No. 23-1155

In The
Supreme Court of the United States

PRISCILLA VILLARREAL,
Petitioner,

v.

ISIDRO R. ALANIZ, *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* MUCKROCK FOUNDATION IN SUPPORT OF PETITIONER

AARON S. JACOBS
Counsel of Record
JEFFREY PYLE
Prince Lobel Tye LLP
One International Place, Suite 3700
Boston, MA 02110
(617) 456-8000
ajacobs@princelobel.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE

Amicus MuckRock Foundation is a journalism and government transparency non-profit organization.[1] Since its founding in 2010, MuckRock has helped thousands of journalists, professionals, and ordinary citizens request, share, and understand public records.

MuckRock's work involves extensive use of the public records laws of the 50 states, including the Texas Public Information Act. State public records laws are essential tools of public accountability. Requests under them have led to the exposure of public corruption, misuse of government funds, and police misconduct, among many other matters of public concern.

MuckRock operates as a hybrid newsroom and journalism support organization. In addition to working with thousands of newsrooms around the country to help file more effective requests, the organization has collaborated on important public interest reporting based on the collection and analysis of government records. For example, in 2023, MuckRock and the Missouri Independent published an investigation about the involvement of the City of St. Louis in the race to build an atomic bomb during World War II, and the government's failure to protect

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief. Pursuant to Rule 37.2, *amicus* affirms that all parties received timely notice of the intent to file this brief.

the public from the environmental contamination that followed. In March 2024, MuckRock won the First Amendment Coalition's Free Speech and Open Government Award for its data journalism collaborations.

SUMMARY OF ARGUMENT

The Fifth Circuit erroneously held that the Respondents, law enforcement officials of the City of Laredo, Texas, were qualifiedly immune from suit based on their acts of charging and arresting a journalist for requesting information from a police officer. The decision rested in part on the court's determination that the information the journalist requested was not subject to disclosure under the Texas Public Information Act ("TPIA"), the state's analogue to the federal Freedom of Information Act. As such, the court held, the journalist's inquiry met the elements of a criminal statute proscribing the solicitation of nonpublic information from a public servant.

Every day, thousands of citizens and corporations submit informal inquiries or formal public records requests to state and local entities for information that government officials ultimately conclude is nonpublic. That is not because requesters are unlawfully seeking confidential information. Rather, it is because state public records laws contain hundreds of exemptions, some of them vaguely defined or subject to complex balancing tests.

In this legal context, the act of merely requesting information that is ultimately deemed nonpublic cannot reasonably be considered a crime. Rarely can

an individual know in advance whether information she requests is subject to a public records exemption. Further, requiring journalists or other citizens always to submit official information requests to authorized government representatives on pain of criminal sanction would lead to the unacceptably delayed disclosure of timely information, and a less-informed public.

Unless corrected, the Fifth Circuit's decision will encourage other government officials, both high and petty, to harass, threaten, and arrest people for requesting information that the government would prefer not to release – even if the government *may* lawfully release the information under state law. The decision not only chills journalists from speaking to unauthorized government sources of information – what the Fifth Circuit scorned as "backchannel" communications – it inhibits the use of state public records acts themselves, which are essential tools of public accountability. The Court should grant certiorari and reverse.

ARGUMENT

I. Respondents Did Not Reasonably Believe that Petitioner's Act of Requesting Government Information Could Be a Crime.

Contrary to the Fifth Circuit's ruling, it was not reasonable for Respondents to believe that Petitioner's conduct – asking a police officer to confirm the identities of two people in her community who had recently died – was a violation of Texas law.[2]

[2] The officers were also on notice that their conduct violated the First Amendment, as Petitioner has argued. *Smith v. Daily*

Villarreal v. City of Laredo, Texas, 94 F.4th 374, 385 (5th Cir. 2024) (en banc) ("*Villarreal* (en banc)"). The Fifth Circuit construed the Texas criminal statute, and the TPIA exemptions that it incorporates by reference, in such a way as to hold that the law prohibits a citizen from requesting information that is subject even to a discretionary exemption to the TPIA. As thus construed, the law would impose the absurd result of imposing liability not only on those who seek "confidential" information, but on those who request information that the government *may,* but need not, make public.

A. Texas law declares that people are entitled to "complete information about the affairs of government and the official acts of public officials and employees," subject to exemptions.

The TPIA, like the public records laws of many other states, provides that records in the hands of the government are presumptively public, subject to narrow exemptions. Tex. Gov't Code § 552.001. The "policy" section of the statute articulates the reason for this presumption:

> Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master

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Mail Pub. Co., 443 U.S. 97, 103–04 (1979) ("[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.").

> of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Tex. Gov't Code § 552.001(a). Consistent with this policy, the TPIA provides that government officers "shall promptly produce public information for inspection, duplication, or both on application by any person to the officer." Tex. Gov't Code § 552.221(a).

Subchapter C of the TPIA sets categories of records exempt from "required disclosure." Tex. Gov't Code §§ 552.101-552.163. For the most part, however, these exempt categories are not "prohibited from disclosure," in the words of the criminal statute under which Petitioner was charged. Tex. Penal Code § 39.06; *see infra* § I.B. Rather, they are merely exempt from *required* disclosure in response to a TPIA request.[3] For example, section 552.108 provides that

[3] The exemptions state that they exclude certain information "from the requirements of Section 552.021," which provides that "[p]ublic information" be "available to the public . . . ." Tex. Gov't Code § 552.021. In a few cases, they additionally provide that certain information "is confidential," and that a government body may not permit a person to view or copy it. *See, e.g.* Tex. Gov't Code § 552.1085 (sensitive crime scene images deemed confidential).

"[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted" from mandatory disclosure "if . . . release of the information would interfere with the detection, investigation, or prosecution of crime," or other conditions are met. Tex. Gov't Code § 552.108(a). In other words, a governmental agency does not *have to* disclose such information, but it still *may* do so.

In fact, the statute expressly permits public bodies to provide exempt information to the public. Section 552.007 provides: "This chapter does not prohibit a governmental body . . . from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law." Tex. Gov't Code § 552.007(a). Thus, a great deal of statutorily exempt information, including investigatory information, may be voluntarily provided to the public at the discretion of a given governmental body.

To put a fine point on it, the TPIA provides: "This chapter shall be liberally construed in favor of *granting* a request for information." Tex. Gov't Code § 552.007(b) (emphasis supplied). The Texas Legislature "has clearly expressed its intent that exceptions to disclosure be construed narrowly." *Jackson v. State Off. of Admin. Hearings*, 351 S.W.3d 290, 299 (Tex. 2011). Like the laws of other states and the federal FOIA, under the TPIA, it is the government's responsibility – not the requester's – to prove that an exemption to required disclosure applies. *See Thomas v. Cornyn*, 71 S.W.3d 473, 480-81 (Tex. App. 2002). In fact, *unlike* the public records laws of other states, the TPIA provides that if a Texas

government body wishes to withhold a record under an exemption listed in Subchapter C, it must seek and obtain "a decision from the attorney general about whether the information is within that exception if there has not been a previous determination" as to the records requested. Tex. Gov't Code § 552.301(a).

B. The Fifth Circuit unreasonably construed the Texas Misuse of Official Information statute so as to make it a crime to request information that may, but need not, be released.

The Texas "Misuse of Official Information" statute under which Petitioner was arrested states in relevant part:

> A person commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he solicits or receives from a public servant information that:
>
> > (1) the public servant has access to by means of his office or employment; and
> >
> > (2) has not been made public.

Tex. Penal Code § 39.06(c). The statute defines the term "information that has not been made public" to mean "any information to which the public does not generally have access, and that is *prohibited from disclosure under Chapter 552, Government Code*," meaning the TPIA. *Id.* (emphasis supplied).

Against the backdrop of Texas's strongly expressed public policy in favor of disclosure of government

information, it was unreasonable for the Respondents and the Fifth Circuit to believe the statute criminalizes any request (with intent to benefit) for governmental information that ultimately turns out to be nonpublic. The TPIA enacts a presumption of disclosure, expresses the "clear[] . . . intent that exceptions to disclosure be construed narrowly," *Jackson*, 351 S.W.3d at 299, and requires a declaration from the Texas Attorney General to apply an exemption, Tex. Gov't Code § 552.301(a). In this legal context, the little-used Misuse of Official Information statute cannot reasonably be construed to make it a crime to request information, merely because the information happens to fall into one of the narrow TPIA exceptions.

It is true that, according to two Texas intermediate appellate courts, the word "prohibited" in the Misuse of Official Information statute includes all of the *discretionary* exemptions listed in Subchapter C of the statute. *State v. Newton*, 179 S.W.3d 104, 109 (Tex. App. 2005); *see also State v. Ford*, 179 S.W.3d 117, 123 (Tex. App. 2005) (companion case to *Newton*) ("[I]n order to give meaning to the penal statute, we will construe the phrase 'prohibited from disclosure' in § 39.06(d) to mean the set of exceptions to disclosure listed in Subchapter C of [the TPIA]."); [4] *Tidwell v. State*, No. 08-11-00322-CR, 2013 WL 6405498, at *12 (Tex. App. Dec. 4, 2013) (agreeing with *Newton*). However, neither of the appellate court decisions

[4] The Texas appellate court need not have decided how to construe this language because the records at issue in *Newton* were grand jury materials, judicial records not subject to the TPIA, and thus the court held that an indictment for seeking them was properly dismissed. *Newton*, 179 S.W.3d at 111.

explained why it made sense to conflate exceptions from mandatory disclosure with information "*prohibited* from disclosure." The Fifth Circuit was not required to adopt this construction of the statute in determining whether there was probable cause to arrest the Petitioner here. *Villarreal* (en banc), 94 F.4th at 387, 386 n.12; *see West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940).

In any event, as construed by the Fifth Circuit, the "Misuse of Official Information" statute is obviously unconstitutional as applied here. If the law prohibits "soliciting" from a public servant information that the government *may,* but need not, disclose, then not only are "routine newspaper reporting techniques" unlawful, but so are ordinary requests by citizens for information that *may lawfully be disclosed*. *Smith*, 443 U.S. at 103.

II. A Person Who Requests Information from a State or Local Government Usually Has No Way of Knowing Whether the Information is Non-Public Under the State's Public Records Law.

In immunizing the Petitioner's arrest, the Fifth Circuit erroneously assumed that a person such as Petitioner who requests information from a state or local government would know in advance whether the information is exempt from disclosure under the state's public records law. That assumption was incorrect. That is shown by the sheer number of exemptions to such laws, and the way those exemptions are drafted and interpreted.

A. Records in the possession of state entities are presumptively public, unless one of a great number of exemptions applies.

As noted *supra* § I.A, the TPIA provides that "each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees." Tex. Gov't Code § 552.001(a). However, there are so many exemptions "otherwise expressly provided by law" as to render almost ineffective any effort by a layperson to follow them.[5]

Texas is not unusual in this respect. The Reporters Committee for Freedom of the Press ("RCFP") surveyed the public records laws of all 50 states, and it found thousands of such exemptions. For example:

- **Florida** has at least 1,100 statutory exemptions to its public records law.[6] *See generally* Fla. Stat. §§ 119.01 *et seq*. (Florida

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[5] For example, MuckRock tracks requests by state, including Texas. Requesters in Texas have a success rate of 37.52%. *Texas Public Records Guide*, MuckRock (last visited May 15, 2024), https://www.muckrock.com/place/united-states-of-america/texas/.

[6] Mark R. Cara *et al.*, *Open Government Guide: Florida*, RCFP (July 31, 2021), https://www.rcfp.org/open-government-guide/florida/#2-discussion-of-each-exemption; *see also id.* ("The difficulty in identifying exemptions is partially because the enactment of exemptions has occurred over many years, often as part of larger bills. Also, because the term 'exemption' had no statutory definition, no uniform language was used when exemptions were created.").

Public Records Law); Fla. Stat. §§ 286.011 *et seq*. (Florida Sunshine Law).

- **Kansas** has "a laundry list" of exemptions in its Open Records Act, as well as more than 350 others spread throughout its statutes.[7] *See generally* K.S.A. §§ 45-215 *et seq*. (Kansas Open Records Act); K.S.A. §§ 75-4317 *et seq*. (Kansas Open Meetings Act).

- **Maine**'s exemptions are "[t]oo numerous to list."[8] *See generally* 1 M.R.S.A. §§ 400 *et seq*. (Maine Freedom of Access Act).

- **North Dakota** has 166 enumerated exemptions.[9] *See generally* N.D. Const., art. XI, § 6; N.D.C.C. §§ 44-04-17 *et seq*. (North Dakota open records statutes).

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[7] Maxwell E. Kautsch, *Open Government Guide: Kansas*, RCFP (Jan. 19, 2023), https://www.rcfp.org/open-government-guide/kansas-2/#ii-exemptions-and-other-legal-limitations; *see also id. at* https://www.rcfp.org/open-government-guide/kansas-2/#b-other-statutory-exclusions ("Any other statute which specifically restricts disclosure takes precedence over the KORA. K.S.A. 45-221(a)(1). The Revisor of Statutes has identified over 350 such other statutes.").

[8] Sigmund D. Schutz & Harper Weissburg, *Open Government Guide: Maine*, RCFP (Oct. 2021), https://www.rcfp.org/open-government-guide/maine/#ii-exemptions-and-other-legal-limitations.

[9] Amy M. Oster, *Open Government Guide: North Dakota* (Jan. 2024), https://www.rcfp.org/open-government-guide/north-dakota/#2-discussion-of-each-exemption.

- **Ohio** has more than 400 statutory exemptions spread throughout its code.[10] *See generally* Ohio Rev. Code § 149.43 (Availability of public records for inspection and copying).

- **Oregon** has more than 500 exemptions.[11] *See generally* ORS § 192.314 (Right to inspect public records).

- **Tennessee**'s Open Records Act lists 48 categories of confidential records, with more than 300 other exemptions scattered throughout other statutes and court rules.[12] *See generally* T.C.A. §§ 10-7-501 *et seq.* (Tennessee Public Records Act); T.C.A. §§ 8-44-101 *et seq.* (Tennessee Sunshine Act).

- **Virginia** has "136 exclusions for public records located in seven different statutes organized loosely by subject matter," while the "Virginia Code contains dozens of specific statutory provisions operating outside of the Act that

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[10] Andrew Geronimo & David Marburger, *Open Government Guide: Ohio*, RCFP (last visited May 15, 2024), https://www.rcfp.org/open-government-guide/ohio/#1-character-of-exemptions.

[11] Duane A. Bosworth & Derek G. Green, *Open Government Guide: Oregon*, RCFP (July 2019), https://www.rcfp.org/open-government-guide/oregon/#1-character-of-exemptions.

[12] Douglas R. Pierce, *Open Government Guide: Tennessee*, RCFP (last visited May 15, 2024), https://www.rcfp.org/open-government-guide/tennessee/#ii-exemptions-and-other-legal-limitations.

make information confidential."[13] *See generally* Va. Code Ann. §§ 2.2-3700 *et seq*. (Virginia Freedom of Information Act).

California presents an interesting (and not uncommon) example. In an effort "to assist members of the public and state and local agencies in identifying exemptions to the California Public Records Act," Cal. Gov't Code § 7930.000(a), the Legislature helpfully collected an alphabetical list of the approximately 570 statutory exemptions spread throughout California's Code. *See generally* Cal. Gov't Code §§ 7930.100 *et seq*. But, this does not tell the whole story, because CPRA includes a "catchall" exemption under which any agency may withhold "any record by demonstrating . . . that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Cal. Gov't Code § 7922.000. This "public interest" exemption involves a "case-by-case balancing process" and has been used to withhold a variety of public records not otherwise expressly exempt under the CPRA. *ACLU Found. v. Sup. Ct.*, 400 P.3d 432, 439 (Cal. 2017) (listing examples).

[13] Craig T. Merritt & David B. Lacy, *Open Government Guide: Virginia*, RCFP (Sept. 2021), https://www.rcfp.org/open-government-guide/virginia/#2-discussion-of-each-exemption.

B. Many exemptions require judgment calls by the governmental entity holding the records.

Quite apart from the sheer number of exemptions, whether information falls within a particular exemption is often unknowable in advance by a requester. For example, one exemption to the TPIA states that information is exempt if "release of the information would interfere with the detection, investigation, or prosecution of crime." Tex. Gov't Code § 552.108(a). But, an exemption to that exemption – *i.e.*, information that may *not* be withheld – is "information that is basic information about an arrested person, an arrest, or a crime." Tex. Gov't Code § 552.108(c). How would anyone know – before asking – whether release of information about a crime would interfere with an investigation? Such a determination could vary depending on the case, on the status of the investigation, and even on the police departments or individual police officers involved. And, if otherwise exempted, how would anyone know – before asking – whether an exemption to the exemption might apply because the information is "basic"?

Further, many exemptions under state public records laws call for a balancing of interests. For example, Section 552.101 of the TPIA exempts information "if it is . . . considered to be confidential by law, either constitutional, statutory, or by judicial decision." Tex. Gov't Code § 552.101.[14] So, the statute

[14] Examples from other states abound. To take just one, the Arizona Supreme Court in *Carlson v. Pima Cty.*, 687 P.2d 1242, 1244 (Ariz. 1984), explained that Arizona's statutory scheme is

invokes common-law privacy doctrine, under which information is confidential if it "contain[s] highly intimate or embarrassing facts about a person's private affairs, such that its publication would be highly objectionable to a person of ordinary sensibilities." *Indus. Found. of the South v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683 (Tex. 1976); *see also* Tex. Att'y Gen. Op. ORD-405 (1983) (stating that "information may be withheld only if it is highly intimate or embarrassing, its release would be highly offensive to a reasonable person, and the public interest in its disclosure is minimal."); Tex. Att'y Gen. Op. ORD-600 (1992). If an unknown government official must balance the public's interest in the newsworthiness of information against the privacy interests of unknown others, the Constitution cannot possibly permit *post hoc* criminal liability simply because a member of the public guesses the outcome of that balancing test wrong.

Indeed, Villarreal's case is a paradigmatic example of this uncertainty. For, contrary to the intimations of the court below, *see Villarreal* (en banc), 94 F.4th at 382, 387-88, there is no TPIA exemption clearly providing that a suicide or crash victim's identity is confidential while the investigation is ongoing or before the notification of the victim's next of kin. This bears repeating: There is *no express exemption* for the information Villarreal sought to confirm.

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simple, providing "a broad right of inspection to the public." But, documents can be withheld on the bases of (1) confidentiality; (2) privacy; or (3) where "disclosure would be detrimental to the best interests of the state," based upon a balancing of interests. *Id.*

The court below stated:

> Texas law prevents the disclosure of certain personal identifying information of victims in accident reports and exempts disclosure of information related to ongoing criminal investigations. See TEX. TRANSP. CODE § 550.065(f)(2)(A) (requiring the Texas Department of Transportation to withhold or redact "the first, middle, and last name of any person listed in a collision report"); TEX. GOV'T CODE § 552.108(a)(1)-(2) (exempting from disclosure information dealing with the investigation of a crime).

Villarreal (en banc), 94 F.4th at 387. These statements are incorrect. Texas Transportation Code § 550.065 only applies to "a written report of a collision" and tabulated collision reports under Section 201.806. Tex. Transp. Code § 550.065(a). It does not apply to the identity of a suicide or crash victim outside of such reports. Villarreal did not seek a written report of a collision; she only asked for information. And, no case or other authority had hitherto applied Texas Government Code § 552.108 to such a request.

So too, the court below claimed that "[t]he state has a longstanding policy to protect individual privacy in law enforcement situations that appear to involve suicide or vehicular accidents," *Villarreal* (en banc), 94 F.4th at 387, but the authorities it cited are inapplicable or support Villarreal's position. The Texas Attorney General's opinion from 1976 spoke only of protecting the privacy of voluntary *witnesses*, not the feelings of grieving families. Tex. Att'y Gen.

Op. ORD-127 at 7 (1976). The Texas Public Information handbook cited by the court below was issued after Villarreal's arrest, and it says nothing about the timing of access to a crash or suicide report. Tex. Att'y Gen., Public Information Act Handbook 76 & n.363 (2022), https://perma.cc/6NJB-X5NM. Finally, the more recent Texas Attorney General opinion cited by the court below was also issued after Villarreal's arrest and, significantly, ordered the information produced. Tex. Att'y Gen. Op. OR2022-36798, 2022 WL 17552725 (2022).

In fact, the 2022 Texas Attorney General's opinion suggests that the identities of the decedents may well have been subject to mandatory disclosure under the TPIA. As the Texas Attorney General explained in 2022:

> [T]he right to privacy is a personal right that lapses at death and therefore may not be asserted solely on behalf of a deceased individual. However, the United States Supreme Court has determined that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004).
>
> Because the submitted information relates to deceased individuals, the information may not be withheld from disclosure based on the deceased individuals' privacy interests. The [Southwestern Institute of Forensic Sciences] contends members of the deceased individuals' families may have privacy interest in the information. As of this date, we have not

> received correspondence from any member of any deceased individual's family asserting a privacy interest in the information. Thus, we have no basis to conclude any family member has a privacy interest in the information at issue. Therefore, the institute may not withhold any portion of the information at issue under section 552.101 of the Government Code in conjunction with constitutional privacy and the holding in *Favish*.
>
> * * *
>
> Because the submitted information pertains solely to deceased persons, we find the institute may not withhold any portion of the information under section 552.101 in conjunction with common-law privacy. The institute must release the submitted information.

Tex. Att'y Gen. Op. OR2022-36798, 2022 WL 17552725, at *2 (2022) (certain citations omitted).

In short, the decedent at issue in the 2022 Texas Attorney General's opinion had – and could have – no privacy interest, as he/she was deceased. And, since no member of the decedent's family had come forward, there were no privacy interests identified such that the information could be withheld. But, of course, there was no way the requester could have known that no family had come forward until she asked for the information. So too, there is no way that Petitioner could have known that the information she sought was exempt until she asked – especially where she

had already obtained the decedents' names from non-governmental sources.

It is also noteworthy that, as discussed *supra* § I.A, Texas law does not entrust the exemption determination to just any government official. In order to invoke one of the exemptions and thereby withhold information, a governmental entity must obtain express permission from the state Attorney General, unless the specific records requested were previously deemed exempt by the Attorney General. Tex. Gov't Code § 552.301. In other words, government officials are not supposed to invoke an exemption on their own – the Texas Attorney General must look over their shoulders and approve the invocation of the exemption. That is because the legislature did not believe that just any government entity would – or even could – apply the exemptions correctly. And yet, according to the court below, it was reasonable to criminally charge a member of the public for failing to correctly guess whether information was subject to a TIPA exemption, and whether the Texas Attorney General would so determine.

III. The Texas Criminal Statute Is Not Limited to the Use of "Backchannel" Sources.

The Fifth Circuit erroneously assumed that Petitioner would not have run afoul of the Misuse of Official Information statute (as it construed that statute) but for the fact that she contacted "an illicit backchannel" source – to wit, Officer Goodman – to confirm the identities of the decedents. *Villarreal* (en banc), 94 F.4th at 389. The court suggests that Petitioner should have sought to confirm the

identities of the decedents through a formal TPIA request, or by asking the City of Laredo's "public information officer," who is "entrusted with reporting to the press and public." *Id.* at 387, 389.

However, under the statute as the Fifth Circuit interpreted it, Petitioner could have been arrested for doing just that. The statute does not limit liability to those who use "backchannel" sources, nor does it provide immunity for soliciting information from authorized spokespeople. Rather, it prohibits any person from "solicit[ing]" (*i.e.*, asking for or trying to obtain) information that is nonpublic under the TPIA from any "public servant" with "intent to obtain a benefit." Tex. Penal Code § 39.06(c). Thus, at least under the Fifth Circuit's construction of the statute, if Petitioner had asked the public information officer to confirm the identities of the decedents on the days they died, Petitioner would have been no less guilty of "soliciting" nonpublic information from a "public servant" under the terms of the statute. And, if Petitioner had filed a TPIA request for public records sufficient to show the decedents' identities, that too could have been an illegal request, if the information were later deemed in retrospect to be exempt.

It cannot constitutionally be a crime to request public information from the government, whether through public records requests, questions directed to government officials, or otherwise. If the Fifth Circuit's ruling to the contrary is allowed to stand, states would be left free to pass similar statutes and deploy them against those who request information the government would rather not produce, inhibiting public accountability.

This is not theoretical. One town in New Jersey recently threatened to bring criminal charges against a lawyer who complained that the town had ignored his public records request.[15] The same town had previously sued an 82-year-old woman who sought records, including items as basic as travel expenditures and copies of township resolutions.[16] If allowed to stand, the Fifth Circuit's ruling could greenlight such intimidation at a much broader scale.

Such intimidation would not be directed just at journalists. While data at the state level is difficult to ascertain, a 1978 study from the Government Accountability Office found 58% of analyzed FOIA requests were commercial in nature.[17] A more recent analysis by Professor Margaret Kwoka found that for some agencies, as many of 95.6% of FOIA requests were commercial.[18] Requesting information via state and federal laws is critical to businesses that, for example, wish to understand why new medicines were denied approval, or why they lost competitive bids for government contracts. All requesters of government information must be protected from retaliation and

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[15] C.J. Ciaramella, "New Jersey Town That Sued a Woman for Public Records Requests Now Wants Lawyer Prosecuted for Same Thing," *reason.com* (Jan. 6, 2023), https://reason.com/2023/01/06/new-jersey-town-that-sued-a-woman-for-public-records-requests-now-wants-lawyer-prosecuted-for-same-thing/.

[16] *Id.*

[17] Comptroller General's Report to the Subcommittee on Government Information and Individual Rights, House Committee on Government Operations, July 25, 1978, at ii.

[18] Margaret B. Kwoka, Saving the Freedom of Information Act (Cambridge Univ. Press, 2021).

harassment like that suffered by Petitioner if the public records laws are to have their intended effect.

IV. Informal Requests for Information Like Petitioner's Must Be Protected, Because Formal Procedures Under State Public Records Laws are Neither a Timely nor Adequate Means to Inform the Public.

The court below suggested that Petitioner should have "take[n] time to go through local or TPIA channels" to confirm the identities of the decedents, even if doing so "sacrifice[d] the status of getting a scoop." *Villarreal*, 94 F.4th at 388. However, even assuming that a formal TPIA request would not have rendered Petitioner liable under the Misuse of Official Information Statute, that vehicle is too slow to satisfy the public's interest in reporting on the news when it is fresh.

It is true that Texas law mandates that information requested under the TPIA be provided "promptly," meaning "as soon as possible under the circumstances," and sets 10 business days as a presumptive standard of reasonableness. Tex. Gov't Code § 552.221(a). In reality, though, the state's compliance with the timeliness requirements of the TPIA does not come close to these standards. MuckRock has surveyed compliance times under all the state records laws, and has found that in Texas, the average wait time is 74 days:

How open is your government?, MuckRock, https://www.muckrock.com/place/ (last visited May 15, 2024). So, had Petitioner gone through official channels, she could have expected to wait many days for the production of records confirming the identities of the decedents – information she already had – assuming the information was released at all.

The value of news is that it is *new*. Or, as this Court put it in *International News Service v. Associated Press*:

> The peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret.

248 U.S. 215, 235 (1918);[19] *see also, e.g.*, *Bridges v. California*, 314 U.S. 252, 269 (1941) (recognizing that a ban on reporting news "just at the time [the] audience would be most receptive" would be effectively equivalent to "a deliberate statutory scheme of censorship"); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, Circuit Justice) ("[E]ach passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable."); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression.").

Accordingly, informal queries to police officers, politicians and other governmental officials are of profound importance to reporting the news when it is still relevant. *Cf. Courthouse News Serv. v. Planet*,

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[19] *INS* was abrogated on other grounds by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

947 F.3d 581, 594 (9th Cir. 2020) ("[A] necessary corollary of the right to access is a right to timely access. CNS's reporting on complaints must be timely to be newsworthy and to allow for ample and meaningful public discussion regarding the functioning of our nation's court systems."). Neither the citizenry, nor the news media that represents it, should be expected to be mere passive conduits for whatever information government publicity offices choose to provide, whenever they choose to provide it. The Fifth Circuit's decision to the contrary should be reversed.

CONCLUSION

For the foregoing reasons, amicus respectfully asks the Court to grant the petition for a writ of certiorari.

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Respectfully Submitted,

AARON S. JACOBS
Counsel of Record
JEFFREY PYLE
Prince Lobel Tye LLP
One International Place,
Suite 3700
Boston, MA 02110
(617) 456-8000
ajacobs@princelobel.com

Counsel for Amicus Curiae