No. 20-40359

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PRISCILLA VILLARREAL,

Plaintiff-Appellant,

v.

THE CITY OF LAREDO, TEXAS, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Laredo Division
Case No. 5:19-CV-48

EN BANC BRIEF OF YOUNG AMERICA'S FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that–in addition to the persons and entities listed in the Appellant's Certificate of Interested Persons–the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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The undersigned also certified under Federal Rule of Appellate Procedure 26.1(a) that Young America's Foundation is not a publicly held corporation, does not have any parent corporation, and no publicly held corporation owns 10% or more of its stock.

Respectfully submitted,

By: */s/ Rory T. Gray*
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INTEREST OF AMICUS CURIAE[1]

Young America's Foundation ("YAF") is a national nonprofit organization committed to ensuring that increasing numbers of young Americans understand and are inspired by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. Young Americans for Freedom is YAF's chapter affiliate on high school and college campuses across the country.

YAF leads the Conservative Movement on campuses throughout the country by sponsoring campus lectures and other activities that are often the most well-attended events of the school year. YAF's advocacy for free speech and conservative ideas on college campuses often results in conflict with university administrators and student government leaders who disagree with the content of YAF's messages. Often, those conflicts result in First Amendment litigation in which qualified immunity plays a major role. *E.g.*, *Young America's Found. v. Kaler*, 482 F. Supp. 3d 829, 856–66 (D. Minn. 2020), *vacated by Young America's*

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Found. v. Kaler, 14 F.4th 879 (8th Cir. 2021). YAF has a significant interest in ensuring that officials who commit obvious violations of the First Amendment do not obtain qualified immunity, especially when those officials have ample time to reflect and obtain legal advice.

YAF's strong interest in this case is magnified by its National Journalism Center, which trains a new generation of journalists to become more responsible reporters and restore balance to the media. Over the last 45 years, the Center has trained over 2,250 journalists. Through weekly seminars, talks with prominent journalists, and on-the-job experience, the Center provides aspiring journalists the tools to combat bias in the mainstream media.

The Center's goals are to teach aspiring conservative journalists the values of responsible, balanced, and accurate reporting. It trains participants to use classic journalistic methods, including seeking news from government officials. The conservative journalists the Center instructs are more likely than most to face government suppression under laws like Texas Penal Code 39.06(c). Accordingly, YAF has a significant interest in establishing that Defendants' alleged conduct violates a journalist's clear-cut First Amendment rights.

BACKGROUND[2]

Priscilla Villarreal, popularly known as "Lagordiloca," is a citizen journalist in Laredo, Texas. ROA.153. Using a smartphone and old pickup truck, Ms. Villarreal publishes livestreams, videos, and photographs of newsworthy events to her 120,000 Facebook followers, particularly footage of local crime scenes and traffic accidents. ROA.153, 158. With such a large following, Ms. Villarreal is arguably the most influential journalist in Laredo. ROA.153.

Ms. Villarreal identified newsworthy information using classic journalistic methods: (1) she followed police sirens, ROA.158; (2) she received tips from private individuals, ROA.159; (3) she spoke with the Laredo Police Department spokesman, occasionally in real-time; ROA.159; (4) she interviewed people near the scene, ROA.166; and (5) she corroborated information from private sources with Laredo Police Department Officer Barbara Goodman, ROA.166.

[2] This factual summary is derived from the allegations of Plaintiff's First Amended Complaint, which must be taken as true at the motion-to-dismiss stage. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2005 (2017) (per curiam).

Ms. Villarreal's news coverage both praised and criticized local officials' conduct. ROA.161. Some examples of Ms. Villarreal's critiques include publicizing a live feed of Laredo police offices choking and using force after a traffic stop, ROA.161, and the Webb County District Attorney Office's decision to recall a valid arrest warrant issued for the close relative of the Chief Assistant District Attorney, ROA.162.

Instances like these resulted in officials intimidating Ms. Villarreal and chilling her First Amendment rights. Police officers attempted to discredit Ms. Villarreal by falsely asserting that she is a five-time convicted felon; obstructed Ms. Villareal's reporting by threatening to take her phone as "evidence," while other journalists were left alone; and severely harassed Ms. Villarreal at a traffic incident where she was employed by a towing company. ROA.163. Laredo police also withheld information from Ms. Villarreal that they freely gave to other journalists. And, at a private meeting with Ms. Villarreal and other local officials, the Webb County District Attorney expressed his displeasure at her criticism of his office. ROA.163.

All of Defendants' acts were taken pursuant to an agreement and official City of Laredo policy to chill and retaliate against Ms.

Villarreal's publication of unfavorable information on Facebook. ROA.163-64. Following Ms. Villarreal's publication of stories naming those involved in a suicide and fatal traffic accident, details she received from private individuals and merely corroborated with Officer Goodman, Defendants hatched a plan to arrest her using a pretextual criminal statute. ROA.166-68. And that is exactly what Defendants did, unearthing an unenforced criminal statute—Texas Penal Code § 39.06(c)—and using it as a pretext to manufacture criminal complaints, a search warrant, and arrest warrants for Ms. Villarreal. ROA.169-170.

Section 39.06(c) makes it a crime for any person to solicit or receive information that has not been made public from a public servant, which that public servant has access to by means of his employment, with the intent to obtain a benefit, or harm or defraud another. Violations of this law are a third degree felony. Texas Penal Code § 39.06(e).

Defendants supervised, approved, and carried out the decision to obtain two invalid arrest warrants for Ms. Villarreal on December 5, 2017. ROA.172. And they did so pursuant to deficient affidavits that

failed to establish basic elements of a § 39.06(c) offense, including that (1) Ms. Villarreal corroborated newsworthy facts with Officer Goodman with the intent to obtain a benefit, or (2) Ms. Villarreal knew those corroborated facts had intentionally not been made public. ROA.171-72. In fact, Defendants knew that Ms. Villarreal did *not* believe the facts she corroborated with Officer Goodman were private. ROA.179. Adding insult to injury, police and other officials showed up *en mass* to mock, photograph, and humiliate Ms. Villarreal when she turned herself in and was arrested. ROA.172-73.

None of Defendants' actions were a legitimate effort to enforce state law. Newspaper journalists, broadcast journalists, and other citizen journalists regularly ask for and receive information from Laredo Police Department employees relating to crime scenes, investigations, and traffic accidents. Defendants never enforced § 39.06(c) against them, even though they regularly ask for or receive information from law enforcement to publish news. ROA.174, 187-88. In fact, Defendants never enforced § 39.06(c) against *anyone but Ms. Villarreal* in the 23 years the present version was in effect. ROA.181-82.

Defendants enforced § 39.06(c) against Ms. Villarreal as a pretext to chill and retaliate against her speech after she corroborated facts with Officer Goodman and published two stories in May and April 2017. ROA.166-67, 173. Defendants knew that probable cause was lacking and that applying § 39.06(c) to Ms. Villarreal's conduct would violate the First Amendment. ROA.170, 173-74. Yet they arbitrarily targeted Ms. Villarreal for enforcement, though she had corroborated similar facts with the Laredo Police Department spokesman in the past without any hint that she was violating state law. ROA.166. What's more, Defendants did so with ample time for reflection, and actually received legal advice, instruction, and assistance from two attorneys in the Webb County District Attorney's Office. ROA.175-76.

Ms. Villarreal filed suit in federal court against the City of Laredo, Webb County, and the officials who allegedly chilled her speech and retaliated against her, causing her arrest. Her complaint stated First, Fourth, and Fourteenth Amendment, civil conspiracy, supervisory liability, municipal liability, and *Monell* claims. ROA.179-203. The officials moved to dismiss, in part, based on qualified immunity and the

district court granted their request *in toto*, dismissing all of Ms. Villarreal's claims before discovery began. ROA.481.

Ms. Villarreal appealed, among other things, the dismissal of her First Amendment claims against the officials. After a split panel of this Court reversed those claims' dismissal, *Villarreal v. City of Laredo*, 44 F.4th 363, 378 (5th Cir. 2022), this Court granted en banc review, *Villarreal v. City of Laredo*, 52 F.4th 265 (5th Cir. 2022) (per curiam).[3]

SUMMARY OF ARGUMENT

Ms. Villarreal can defeat qualified immunity without citing a prior case with similar facts because clearly established law gave officials fair notice their conduct was illegal. If reasonable officials would have predicted that Defendants' actions were unlawful, qualified immunity does not apply. And that showing is easier in cases with egregious facts, like this one. Defendants' case for qualified immunity is particularly weak because they had *months* to obtain legal advice, and First Amendment principles are relatively fixed and well-defined. This

[3] Because Amicus is primarily concerned with qualified immunity in the First Amendment context, this brief analyzes only Ms. Villarreal's First Amendment claims (Count I) and not her equally promising claims for violations of the Fourth and Fourteenth Amendments (Counts II and III), and civil conspiracy (Count IV).

situation presents nothing like the heat-of-the moment decisions that government officials must make during traffic stops or in hot pursuit of a suspected criminal.

Ms. Villarreal's right to gather and publish truthful news has been clearly established for decades. Journalists are free to seek out government employees willing to share non-public information. It was plainly unconstitutional for Defendants to attempt to bar Ms. Villarreal from using standard journalistic techniques to uncover and report news. Defendants' harassment of Ms. Villarreal, efforts to bar her from seeking non-public information from officials, and better treatment of the general public makes the First Amendment violation plain.

This Court should correct its First Amendment retaliation precedent, which inserts subjectivity into an objective test. And it should hold that no reasonable official would find probable cause knowing that Texas Penal Code § 39.06(c) was an unenforced law exhumed to retaliate against Ms. Villarreal. With this knowledge, no reasonable official would apply for a warrant. And no presumption of reasonableness applies when a magistrate issues a warrant under an unenforced law. What's more, probable cause is not determinative.

Plaintiffs may still bring a retaliatory arrest claim if officials left similarly situated individuals not engaged in the same sort of protected speech alone. Ms. Villarreal qualifies for this exception. And the unlawfulness of Defendants' retaliatory conduct was clear.

ARGUMENT

I. Ms. Villarreal can defeat qualified immunity without citing a prior case with similar facts.

For 35 years, the Supreme Court has held that plaintiffs can overcome qualified immunity without showing that "the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Ms. Villarreal need not provide "'a case directly on point for a right to be clearly established.'" *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7–8 (2021) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)). "'In an obvious case'" even standards cast "'at a high level of generality'" may "'clearly establish' the answer, even without a body of relevant case law" spelling out the legal analysis. *Id.* at 8 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)) (cleaned up). In other words, "general statements of the law" may still "giv[e] fair and clear warning to officers." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quoting *White*, 137 S. Ct. at 552).

"[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The Supreme Court has "rejected a requirement that previous cases be 'fundamentally similar'" and warned lower courts against "a rigid, overreliance on factual similarity." *Id.* at 741–42. "[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* at 741. That is especially true in cases with "particularly egregious facts," *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020)—like those Ms. Villarreal has alleged here.

So the question is not whether Ms. Villarreal can find a prior case with nearly identical outrageous facts. Otherwise, local officials could slightly alter their previous unconstitutional conduct and get away with it. Rather, the qualified-immunity test is whether clearly established law gave Defendants "fair notice" that their conduct was unlawful at the time they acted. *Rivas-Villegas*, 142 S. Ct. at 7. Another way to put it is whether "reasonable [officials] could have concluded," under the circumstances, that "it was constitutionally permissible" to act as they did. *Taylor*, 141 S. Ct. at 53.

A legal principle is clearly established when it has "a sufficiently clear foundation in then-existing precedent" and qualifies as "'settled law.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam)). If reasonable officials in the same position would "have known" *or "predicted"* that their actions were unlawful, the law is clearly established and qualified immunity does not apply. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017) (emphasis added).

Here, there was no exigency when making that prediction. Defendants did not have to make lightning fast decisions in hazardous circumstances. *Contra Stanton v. Sims*, 571 U.S. 3, 10–11 (2013). Defendants took *at least six months* to formulate a response to Ms. Villarreal's citizen journalism and pursue activity that the First Amendment mentions explicitly and clearly protects. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Reasonable officials with the luxury of time would use it to research precedent and seek legal advice.

What's more, free-speech and free-press rights are relatively fixed and clear. They are not as abstract or case specific as other rights, such as the Fourth Amendment's "reasonableness" test, which has caused

most of courts' qualified-immunity concerns. *E.g.*, *Kisela*, 138 S. Ct. at 1152–53; *Wesby*, 138 S. Ct. at 590; *Ziglar*, 137 S. Ct. at 1866.

So Defendants' case for qualified immunity runs thin. It makes little sense to give officials "who have time to make calculated choices about . . . enforcing" laws in an unconstitutional manner the exact "same protection as a police officer who makes a split-second decision to use force in a dangerous setting." *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting the denial of certiorari). Qualified immunity need not be "one-size-fits-all" in every respect. *Id.* at 2421. Courts should account for these relevant differences.

II. Reasonable officials in Defendants' positions would know that obstructing Ms. Villarreal's gathering and publication of news violates the First Amendment.

Count I of Ms. Villarreal's First Amended Complaint states a direct claim for violations of the Free Speech and Free Press Clauses. ROA.179-185. Ms. Villarreal seeks actual, compensatory, and punitive damages, ROA.184, 203, for Defendants "interfer[ing] directly with [her] gathering and publication of information and commentary about matters of public concern," ROA.180. Ms. Villarreal contends that qualified immunity does not apply because "[i]t is clearly established

that the First Amendment protects the right of every citizen to ask for information from a police officer or other official, as for example, is routine by members of the press." ROA.183.

Ms. Villarreal is correct. In December 2017, reasonable officials in Defendants' positions would have known that seeking to stymy a citizen journalist's newsgathering activities—including denying her the right to ask officials basic questions—violates the First Amendment. The "freedom to speak is of little value if there is nothing to say." *In re Express-News Corp*, 695 F.2d 807, 808 (5th Cir. 1982). So the Supreme Court and this Court have recognized that "news-gathering is entitled to [F]irst [A]mendment protection." *Id.* (citing *Branzburg*, 408 U.S. at 681); *accord Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (noting "right to gather information" (quotation omitted)).

A standard way for journalists to gather news is by speaking to government insiders who have non-public information. *E.g.*, *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion) (journalists are "free to seek out . . . public officials, and institutional personnel"); *Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 927 n.6 (5th Cir. 1996)

(before a confidentiality order school board "employees or members or both willingly spoke to the news agencies").

Over 50 years ago, the Supreme Court recognized that "a journalist is free to seek out [these confidential] sources of information not available to members of the general public" and "that government cannot restrain the publication of news emanating from" them. *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (citing *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971)). Both principles flow from the First Amendment's bar on government "limiting the stock of information from which members of the public may draw." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978).

Applying statutes or regulations intentionally "to frustrate" or "inhibit press investigations" is constitutionally suspect. *Garrett v. Estelle*, 556 F.2d 1274, 1278–79 (5th Cir. 1977). Citizens have a right "to inquire, to hear, to speak, and to use information," especially on matters of public concern. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010). That vaunted category of speech covers any "subject of legitimate news interest," *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (quotation omitted), including "reporting about the criminal

justice system," *United States v. Brown*, 250 F.3d 907, 915 (5th Cir. 2001).

Ms. Villarreal's citizen journalism communicated "matters relating to the functioning of government," a First Amendment "core purpose." *Richmond Newspapers,* 448 U.S. at 575. The Free Speech and Free Press Clauses barred Defendants' efforts to prevent Ms. Villarreal from using "routine . . . reporting techniques" to uncover and report news. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979). This is true of Defendants' refusal to give Ms. Villarreal information they made readily available to other journalists (ROA.163) and Defendants' attempt to restrict Ms. Villarreal's ability to ask government employees for information (ROA.168-69, 173-74).

The Supreme Court recognized over 40 years ago that "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information."[4] *Smith*, 443 U.S. at 104. Yet that is

[4] The Supreme Court's newsgathering cases refer to "lawfully obtained information," by which it means information garnered through "violat[ions] [of] valid criminal laws," such as generally applicable statutes barring "stealing documents or private wiretapping." *Bartnicki v. Vopper*, 532 U.S. 514, 515, 529, 532 n.19 (2001); *accord Branzburg*, 408 U.S. at 691–92. Defendants' illegal and targeted application of

precisely what Defendants sought to do by refusing to provide Ms. Villarreal the same information given to other journalists and barring her from asking a friendly police officer basic questions.

Consider the Supreme Court's reasoning in *Houchins*, which involved the news media's attempt to gain superior access to a local jail. Even the plurality opinion, which is *the least protective* of First Amendment rights,[5] explained that the government cannot prevent journalists "from learning about [hidden information] in a variety of ways, albeit not as conveniently as they might prefer." *Houchins*, 438 U.S. at 15 (plurality opinion). Journalists are "free to seek out former inmates, visitors to the prison, *public officials, and institutional personnel*, as they sought out [and reported a statement by a]

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§ 39.06(c) to Ms. Villarreal's journalism do not render the facts she corroborated with Officer Goodman "unlawfully obtained."

[5] Only seven Justices participated in *Houchins*. The plurality opinion authored by Chief Justice Burger was joined by Justices White and Rehnquist. Justice Stewart concurred in the judgment because he thought the preliminary injunction was overbroad, but he would have accorded greater jail access to the press than the general public. *Houchins*, 438 U.S. at 16–18 (Stewart, J., concurring in the judgment). In dissent, Justices Stevens, Brennan, and Powell would have affirmed a preliminary injunction that granted a media company special jail access, "at least temporarily," "to let relevant facts, which may have been concealed, come to light." *Id.* at 40 (Stevens, J., dissenting).

psychiatrist" who blamed jail conditions for his patient's illness. *Id.* (emphasis added); *accord id.* at 3.

So too here. Defendants need not volunteer any non-public information that Ms. Villarreal, other journalists, or members of the public seek. But they cannot bar Ms. Villarreal (or anyone else) from posing questions to willing government employees, like Officer Goodman, without violating the First Amendment.[6] *Accord Branzburg*, 408 U.S. at 691 (stressing that forcing journalists to testify before grand juries did not "restrain[ ] . . . the type or quality of information reporters may seek to acquire").

This Court has never "ignore[d] the realities of everyday news gathering of government information." *Poirier v. Carson*, 537 F.2d 823, 826 (5th Cir. 1976). And the correct answer to leaks by government insiders is plain: the state has ample tools to keep information private, but if those measures fail, the government can punish the leaker but not the journalist who sought or received non-public information. *The*

[6] Here, Ms. Villarreal was merely corroborating facts that she received from private sources, a safeguard "responsible" journalists employ that "call[s] for verification of information" before publication. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976).

Fla. Star v. B.J.F., 491 U.S. 524, 534–35 (1989); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 837 & n.10 (1978); *United States v. Wallington*, 889 F.2d 573, 579 (5th Cir. 1989).

Three unique features make Defendants' violation of Ms. Villarreal's First Amendment rights even more clear-cut. First, "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporters' relationship with [her] news sources [has] no justification."[7] *Branzburg*, 408 U.S. at 707–08. And that is precisely what Ms. Villarreal has alleged: Defendants sought to use an unenforced criminal statute—Texas Penal Code § 39.06(c)—not to administer the law but to disrupt Ms. Villarreal's ability to question her news source (*i.e.*, Officer Goodman) and chill her speech. ROA.168-69, 173-74. Such official harassment plainly violates the First Amendment. When the government attempts to punish those engaged in "truthful publication," it must "apply[ ] its prohibition evenhandedly, to the smalltime disseminator as well as the media giant." *The Fla.*

[7] *Accord Grossman v. City of Portland*, 33 F.3d 1200, 1209 n.19 (9th Cir. 1994).

Star, 491 U.S. at 540. Yet Defendants chilled *only* Ms. Villarreal's speech.

Second, Defendants tried to block Ms. Villarreal from seeking or obtaining non-public information from *any* government official regardless of whether she knew the information was private. Yet the Supreme Court has expressly disallowed "categorical prohibitions upon media access where important First Amendment interests are at stake." *The Fla. Star*, 491 U.S. at 539.

Third, a key reason the Supreme Court has given for upholding newsgathering restrictions is that they do "not deny the press access to sources of information available to members of the general public." *Pell*, 417 U.S. at 835; *accord Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974). The opposite is true here. Defendants' reading of § 39.06(c)'s "intent to obtain a benefit" language renders it *a felony* for journalists to seek or obtain non-public information from government employees. In contrast, others may seek or obtain this information if they have no potential economic interest at stake. ROA.174. Such lopsided access to government sources and the non-public information they willingly disclose violates the First Amendment.

III. Reasonable officials in Defendants' positions would know that retaliating against Ms. Villarreal for her journalism violates the First Amendment.

Count I of Ms. Villarreal's First Amended Complaint also states a First Amendment retaliation claim. ROA.179-185. Ms. Villarreal seeks actual, compensatory, and punitive damages based on Defendants "willfully act[ing] to intimidate, defame, and harass [her] in retaliation for [the] exercise of her First Amendment rights," which culminated in Defendants "target[ing] Villarreal for investigation and arrest under a pretextual and inapplicable statute." ROA.179-180; *accord* ROA.184, 203. She argues that "[n]o reasonable official would have so unlawfully, willingly, and arbitrarily retaliated against and restricted speech on matters of public concern." ROA.184.

Again, Ms. Villarreal is correct. The Court should take this opportunity to correct its retaliation precedent, which requires not only that the defendant's actions would chill a person of ordinary firmness from engaging in protected activity, but also that the defendant succeed in curtailing *the plaintiff's* speech. *Keenan v. Tejeda*, 290 F.3d 252, 258–59 (5th Cir. 2002). Courts generally require one or the other. Amicus is aware of no other Court of Appeals that requires both. *Houston Cmty.*

Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1261 (2022) (contrasting the Ninth Circuit's person-of-ordinary-firmness standard with the Fourth Circuit's "adversely affected the plaintiff 's . . . protected speech" test); *Bennett v. Hendrix*, 423 F.3d 1247, 1250–51 (11th Cir. 2005) (describing an objective vs. subjective circuit split).

The person-of-ordinary-firmness test, which this Court has adopted, is designed to be objective. Adding a subjective requirement that punishes stalwart plaintiffs who stick to their rights defeats the test's purpose. This Court should correct *Keenan*'s error and hold that the test's language means what it says: plaintiffs may recover if the defendant's retaliatory actions would chill a person of ordinary firmness from engaging in protected speech.[8] *E.g.*, *Bell v. Johnson*, 308 F.3d 594, 606 (6th Cir. 2002); *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 916 (9th Cir. 2012); *Bennett*, 423 F.3d at 1250–51.

[8] Regardless, the complaint plausibly alleges that Defendants' retaliatory conduct chilled Ms. Villarreal's reporting. ROA.182. The Court accepts those "facts as true and draws all reasonable inferences in [Ms. Villarreal's] favor." *Franklin v. Regions Bank*, 976 F.3d 443, 447 (5th Cir. 2020).

Another purported hurdle to Ms. Villarreal's retaliation claim is probable cause to seek and obtain warrants for her arrest under Texas Penal Code § 39.06(c). *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) (requiring that retaliatory-arrest plaintiffs generally show a lack of probable cause). But probable cause for an arrest depends on "the standpoint of an objectively reasonable [official]" and "the totality of the circumstances." *Wesby*, 138 S. Ct. at 586 (quotation omitted). And no "reasonable [official] could conclude" there was probable cause to arrest Ms. Villarreal knowing that § 39.06(c) was an unenforced law that officials dug up to punish her protected newsgathering and truthful speech on matters of public concern. *Id.* at 588; *accord* ROA.166-172, 179-182. On these facts, it would be objectively unreasonable to believe that probable cause exists, so qualified immunity does not apply.[9]

That a magistrate authorized two arrest warrants for Ms. Villarreal is irrelevant. Courts require officials arranging the "appl[ication] for [a] warrant to minimize th[e] danger [of mistaken

[9] *Cf. Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 824–25 (6th Cir. 2007); *Leonard v. Robinson*, 477 F.3d 347, 358–61 (6th Cir. 2007); *Sandul v. Larion*, 119 F.3d 1250, 1255–56 (6th Cir. 1997).

approval] by exercising reasonable professional judgment." *Malley v. Briggs*, 475 U.S. 335, 346 (1986). The magistrate was *unaware* that officials had unearthed § 39.06(c) as a pretext to chill and punish Ms. Villarreal for her protected newsgathering and speech. But *Defendants knew* because it was the ruse they agreed on and jointly carried out. ROA.165-177. No official "of reasonable competence" would have participated in Defendants' plan to retaliate against Ms. Villarreal or "requested the warrant[s]" in the first place. *Malley*, 475 U.S. at 346 n.9. That is especially true when Defendants' supporting affidavits failed to establish key elements of a § 39.06(c) offense, including "how or why Villarreal intended to enjoy an economic gain or advantage from the information" she corroborated with Officer Goodman. ROA.171.

What's more, officials are not "automatically entitled to qualified immunity for seeking a warrant unsupported by probable cause, simply because a magistrate had approved the application." *Messerschmidt v. Millender*, 565 U.S. 535, 554 (2012). Any presumption of objective reasonableness disappears when magistrates find probable cause that plaintiffs violated a law that has fallen into disuse. *Grossman*, 33 F.3d at 1209 n.19; *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1253 (10th

Cir. 2003). And that exception to the independent intermediary doctrine applies here because § 39.06(c) went unenforced for 23 years. ROA.181-82, 187.

Because Ms. Villarreal's claims are compelling and not "insubstantial," Defendants are not entitled to qualified immunity at this early stage. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotation omitted). When Defendants hatched and executed their retaliation plan, every reasonable official knew that government "reprisal for protected speech 'offends the Constitution because it threatens to inhibit exercise of the protected right.'" *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 & n.10 (1998)) (alteration omitted). "[T]he law [was] settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions." *Id.*

Nor is it "game over" if this Court rules there was probable cause for Ms. Villarreal's arrest. Plaintiffs may bring a retaliatory-arrest claim if, by the summary-judgment stage, they can "present[ ] objective evidence that [they were] arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not

been." *Nieves*, 139 S. Ct. at 1727; *accord id.* (deciding whether "Bartlett's retaliation claim [could] survive summary judgment").

The burden is lower on a motion to dismiss. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Ms. Villarreal need show only "sufficient factual matter [in the complaint], accepted as true, to state" a facially plausible claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). Here, the complaint plausibly alleges that Defendants targeted Ms. Villarreal for arrest, while leaving alone reporters not engaged in her "gritty style of journalism and often colorful commentary." ROA.160; *accord id.* at 158-163, 165-184, 187-189.

Whether or not there was probable cause to arrest Ms. Villarreal, her First Amendment retaliation claim survives. And the merits of that claim are clear. Ms. Villarreal's newsgathering and truthful publications on matters of public concern are protected by the Free Speech and Free Press Clauses. Defendants' attempt to bar Ms. Villarreal from newsgathering and successful plan to arrest her would objectively chill a person of ordinary firmness from journalism. And Defendants' retaliatory actions were substantially motivated by dislike

for Ms. Villarreal's protected reporting. ROA.165-67, 169-170, 173-78. So the unlawfulness of Defendants' retaliatory conduct was plain to see.

Regardless of how one phrases the qualified-immunity standard, it is satisfied here. Defendants had "fair notice" that their retaliatory conduct violated the First Amendment. *Rivas-Villegas*, 142 S. Ct. at 7. The "contours" of that provision were "sufficiently clear" that "reasonable official[s] [in Defendants' positions] would understand that what [they were] doing violate[d]" Ms. Villarreal's free-speech and free-press rights. *Anderson*, 483 U.S. at 640. And the First Amendment rule against government retaliation for engaging in protected journalism was "settled law" with a "clear foundation in then-existing precedent." *Wesby*, 138 S. Ct. at 589 (quotation omitted). One thing is sure: Ms. Villarreal had a clearly established right to gather news and publish truthful information without government retaliation.

CONCLUSION

This Court should (1) rule that Ms. Villarreal can overcome qualified immunity without citing a prior case that holds similarly outrageous facts unconstitutional under the First Amendment; (2) align the Fifth Circuit's person-of-ordinary-firmness test for retaliation

claims with the law of other circuits; (3) hold that Defendants' alleged conduct violated Ms. Villarreal's clearly-established First Amendment rights; and (4) reverse and remand for those claims to proceed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 29 because it contains 5,192 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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