

No. 23-1155

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**In the Supreme Court of the United States**

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PRISCILLA VILLARREAL,  
*Petitioner,*

v.

ISIDRO R. ALANIZ, *ET AL.*,  
*Respondents.*

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

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**BRIEF OF REPORTERS AS *AMICI*  
*CURIAE* IN SUPPORT OF PETITIONER**

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**INTEREST OF THE *AMICI CURIAE*<sup>1</sup>**

*Amici curiae* are award-winning journalists with extensive experience across print, digital, and broadcast media. They work to strengthen journalism at every level—through their own reporting, by serving as editors, and by training the next generation of journalists.

The right of journalists to ask questions of public officials is essential to the proper functioning of a free and democratic society. A free press acts as a check on government power and holds officials responsible to the people they serve. Without the ability to question government officials, journalists cannot do their jobs.

*Amici* have an interest in seeing that the First Amendment rights of all journalists are respected and protected. The Fifth Circuit's *en banc* decision undermines that basic constitutional order and will have particularly severe consequences for already-threatened citizen journalists. *Amici* hope to assist the Court by explaining the negative effects that the Fifth Circuit's decision would have on journalism in Texas and throughout the country. *Amici* are:<sup>2</sup>

- **Radley Balko** is an independent journalist who has reported extensively on criminal justice and civil liberties. He formerly worked

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<sup>1</sup> No party or party's counsel authored or financially supported the authoring of any part of this brief. Counsel of record for all parties received timely notice of *amici*'s intent to file this brief.

<sup>2</sup> Professional affiliations of *amici* are provided for identification purposes only.

at *The Washington Post*, *Reason* magazine, and *The Huffington Post* and was a Policy Analyst for the Cato Institute.

- **David Barstow** worked for *The New York Times*'s investigative unit for over two decades and is the first reporter to win four Pulitzer Prizes. He is currently the Reva and David Logan Distinguished Chair in Investigative Journalism at the University of California, Berkeley Graduate School of Journalism.
- **Kathleen McElroy** was a professional journalist for nearly 30 years and an associate managing editor at *The New York Times*. She is currently a professor at the University of Texas at Austin School of Journalism and Media.
- **Walter Robinson** is the editor at large of *The Boston Globe*. He has spent over half a century at *The Globe* and led the paper's Spotlight Team to a Pulitzer Prize for Public Service.
- **John Schwartz** is a former science writer for *The New York Times*. He is currently a professor of practice in journalism at the University of Texas at Austin School of Journalism and Media.
- **Jacob Sullum** is a senior editor at *Reason* magazine who has covered drug policy, public health, gun control, civil liberties, and criminal justice for more than three decades.

## SUMMARY OF ARGUMENT

Priscilla Villarreal is a citizen journalist who reports on local news in Laredo, Texas. Pet. App. 194a–95a. Some of her reporting has been critical of the Laredo Police Department and other local officials. *Id.* at 205a–206a. She posted live video of a police officer choking a suspect during a traffic stop. *Id.* at 205a. She reported on potential conflicts of interest when the Webb County District Attorney’s Office decided not to prosecute a close relative of the Chief Assistant District Attorney. *Id.* at 206a–207a.

Unhappy with her reporting, Respondents began a campaign of harassment and intimidation, which escalated when they arrested Ms. Villarreal for allegedly violating a Texas statute that makes it illegal to “solicit[] or receive[] from a public servant information that . . . has not been made public,” with the “intent to obtain a benefit.” Tex. Penal Code § 39.06(c). According to Respondents, Ms. Villarreal committed a felony by asking a police officer to confirm the names of a border agent who had committed suicide and victims who had died in a traffic accident.

Ms. Villarreal’s arrest clearly violated her constitutional rights. Respondents may not like Ms. Villarreal or the news that she reports, but they cannot punish her for it. The First Amendment requires state officials to tolerate speech that is “vehement, caustic, and sometimes unpleasantly sharp.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Protecting speech that is offensive or embarrassing to the state is a core purpose of the First

Amendment. *See Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944) (“One of the prerogatives of American citizenship is the right to criticize public men and measures . . .”).

This Court has clearly established that the First Amendment protects “routine newspaper reporting techniques,” including the right of journalists to question government officials. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979). In upholding Respondents’ claim to qualified immunity, the Fifth Circuit misapplied this Court’s precedents.

In addition, the Fifth Circuit failed to hold Respondents to even the minimal standard that they conduct themselves as “reasonable official[s].” *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam). A reasonable police officer is trained to respond to press inquiries. A reasonable police officer follows police policies and directives requiring officers to provide the public with basic information regarding traffic accidents. A reasonable police officer has extensive experience fielding questions from journalists. A reasonable police officer understands that there was nothing unusual, much less criminal, about Ms. Villarreal’s questions.

Beyond the personal consequences for Ms. Villarreal, the Fifth Circuit’s decision weakens the press freedoms that are essential to a democratic society. Journalists act as a check on government power and the abuses of government officials. By denying that there is a clearly established right to question public servants or to seek out even the most basic facts on matters of public concern, the Fifth

Circuit has made it more difficult for journalists to perform their critical role. Journalists cannot do their jobs if they must fear that any interaction with the government—even a simple request for truthful, factual information—may be used as a pretext for an arrest and criminal prosecution.

## ARGUMENT

### **I. The First Amendment Guarantees the Right to Gather News, Including the Right to Question Public Officials.**

The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Sullivan*, 376 U.S. at 270. This country was founded on the self-evident truth that governments “deriv[e] their just powers from the consent of the governed.” *The Declaration of Independence* para. 2 (U.S. 1776). Government officials act in the people’s name, and the people are not only entitled but expected to judge how those powers are being used. As the Supreme Court of Pennsylvania observed over 200 years ago, every citizen has “a right of investigating the conduct of those who are entrusted with the public business.” *Respublica v. Oswald*, 1 Dall. 319, 325 (Pa. 1788).

A free press is essential to the public debate on which democratic self-government depends. A “people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” James Madison, *Letter to W.T. Barry* (Aug. 4, 1822), in 9 *The Writings of James Madison* 103 (Gaillard Hunt ed. 1910). The press is both the medium of

debate and the means by which the people obtain the knowledge required to hold their leaders accountable. As John Adams explained: “Our chief magistrates and Senators are annually eligible by the people. How are their characters and conduct to be known to their constituents but by the press?” Leonard W. Levy, *The Emergence of a Free Press* 198–99 (1985).

The First Amendment’s protection of the freedom of the press is therefore an integral part of the constitutional order. This Court has consistently recognized that the press is the “constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *see also Houchins v. KQED, Inc.*, 438 U.S. 1, 10 (1978); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (“[A citizen] relies necessarily upon the press to bring to him in convenient form the facts of [government] operations.”). It is “one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.” *Mills*, 384 U.S. at 219.

The First Amendment protects more than just the rights to speak and to publish. In order to meaningfully debate matters of public importance, citizens must have the relevant facts. To hold the government accountable, a public debate must be an *informed* debate. *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 604–05 (1982) (stressing that the First Amendment “ensure[s] that . . . discussion of governmental affairs is an informed one” (cleaned up)); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250

(1936) (“[I]nformed public opinion is the most potent of all restraints upon misgovernment . . .”).

To ensure that debate is as informed as it is robust, this Court has recognized the “undoubted right to gather news ‘from any source by means within the law.’” *Houchins*, 438 U.S. at 11 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972)); see also *Branzburg*, 408 U.S. at 727 (Stewart, J., dissenting) (“A corollary of the right to publish must be the right to gather news.”).

In particular, this Court has repeatedly protected “routine newspaper reporting techniques,” including the right to question government officials. *Daily Mail*, 443 U.S. at 103. In *Daily Mail*, the Court struck down a West Virginia statute making it a crime to publish the name of a juvenile offender without prior approval of the juvenile court. *Id.* at 105–06. The *Daily Mail* reporters obtained the juvenile’s name using the same “routine” techniques employed by Ms. Villarreal—“by asking various witnesses, the police, and an assistant prosecuting attorney” who were at the crime scene. *Id.* at 99.

In *Houchins*, the Court again affirmed the right to question government officials. 438 U.S. at 15. This Court held that although journalists reporting on prison conditions do not have a special right of access to the prison or other locations off limits to the general public, they *do* have the right to investigate such matters of public importance. In particular, journalists “are free to interview” individuals who have been inside the prison, including “inmates’



attorneys,” “public officials, and institutional personnel.” *Id.*

Following this Court’s precedents, the courts of appeals have consistently upheld the First Amendment right to gather news. *See, e.g., Hils v. Davis*, 52 F.4th 997, 1002 (6th Cir. 2022) (recognizing a “general First Amendment right to gather information in public settings”); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012); *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1197 (10th Cir. 2017); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

Even the Fifth Circuit has acknowledged the First Amendment’s “right to gather news.” *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017). In holding that a plaintiff’s right to film police was protected by the First Amendment, the court explained that “[n]ews-gathering . . . ‘is entitled to first amendment protection, for without some protection for seeking out the news, freedom of the press could be eviscerated.’” *Id.* (quoting *In re Express-News Corp.*, 695 F.2d 807, 808 (5th Cir. 1982); *Branzburg*, 408 U.S. at 681).

## **II. No Reasonable Official Would Believe That the First Amendment Permits the Criminalization of “Routine Newspaper Reporting Techniques.”**

Qualified immunity exists “to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.” *Saucier v. Katz*, 533 U.S. 194, 206 (2001). But it offers no protection to “those who

knowingly violate the law.” *Ziglar v. Abbasi*, 582 U.S. 120, 152 (2017). The test is “whether it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted.” *Id.*

The decision to arrest Ms. Villarreal was not reasonable. Two hundred years of history and decades of precedent are more than sufficient notice that a journalist cannot be arrested for asking the names of accident and suicide victims. Any reasonable official would have known that Ms. Villarreal’s arrest was clearly unconstitutional.

Respondents’ conduct is particularly egregious in light of the statutes and regulations requiring law enforcement officers to provide the press, and the public at large, with information about police activities. In *Hope v. Pelzer*, 536 U.S. 730 (2002), this Court held that prison officials had fair warning that shackling a prisoner to a hitching post for seven hours was cruel and unusual punishment. *Id.* at 741–42. The Court relied not only on its own precedent but also on an Alabama Department of Correction regulation restricting the use of a hitching post. *Id.* at 743–44. The fact that correction officials “frequently ignored” the regulation provided “strong support for the conclusion that they were fully aware of the wrongful character of their conduct.” *Id.* at 744.

The same is true here. Police procedures and regulations, as well as Respondents’ experience with Texas’s public information laws, would have provided fair notice that Respondents’ conduct was illegal.

**A. Police officers are trained to answer questions from reporters.**

Interacting with the public, including the press, is a fundamental part of a police officer's duties and responsibilities. Police officers field questions from reporters every day. They are explicitly trained to handle press inquiries and are encouraged to develop cooperative relationships with journalists.

The regulations adopted by police organizations across the country confirm that interactions with the press are not only accepted but expected and encouraged. Washington, D.C.'s Metropolitan Police Department (MPD) has issued a General Order governing the "Release of Information to the New[s] Media."<sup>3</sup> The *MPD Order* acknowledges that "[t]he public has a right to certain types of information regarding policy activity." *Id.* § I. Because "community members often obtain the majority of their information from the news media, the MPD is encouraged to work in cooperation with the media." *Id.* It is therefore the policy of the MPD "that members shall make available to the news media timely information pertaining to matters within the scope of the Department." *Id.* § II.

Under the *MPD Order*, all members of the Department are encouraged to "respond to media requests." *Id.* § VI.A. Police officers may provide "[f]actual information concerning an individual

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<sup>3</sup> Metro. Police Dep't (D.C.), GO-SPT-204.01, *Release of Information to the News Media* (Apr. 13, 2001) [hereinafter *MPD Order*].

involved in an incident, such as the complainant’s name and address,” as well as “[c]ircumstances surrounding an incident, such as time and place, possession and use of weapons, resistance, pursuit, identity of the arresting officers, length of investigation, and a general description of items seized.” *Id.* § VI.B. Police officers are encouraged to answer questions from journalists who reach out “requesting interviews and/or information pertaining to an incident.” *Id.* § VI.D.1.

The *MPD Order* is representative of police regulations across the country.

Philadelphia Police Department Directive 4.16<sup>4</sup> states that “[i]t is the policy of this department to provide relevant and timely information to the media and the public.” *Id.* § 2. When a suspect is arrested, police officers may provide the “[n]ame, age, employment, marital status, and similar background information of the arrested person(s).” *Id.* § 3.G.1.a.

The Atlanta Police Department’s Standard Operating Procedure 1060<sup>5</sup> states “[t]he Atlanta Police Department will assist news media personnel and the public by releasing impartial information and will cooperate with the media at the scene of crimes, accidents, and other public safety incidents.” *Id.* ¶ 2. The Department is instructed to “promote positive

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<sup>4</sup> Phila. Police Dep’t, Directive 4.16, *Public Affairs and Release of Information to the Public* (Oct. 11, 2016).

<sup>5</sup> Atlanta Police Dep’t, Policy Manual, APD.SOP.1060, *Policy and Procedure for Interacting with the Public and Media Representatives* (Mar. 28, 2022).

relations with the public” by “[a]ssisting news media personnel in covering stories at the scenes of incidents as they pertain to public safety,” “[b]eing available for on-call responses to the news media,” and “[c]oordinating and authorizing the release of information about victims, witnesses and suspects.” *Id.* ¶ 4.1.1.

According to the San Jose Police Department Duty Manual,<sup>6</sup> “[a]ll employees of the Department will cooperate as completely as possible with members of the news media.” *Id.* at Proc. C 1902. The manual instructs officers to answer questions from reporters: “Officers who are contacted by the media at the scene of an ‘in-progress’ event should provide them with the basic details of the event.” *Id.* at Proc. C 1903.<sup>7</sup>

These regulations also identify categories of information that police officers should not provide to journalists. *See, e.g., id.* at Proc. C 1904 (providing that the names of juveniles who have been arrested “are not to be released”). But while barring the release of such information, the regulations also direct

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<sup>6</sup> San Jose Police Dep’t Duty Manual, Proc. C 1900, *Supplying Information Department Operations* (2023).

<sup>7</sup> The Fifth Circuit faulted Ms. Villarreal for seeking information from “back-channel source[s]” because she did not direct her questions to the Laredo Police Department’s Public Information Officer. Pet. App. 3a–4a. The court did not consider that many departments encourage *all* officers to collaborate with the media. Moreover, the statute under which Ms. Villarreal was arrested criminalizes solicitation of qualifying information from all “public servants” and makes no exception for inquiries directed to public information officers.

officers how to respond to such requests: “The press should be told that the case is currently under investigation and that more complete information may be obtained from the Media Relations Unit or the Deputy Chief of the Bureau of Investigations.” *Id.* The *MPD Order* instructs that “[i]n the case of a denial of a media request for information, a Command Staff Member, Public Information Officer, or the Director of Corporate Communications shall provide a timely and professional explanation.” *MPD Order* § VI.D.7.

The Laredo Police Department is no exception. Laredo police officers routinely field questions from reporters without threatening them with criminal prosecution. The Laredo Police Department holds regular press conferences. The videos of those press conferences, which the Department posts to its Facebook page, demonstrate that officers understand that journalists are entitled to ask questions and that it is not crime to ask for nonpublic information.

For example, on October 2, 2018, the Laredo Police Department held a press conference to announce the results of “Operation Full Throttle,” a joint effort by multiple law enforcement agencies to crack down on auto theft.<sup>8</sup> In addition to taking questions from reporters, the Police Department volunteered to provide the press with “an opportunity for one-on-one interviews” with members of the task force. After the Chief of Police announced that the

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<sup>8</sup> Laredo Police Dep’t, *Laredo PD Press Conference: Auto Theft Ring Arrested*, Facebook (Oct. 2, 2018), <https://www.facebook.com/laredopd/videos/laredo-pd-press-conference-auto-theft-ring-arrested/1352929308172132/>.

operation had resulted in eleven arrests, the *first* question asked by a reporter was whether the police would release the names of the suspects—the same type of information sought by Ms. Villarreal. Although the police demurred, citing the ongoing investigation, the reporter was not arrested. Any reasonable officer, trained to deal with the press, would understand that the reporter was entitled to ask about the suspects’ names. Any reasonable officer would understand that journalists ask such questions every single day.

**B. Public information laws further inform officials of the rights of journalists to ask questions.**

All public officials, not just police officers, must interact with reporters on a regular basis. Recognizing the need for an informed citizenry, every state legislature, as well as the federal government, has enacted legislation for responding to public information requests. *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552; Freedom of Information Law, N.Y. Pub. Off. Law §§ 84 *et seq.*; Access to Public Records Act, Ind. Code §§ 5-14-3-1 *et seq.*

The Texas Public Information Act (TPIA), Tex. Gov’t Code §§ 552.001 *et seq.*, provides an example of a routine, nonpunitive system for responding to journalistic inquiries. Under the TPIA, when a journalist—or any member of the public—requests information from state or local officials, those officials can seek guidance from the Office of the Texas Attorney General (OAG) to decide whether they must disclose that information. If they decide against

disclosure, they must defend their decision with a statutory justification.

*Amici's* experiences with the TPIA are typical. In March of 2019, *amicus* Jacob Sullum emailed the Harris County Institute of Forensic Sciences requesting autopsy reports on two people shot and killed by police officers. In April, the Office of the Harris County Attorney sent a letter to the OAG expressing its belief that the autopsy reports could be withheld under Tex. Gov't Code § 552.108(a)(1), which exempts certain information related to active criminal cases from disclosure.<sup>9</sup> The OAG responded the following month, confirming that the autopsy reports could be withheld.<sup>10</sup>

While covering the same story, Sullum also asked a Houston Police Department spokesman how many shots had been fired during the incident. The spokesman declined to say, again out of the concern that divulging the information might compromise an ongoing investigation.

Texas officials handle thousands of such requests every year. In 2015, OAG issued over 7,000 rulings based on § 552.108(a)(1) alone.<sup>11</sup> This is the same

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<sup>9</sup> Letter from Vince Ryan, Cnty. Att'y, Off. of the Harris Cnty. Att'y, to Ken Paxton, Att'y Gen. of Tex. (Apr. 4, 2019), <https://perma.cc/3BDA-FUPU>.

<sup>10</sup> Letter from Off. of Tex. Att'y Gen., to Deanne Lin, Assistant Cnty. Att'y, Off. of the Harris Cnty. Att'y (May 8, 2019), <https://perma.cc/4A9R-PD7H>.

<sup>11</sup> Off. of the Att'y Gen. of Tex., *108 Previous Determinations*, <https://perma.cc/3WMS-6X9U>.



provision that the Fifth Circuit cited in holding that “there was abundant evidence for a reasonable belief” that Ms. Villarreal had illegally solicited nonpublic information. Pet. App. 16a. Yet neither *amici*, nor any of the thousands of other individuals who solicited similar information, were ever arrested or prosecuted for their requests.

Moreover, a reasonable official would understand his responsibilities under the TPIA. Section 552.012 requires that many elected or appointed public officials “shall complete a course of training” on Texas’s open record laws. The OAG also publishes a Public Information Act Handbook to “help[] public officials and the people they serve understand and comply with the Texas Public Information Act.”<sup>12</sup>

In short, a reasonable officer would know that the First Amendment protects “routine newspaper reporting techniques,” including the right to question police officers and other public officials. *Daily Mail*, 443 U.S. at 103. Based on the TPIA, police department regulations, officer training on responding to press inquiries, and personal experience dealing with reporters, a reasonable officer would know that journalists are permitted to ask police officers the names of accident and suicide victims. A reasonable officer would know that reporters ask for such information every day. It therefore “would have been clear to a reasonable officer” that Ms. Villarreal’s arrest was unconstitutional. *Ziglar*, 582 U.S. at 152.

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<sup>12</sup> Off. of the Att’y Gen. of Tex., *Public Information Act Handbook 2024* (2024), <https://perma.cc/3TCV-ZGEU>.

### **III. Criminalizing Routine News Gathering Would Prevent Journalists from Doing Their Jobs.**

Asking questions of government officials is an indispensable part of what it means to be a journalist. Virtually every story published in the newspaper, posted online, or reported on the six o'clock news required the reporters to speak to government officials in order to obtain information that would otherwise be unavailable to the public. Without the ability to seek out the truth from those in power, journalists cease to be a check on government and are reduced to reprinting the government's carefully worded talking points.

#### **A. Journalists are required to question government officials.**

Public officials are rarely shy about talking to journalists. Government agencies at the federal, state, and local levels issue thousands of press releases every day. Individual officials—everyone from the local sheriff to the President of the United States—hold regular press conferences. Governments seek to use the media to win the news cycle, to disseminate their messages, and tout their successes.

Journalists are not merely the passive recipients of official pronouncements. Ethical journalism requires reporters to question all information they receive, especially information from government sources. Journalists can “never simply repost or broadcast” press releases, because “claims made in official news releases must be subject to the same fact

checking” as information from any other source.<sup>13</sup> An editor would rightly admonish a reporter who did nothing more than repeat what he had been told at a press conference. A press statement may be the beginning of a story; it is never the end.

*Amici* can attest from their personal experiences as to how responsible journalists interact with public officials and as to the importance of seeking out the information those officials may prefer not to share.

When the Boston-based priest John Geoghan was accused of and prosecuted for repeated sexual abuse, most Americans looked on with horror. *The Boston Globe*’s Spotlight Team, led by *amicus* Walter Robinson, helped bring the full story to the public’s attention. They began examining the story by looking at the facts uncovered by prosecutors, the victims, and their lawyers. The Spotlight Team then sought out judges, police officers, prosecutors, and court officials, speaking with them on and off the record to uncover leads. Ultimately, these conversations helped *The Globe* track down stories about dozens of predators and expose how the Catholic Church concealed their abuse for decades.<sup>14</sup>

*Amicus* David Barstow underwent a similar process when drafting his exposé detailing the Bush Administration’s military analyst program, which used ostensibly independent military analysts “in a

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<sup>13</sup> Radio Free Europe/Radio Liberty, *Standards of Ethical Journalism* (June 26, 2023), <https://perma.cc/4P5V-PNB2>.

<sup>14</sup> See *The Boston Globe*, Pulitzer Prizes (2003), <https://www.pulitzer.org/winners/boston-globe-1>.

campaign to generate favorable news coverage of the administration's wartime performance."<sup>15</sup> While Barstow was uncovering the story, his sources helped him obtain internal memoranda detailing the rationale and strategy behind the program. Barstow learned about the government's covert effort to "re-energize surrogates and message-force multipliers": Public officials would grant access and information to former military officers, who would then deliver pro-Administration talking points on television and radio, resulting in compensation and career advancement. *Id.* As Barstow reported, these efforts helped the Bush Administration convince the American public that "Iraq . . . was developing nuclear weapons" and that "an invasion would be . . . relatively quick and inexpensive." *Id.* Without the ability to ask questions of government, Barstow and other reporters could not have brought this important story to light.<sup>16</sup>

In 2005, NASA was preparing for its first shuttle launch after the tragic loss of Space Shuttle *Columbia* and its crew of seven astronauts. Uncomfortable with the agency's timeline, several NASA engineers—who could not speak on the record for fear of reprisal—shared data with *amicus* John Schwartz showing that some of the shuttle's elements fell short of safety standards. Schwartz began asking questions of NASA officials by email and then in phone interviews—questions that bucked the institutional narrative and probed concerns that the shuttle was unsafe to return

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<sup>15</sup> David Barstow, *Behind TV Analysts, Pentagon's Hidden Hand*, N.Y. Times (Apr. 20, 2008), <https://perma.cc/YHT5-YKGC>.

<sup>16</sup> See *David Barstow of The New York Times, Pulitzer Prizes* (2009), <https://www.pulitzer.org/winners/david-barstow>.

to flight. One week after *The New York Times* published the results of Schwartz's investigation, NASA decided to delay the launch of Space Shuttle *Discovery* amid lingering safety concerns.<sup>17</sup>

Journalists do not always question government officials to expose earthshaking truths. Often, journalists question public servants for more run-of-the-mill reasons—to ensure that their stories are comprehensive, to corroborate information obtained from other channels, or to drive stories forward at a pace faster than the government might prefer. But in all cases, journalists must ask questions of public officials—some of which bear fruit and some of which do not—to facilitate their reporting. When the Fifth Circuit held that the right to ask questions of public officials was not clearly established, it took aim at core journalistic activity.

**B. Fear of prosecution would discourage journalists and deny the public access to important information.**

This Court has repeatedly warned against “the ‘timidity and self-censorship’ which may result from allowing the media to be punished for publishing certain truthful information.” *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989) (quoting *Cox Broad. Corp.*, 420 U.S. at 496). In denying the clearly established

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<sup>17</sup> See John Schwartz, *NASA Is Said to Loosen Risk Standards for Shuttle*, N.Y. Times (Apr. 22, 2005), <https://perma.cc/UX3S-LM2C>; John Schwartz, *NASA May Delay Shuttle Launching Until July*, N.Y. Times (Apr. 29, 2005), <https://perma.cc/5MBJ-PG4J>.

right to ask questions of government officials, the court of appeals encouraged self-censorship by any person who is “unsure about the side of a line on which his speech falls” or who “worr[ies] that the legal system will err, and count speech that is permissible as instead not.” *Counterman v. Colorado*, 600 U.S. 66, 75 (2023). The harms flowing from the Fifth Circuit’s opinion are not limited to individual affected journalists. Allowing journalists to be threatened with criminal prosecution by the officials they are investigating would “very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public.” *Cox Broad. Corp.*, 420 U.S. at 496. When that happens, we are all harmed.

The fact that the criminal charges against Ms. Villarreal were ultimately dismissed does not negate the dangers. “Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.” *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965); *see also Counterman*, 600 U.S. at 75 (noting that speakers “may worry that the legal system will err” or “may simply be concerned about the expense of” legal “entangle[ment]”). According to the Fifth Circuit, the law was not clearly established because the specific statute Respondents cited had not been held unconstitutional. Pet. App. 33a–34a. But motivated policer officers have no trouble identifying other provisions of the criminal code to justify pretextual arrests, as demonstrated by the following examples:

On February 8, 2023, Ohio Governor Mike DeWine held a press conference to discuss the

derailment of a train containing toxic chemicals.<sup>18</sup> When NewsNation journalist Evan Lambert attempted to report live from the press conference, the commanding General of the Ohio National Guard ordered him to stop. *Id.* ¶¶ 28–29. The Columbiana County Sheriff insisted that Lambert leave the event. *Id.* ¶¶ 36–46. Officials then physically removed Lambert from the venue, forced his hands behind his back, shoved him to the ground, arrested him, and charged him with trespassing and resisting arrest. *Id.* ¶¶ 47–55. The Ohio Attorney General dismissed the charges a week later, explaining that Lambert was “lawfully present” at the press conference and that “[h]is conduct was consistent with the purpose of the event and his role as a reporter.” *Id.* ¶ 80.

On September 12, 2020, Josie Huang—a reporter for radio station LAist 89.3—attended a press conference held by then-Los Angeles County Sheriff Alex Villanueva.<sup>19</sup> While returning to her car after the press conference, Huang—who was wearing a visible press badge—witnessed Villanueva’s deputies “responding to a peaceful protest and used her phone to film the interaction.” *Id.* The deputies shouted at Huang to “back up” and then tackled her to the ground, attempted to break her phone, “and later cited her for obstructing a peace officer.” *Id.* A judge

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<sup>18</sup> Complaint for Declaratory Relief, Injunctive Relief & Damages ¶ 21, *Lambert v. Columbiana County*, No. 4:23-cv-02200 (N.D. Ohio filed Nov. 13, 2023), ECF No. 1.

<sup>19</sup> *Public Radio Journalist Josie Huang Reaches \$700,000 Settlement with LA County, Sheriff’s Department*, Reps. Comm. for Freedom of the Press (Nov. 7, 2023), <https://perma.cc/8Q6C-3KVZ>.

subsequently granted Huang’s petition for a finding of factual innocence, and the County settled with Huang for \$700,000. *Id.*

**C. The consequences of the Fifth Circuit’s opinion will fall hardest on citizen journalists and the communities they serve.**

Citizen journalists like Ms. Villarreal fill a vital need in communities that are underserved by mainstream journalism. Newspaper circulation peaked in the mid-1980s, reaching approximately 63.3 million readers in 1984.<sup>20</sup> Over the past forty years, circulation has steadily declined, reaching a new low of 24.3 million readers in 2020. *Id.* The loss of readership has forced many newspapers to close or scale back their operations. In 2008, newspaper newsrooms across the United States employed 71,000 people; by 2020, that number had fallen to 31,000.<sup>21</sup> According to a 2022 study, more than a fifth of the population of the United States live in “news deserts,” having either no local newspaper or, at best, a once-weekly paper “covering multiple communities spread over a vast area.”<sup>22</sup> As a result, many communities

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<sup>20</sup> Pew Rsch. Ctr., *Newspaper Fact Sheet* (Nov. 10, 2023), <https://perma.cc/SJ3J-LHER>.

<sup>21</sup> Mason Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, Pew Rsch. Ctr. (July 13, 2021), <https://perma.cc/LFW8-B5CC>.

<sup>22</sup> Penny Abernathy, *The State of Local News 2022*, Nw. Univ. Medill Sch. of Journalism Loc. News Initiative (June 29, 2022), <https://perma.cc/WU5T-PWPN>.



rely on citizen journalists as their primary—in some cases their only—source of local news.

But citizen journalists are at the greatest risk of being silenced, as they cannot depend on the institutional resources available at major news organizations. Traditional news organizations will often have a dedicated department of in-house attorneys whose sole job is to vindicate the rights of the publication and the journalists it employs. Many others have the means to retain outside counsel. Traditional news organizations also have the financial means both to defend their journalists against malicious prosecution and to ensure their continued employment. Most citizen journalists do not have the same kinds of legal and financial resources. The threats posed by the Fifth Circuit's decision therefore fall heaviest on those least able to advocate for themselves.

**CONCLUSION**

When government fails to protect the freedom of the press, society as a whole suffers, slowly losing access to free and open discourse. That is why we must give “First Amendment freedoms [the] breathing space to survive.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967). Qualified immunity should not become a shield to protect police officers who harass journalists they dislike in blatant disregard of fundamental First Amendment rights. The petition for writ of certiorari should be granted.

Respectfully submitted,

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