's repeated and long-standing precedent validating the right of citizens to verbally criticize police officers," *Aubin*, 272 F. Supp. 3d at 838–39;

- a police officer was not entitled to qualified immunity for relying on state statutes criminalizing obscene conduct, indecent language in front of women or children, cursing or swearing by the name of God, and disturbance of a peaceful meeting, to arrest a man who said "God damn" at a township board meeting, because "no reasonable officer would find that probable cause exists to arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) unless and until the speaker is determined to be out of order," *Leonard*, 477 F.3d at 361;
- an official was not entitled to qualified immunity when he arrested a person based on statutes requiring individuals to identify themselves to the police during a *Terry* stop, because a reasonable officer should have known that the arrestee "had a

clearly established Fourth Amendment right not to identify himself" based on Supreme Court and Ninth Circuit precedent that *Terry* detainees' refusal to answer questions does not justify an arrest, *Carey*, 279 F.3d at 882;

- qualified immunity was inappropriate where a police chief enforced a derelict vehicle ordinance that provided "no hearing whatsoever," because that was a "sufficiently obvious" violation of due process, *Lawrence*, 406 F.3d at 1233; and
- reliance on a statute that allowed professional-license revocation without a pre-deprivation hearing did not entitle officials to qualified immunity because it has "long been established that a state may not suspend a professional license without a pre-deprivation hearing" consistent with due process, *Guillemard-Ginorio*, 490 F.3d at 40–41.

This Court should recognize this "patently violative" rule,[3] and it should hold that by criminalizing "solicit[ing] or receiv[ing]" information

[3] This Court has not yet explicitly embraced the rule, but district courts within the Circuit have, including in circumstances similar to this case. *See, e.g.*, *Aubin*, 272 F. Supp. 3d at 838–39.

from government officials, Section 39.06(c) patently violates the First Amendment's protection of routine newsgathering.

2. Section 39.06(c) is patently unconstitutional because it criminalizes asking government officials for information.

Section 39.06(c) criminalizes "solicit[ing] or receiv[ing]" information from government officials. The statute's only qualifier is that the information sought is "prohibited from disclosure under" certain sections of the Texas Government Code. Tex. Penal Code Ann. § 39.06(d). But it is not limited to "nonconsensual acquisition" or obtaining information through unlawful acts. *Florida Star*, 491 U.S. at 534.

Therefore, the statute criminalizes simply *asking government officials for facts*—one of the most routine and fundamental ways that journalists and others obtain newsworthy information. That is patently unconstitutional because "there is an *undoubted right* to gather news from *any source* by means within the law." *Turner*, 848 F.3d at 688 (emphases added) (quoting *Houchins*, 438 U.S. at 11). And it is too fundamental to "require belaboring" that asking for facts is within the law. *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979); *see also Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99, 103 (1979).

None of the statute's other elements save it. The requirement that the information be sought "with intent to obtain a benefit or with intent to harm or defraud another" is meaningless because neither of those limitations changes the *act* that the statute criminalizes: asking for information. (Indeed, by criminalizing the *mere receipt* of information, in some instances the statute actually requires *no act at all*.)

The "benefit" requirement has no effect on the statute's unconstitutionality because it too criminalizes routine newsgathering, which is rarely if ever done for no reason. And while harming or defrauding another is certainly subject to regulation, merely asking for or receiving information—which, again, is the only act the statute requires—cannot be criminalized, unless it is "[c]ore criminal speech such as extortion, bribery, or perjury" or "speech integral to criminal conduct." *Seals v. McBee*, 898 F.3d 587, 597 n.25 (5th Cir. 2018). The statute refers to none of that (and none of that was present in Villarreal's case).

Against this backdrop, the district court's analysis is inexplicable. First, it avoided ruling on whether the statute is *facially* patently unconstitutional by incorrectly asserting that Villarreal did not challenge the statute's "valid[ity] under any circumstances." ROA.446. She did. *See*

ROA.169, ¶¶ 81–82. Worse yet, in determining whether the officers' enforcement of the statute *in Villarreal's circumstances* (*i.e.*, merely asking for and receiving corroborating information regarding public events) was patently unconstitutional, the district court relied on the fact that the statute might in some instances serve a "legitimate law enforcement purpose"—without asking whether a reasonable officer would think its enforcement *served such a purpose in this case*. ROA.446. And, unsurprisingly, no one has seriously argued that it did.

3. Any reasonable official would know—based on fundamental First Amendment principles and fair warning from on-point caselaw—that using Section 39.06(c) in Villarreal's circumstances was egregiously unconstitutional.

Any reasonable official would know that applying Section 39.06(c) to Villarreal's circumstances was an "egregious manner" of enforcement, or "exceed[ed] the bounds of the ordinance." *Grossman v. City of Portland*, 33 F.3d 1200, 1210 (9th Cir. 1994); *see Herrington v. Gautreaux*, No. 13-cv-650, 2014 WL 811584, at *5 (M.D. La. Feb. 28, 2014) ("officers may not blindly rely upon an ordinance to justify their actions").

There was no allegation in Villarreal's arrest warrant that her receipt of information from Officer Goodman was anything but

consensual, or that it resulted from coercion, force, or subterfuge. Villarreal engaged in nothing except purely protected newsgathering activity—*i.e.*, asking questions. "[N]o reasonable police officer would believe that [Section 39.06(c) was] constitutional as applied to" Villarreal's conduct, because "if not facially invalid, [the statute] is radically limited by the First Amendment." *Leonard*, 477 F.3d at 359–60. And "[i]f no reasonable officer could have believed that probable cause existed for the law enforcement actions [at issue], then their retaliation violated clearly established law in this circuit." *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002).

In short, no government official should need a federal court to tell them that arresting someone for asking a police officer to corroborate newsworthy information violates the First Amendment. This is even more obvious because—as Villarreal points out—the Supreme Court had already said as much. Opening Brief at 27–29 (citing *Florida Star*, 491 U.S. 524; *Daily Mail*, 443 U.S. 97).

Moreover, months before the events of this case, this Court reaffirmed that "there is 'an *undoubted right* to gather news from *any source* by means within the law.'" *Turner*, 848 F.3d at 688 (emphases

added) (quoting *Houchins*, 438 U.S. at 11). If asking an officer for news can be deemed outside the law, the First Amendment "protection for seeking out the news … could be eviscerated." *Branzburg*, 408 U.S. at 681.[4]

This caselaw provided far more than "fair warning"—which is the qualified immunity inquiry's "central concept"—that Section 39.06(c) unconstitutionally criminalized Villarreal's protected speech and newsgathering. *See Anderson*, 845 F.3d at 600. Indeed, in pronouncing that people cannot be punished based on "lawfully obtained" information, the conduct the Supreme Court referred to in *Daily Mail* was remarkably similar to asking Officer Goodman to corroborate information Villarreal learned from others: "simply by asking various witnesses, the police, and an assistant prosecuting attorney who were at the [scene of a crime]," the reporters in *Daily Mail* conducted "routine newspaper reporting techniques." 443 U.S. at 99, 103. That factual similarity to established caselaw is yet another reason to deny the individual defendants qualified immunity.

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[4] Conduct that is not within the law includes "break[ing] and enter[ing] an office or dwelling to gather news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). Villarreal's conduct—*i.e.*, asking Officer Goodman—is nothing like that.

4. The district court's analysis absurdly imputes obscure statutory knowledge to Villarreal while permitting the government-official defendants to plead ignorance of the First Amendment.

If we expect government officials to know clearly established caselaw, we should expect them to know when they are acting pursuant to a clearly unconstitutional statute, or when they are enforcing a constitutional statute in an obviously unconstitutional manner. After all, ordinary people are subject to the "principle that ignorance of the law generally is no defense to a criminal charge," *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994), and must pay the price for unknowingly breaking a law. By granting qualified immunity, however, the district court allowed law enforcement officers to violate fundamental First Amendment tenets without consequences. If ordinary people are presumed to know the nuances of the law or risk penalties, then officers of the law should be held to account for violating basic constitutional principles.

The district court's analysis demonstrates the absurdity and injustice of imputing knowledge of the law only to ordinary people, but not to government officials.

Villarreal was punished for asking for and receiving "some corroborating information" about the identities of a suicide victim and traffic accident victims. ROA.166, ¶¶ 65–66. The district court held that the defendants had probable cause to arrest her for that, because she should have known that she was potentially asking for information that various obscure sections of the Texas Government Code, Transportation Code, and Family Code "might have" prohibited certain government officials from disclosing. ROA.440. Moreover, the district court expected Villarreal to know that Officer Goodman was not one of the officials authorized to give her that information. On the other hand, the district court took no umbrage when the government officials who arrested Villarreal for this conduct pleaded ignorance of the fact that punishing a person for asking for information violates the First Amendment. This turns the First Amendment, the Fourth Amendment, and Section 1983 on their heads.

III. *Nieves* does not require the absence of probable cause for a premeditated arrest based solely on protected speech; but even if it does, an arrest for everyday newsgathering falls within *Nieves*'s explicit exception.

Even if the individual defendants had probable cause to arrest Villarreal under Section 39.06(c) (which they did not, because the statute

and their conduct were patently unconstitutional under the First Amendment), her retaliatory-arrest claims should go forward. "Although probable cause should generally defeat a retaliatory-arrest claim, a narrow qualification is warranted" for cases like this one. *See Nieves*, 139 S. Ct. at 1727. Because Section 39.06(c) criminalizes speech directly, the no-probable-cause requirement does not apply. Nor does it apply when an arrest is premeditated, rather than a "dangerous task that requires making quick decisions" in "tense, uncertain, and rapidly evolving" circumstances. *Id.* at 1725 (internal quotation omitted).

And in any event, *Nieves*'s explicit "jaywalking exception" applies here because the defendants—who have a history of targeting Villarreal for her journalism—arrested her for doing what journalists and others do every day without fear of arrest: asking a government official to corroborate facts.

A. *Nieves* does not apply to cases involving the criminalization of speech directly, especially in circumstances without split-second decision-making.

The district court erred by holding that the individual defendants had probable cause to arrest Villarreal for routine newsgathering. The conduct they criminalized was solely protected speech, so Villarreal's

arrest was obviously and egregiously unconstitutional. But even if they had probable cause for the arrest, *Nieves*'s rule—that probable cause generally defeats a First Amendment retaliatory-arrest claim—does not apply to arrests based solely on speech, particularly premeditated ones.

In *Nieves*, the Supreme Court held that "generally … the presence of probable cause will suggest" that an "officer's animus [did not] cause[] the arrest." 139 S. Ct. at 1724. That holding was based on the "complex" "causal inquiry" in retaliatory-arrest cases where speech is incidental to criminal conduct. *Id.* at 1723. Specifically, when officers must make "split-second judgments when deciding whether to arrest" someone for criminal conduct, her protected speech may be a "wholly legitimate consideration," to the extent it "may convey vital information" regarding whether she poses an immediate threat. *Id.* at 1724 (internal quotations omitted).

But as the Sixth Circuit has recognized, *Nieves* leaves open an important question: Does its "general rule" that probable cause defeats a retaliatory-arrest claim apply at all where, as in Villarreal's case, "the sole basis for probable cause was speech"? *Novak v. City of Parma*, 932 F.3d 421, 431 (6th Cir. 2019).

This Court should answer no. *Nieves* applies only in cases involving "a mix of protected speech and unprotected conduct." *Id.* As the Sixth Circuit explained, "based on the reasoning underlying the [Supreme Court's] retaliation cases," there "is an important difference" between (1) cases where an arrest is for "unprotected conduct" and speech simply conveys information regarding the immediacy of the threat (like *Nieves* and *Reichle v. Howards*, 566 U.S. 658, 668 (2012)), and (2) cases where the "potential probable cause was based on protected speech alone" (like Villarreal's). *Novak*, 932 F.3d at 431.

In the latter type of case, the causal "inquiry gets us nowhere." *Id.* When speech alone forms the basis for an arrest, probable cause "does little to prove or disprove the causal connection" between protected speech and retaliatory motive. *Id.* at 431–32 (quoting *Nieves*, 139 S. Ct. at 1727). Such cases are "prime ground for the pretext that the Supreme Court has worried about." *Id.* at 431.

In other words, when officers can arrest people for speech alone, cutting off the retaliation inquiry upon a showing of probable cause poses a serious "risk that some police officers may exploit the arrest power as

a means of suppressing speech." *Id.* (quoting *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018)).

Moreover, requiring a lack of probable cause poses an even greater threat for retaliatory arrests in cases, like Villarreal's, where the alleged crime is not committed in the officer's presence and therefore requires no "split-second judgments" about a suspect's threat level. *See Nieves*, 139 S. Ct. at 1724. Officers can arrest people for a "wide[] range" of "very minor criminal offense[s]." *Id.* at 1727 (internal quotation omitted). When police have time to comb the books for laws to levy against people they deem a thorn in their side, the threat of retaliatory arrest skyrockets—and probable cause tells us nothing about the propriety of the officers' motives. That is why, "unlike the standards governing warrantless arrests, whether an arrest pursuant to a warrant is valid can turn on the mental state of the arresting officer." *Williams v. Aguirre*, 965 F.3d 1147, 1162 (11th Cir. 2020).

In short, under the Supreme Court's holding in *Nieves*, a plaintiff is only required to show an absence of probable cause in arrests (1) involving "a mix of protected speech and unprotected [criminal] conduct," *Novak*, 932 F.3d at 431, and (2) where the criminal conduct

occurred "in the presence of an arresting officer," *Johnson v. McCarver*, 942 F.3d 405, 409 (8th Cir. 2019).

Villarreal's arrest was for speech only: all she did was ask Officer Goodman for information corroborating facts. And her arrest was pursuant to a premeditated warrant—not split-second judgments of the sort at issue in *Nieves* and *Reichle*. Accordingly, her retaliatory-arrest claims should go forward, regardless of whether the defendants could rely on an unconstitutional statute to manufacture probable cause.

B. *Nieves*'s explicit exception for commonly unpunished conduct applies because the complaint plausibly alleges that the defendants have only ever arrested Villarreal under Section 39.06(c), even though common sense dictates that journalists and others ask for non-public information all the time.

Finally, even if the no-probable-cause requirement applies here, the district court misapplied the *Nieves* rule. By ignoring the fact that the defendants arrested Villarreal for doing what journalists and others do every day without fear of arrest—*i.e.*, asking a government official to corroborate facts—the district court ignored *Nieves*'s key holding.

In *Nieves*, the Supreme Court held that "the no-probable-cause requirement [for retaliatory-arrest claims] should not apply when a plaintiff presents objective evidence that he was arrested when otherwise

similarly situated individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. at 1727. As an example, the Court offered:

> [A]t many intersections, jaywalking is endemic but rarely results in arrest. If an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest. In such a case, … probable cause does little to prove or disprove the causal connection between animus and injury[.]

Id.

Justices Sotomayor and Gorsuch urged lower courts to apply this rule "commonsensically." *Id.* at 1741 (Sotomayor, J., dissenting), 1734 (Gorsuch, J., concurring in part and dissenting in part). And lower courts are heeding that admonition. *See, e.g.*, *Lund v. City of Rockford*, 956 F.3d 938, 945–46 (7th Cir. 2020) ("We must consider each set of facts as it comes to us, and in assessing whether the facts supply objective proof of retaliatory treatment, we surmise that Justices Gorsuch and Sotomayor are correct—common sense must prevail.").

In that vein, the majority did not point to record evidence or cite anything for its matter-of-fact assertion that "jaywalking is endemic but

rarely results in an arrest." *Nieves*, 139 S. Ct. at 1727. This signals to lower courts that they should not check their universal experiences or knowledge at the door when assessing comparator evidence.

Applying that guidance, several courts have commonsensically denied motions to dismiss in cases like Villarreal's:

- A complaint's allegation that "no other person" was punished for writing on the sidewalk in chalk was sufficient to meet the *Nieves* exception standard on a motion to dismiss, because it allowed the court to "draw[] the reasonable inference that" the plaintiff's punishment was retaliatory, given that her conduct "rarely, if ever, is prosecuted." *Bledsoe v. Ferry Cty.*, No. 2:19-cv-227, 2020 WL 376611, at *5–6 (E.D. Wash. Jan. 23, 2020).
- A motion to dismiss was denied where "it *appear[ed] unlikely* that [examples of others being arrested for failure to produce identification] exist[ed]." *Lull v. Cty. of Sacramento*, No. 2:17-cv-1211, 2019 WL 6908046, at *3 (E.D. Cal. Dec. 19, 2019) (emphasis added). If the evidence ultimately showed otherwise, it could be considered at summary judgment. *Id.*

- A plaintiff's allegation that there were only fourteen citations under the relevant statute over the last seven years—coupled with his "reputation as a vocal critic of [c]ity officials"—was sufficient to "find[] the *Nieves* exception could apply." *Henneberry v. City of Newark*, No. 13-cv-05238, 2019 WL 4194275, at *7 (N.D. Cal. Sept. 4, 2019).

The district court's analysis here, by contrast, was far from commonsensical.

Just like in the cases above, the district court had before it allegations of:

- Villarreal's reputation for criticizing the local government, ROA.161–162, ¶¶ 42–50;
- hostile acts by local officials—including several of the individual defendants—in response to Villarreal's criticism, ROA.162–165, ¶¶ 51–63; and
- the defendants having never "before arrested, detained, or prosecuted a person under [Section 39.06(c)] during the 23 years the operative version of the statute had been in effect," ROA.181–182, ¶ 141.

Faced with these allegations, the district held that because Villarreal's complaint did not identify *particular people* who also "asked for or received information from local law enforcement officials," her allegations of a comparator group were "conclusory." ROA.442 n.8.

And the district court intimated that some of the people who obtain information from the police department without being arrested might be getting their information from the department's official spokesperson, so the court refused to infer that there are *any* journalists who solicit and receive non-public information from non-spokesperson police officers (the way Villarreal did from Officer Goodman). *Id.*[5]

By ignoring Villarreal's allegation that *no one* was prosecuted under the statute for 23 years—which must be taken as true on a motion to dismiss—the district court ignored the stage of the proceedings by insisting on the names of particular people.

More fundamentally, by requiring *any evidence at all* for the proposition that journalists regularly ask for and receive information

[5] The district court inaccurately asserted that Villarreal "mischaracterizes the basis for [her] arrest and prosecution under § 39.06(c) as being for 'publishing' of information, rather than for *obtaining* information." ROA.442–443 n.8 (emphasis in original). But the complaint paragraph that the district court cited for this assertion says Villarreal's arrest was for "gathering … information" and "merely asking for or receiving" information. ROA.169, ¶ 81.

from police officers and other government officials who are not the government's designated spokespeople—without facing arrest or prosecution—the district court ignored the Supreme Court's admonition to not "exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (internal quotation omitted).

That is not the proper way to assess the applicability of the *Nieves* exception. Some propositions are too obvious to require citation. *See Russell v. Collins*, 998 F.2d 1287, 1293 n.30 (5th Cir. 1993); *United States v. Rodgers*, 461 U.S. 677, 694 (1983). And at least on a motion to dismiss, courts should not insist on citations and documentary evidence for propositions as commonsensical as this: journalists and others regularly ask for and obtain information from police officers and other government officials who are not designated spokespeople, and they do not face arrest or prosecution for doing so.[6]

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[6] Villarreal's case is not like this Court's decision in *Roy v. City of Monroe*, 950 F.3d 245 (5th Cir. 2020). There, this Court held that the *Nieves* exception did not apply because "the record reveal[ed] that [the plaintiff], the most 'similarly situated' individual of all, was allowed to conduct street ministry both before and after the night in question, without any harassment from the police." *Id.* at 255 n.4. But Villarreal's conduct is not like street ministry, which is public and obvious. Her conduct is discreet newsgathering from insider sources. Therefore, any indication that she engaged in that conduct before the events at issue in this case without being

CONCLUSION

This Court should reverse the district court's dismissal of Villarreal's First Amendment retaliatory-arrest claims against the individual defendants and remand for further proceedings.

Dated: September 8, 2020

Respectfully submitted,

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arrested is not probative, because we don't know if anyone knew about it. And the record does not indicate whether she continued to engage in that conduct after being arrested—indeed, the arrest may have chilled her from continuing to exercise that basic right, or to be more careful to not let defendants find out she is exercising that basic right.

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I caused the foregoing Brief of *Amicus Curiae* Institute for Justice in Support of Plaintiff-Appellant to be file electronically with the Clerk of the Court using the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: September 8, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation in Fed. R. of App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,479 words, excluding the parts of the brief exempted by Fed. R. of App. P. 32(f) and Fifth Circuit Rule 32.2.

2. This brief also complies with the typeface requirements of Fed. R. of App. P. 32(a)(5) and the type style requirements of Fed. R. of App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

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