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

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

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December 12, 2022

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.

December 12, 2022

/s/ Jaba Tsitsuashvili
Lead Counsel for Amicus Curiae
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INTEREST OF AMICUS CURIAE[1]

The Institute for Justice (IJ) is "a respected national public interest law firm." *Villarreal v. City of Laredo*, 44 F.4th 363, 371 (5th Cir. 2022) (vacated). IJ defends the foundations of a free society, including judicial enforcement of the right to hold officials accountable for constitutional violations.

Qualified immunity obstructs the enforcement of constitutional rights, so IJ litigates and files amicus briefs in government immunity and accountability cases nationwide, including before the panel in this case, *available at* 2020 WL 5751737. *See also Gonzalez v. Trevino*, 21-50276 (5th Cir.); *Pollreis v. Marzolf*, 21-3267 (8th Cir.); *Rosales v. Bradshaw*, 22-2027 (10th Cir.); *Ashaheed v. Currington*, 20-1237 (10th Cir.).

To properly delineate and cabin qualified immunity's scope, IJ has an interest in affirming the panel majority's holding that immunity is foreclosed because Appellant Villarreal has stated claims for obvious First and Fourth Amendment violations.

[1] Pursuant to Fed. R. App. P. 29(a), counsel for amicus states: Appellant consents to the filing of this brief; Appellees do not consent; no party, party's counsel, or person other than amicus authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This case asks whether qualified immunity shields the defendants from suit for (1) a premeditated arrest (2) based on (i) the plaintiff asking questions (ii) to a government official (iii) about nonpublic facts (iv) for some tangible or intangible benefit. Simply stated: Did reasonable officials have fair warning that the First and Fourth Amendments prohibit arresting a person for peacefully asking questions to a government official for quintessential journalistic purposes?

Of course they did. And under both the modern doctrine and the original meaning of Section 1983, qualified immunity does not shield the defendants' obvious constitutional violations, even if laundered through state law, and especially because they were premeditated.

Indeed, granting immunity here would not only reward the knowing punishment of speech and journalism, but also: countenance government control of speech and information; absurdly impute obscure statutory knowledge to ordinary individuals while allowing government officials to plead ignorance of the First Amendment; and tell officials of all stripes that they can weaponize bloated criminal codes to target and upend the lives of disfavored persons, groups, or views.

I. No reasonable official would think the Constitution permits criminalizing plain speech or routine journalism, so granting qualified immunity here would violate the doctrine's scope and its policy justification.

As to scope: Even without factually on-point caselaw, qualified immunity does not shield obviously unconstitutional conduct, including the premeditated use of a statute in an obviously unconstitutional way.

As to policy: The judge-made doctrine may countenance reasonable mistakes, but it does not protect plainly incompetent or knowing constitutional violations—including, most obviously, the weaponization of state law to punish speech.

Accordingly, granting immunity here would be dangerous to a free press, free society, and informed public; turn a blind eye to egregious government misconduct; and signal that officials of all stripes can silence and punish the disfavored if they can find some arguably applicable criminal law.

Luckily, qualified immunity does not extend so far.

II. Indeed, the historical textual evidence shows that Congress enacted Section 1983 precisely so that government officials could not launder constitutional violations through state statutes or even common law immunities.

Unsurprisingly, the original text of the Ku Klux Klan Act (passed to remedy state deprivations of rights in the postwar South) makes clear that its remedies apply "notwithstanding" unconstitutional state laws or practices. And the removal of that text was administrative—not a change in the statute's meaning.

The judge-invented qualified immunity doctrine is irreconcilable with that history, and has eroded Section 1983's landmark protections. So a growing chorus of Supreme Court justices, federal judges (including from this Court), and constitutional scholars are calling for the doctrine's reconsideration.

Until then, it should be properly cabined. It should not be extended to obvious constitutional violations—such as premeditated arrests for pure speech and routine newsgathering.

ARGUMENT

I. As a matter of law and policy, qualified immunity does not excuse obvious constitutional violations—even if laundered through state law, and especially if premeditated.

Qualified immunity is a legal fiction, but its scope remains grounded in the facts of each case. Sometimes those facts present government misconduct so obviously unconstitutional that immunity cannot attach, even without a direct factual analog in past cases, and even if a statute purports to authorize the government conduct at issue.

This case presents such government misconduct. As recounted by the panel majority: (1) Villarreal asked an officer to corroborate information about a suicide and a car accident; (2) the officer answered; (3) six months later, the defendants arrested and prosecuted Villarreal because she "solicited or received" that "nonpublic" information and "benefitted" (in the form of journalistic scoops, Facebook followers, and some free meals). *Villarreal v. City of Laredo*, 44 F.4th 363, 368–69 (5th Cir. 2022).

That is: Villarreal did what journalists do every day (uncover information from government sources to publish scoops and benefit from their efforts), and the defendants arrested and prosecuted her (and only

her) for it, after ruminating for months. "If that is not an obvious violation of the [First and Fourth Amendments], it's hard to imagine what would be." *Id.* at 367.[2]

The defendants' effort to launder that violation through state law fails. Even if a statute purports to provide probable cause to arrest a person for asking questions to a government employee, doing that is so "patently violative of fundamental constitutional principles" that it "does not immunize the [defendants'] conduct." *Lawrence v. Reed*, 406 F.3d 1224, 1232 (10th Cir. 2005) (citation omitted).

Moreover, the defendants' "time to make calculated choices about enacting or enforcing unconstitutional policies" takes their misconduct further from qualified immunity's reach. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement regarding denial of certiorari).

And granting immunity in these circumstances would disserve the public interest. It would be dangerous to free speech, free press, and free society, while telling officials that they can plead ignorance of

[2] Because Villarreal was singularly punished for doing what all journalists do, the panel majority also correctly held that the "district court . . . erred in dismissing Villarreal's selective enforcement claim for failure to identify similarly situated individuals." *Villarreal*, 44 F.4th at 377. *See* Br. of Amicus Curiae Institute for Justice, 2020 WL 5751737 (IJ Amicus), at *28–33.

fundamental constitutional rights while weaponizing bloated criminal codes to punish and harm anyone they dislike.

A. Qualified immunity is a fair warning standard; it does not countenance obvious constitutional violations.

In assessing government conduct, judges do not "exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted). Accordingly, qualified immunity does not shield what reasonable officials should recognize is "obvious[ly]" unconstitutional, even without combing the federal reporter. *Hope v. Pelzer*, 536 U.S. 730, 737–46 (2002).

For all its flaws, *see infra* section II, the judge-invented doctrine is not a "license to lawless conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). "Where an official *could be expected* to know that certain conduct would violate . . . constitutional rights, he *should be made* to hesitate." *Id.* (emphases added).

So, as this Court recognizes, the "salient question" is "fair warning," not "danger[ously] . . . rigid[] overreliance on factual similarity" to past cases. *Hope*, 536 U.S. at 741–42; *see Anderson v. Valdez*, 845 F.3d 580, 600 (5th Cir. 2016) ("central concept" is "fair warning") (quoting *Hope*);

Timpa v. Dillard, 20 F.4th 1020, 1034 (5th Cir. 2021) ("notable factual distinctions" do not preclude "reasonable warning") (quoting *Hope*).

Some fair warning inquiries are nuanced. For example: In *Sause v. Bauer*, the Supreme Court reversed immunity on a free exercise claim despite "the absence of a prior case involving the unusual situation alleged" because "[t]here can be no doubt that the First Amendment protects the right to pray." 138 S. Ct. 2561, 2562 (2018) (per curiam). Yet the Court acknowledged that facts regarding reasons for the officers' conduct needed to be developed, without which "neither the free exercise issue nor the officers' entitlement to qualified immunity [could] be resolved." *Id.* at 2563. So the plaintiff did not need factually on-point caselaw; but whether reasonable officials had fair warning of a constitutional violation required facts regarding exigency and necessity—the implication being that in their absence, immunity would not attach, even in novel circumstances.

Other fair warning inquiries are easy—i.e., obvious. The throughline of three such Supreme Court decisions is that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question," without on-point

caselaw, if the facts dispense with exigency or necessity. *Hope*, 536 U.S. at 741 (citations omitted). *See id.* at 745–46 (defendants tied plaintiff to painful "hitching post" as punishment); *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (defendants put plaintiff in "deplorably unsanitary conditions for . . . extended period"); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (defendant pepper-sprayed plaintiff "for no reason," *see* 950 F.3d 226, 235–37 (5th Cir. 2020) (Costa, J., dissenting in part)).

The upshot, per the panel majority, is simple: "The doctrine of qualified immunity does not always require the plaintiff to cite binding case law involving identical facts. An official who commits a patently 'obvious' violation of the Constitution is not entitled to qualified immunity." *Villarreal*, 44 F.4th at 371 (quoting *Hope*).

B. An arrest for routine newsgathering is obviously unconstitutional.

The panel majority correctly applied those qualified immunity principles. It rightly held that the defendants' arrest of Villarreal for peacefully asking questions to a government official obviously violated the First Amendment's free speech and free press guarantees and the Fourth Amendment's protection against unreasonable seizures.

Instead of conducting a "scavenger hunt" for factually identical cases, *Parea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016) (citation omitted), the panel majority rightly asked: What did Villarreal do, and did reasonable officials have fair warning that arresting her for it would violate the First and Fourth Amendments?

It correctly answered: "If the First Amendment means anything, it surely means that a citizen journalist has the right to ask a public official a question, without fear of being imprisoned." *Villarreal*, 44 F.4th at 367.

For reasonable officials to reach that conclusion, passing familiarity with the phrase "abridging the freedom of speech, or of the press" (*see* Amendment I) and our national culture should have sufficed. But "general constitutional rule[s] already identified in the decisional law" also made it obvious. *Hope*, 536 U.S. at 741. It is axiomatic that "there is 'an *undoubted right* to gather news from *any source* by means within the law.'" *Turner v. Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (emphases added) (quoting *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978)).

Decades of jurisprudence make it too obvious to "require belaboring," *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979), that asking questions to solicit, receive, and even publish nonpublic

information is a means of newsgathering within the law, because it is unequivocally protected by the First Amendment. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99, 103 (1979); *Fla. Star v. B.J.F.*, 491 U.S. 524, 534 (1989); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972).[3]

Under qualified immunity's fair warning standard, some claims arising from newsgathering-related arrests might be nuanced or go the government's way—e.g., "break[ing] and enter[ing] an office or dwelling to gather news," *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991), or scoops obtained by "[c]ore criminal speech such as extortion, bribery, [] perjury," or "[s]peech integral to criminal conduct," *Seals v. McBee*, 898 F.3d 587, 597 n.25 (5th Cir. 2018).

But Villarreal's situation is "an easy one," *Thompson v. Ragland*, 23 F.4th 1252, 1259 (10th Cir. 2022): It has been obvious for decades to

[3] In addition to obviously violating the free speech and free press guarantees, the defendants also clearly violated the right to petition, as recognized by the panel majority. "[I]f the First Amendment safeguards the right to petition the government for a redress of grievances, then it surely safeguards the right to petition the government for information." *Villarreal*, 44 F.4th at 371. Per the "original design of the First Amendment," petitioning has long been "used to expose public oppressions . . . and misconduct by local officials." Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 142–43, 154 (1986). These rights would evaporate if officials could arrest people for asking questions.

every reasonable official that the Constitution prohibits arresting a person for asking questions to a government employee peacefully and uncoercively.

C. Using a statute in an obviously unconstitutional manner is obviously unconstitutional.

In the face of all that common sense and constitutional jurisprudence, the defendants' reliance on a state statute (Texas Penal Code § 39.06(c)) could not take Villarreal's routine newsgathering (per her "undoubted right to gather news from any source") from "within the law," *Turner*, 848 F.3d at 688, to even arguably afoul of it.

To determine what is within the law, the statute cannot override the First Amendment. It cannot turn pure speech into probable cause; doing so violates both the First and Fourth Amendments. In the words of the panel majority: Officials "may not base [their] probable cause determination on an unjustifiable standard, such as speech protected by the First Amendment"—which peacefully asking questions obviously is, as discussed above. *Villarreal*, 44 F.4th at 375 (quotation marks and citations omitted).

In short: Qualified immunity cannot attach for such obvious misconduct, notwithstanding its purported laundering through state law.

1. The Supreme Court has explained (under the exclusionary rule) that officials cannot avoid the consequences of constitutional violations by asserting reliance on a statute "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Michigan v. DeFillipo*, 443 U.S. 31, 38 (1979).

Under similar logic, at least seven circuits recognize that reliance on "a statute [that] authorizes conduct that is patently violative of fundamental constitutional principles . . . does not immunize" misconduct, *Lawrence*, 406 F.3d at 1232 (quotation marks and citation omitted). *See Guillemard-Ginorio v. Contreras-Gómez*, 490 F.3d 31, 40–41 (1st Cir. 2007); *Vives v. City of New York*, 405 F.3d 115, 117–19 (2d Cir. 2005); *Leonard v. Robinson*, 477 F.3d 347, 359, 361 (6th Cir. 2007); *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002); *Cooper v. Dillon*, 403 F.3d 1208, 1220–21 (11th Cir. 2005); *Lederman v. United States*, 291 F.3d 36, 47 (D.C. Cir. 2002).

Stated differently: "[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." *Lawrence*, 406 F.3d at 1232–33.

Courts apply 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. *See* IJ Amicus, 2020 WL 5751737, at *14–16.

2. This Court should recognize this "patently violative" rule for denying immunity (as the panel majority did, *Villarreal*, 44 F.4th at 372). And it should hold that by criminalizing "solicit[ing] or receiv[ing]" information from government employees, section 39.06(c) patently and facially violates the First Amendment's protection of routine newsgathering—such that the defendants cannot launder their misconduct through the statute.

That is because, for the reasons in section I.B above regarding the obvious unconstitutionality of criminalizing journalism, section 39.06(c) purports, "by [its] own terms," to "authorize[] [seizures] under circumstances which [do] not satisfy the traditional . . . probable-cause requirements of the Fourth Amendment"—because the terms of the

statute satisfy probable cause based on protected speech. *DeFillippo*, 443 U.S. at 39; *see Villarreal*, 44 F.4th at 375 (collecting cases).

3. But the Court need not go so far. It can simply hold (as the panel majority did, *Villarreal*, 44 F.4th at 372) that an arrest under section 39.06(c) *in Villarreal's circumstances* was obviously unconstitutional to any reasonable official.

If, as explained by *DeFillippo* and the "patently violative" circuit cases discussed above, government officials should know that a statute is facially unconstitutional (a notoriously high bar), they surely should know that its use in a particular circumstance is unconstitutional. *See Grossman v. City of Portland*, 33 F.3d 1200, 1210 (9th Cir. 1994) (no immunity for "egregious manner" of enforcement, or "exceed[ing] the bounds of the ordinance"); *Herrington v. Gautreaux*, 2014 WL 811584, at *5 (M.D. La. Feb. 28, 2014) ("officers may not blindly rely upon an ordinance to justify their actions").

And reasonable government officials should know that it obviously violates the First and Fourth Amendments to arrest a person for asking questions to a government official peacefully and uncoercively,

"notwithstanding the existence of probable cause" under section 39.06(c). *Ballentine v. Tucker*, 28 F.4th 54, 65 (9th Cir. 2022).

4. Finally, the statute's "benefit" requirement does not save the defendants from that conclusion. Whether facially or as applied, it still criminalizes routine newsgathering, which is not done for no reason—indeed, is *usually* done for some financial or economic gain.

The panel majority construed the facts as Villarreal seeking "not to obtain economic gain, but to be a good journalist," taking her conduct out of section 39.06(c)'s reach altogether. *Villarreal*, 44 F.4th at 372–73. But *even if she unambiguously did act for economic gain,* arresting her in these circumstances would *still* patently criminalize routine, everyday journalism—which the First Amendment obviously prohibits any statute from doing. *See DeFillippo*, 443 U.S. at 39; *Davidson v. City of Stafford*, 848 F.3d 384, 393–94 (5th Cir. 2017).

As the panel majority held, that makes "the Fourth Amendment violation alleged here" just as "obvious for purposes of qualified immunity" as the First Amendment violation. *Villarreal*, 44 F.4th at 375.

Therefore, there remains no close call as to the unconstitutionality of the defendants' conduct. These are precisely the circumstances in

which they "could be expected to know that certain conduct would violate . . . constitutional rights" and therefore "be made to hesitate" or face liability. *Harlow*, 457 U.S. at 819.

D. The obviousness standard is easy to apply in cases with premeditated misconduct.

The force of the principles discussed above is particularly strong here because the defendants arrested Villarreal months after she engaged in her journalistic endeavors. The defendants deliberated yet forged ahead, knowing that all Villarreal did was peacefully ask questions. Such "'premediated plans to arrest a person for her journalism, especially by local officials who have a history of targeting her because of her journalism'" "present an especially weak basis for invoking qualified immunity." *Villarreal*, 44 F.4th at 371–72 (quoting IJ Amicus, 2020 WL 5751737, at *4).

To be sure, courts sometimes worry that deciding whether officials should have hesitated is difficult in some dangerous, split-second scenarios where they might "make reasonable but mistaken judgments." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). But qualified immunity's fair warning standard does not "protect[] . . . the plainly incompetent or those who knowingly violate the law." *Id.*

So, as members of this Court have recognized, "when public officials make the deliberate and considered decision to trample on a citizen's constitutional rights, they deserve to be held accountable." *Wearry v. Foster*, 52 F.4th 258, 259 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc); *see Gonzalez v. Trevino*, 42 F.4th 487, 506–07 (5th Cir. 2022) (Oldham, J., dissenting) (similar); *see also* IJ Amicus, 2020 WL 5751737, at *24–28.

Indeed, Justice Thomas recently observed the oddity of providing "the same protection" to officials "who have time to make calculated choices about enacting or enforcing unconstitutional policies" as officials forced to make "a split-second decision to use force in a dangerous setting." *Hoggard*, 141 S. Ct. at 2422.

Here, for the reasons discussed above illustrating the obvious unconstitutionality of the defendants' conduct, they clearly "turned a blind eye to decades of First Amendment jurisprudence or they proceeded full speed ahead knowing they were violating the law. Either way, qualified immunity provides no safe haven." *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 867 (8th Cir. 2021).

E. Granting immunity here would be dangerous to a free society and disserve qualified immunity's purported public policy justification.

Finally, granting immunity for the defendants' misconduct would disserve the Supreme Court's purported "public policy" justification for the doctrine, which seeks to balance "excessive disruption of government" with "deterrence of unlawful conduct and [] compensation of victims." *Harlow*, 457 U.S. at 813–20. That judicial policymaking should not have overridden Section 1983's text and purpose, *see infra* section II; but regardless, the balance here cuts lopsidedly against excusing the defendants' misconduct.

1. Allowing officials to subject anyone to arrest for seeking information from sources other than the government's designated gatekeeper threatens to chill core First Amendment activity, making us all less knowledgeable and worse off. Per the panel majority, it is "'dangerous to a free society,' for '[i]t assumes that the government can choose proper and improper channels for newsgathering—indeed, that the government can decide what is and is not newsworthy.'" *Villarreal*, 44 F.4th at 378 (quoting IJ Amicus, 2020 WL 5751737, at *2).

And it erodes our ability to learn facts some officials want to hide—as journalists are increasingly skeptical of the credibility of official reports regarding police violence and other activities. *See* Paul Farhi & Elahe Izadi, *Journalists Are Reexamining Their Reliance on a Longtime Source: The Police*, Wash. Post (June 30, 2020), https://wapo.st/2ECJ1la.

2. Granting immunity here would absurdly impute obscure statutory knowledge to Villarreal while permitting government officials to plead ignorance of the First Amendment.

It would say that the defendants did not need to know that punishing a person for asking questions violates the First Amendment, while Villarreal had to know that (1) she was potentially asking for information that obscure sections of the Texas Government Code, Transportation Code, and Family Code "might have" prohibited certain officials from disclosing, and (2) Officer Goodman was not one of the officials authorized to disclose that information. *Villarreal v. City of Laredo*, 2020 WL 13517246, at *10 (S.D. Tex. May 8, 2020).

That turns the First Amendment on its head; "we are concerned about government chilling the citizen—not the other way around."

Horvath v. City of Leander, 946 F.3d 787, 802 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part).

3. These concerns are particularly pressing because "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part).

"[I]nnumerable local ordinances carry the possibility of criminal consequences," including jailtime. Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 704 (2005).[4] Arrest or jailing (even without conviction) is life-altering; it harms employment, housing, children, and health. *See* Rebecca Neusteter & Megan O'Toole, Vera Inst. of Justice, *Every Three Seconds* (Jan. 2019), https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/the-issue.

[4] Texas alone has "27 state codes and 31 total categories of state law . . . each of which ranges from a few thousand words long to hundreds of thousands of words long." Austin Prochko & Chance Weldon, Tex. Pub. Policy Found., *Incomprehensible Laws are No Laws at All* (Nov. 30, 2022), https://www.texaspolicy.com/incomprehensible-laws-are-no-laws-at-all/.

Because "the police almost always will have probable cause to arrest someone for something," Paul Larkin, *Public Choice Theory and Overcriminalization*, 36 Harv. J. L. Pub. Pol'y 715, 720 (2013), granting immunity based on mechanic invocations of local laws would weaponize them against disfavored persons, groups, or views and allow government officials to wreck lives with impunity.

At the very least, it would tell government officials they can "duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly" in a particular way or under a particular statute. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part).

* * *

In short: Using qualified immunity to launder the defendants' misconduct here through a rote search for identical caselaw or a mechanical probable cause analysis under section 39.06(c) would be to hold that reasonable government officials could—with time to consult Amendment I *and* the federal reporter—posit that the criminalization of journalism was an open constitutional question and plow ahead with the arrest of a muckraking thorn in their side.

Countenance what it may, the qualified immunity regime does not, thankfully, countenance that. Indeed, "with so many voices critiquing current law as insufficiently protective of constitutional rights, the last thing we should be doing is recognizing an immunity defense when existing law rejects it." *McCoy*, 950 F.3d at 237 (Costa, J., dissenting) (vacated).

II. The original meaning of Section 1983 abrogates reliance on state laws or immunities to evade liability, and the statute should not be further eroded.

In the face of the dangers posed by the proliferation of criminal laws just discussed, it is worth noting the historical textual evidence showing that Section 1983 prohibits the laundering of constitutional violations through state statutes. Its remedies apply "notwithstanding" state laws or common law immunities.

Qualified immunity is irreconcilable with that history, and judges and scholars of all stripes are rightly calling for its reconsideration. Until then, the atextual, ahistorical doctrine should not be extended to reach obviously unconstitutional conduct, especially premediated punishment of speech.

A. Historical textual evidence reveals that Section 1983 creates liability "notwithstanding" state statutes and common law immunities.

The original (and unchanged) meaning of Section 1983 shows that Congress abrogated reliance on state laws and immunities to commit or excuse federal constitutional violations.

1. The 42d Congress enacted the Ku Klux Klan Act in 1871 to provide federal remedies for rampant abuses by southern states. Its familiar text now appears in the U.S. Code at 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

This broad language creates a "mechanism for enforcing individual rights." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002); *see also Maine v. Thiboutot*, 448 U.S. 1, 5 (1980).

Notably, the Act originally contained "additional significant text" "[i]n between the words 'shall' and 'be liable.'" Alexander Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 101, 166–67

(forthcoming), https://tinyurl.com/QI-Flawed-Fnd. It directed that officials "shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable." Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (emphasis added).

2. The meaning of this additional text: State officials were never meant to be able to hide behind state laws—including positive statutory laws or common law immunities—to escape liability under Section 1983.

(i) The meaning of "law, statute, ordinance, [or] regulation" is essentially self-explanatory.

(ii) The 1871 Congress would have understood "custom or usage" to mean "common law," which was the source of "the vast majority of immunity doctrine" available to state actors. Reinert, *supra*, at 167–69.

(iii) "Notwithstanding" means "[w]ithout opposition, prevention, or obstruction from," or "in spite of." Webster's Complete Dictionary of the English Language 894 (1886); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017) (ordinary meaning of "notwithstanding" is "in spite of" or "without prevention or obstruction from or by"); Bryan A. Garner, Garner's Modern English Usage 635 (4th ed. 2016) ("This usage [of notwithstanding] has been constant from the 1300s to the present day.").

Taken together, this "Notwithstanding Clause" (which the Supreme Court has never assessed) demonstrates that Congress intended the liability created by Section 1983 to apply despite the operation of state laws, including state statutes and common law immunities.

That original meaning reinforces the impropriety of shielding the defendants from liability here based on their invocation of the Texas Penal Code. *See supra* section I.C.

2. The removal of the "Notwithstanding Clause" from Section 1983 did not change the statute's meaning, because the removal was not the result of "positive lawmaking." Reinert, *supra*, at 169.

Rather, the clause was dropped when Congress gathered federal laws in one place for the first time, in compiling the Revised Statutes of 1874. Congress recognized that condensing all federal laws into one volume meant some language would be "necessarily changed." 2 Cong. Rec. at 1210 (1874). So it made clear its intent "to preserve absolute identity of meaning in the law." 2 Cong. Rec. at 4220 (1874). And when Congress decides to "revis[e] and consolidat[e] the laws," it does not change the effect of the law unless it explicitly says so. *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964).

So the omission of the Notwithstanding Clause—with no indication that Congress meant to alter the statute's effect—still "speaks powerfully to the intent of Congress in enacting the Civil Rights Act." Reinert, *supra*, at 171.

3. The 1871 Congressional debates reinforce the conclusion that Congress never intended for state statutes or immunities to shelter officials from the consequences of violating federal rights:

> "[F]ar from being silent about immunities, the debates on [Section 1983] are replete with statements of the opponents of civil rights statutes that the legislation was overriding those immunities. Furthermore, nothing in the legislative history is said to assuage the fears of these opponents. Thus, Congress was not silent about immunities; it was only silent about *retaining* immunities."

Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 Ark. L. Rev. 741, 771 (1987).

That makes perfect sense, as "the central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Felder v. Casey*, 487 U.S. 131, 139 (1988) (quoting *Burnett v. Grattan*, 468 U.S. 42, 55 (1984)). Because

Section 1983 "provides a uniquely federal remedy against incursions upon rights secured by the Constitution and laws of the Nation," *id.*, allowing the enforcement of a state law to effectively nullify that federal remedy completely undermines the statute's purpose.

4. In fact, in the first half of the 20th century, the Supreme Court thrice reversed the dismissal of Section 1983 actions against state officials *who enforced state laws* to prevent Black citizens from voting, in violation of the Fourteenth and Fifteenth Amendments. Tellingly, none of the three cases discussed whether the officials were immune from suit, notwithstanding the fact they were enforcing state laws that ran contrary to the plaintiffs' federal constitutional rights. *See Smith v. Allwright*, 321 U.S. 649, 650–52 (1944) (petitioner sued election officials who denied him permission to vote based on state party resolution); *Lane v. Wilson*, 307 U.S. 268, 269 (1939) (petitioner sued election officials who prevented him from registering to vote based on state legislation); *Nixon v. Herndon*, 273 U.S. 536, 539–41 (1927) (petitioner sued election officials who prevented him from voting based on state legislation).

B. Judges and scholars across the ideological spectrum agree that qualified immunity unjustifiably subverts Section 1983's remedial text, history, and purpose.

As is now clear, Section 1983's text, history, and purpose "embod[y] a foundational constitutional principle: Where there is a right, there must be a remedy." Evan Bernick, *It's Time to Limit Qualified Immunity*, Geo. J. L. & Pub. Pol'y: Legal Blog (Sept. 17, 2018), https://www.law.georgetown.edu/public-policy-journal/blog/its-time-to-limit-qualified-immunity/.

But qualified immunity directly undermines that bedrock principle and erodes Section 1983's purpose: to hold officials accountable "notwithstanding" the use of state law to violate federal rights.[5]

[5] Indeed, the "good faith" immunity first incorporated into Section 1983 in *Pierson v. Ray* came directly from Mississippi common law, in marked violation of the Notwithstanding Clause's explicit abrogation of state common law. *See* 386 U.S. 547, 557 (1967).

That is why a growing, cross-ideological chorus of Supreme Court justices,[6] federal judges,[7] and constitutional scholars[8] are sounding the

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[6] *E.g.*, *Ramirez v. Guadarrama*, 142 S. Ct. 2571, 2571–73 (2022) (mem.) (Sotomayor, J., with Breyer and Kagan, JJ., dissenting from denial of certiorari); *Baxter v. Bracey*, 140 S. Ct. 1862, 1862–65 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari) (quoted in main text, *infra*); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (quoted in main text, *infra*); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (quoted in main text, *infra*); *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume"); *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity . . . we have diverged to a substantial degree from the historical standards.").

[7] *E.g.*, *Cunningham v. Blackwell*, 41 F.4th 530, 544–47 (6th Cir. 2022) (Donald, J., concurring in part and dissenting in part); *Zadeh*, 928 F.3d 457, 479, 480–81 (5th Cir. 2019) (Willett, J., concurring in part) (quoted in main text, *infra*); *Horvath*, 946 F.3d at 801 (Ho, J., concurring in the judgment in part and dissenting in part) (quoted in main text, *infra*); *Morrow v. Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019) (Oldham, J.); *Thompson v. Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018) (Hamilton, J.); *Rodriguez v. Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018) (Kleinfeld, J.); *Thompson v. Clark*, 2018 WL 3128975, at *7 (E.D.N.Y. June 26, 2018) ("The legal precedent and policy justifications of qualified immunity, it has been charged, fail to validate its expansive scope."); *Estate of Smart v. City of Wichita*, 2018 WL 3744063, at *18 n.174 (D. Kan. Aug. 7, 2018) ("the court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment"); *Manzanares v. Roosevelt Cnty. Adult Detention Ctr.*, 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018) ("qualified immunity has increasingly diverged from the statutory and historical framework on which it is supposed to be based") (citation omitted); *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) ("this judge joins with those who have endorsed a complete re-examination of [qualified immunity] which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases"). *See also generally Jamison v. McClendon*, 476 F. Supp. 3d 386 (S.D. Miss. 2020) (Reeves, J.).

[8] *E.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55–61 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1799–1814 (2018); Reinert, *supra*, 165–87; Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 912–37 (2014).

alarm about qualified immunity's abrogation of Section 1983 and its corrosive effects on the ability of the people to hold government officials accountable for the violence and other constitutional harms they inflict.

Justice Thomas has expressed "strong doubts about [the] qualified immunity doctrine" several times, arguing there is likely no historical justification for either "the objective inquiry into clearly established law that our modern cases prescribe" or "a one-size-fits-all, subjective immunity based on good faith." *Baxter v. Bracey*, 140 S. Ct. 1862, 1864–65 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari). He explained that "we have diverged from the historical inquiry mandated by the statute [and] have 'completely reformulated qualified immunity along principles not at all embodied in the common law.'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (citations omitted).

Similarly, Justice Sotomayor laments that qualified immunity has become "an absolute shield for law enforcement officers" and effectively "gutt[ed]" constitutional protections. *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

More voices decrying qualified immunity come from this Court. Judge Ho explained that "there is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases." *Horvath*, 946 F.3d at 801 (Ho, J., concurring in the judgment in part and dissenting in part).

And Judge Willett lamented: "To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly"; "this entrenched, judge-created doctrine excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations." *Zadeh*, 928 F.3d at 479, 480–81. *See also Morrow v. Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019) (Oldham, J.); *McCoy*, 950 F.3d at 237 (Costa, J., dissenting).

Under the doctrine, Judge Willett continued, plaintiffs unlucky enough to have their rights violated in novel ways face a predictable fate: "No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses." *Zadeh*, 928 F.3d at 479–80. And "an unholy trinity of legal doctrines—qualified immunity, absolute prosecutorial immunity, and *Monell*" "frequently conspires to

turn winnable [civil rights] claims into losing ones." *Wearry v. Foster*, 33 F.4th 260, 278 (5th Cir. 2022) (Ho, J., dubitante).

Most recently, Judge Calabresi of the Second Circuit catalogued the myriad reasons that "more and more judges have come to recognize[] qualified immunity cannot withstand scrutiny," and that broad readings of the doctrine do not "strike[] the right balance." *McKinney v. City of Middletown*, 49 F.4th 730, 756–58 (2d Cir. 2022) (Calabresi, J., appendix to dissenting opinion) (collecting additional cases).

To be sure, despite these pleas for change, this Court remains bound to apply qualified immunity until its abolition by the Supreme Court or Congress. But that does not mean this Court should extend the doctrine to obvious constitutional violations—such as a premeditated arrest for doing nothing more than asking questions to a government official. Such a broad reading would not, even under the doctrine's current formulation, strike the right balance.

CONCLUSION

This Court should deny immunity and remand to the district court.

December 12, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2022, I caused the foregoing En Banc Brief of Amicus Curiae Institute for Justice to be filed 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.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,492 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font, with 12-point Century Schoolbook font footnotes.

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