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No. 20-40359

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Priscilla Villarreal,

Plaintiff—Appellant,

versus

Priscilla Villarreal alleged First and Fourth Amendment § 1983 claims arising from her brief arrest for publicly disseminating nonpublic law enforcement information,

For a number of reasons, the officials were entitled to qualified immunity and the district court's judgment is AFFIRMED.

I. Background

Villarreal is a well-known Laredo citizen-journalist (a/k/a "Lagordiloca") who publishes to over a hundred thousand followers on Facebook.[1] She frequently posts about local police activity, including content unfavorable to the Laredo Police Department ("LPD" or "Department"), the district attorney, and other local officials.

Her complaint alleges that, as a result of her "gritty style of journalism and often colorful commentary," Villarreal has critics as well as admirers. The admirers treat her to occasional free meals, and she occasionally receives fees for promoting local businesses. She has used her Facebook page to ask for and obtain donations for new equipment to support her journalistic efforts. But, she alleges, officials in Laredo city government and the LPD engaged in a campaign to harass and intimidate her and stifle her work.

The events before us began on April 11, 2017, when Villarreal published, as a likely suicide, the name and occupation of a U.S. Border Patrol employee who jumped off a Laredo public overpass to his death. She had corroborated this information with LPD Officer Barbara Goodman, her back-channel source, who was not an official city or LPD information officer. Then, on May 6, she posted a live feed of a fatal traffic accident, including the location and last name of a decedent in a family from Houston. Officer Goodman also corroborated the information on this tragic ( )-233(h)-6(e)TfmreW* nBT/

published while the incident was being investigated. She acknowledges that for several years she had published information obtained unofficially.

Villarreal alleges that several named Appellees conspired to suppress her speech and arrest her for violating a law they had to know was unconstitutionally applied to her. Facts revealed by publicly available documents and incorporated by reference in Villarreal's complaint complete the picture.[2]

LPD investigator Deyanira Villarreal ("DV" or "investigator")[3] is tasked with upholding the Department's professional standards. She received a tip from her colleagues on July 10, 2017, that Officer Barbara Goodman was secretly communicating with Villarreal.[4] Along with the tip, DV noticed that some of the content posted to Villarreal's Facebook page was not otherwise publicly available information.

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[2] "[W]hen ruling on a Rule 12 motion, a court may consider "documents that are referred to in the plaintiff's complaint and are central to the plaintiff's claim.

Two weeks later, DV assigned Officer Juan Ruiz to investigate. Ruiz prepared two grand jury subpoenas for phone records from cellphones belonging to Officer Goodman, Officer Goodman's husband, and Priscilla Villarreal. Webb County Assistant District Attorney Marisela Jacaman approved the subpoenas.

The phone records revealed that Officer Goodman and Villarreal communicated with each other regularly and at specific times coinciding with law enforcement activities.[5] Ruiz presented to a Webb County magistrate an affidavit in support of a warrant to search Officer Goodman's cellphones. The court approved that search. Officers performed forensic extractions on the phones and sent additional subpoenas for call logs. As a result of the investigation, Goodman was suspended for twenty days.

With evidence in hand, Ruiz prepared two probable cause affidavits to arrest Villarreal for her conversations with Officer Goodman that were uncovered during the investigation. In the first conversation, Villarreal texted Officer Goodman about the man who committed suicide by jumping from a highway overpass. She asked about the deceased's age, name, and whether he was employed by U.S. Customs and Border Protection. Goodman answered her questions.[6]

The second conversation involved a fatal car accident. On the date of the accident, Villarreal sent dozens of text messages to Officer Goodman. Villarreal then posted on Facebook that one person, whom she named, died in the accident. She also disclosed that a family from Houston was in the car

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and that three children had been med-evac'd to San Antonio. Villarreal's text messages asked Goodman about those precise details.

Ruiz's affidavits stated that the information Villarreal requested, and Goodman provided, "was not available to the public at that time." The affidavits further stated that by posting this information on her Facebook page "before the official release by the Laredo Police Department Public Information Officer" and ahead of the official news media, Villarreal gained "popularity in 'Facebook.'"

Attorney Jacaman approved the two affidavits and submitted them to the Webb County Justice of the Peace. The judge, finding probable cause, issued two warrants for Villarreal's arrest for misuse of official information in violation of section 39.06(c) of the Texas Penal Code. Section 39.06(c) prohibits individuals from soliciting or receiving nonpublic information from a public servant who has access to that information by virtue of her position with the intent to obtain a benefit.

Villarreal voluntarily surrendered. She alleges that she was detained, not that she was "jailed," and she was released on bond the same day. Villarreal alleges that when she surrendered, many LPD officers and employees, including Enedina Martinez, Laura Montemayor, and Alfredo Guerrero, surrounded her, laughed at her, took pictures with their cell phones, and "otherwise show[ed] their animus toward Villarreal with an intent to humiliate and embarrass her."

Villarreal petitioned for a writ of habeas corpus. A Texas district court judge granted her petition and, in a bench ruling, held section 39.06(c) unconstitutionally vague. The state did not appeal.

II. Procedural Background

In April 2019, Villarreal sued Laredo police officers, the Doe defendants, the Laredo Chief of Police (Claudio Treviño, Jr.), Webb County prosecutors, the county, and the city in federal court under § 1983 for violating the First, Fourth, and Fourteenth Amendments. She alleged multiple counts, including direct and retaliatory violations of free speech and freedom of the press, wrongful arrest and detention, selective enforcement in violation of equal protection, civil conspiracy, and supervisory and municipal liability.

The defendants moved to dismiss under Rule 12(b)(6) on the basis of their qualified immunity and for failure to state a claim. The district court dismissed all claims. Villarreal appealed, excepting her claims against Laredo and Webb County.

Initially, a panel of this court reversed in part and held principally that the defendants were not entitled to qualified immunity

2015) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007)).

III. Discussion

A. Fourth Amendment Arrest Claim

We first address Villarreal's Fourth Amendment and First Amendment claims against Ruiz for the search warrant affidavits; DV, for her role in the investigation; Does 1 and 2, who tipped off DV; Treviño, who supervises LPD officers; Jacaman, the prosecutor who signed off on the subpoenas and warrant affidavits; and Alaniz, another prosecutor who allegedly endorsed the subpoenas and warrant affidavits. Villarreal alleges each of these defendants caused a warrant to issue without probable cause for conduct protected by the First Amendment. Because Villarreal's First Amendment free speech claim arises from her arrest and is inextricable from her Fourth Amendment claim, liability for both rises and falls on whether the officers violated clearly established law under the Fourth Amendment. *See Sause v. Bauer*, 585 U.S. __, 138 S. Ct. 2561, 2563 (2018) ("When an

(1987). Accordingly, qualified immunity shields from suit "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986).[8]

Villarreal fails to satisfy her burden on either prong. This is not a case about a "citizen journalist just asking questions." That clever but misleading phrase cannot relieve this court of our obligation to evaluate Villarreal's conduct against the standards of Texas law. Villarreal was arrested on the defendants' reasonable belief, confirmed by a neutral magistrate, that probable cause existed based on her conduct in violation of a Texas criminal statute that had not been declared unconstitutional. We need not speculate whether section 39.06(c) allegedly violates the First Amendment as applied to citizen journalists who solicit and receive nonpublic information through unofficial channels. No controlling precedent gave the defendants fair notice that their conduct, or this statute, violates the Constitution facially or as applied to Villarreal. Each defendant[9] is entitled to qualified immunity from suit.

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[8] Ordinarily, a plaintiff must explain why each individual defendant is not entitled to qualified immunity based on that defendant's actions and the corresponding applicable law. *See Ashcroft v. Iqbal,* 556 U.S. 662, 577, 129 S. Ct. 1937, 1948 (2009) ("[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Meadours v. Ermel,* 483 F.3d 417, 421 (5th Cir. 2007). Plaintiff failed to plead properly. However, the district court opinion, in concluding that the statute did not facially violate clearly established law and probable cause existed for the arrest, correctly found all defendants protected by qualified immunity.

[9] We assume *arguendo* that Jacaman and Alaniz, Assistant District Attorneys, are counted among defendant officers despite their positions as prosecutors. Participating in the issuance of the warrants here was arguably outside their absolute prosecutorial immunity. *See* Richard H. Fallon Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 1044 (7th ed. 2015) ("[P]rosecutorial immunity extends only to prosecutorial functions related to courtroom

1. The Officials Reasonably Believed They Had Probable Cause

Probable cause to arrest "is not a high bar." *Kaley v. United States*, 571 U.S. 320, 338, 134 S. Ct. 1090, 1103 (2014). It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 2335 n.13 (1983). And in the qualified immunity context, "[e]ven law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity." *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 536 (1991)).

We begin with the text of the statute officers believed Villarreal violated. A person violates section 39.06(c) of the Texas Penal Code

> if, with intent to obtain a benefit . . . , 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.[10]

Section 39.06(d) defines "information that has not been made public" as "any information to which the public does not generally have access, and that is prohibited from disclosure under" the Texas Public Information Act ("TPIA"), Tex. Gov't Code §§ 552.001–.353.

The Texas Penal Code further defines a "benefit" as "anything reasonably regarded as economic gain or advantage, including benefit to any

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advocacy[.]"). Under this assumption, they are entitled to qualified immunity along with the police officer defendants. *See id*.

[10] A similar provision restricts public servants: "A public servant commits an offense if with intent to obtain a benefit or with intent to harm or defraud another, he discloses or uses information for a nongovernmental purpose that: (1) he has access to by means of his office or employment; and (2) has not been made public." Tex. Penal Code § 39.06(b).

other person in whose welfare the beneficiary is interested." Tex. Penal Code § 1.07(a)(7).

The TPIA, expressly referenced in section 39.06(c), governs the overall availability of public records.[11] This Act, formerly known as the Open Records Act, states as its policy "that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government." Tex. Gov't Code § 552.001. But to protect important governmental interests, and ensure that some categories of nonpublic information are not unwisely disclosed, the TPIA

detection, investigation, or prosecution of crime is excluded from disclosure. *See* Tex. Gov't Code § 552.108 (requiring the release of "basic information about an arrested person, an arrest, or a crime," but not other information if it would "interfere with the detention, investigation, or prosecution of crime").

The Supreme Court of Texas has held that statutes like section 39.06 permissibly shield from public disclosure certain sensitive "information that has not been made public." *See Hous. Chron. Pub. Co. v. City of Houston*, 536 S.W.2d 559, 561 (Tex. 1976) (upholding provisions of the Texas Open Records Act, predecessor to the TPIA, that excepted certain police records from disclosure), *aff'g Hous. Chronicle Pub. Co. v. City of Houston,* 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975).

The state has a longstanding policy to protect individual privacy in law enforcement situations that appear to involve suicide or vehicular accidents. In 1976, the Texas Attorney General authoritatively interpreted the Open Records Provision dealing with criminal investigation, and stated:

> We do not believe that this exception was intended to be read so narrowly that it only applies to those investigative records which in fact lead to prosecution. We believe that it was also intended to protect other valid interests such as . . . insuring the privacy and safety of witnesses willing to cooperate with law enforcement officers.

Tex. Att'y Gen. Op. ORD 127 at 7 (1976); *see also Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 678–85 (Tex. 1976) (recognizing both a federal constitutional right and a separate common-law right to privacy); *id.* at 685 ("[I]nformation [is] deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.").

Recently, the Texas Attorney General has stated that under the Texas Constitution, "surviving family members can have a privacy interest in information relating to their deceased relatives." Tex. Att'y Gen. OR2022-36798, 2022 WL 17552725, at *2 (2022) (citing *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 168, 124 S. Ct. 1570, 1578 (2004)). This right extends at least until the government has notified the deceased's family. *See* Office of the Texas Attorney General, Public Information Act Handbook 76 & n.363 (2022), https://perma.cc/6NJB-X5NM (citing Tex. Gov't Code § 552.304). Thus, because Texas law protects the privacy of the bereaved family, the identity of a suicide or a deceased car accident victim may be considered confidential, especially when a law enforcement investigation has just begun or is ongoing.

Finally, 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).

Moving from Texas law to the objective facts available to the defendant officers, there was abundant evidence for a reasonable belief that Villarreal's conduct matched the elements of a section 39.06(c) violation. Officer Ruiz attested in support of a warrant for misuse of official information that Villarreal "had received or solicited the name and condition of a traffic accident victim and the name and identification of a suicide victim" from Officer Goodman while their deaths were under investigation. The affidavit also states that Villarreal gained popularity through her readership on Facebook. Officer Goodman was in possession of nonpublic information by

virtue of her position but was not authorized to provide this information to Villarreal.

Villarreal disputes none of these facts. Instead, Villarreal denies that she solicited and received the information with "intent to obtain a benefit," and she contends that the information was not "nonpublic." She also maintains that the warrants fail because the officers did not identify the specific TPIA or other exceptions on which they relied. We reject each contention. In her most extensive argument, which is dealt with in succeeding sections, Villarreal asserts that section 39.06 was "obviously unconstitutional" as applied to her conduct as a citizen-journalist.

First, Villarreal claims she could not "benefit" from soliciting information from Officer Goodman if she already knew the requested information from tips. In other words, soliciting and receiving information that she already knew, even though she could not confirm its accuracy, cannot be a prohibited benefit. But Texas law defines "benefit" broadly as "anything reasonably regarded as economic gain or advantage." Tex. Penal Code § 1.07(a)(7). Scorning to await an official LPD report, and ignoring other TPIA open records procedures, Villarreal secretly solicited information from Officer Goodman to bolster her first-to-report reputation. Her reputation is integral to her local fame and success as a journalist. After all, if she did not confirm the name and condition of a traffic accident victim or suicide victim from a back-channel police source, Villarreal would face a choice: (a) report the raw witness information and run the risk of grotesque error, or (b) take time to go through local or TPIA channels and sacrifice the status of getting a scoop.

Villarreal's federal complaint, in any event, readily admits the "benefits" of her journalistic style. She boasts over one hundred thousand Facebook followers and a well-cultivated reputation, which has engendered

publicity in the *New York Times,* free meals "from appreciative readers," "fees for promoting a local business," and "donations for new equipment necessary to her citizen journalism efforts." Villarreal pleads that she "does not generate regular revenue or other regular economic gain from her citizen journalism." That bald assertion, however, does not contradict the pleadings showing she benefited from receiving the nonpublic information solicited through a backchannel.

Further, at the time of her arrest, no Texas court had construed the meaning of "with intent to obtain a benefit" as used in section 39.06(c) to exclude the perks available to citizen journalists. Her effort at statutory construction hardly shows the law was so clearly established that "every reasonable [law enforcement officer] would have understood" the statute could not apply to Villarreal. *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5, 142 S. Ct. 4, 7 (2021).

Second, Villarreal maintains that information already known to her cannot be nonpublic. More precisely, her complaint alleges that, because she initially received information from two non-government witnesses, that

> witnesses to a crime, for example, does not mean that information the witnesses have or may have related to other individuals is publicly accessible. Information individual witnesses have is not commonly thought of as generally accessible to the public.

Villarreal, 44 F.4th at 388 (Richman, C.J., dissenting). That a private third-party knows some information does not change whether the information is nonpublic under the statute.

Further undermining this (unconvincing) interpretation of the statute, Villarreal never alleges that any defendant actually knew "that she had obtained the identities of the victims before she approached her backchannel source." *Id.* at 387. But if the officers did not know she had obtained information first from non-government sources, then they could not have been unreasonable in inferring that she obtained the information illegally from Officer Goodman.

Third, Villarreal contends that probable cause was defeated because the affidavits fail to identify a specific TPIA exception. But an arrest warrant affidavit is not required to paraphrase the elements of the law the defendant allegedly violated. *See Adams v. Williams*, 407 U.S. 143, 149, 92 S. Ct. 1921, 1924 (1972) ("Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction."). The whole point of a probable cause affidavit is to present relevant "facts and circumstances" so that a *judge* can independently determine the legal question—whether probable cause exists that a law was violated. *United States v. Satterwhite*, 980 F.2d 317, 321 (5th Cir. 1992). The judge looks to the "totality of the circumstances" and decides "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer," demonstrate "a probability or substantial chance of criminal

activity." *District of Columbia v. Wesby*, 583 U.S. 48, 56–57, 138 S. Ct. 577, 586 (2018) (quotations and citations omitted).

Here, the affidavits clearly and expressly allege that

2. No "Obvious Unconstitutionality"

The crux of Villarreal's argument is that even if probable cause existed,

not what was thought, or the law turns out to be not what was thought, the result is the same: The facts are outside the scope of the law." *Id.* Thus, when a grand jury fails to indict, or charges are later dismissed, officers cannot be held liable solely for arrests made reasonably but without probable cause.[15] Whether section 39.06 ultimately violates First Amendment principles as applied here, "the officers' assumption that the law was valid was reasonable." *Id.* at 64, 135 S. Ct. at 538.[16]

This principle defeats Villarreal's contention. At the time of Villarreal's arrest, no final decision of a state court had held section 39.06(c) unconstitutional. When Villarreal petitioned for a writ of habeas corpus after posting bail, the Texas district court orally granted the writ and ruled section 39.06 unconstitutionally vague. But that decision is irrelevant. First, courts only take account of

itself from the trial court's holding of unconstitutionality. *State v. Newton*, 179 S.W.3d 104, 111 (Tex. App.—San Antonio 2005) ("[W]e do not address the remaining issues raised on appeal, including the constitutionality of § 39.06(c) and (d) of the Penal Code.").[17] Moreover, *Newton* was a companion case to another prosecution initiated under section 39.06(c). *See State v. Ford*, 179 S.W.3d 117, 125 (Tex. App.—San Antonio 2005) (dismissing indictment because the TPIA does not apply to judicial information); *see also Matter of J.B.K.*, 931 S.W.2d 581, 584 (Tex. App.—El Paso 1996) (referring to a potential violation of section 39.06(c) in an attorney discipline proceeding). Several other prosecutions have been brought under the companion section 39.06(b), which prohibits a public servant from disclosing nonpublic information. *See Patel v. Trevino*, No. 01-20-00445-CV, 2022 WL 3720135 (Tex. App.—Houston Aug. 30, 2022); *Tidwell v. State*, No. 08-1100322-CR, 2013 WL 6405498 (Tex. App.—El Paso Dec. 4, 2013); *Reyna v. State*, No. 13-02-499-CR, 2006 WL 20772 (Tex. App.—Corpus Christi Jan. 5, 2006). These cases reinforce that the officers had no need to predict the future exegesis of a presumptively constitutional law.

b.

enforcement officers concerning its constitutionality." *DeFillippo*, 443 U.S. at 38, 99 S. Ct. at 2632.[20]

Villarreal analogizes her conduct to that in *Sause v. Bauer*, in which, she alleges, the Supreme Court held it is "obvious" that the right to pray is protected by the First Amendment, and that an arrest of someone praying was an obvious constitutional violation. She misconstrues *Sause*. The Supreme Court reversed and remanded for further proceedings because there were not enough facts to determine whether "circumstances [existed] in which a police officer may lawfully prevent a person from praying at a particular time and place." *Sause*, 138 S. Ct. at 2562.

> For example, if an officer places a suspect under arrest and orders the suspect to enter a police vehicle for transportation to jail, the suspect does not have a right to delay that trip by insisting on first engaging in conduct that, at another time, would be protected by the First Amendment.

Id. at 2562–63. *Sause* made no holding that the "obvious" violation exception applies broadly to arrests that may impinge on First Amendment rights; indeed, the court's hypothetical example suggests the opposite proposition.

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[20] A handful of circuit court decisions

Closer on point is *DeFillippo*, where the Court upheld an officer's arrest of a suspect for failing to identify himself in violation of Michigan law, even though a state court later held that law unconstitutionally vague. *DeFillippo,* 443 U.S. at 34–35, 99 S. Ct. at 2631 (noting that DeFillippo was ultimately charged with possession of a controlled substance). The law on its face raised an issue of compelled speech in violation of the First Amendment. Yet at the time of DeFillippo's arrest, "there was no controlling precedent that this statute was or was not constitutional, and hence the conduct violated a presumptively valid ordinance." *Id.* at 37, 99 S. Ct. at 2632. Even if Villarreal's arrest implicated her First Amendment rights, this case is substantially similar to *DeFillippo* because there was certainly no "obvious" constitutional violation.

If more were needed, in *Vives v. City of New York,* 405 F.3d 115, 116–17 (2d Cir. 2004), the court held that officers were entitled to qualified immunity for arresting a defendant under an "aggravated harassment" statute on account of his harassing letter to a candidate for state office. The statute had never before been declared unconstitutional, and state courts had declined to find it unconstitutional. Consequently, the statute was far from being "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.* at 117 (quoting *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 103 (2d Cir. 2003)).

Because Villarreal's conduct fell within the elements of a violation of section 39.06(c), a statute that is not "grossly and flagrantly unconstitutional,"

who rely on it. *See Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988); *see also Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 553–54 (5th Cir. 2016) (applying independent intermediary doctrine to false arrest claims under First and Fourth Amendment). Villarreal argues her claim can be shoehorned into the independent intermediary rule's single, narrow exception, which arises "when 'it is obvious that *no* reasonably competent officer would have concluded that a warrant should issue.'" *Messerschmidt v. Millender*, 565 U.S. 535, 547, 132 S. Ct. 1235, 1245 (2012) (emphasis added) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986)). Further, the magistrate's mistake in issuing the arrest warrant must be "not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty." *Malley*, 475 U.S. at 346 n.9, 106 S. Ct. at 1098 n.9.

That is a high bar. The Supreme Court puts such weight on a magistrate's ¥ ago tЙ‘ we ’ ‘

(5th Cir. 2007), *modified on other grounds on reh'g*, 489 F.3d 666 (5th Cir. 2007). Nor has Villarreal alleged anything beyond conclusional assertions that defendants tainted the intermediary's decision-making process by "maliciously withh[olding] relevant information or otherwise misdirect[ing] the intermediary." *Shaw v. Villanueva*, 918 F.3d 414, 41716,2[((5th).96 Tf18

Chief Judge Richman's dissent urged, would "shred[] the independent intermediary doctrine." *Villarreal,* 44 F.4th at 380 (opinion on rehearing).

* * *

Probable cause existed to arrest Villarreal for allegedly violating a presumptively valid Texas law that had not previously been overturned. On its face, the law was not grossly and flagrantly unconstitutional, and the arrest warrants were approved by a neutral magistrate. Since there was no Fourth Amendment violation, the officers have qualified immunity on these grounds alone from Villarreal's First Amendment claims.

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1148, 1153 (2018) (per curiam) (internal quotation marks and citation

violates the Constitution. And

the pressroom, "it is clear . . . that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity"). A right to *publish* information that is no longer within the government's control is different from what Villarreal did: she

on news gathering by "means within the law." Far from supporting the "obviousness" of her claims, these authorities require further careful analysis before any constitutional violation can be ascribed to her arrest.

The First Amendment also does not prevent the elected political branches from protecting "nonpublic" information. *L.A. Police Dep't v.*

An addendum to

defendants' adverse actions were substantially motivated

similarly situated individuals, perhaps because others are not in the habit of obtaining backchannel information about ongoing criminal investigations, like Villarreal.

2. Fourteenth Amendment Selective Enforcement

Villarreal's Fourteenth Amendment selective enforcement claim likewise required her to identify "examples" of similarly situated individuals who were nonetheless treated differently. *Tex. Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 514 (5th Cir. 2021). " 'Similarly situated'

James E. Graves, Jr.,

Amendment itself forbids the government from "abridging the freedom . . . of the press." U.S. Const. amend. I.

There is simply no way such freedom can meaningfully exist unless journalists are allowed to seek non-public information from the government. Today's majority opinion overlooks that protection all too cavalierly. But in fact, the right to "newsgathering" has long been protected in American jurisprudence. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."). The Supreme Court has made clear that the First Amendment protects the publication of information obtained via "routine newspaper reporting techniques"—which include asking for the name of a crime victim from government workers not clearly authorized to share such information. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 99, 103-04 (1979).

The majority at times conflates that right with the government's prerogative to "guard against the dissemination of private facts." *Fla. Star*, 491 U.S. at 534. But those

anything make it unlawful for Villarreal to obtain that information, except for the law that she now argues is unconstitutional.

While I agree with Judge Ho that the enforcement of Texas Penal Code § 39.06(c) against Villarreal was obviously unconstitutional in light of the broad right of each person to ask questions of the government, it is also obviously unconstitutional in light of the related and equally well-established right of journalists to engage in routine newsgathering. That right, arising out of the plain language of the Constitution, acknowledges that journalists play a special role in our society as agents of the people. They are individuals who take on a civic and professional responsibility to keep the public informed, and thereby provide a crucial check on the power of the government. That is not to say that press possess any right of access to information that is unavailable to the general public, *see Branzburg*, 408 U.S. at 684—

also

Stephen A. Higginson,

respond when an individual brings a complaint against the government for First Amendment retaliation. Because that instruction was not applied, I would vacate and remand.

I. Villarreal alleges that her arresting officers lacked probable cause and misled the magistrate who issued her arr maa

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recite this essential element of the Statute in the Arrest

Of course, the manipulation of a magistrate who issues an arrest warrant, accomplished by malicious law enforcement, remains an untested allegation. But at the dismissal stage—before we, as judicial government officers, confer immunity as a matter of law on executive government officers—a comprehensive complaint that law enforcement misled a court must be taken not just as true, but in the light most favorable to the citizen-complainant. *See McLin v. Ard*, 866 F.3d 682, 689–90 & n.3 (5th Cir. 2017).

Otherwise, the "independent intermediary doctrine" would over-protect police misconduct, and even reward it. Indeed, the heart of the independent intermediary doctrine—which has strong critics, such as the Cato Institute, appearing before us here as amicus curiae[3]—depends on the assumption in its title. A judicial "intermediary," whose post-hoc determination will operate legally to shield police from liability for unconstitutional action, must of course be "independent" from the underlying illegality. Thus, "if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation' for the Fourth Amendment violation." *Jennings v. Patton*, 644 F.3d 297, 300–01 (5th Cir. 2011) (*quoting Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)). But this is true only "whe[n] all the facts are presented to the grand jury, or other independent intermediary[,] where the malicious motive of the law enforcement officials does not lead them to withhold *any* relevant information from the independent intermediary." *Cuadra*, 626 F.3d at 813

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intervening authority. And you can't have qualified immunity as a result."), *with* Memorandum and Order at 14-15, *Villarreal v. City of Laredo*, No. 5:19-00048 (S.D. Tex. May 8, 2020), ECF No. 51 (paraphrasing paragraphs 90-93 of the first amended complaint, yet overlooking the taint allegation in paragraph 91).

[3] *See also generally* Amanda Peters, *The Case for Replacing the Independent Intermediary Doctrine with Proximate Cause and Fourth Amendment Review in § 1983 Civil Rights Cases*, 48 PEPP. L. REV. 1 (2021).

(citation omitted) (emphasis added). Otherwise, a malicious officer seeking to obtain a facially valid arrest warrant would "be absolved of liability simply because he succeeded." *Thomas v. Sams*, 734 F.2d 185, 191 (5th Cir. 1984) (citation omitted); *see also Wilson v. Stroman*, 33 F.4th 202, 208 (5th Cir. 2022).

This is our court's settled "taint" exception critical to our independent intermediary doctrine—in the vernacular, preventing "garbage in, garbage out"—which we have restated for over thirty years. *See Hand v Gary*, 838 F.2d 1420, 1427-28 (5th Cir. 1988) ("[T]he chain of causation is broken only where *all the facts* are presented to the grand jury, where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information . . . from the independent intermediary. *Any* misdirection of the magistrate or the grand jury by omission or commission perpetuates the taint of the original official behavior.") (emphases added); *Winfrey v. Rogers*, 901 F.3d 483, 497 (5th Cir. 2018) (same); *see also Morris v. Dearborne*, 181 F.3d 657, 673 (5th Cir. 1999) ("[T]he question of causation is 'intensely factual' . . . A fact issue exists regarding the extent to which (if at all) Dearborne subverted the ability of the court to conduct independent decision making by providing false information, and in so doing, withholding true information.").

It is important to emphasize, again, that Villarreal may be wrong in her accusation of malice and law enforcement abuse of office. The Defendants may not have misled anyone to secure their warrants to arrest her. But when there is uncertainty, especially at the dismissal stage, *see McLin*, 866 F.3d at 689-690 & n.3, we are explicit that this judicially-created shield from liability for a false arrest "does not apply," *Winfrey*, 901 F.3d at 497. And

Cir. 2019) (applying *Winfrey*, 901 F.3d at 497). Otherwise, police immunity would mean police impunity. *See Bledsoe v. Willis*, No. 23-30238, 2023 WL 8184814, at *4–5 (5th Cir. Nov. 27, 2023) (unpublished).

II. Because Villarreal alleges her arrest was atypical, her arrestors do not get immunity without inquiry even if they had probable cause to arrest her.

When a plaintiff alleges that she was arrested in retaliation for First Amendment activity, "probable cause should generally defeat a retaliatory arrest claim." *Nieves*, 139 S. Ct. at 1727. But "when a plaintiff presents

should trigger the *Nieves* atypical-arrest exception and defeat, at the motion to dismiss stage, any probable cause the majority imagines conferred immunity on Defendants.

Defendants had probable cause to arrest her without testing the factual allegation that the magistrate who issued her arrest warrants was tainted by "misrepresentations and omissions" from her alleged antagonists. Our court further errs in failing to apply *Nieves* to test whether, even if Laredo law enforcement had probable cause to arrest her, they did so in retaliation for her news reporting. In short, Villarreal's complaint requires discovery and fact-assessment, applying settled law. This court should not countenance the erosion of the First Amendment's protection of citizen-journalists from intimidation by the government officials they seek to hold accountable in their reporting.

Don R. Willett, *Circuit Judge*, joined by Elrod, Graves, Higginson, Ho, and Douglas, *Circuit Judges*, dissenting:

indulges the notion that Villarreal had zero excuse for not knowing that

holding on the principle that the officers reasonably presumed that Penal Code § 39.06 was constitutional.[9] Whatever one might think of that principle or the majority's application of it, ending the analysis there stops a half-step short. It does not account for the possibility—indeed, the real-world certainty—that government officials can wield facially constitutional statutes as blunt cudgels to silence speech (and to punish speakers) they dislike, here in a vengeful,

squared with the statutory text.[14] If nothing else, today's decision underscores a striking statutory double standard: Judges read *out* text that is plainly there, and read *in* text that is plainly not—both for the benefit of rights-violating officials. Whatever the operative language of § 1983 says, or does not say, current judge-invented immunity doctrine seems hardwired—relentlessly so—to resolve these questions in one direction and one direction only. Counter-textual immunity is a one-way ratchet, and regrettably, today's decision inflicts yet another wrong turn.

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[14] The most glaring made-up defense is the "clearly established law" test, which collides head-on with § 1983's broad and unqualified textual command. Even those who argue for *some* version of qualified immunity nevertheless disavow the clearly

No. 20-40359

James C. Ho, *Circuit Judge*, joined by Elrod, Graves, Higginson, Willett, and Douglas, *Circuit Judges*, dissenting:

If the First Amendment means anything, surely it means that citizens have the right to question or criticize public officials without fear of imprisonment. The Constitution doesn't mean much if you can only ask questions approved by the state. Freedom of speech is worthless if you can only express opinions favored by the authorities. The government may not answer or agree—but the citizen gets to ask and to speak.

As the Supreme Court has long recognized, "[t]he right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes." *Ashton v. Kentucky*, 384 U.S. 195, 199 (1966) (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)). "The right of citizens to inquire . . . is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

The right to speak freely and to inquire is precisely what's at stake in this case.

Like every American, Priscilla Villarreal holds views that are shared by some—and disliked by others. But a group of police officers and prosecutors in Laredo weren't content to simply disagree with her. They had to weaponize the coercive powers of the criminal justice system against her.

So they charged her and jailed her for asking a police officer a question.

The majority bristles at this short-hand description. But facts are stubborn things. Just look at the majority's own recitation of the facts presented in this case:

took place in February 2021, nearly three years ago). Because Villarreal convincingly alleges not one but multiple violations of our Constitution.

To begin with, the operative complaint presents two distinct theories of First Amendment liability—Villarreal alleges both a direct violation and unconstitutional retaliation. As our court has observed, "the First Amendment prohibits not only direct limitations on speech but also . . . retaliation against the exercise of First Amendment rights." *Colson v. Grohman*, 174 F.3d 498, 508–9 (5th Cir. 1999). The government can't arrest you for engaging in protected speech. That would constitute a direct violation of your First Amendment rights. In addition, the First Amendment also prohibits the government from arresting you because it dislikes your views. That would be unconstitutional retaliation under the First Amendment.

Villarreal presents both theories. She alleges that Defendants directly interfered with her First Amendment rights by arresting her for asking questions. And she further alleges that Defendants retaliated against her because they dislike her criticisms of Laredo police and prosecutors. These are distinct theories of liability. We should examine them both. *See*, *e.g.*, *Davidson v. City of Stafford*, 848 F.3d 384, 398 (5th Cir. 2017) (noting that "[t]he district court appears to have addressed only [the plaintiff's] First Amendment claim in the context of § 1983 retaliation," and failed to address

In response, Defendants claim that Texas Penal Code § 39.06(c) justifies their campaign against Villarreal. But this statutory defense to liability under § 1983 is deficient in several obvious respects.

To start, there's the Supremacy Clause. U.S. Const. art. VI, cl. 2. Federal constitutional rights obviously trump state statutes. And courts have

unconstitutional statute—or face a suit for damages if they don't." *Lawrence v. Reed*, 406 F.3d 1224, 1233 (10th Cir. 2005).

Tellingly, none of the parties disputes this principle. Only the majority flirts with the extreme notion that public officials are categorically immune from § 1983 liability, no matter how obvious the depredation, so long as they can recite some statute to justify it. *See ante*, at 21–22 (rejecting "the idea of 'obvious unconstitutionality'" as a basis for § 1983 liability). It's a recipe for public officials to combine forces with state or local legislators to do—whatever they want to do. It's a level of blind deference and trust in government power our Founders would not recognize.

What's worse, in addition to the obvious constitutional problems, Defendants fail to show that Villarreal violated § 39.06(c) in the first place.

Section 39.06(c) purports to prohibit citizens from asking a public servant for certain non-public information. It's only a crime, however, if the information meets the criterion specified by subsection (d).

Yet by all indications, Defendants were entirely unaware of subsection (d) when they used § 39.06(c) to justify Villarreal's arrest. Subsection (d) makes clear that a citizen violates § 39.06(c) only when she asks for non-public information that is "prohibited from disclosure under" the Texas Public Information Act. But nowhere in their arrest warrant affidavits or charging documents do Defendants ever mention subsection (d)

investigation, and therefore shielded from disclosure under § 552.108 of the Texas Government Code. But that's wrong for several reasons, the most simple of which is this: Subsection (c) of that provision *requires* the release of "basic information about an arrested person, an arrest, or a crime." It's hard to imagine anything more "basic" than a person's name. Every authority cited by the majority supports that view. *See*, *e.g.*, Tex. Att'y Gen. Op. ORD–127, at 9 (1976) ("the press and the public have a right of access to

Rights and Expression—including Alliance Defending Freedom, Americans for Prosperity Foundation, the Cato Institute, the Constitutional Accountability Center, the Electronic Freedom Foundation, the First Liberty Institute, the Institute for Justice, and Project Veritas—stands firmly behind Villarreal.

I'm sure that a number of these amici disagree with Villarreal on a wide range of issues. But although they may detest what she says, they all vigorously defend her right to say it. These organizations no doubt have many pressing matters—and limited resources. Yet they each decided that standing up to defend the Constitution in this case was worth the squeeze.

This united front gives me hope that, even in these divided times, Americans can still stand up and defend the constitutional rights of others—including even those they passionately disagree with. We all should have joined them in this cause. Because my colleagues in the majority decline to do so, I must dissent.

I.

This should've been an easy case for denying qualified immunity. The First Amendment obviously protects the freedom of speech. That protection has long been incorporated against state and local governments under the Due Process Clause. And it should go without saying that the freedom of speech includes not only the right to speak, but also the right to criticize as well as the right to ask questions.

Indeed, the First Amendment expressly protects not only "the freedom of speech" but also "the right . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. It would make no sense for the First Amendment to protect the right to speak, but not to ask questions—or the right to petition the government for a redress of grievances, but not for information.

It should be obvious, then, that citizens have the right to ask questions and seek information. *See*, *e.g.*, *Citizens United*, 558 U.S. at 339 (recognizing the First Amendment "right of citizens to inquire, to hear, to speak, and to use information"); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 99, 103 (1979) ("The reporters . . . obtained the name of the alleged assailant simply by asking various witnesses, the police, and an assistant prosecuting attorney"—which are all "routine newspaper reporting techniques" protected by the First Amendment); *see also Villarreal v. City of Laredo*, 44 F.4th 363, 371 (5th Cir. 2022) (collecting other cases and examples).

The fact that the qu3(79))]gsW* 20 G[q0.00r5(q)40-3(r-979))q4uest o(r-97( )-85(i)-3(nfo

qualified immunity for obvious violations of constitutional rights. *See*, *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Taylor v. Riojas*, 592 U.S. 7, 9 (2020).

The majority responds that the standard articulated in *Hope* and *Taylor* doesn't apply here, because those cases arose under the Eighth Amendment, not the First Amendment. *Ante*, at 27.

But that would treat the First Amendment as a second-

That's what the Supreme Court did in *Sause v. Bauer*, 138 S. Ct. 2561 (2018). Two police officers entered a woman's living room in response to a noise complaint. When she knelt down to pray, the officers ordered her to stop, despite the lack of any apparent law enforcement need. *Id.* at 2562. The Tenth Circuit granted qualified immunity on the ground that Sause couldn't "identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." *Sause v. Bauer*, 859 F.3d 1270, 1275 (10th Cir. 2017). But the Supreme Court summarily reversed, holding that "there can be no doubt that the First Amendment protects the right to pray." *Sause*, 138 S. Ct. at 2562.[1]

Sause readily applies here. Just as it's obvious that Sause has the right to pray, it's equally obvious that Villarreal has the right to ask questions.

A.

I suppose it's understandable, given the obvious First Amendment violation alleged in this case, why the majority would like to avoid the First Amendment inquiry altogether. It opens by claiming that Defendants don't have to comply with the First Amendment *at all*. *Ante*, at 8.

The theory appears to go something like this: Villarreal is challenging an arrest. So she can't state a First Amendment claim unless she first establishes a Fourth Amendment claim. To quote the majority: "Because Villarreal's First Amendment free speech claim arises from her arrest," it's "inextricable from her Fourth Amendment claim"—so "liability for both

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[1] The majority suggests I'm overreading *Sause*. It claims that the decision merely "remanded for further proceedings." *Ante*, at 22. But

[claims] rises and falls on whether the officers violated clearly established law under the Fourth Amendment." *Id.* *See also id.* at 26 ("Since there was no Fourth Amendment violation, the officers have qualified immunity on these grounds alone from Villarreal's First Amendment claims.").

even where there is probable cause to arrest under the Fourth Amendment, the First Amendment forbids a police officer from retaliating against a citizen for engaging in protected speech. *See Lozman*, 138 S. Ct. at 1949 ("the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech"); *Nieves*, 139 S. Ct. at 1727 ("it would seem insufficiently protective of First Amendment rights to dismiss . . . on the ground that there was undoubted probable cause for the arrest").[2]

The majority's misreading of *Sause* also places us in square conflict with countless circuit decisions around the country that subject police arrests to First Amendment analysis—

Tenth Circuit held that the citizen's "verbal criticism was clearly protected by the First Amendment." *Id.* at 1168.[3]

B.

Forced to [illegible]

"impos[es] liability on any person who, under color of state law, deprived another of a constitutional right") (citing *Myers*, 238 U.S. at 379, 383); *Lawrence*, 406 F.3d at 1233 ("some statutes are so obviously unconstitutional that we will require officials to second-guess the legislature and refuse to enforce an unconstitutional statute—or face a suit for damages if they don't"); *see also Guillemard-Ginorio v. Contreras-Gomez*, 490 F.3d 31, 40–41 (1st Cir. 2007); *Vives v. City of New York*, 405 F.3d 115, 118 (2nd Cir. 2005); *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 103 (2nd Cir. 2003); *Leonard v. Robinson*, 477 F.3d 347, 359 (6th Cir. 2007); *Ballentine v. Tucker*, 28 F.4th 54, 66 (9th Cir. 2022); *Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002); *Jordan*, 73 F.4th 1162; *Thompson v. Ragland*, 23 F.4th 1252, 1255–56 (10th Cir. 2022); *Lederman v. United States*, 291 F.3d 36, 47 (D.C. Cir. 2002).

The majority ignores all of this and instead claims that there is, at most, only "a *possible* exception for 'a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.'" *Ante*, at 21 (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979))

But as for this case, it ought to be enough that arresting citizens for "speak[ing] freely" is exactly how "totalitarian regimes" behave. *Ashton*, 384 U.S. at 199. I'll leave it to the majority to explain why a totalitarian government is not as bad as a grossly and flagrantly unconstitutional one.

C.

So Defendants cannot avoid liability for obvious constitutional violations by invoking a state statute. Moreover, § 39.06(c) of the Texas Penal Code is a particularly weak justification.

To begin with, courts have repeatedly held § 39.06(c) unconstitutional, whether facially or as applied, both before as well as after Villarreal's arrest. *See Newton*, 179 S.W.3d at 107, 111 (observing that "[t]he trial court . . . held that subsections (c) and (d) of § 39.06 are unconstitutionally void for vagueness," and affirming on statutory grounds, while expressly reserving the constitutional question); *Ford*, 179 S.W.3d at 120, 125 (same).[4]

Not surprisingly, then, no one has identified a single prosecution ever successfully brought under § 39.06(c)—and certainly not one against a

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[4] The majority responds that Villarreal doesn't argue that § 39.06(c) is unconstitutionally vague under the First Amendment. *Ante*, at 20. But her complaint repeatedly alleges that Defendants arrested her under an "unconstitutionally vague" statute on which "no reasonable official would have relied," and that the statute was "vague to the average reader, and contrary to [] clearly established First Amendment right[s]." ***See*** ROA.154 at ¶ 4; 169 at ¶ 82; 178 at ¶ 124; 202 at ¶ 256. The First Amendment prohibits unconstitutionally vague laws—indeed, we apply "*stricter*

citizen for requesting basic information of public interest so that she can report the information

that same provision *requires* the release of "basic information about an arrested person, an arrest, or a crime."

In the absence of a statutory prohibition on disclosure, the majority scrambles and identifies a small handful of other authorities. But none of the majority's authorities establish a crime by Villarreal. *Ante*, at 12–14. To the contrary, every authority cited by the majority undermines its claims.

The majority cites *Houston Chronicle*. But there the city was required to release a broad range of basic information—including "the offense committed, location of the crime, identification and description of the complainant, the premises involved, the time of the occurrence, description of the weather, a detailed description of the offense in question, and the names of the investigating officers," 536 S.W.2d at 561, as well as the property and vehicles involved. *See Houston Chron. Pub'g Co. v. City of Houston*, 531 S.W.2d 177, 187 (Tex. App.—Houston [14th Dist.] 1975).

Next, the majority cites a 1976 Texas Attorney General opinion, Tex. Att'y Gen. Op. ORD–127. But that opinion construes *Houston Chronicle* to hold that "the press and the public have a right of access to information concerning crime in the community and to information relating to activities of law enforcement agencies"—including, among other things, "the name and age of the victim." *Id*. at 9.

The majority also cites *Industrial Foundation*. But that decision holds only that "highly intimate or embarrassing facts" may be excluded from disclosure under certain circumstances. 540 S.W.2d at 685. What's more, it also holds that the release of a person's "name" and "identity" would *not* be "highly objectionable to a reasonable person," and therefore must be disclosed. *Id*. at 686.

Finally, the majority cites a 2022 Texas Attorney General opinion, Tex. Att'y Gen. Op. OR2022–36798. But that opinion observes that "the

right to privacy is a personal right that lapses at death," and therefore, "information relate[d] to deceased individuals . . . may not be withheld from disclosure." *Id.* at 2-3. To be sure, the

D.

Notwithstanding these glaring constitutional and statutory defects, the majority insists that, because a state court magistrate agreed to issue the warrants, the independent intermediary rule entitles Defendants to immunity. As the majority puts it, "[a] warrant secured from a judicial officer typically insulates law enforcement personnel who rely on it." *Ante*, at 24. "In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination." *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 921 (1984)).

But it should be obvious by now that this is not remotely the "typical" or "ordinary" case. According to the complaint, Defendants jailed Villarreal for exercising her fundamental right to ask questions and petition officials for information of public interest. Moreover, they did so without even trying to satisfy the statutory requirements enumerated in subsection (d)—presumably because their goal was to humiliate, not incarcerate.

It's precisely because of cases such as this that the Supreme Court has warned us not to place blind trust in magistrates. The Court has cautioned us about the circumstances in which "a magistrate, working under docket pressures, will fail to perform as a magistrate should." *Malley v. Briggs*, 475 U.S. 335, 345–46 (1986). That's why courts must "require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment." *Id.* at 346.

So courts may not allow police officers to shift responsibility to a magistrate. Instead, we must conduct an independent inquiry to determine "whether a reasonably well-trained officer . . . would have known that his affidavit failed to establish probable cause, and that he should not have applied for the warrant." *Id.* at 345. "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would

have concluded that a warrant should issue." *Id.* at 341.

And never mind that Defendants have presented no evidence of any emotional harm to families or interference with criminal investigations—to the contrary, the majority is actively *preventing* the parties from presenting evidence at trial.

What's worse, the majority hasn't explained how any of this provides a basis for curtailing

up a meeting—without staff—or disclose substantive information than the humble text.").

Finally, the majority attempts to diminish the injury inflicted by the police officers and prosecutors on Villarreal. It notes that Villarreal was "detained, not . . . jailed." *Ante*

But counsel for the Texas Attorney General's office gave precisely the opposite response. She said that it would be a crime. Oral Argument at 1:00:38–1:01:00.[7]

If the attorneys who represent and advise local Texas law enforcement officials and the attorneys who work for the Texas Attorney General can't agree on which questions can

questions, Villarreal alleges that Defendants arrested her in retaliation for expressing viewpoints critical of local law enforcement.

I agree with, and concur in, Judge Higginson's eloquent articulation as to how Villareal has alleged a valid First Amendment retaliation claim. It seems obvious, and Villarreal's complaint amply alleges, that others have asked Laredo officials countless other questions that would violate the same offense alleged by the government here. Yet the officials only targeted Villarreal—presumably because they dislike her views. *See*, *e.g.*, *Villarreal*, 44 F.4th at 376 ("Villarreal's complaint sufficiently alleges that countless journalists have asked LPD officers all kinds of questions about nonpublic information. Yet they were never arrested."); *id.* (Defendants "knew that members of the local media regularly asked for and received information from LPD officials relating to crime scenes and investigations, traffic accidents, and other LPD matters."); *id.* ("Villarreal alleges, and Defendants concede, that LPD had never before arrested any person under § 39.06(c).").

The majority intimates that, under our circuit's precedents, Villarreal's retaliation claim fails as a matter of law. But if that is so, we could've used this very en banc proceeding to revisit those same precedents. Some members of this court have urged that very course in other cases, but each time, the majority has declined. *See Gonzalez v. Trevino*, 60 F.4th 906 (5th Cir. 2023); *Mayfield v. Butler Snow*, 78 F.4th 796 (5th Cir. 2023). So it's not surprising that the majority has declined to do so here.

Be that as it may, the Supreme Court recently granted certiorari to examine our circuit precedent in any event. *See Gonzalez v. Trevino*, 144 S. Ct. 325 (2023).

III.

As for Villarreal's remaining claims, I would allow her Fourth Amendment claim to proceed, for the reasons already detailed above, as well

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January 23, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 20-40359 Villarreal v. City of Laredo
USDC No. 5:19-CV-48

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.