No. 20-40359

In the United States Court of Appeals for the Fifth Circuit

PRISCILLA VILLARREAL,

Plaintiff-Appellant,

v.

THE CITY OF LAREDO, TEXAS; WEBB COUNTY, TEXAS; ISIDRO R. ALANIZ; MARISELA JACAMAN; CLAUDIO TREVIÑO, JR.; JUAN L. RUIZ; DEYANIRA VILLARREAL; ENEDINA MARTINEZ; ALFREDO GUERRERO; LAURA MONTEMAYOR; DOES 1-2,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, No. 5:19-cv-48
Honorable George P. Kazen

EN BANC BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: December 12, 2022 */s/ Brianne J. Gorod*
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION

In the wake of the Civil War, as Southern state officials continued to trample upon the rights of Black Americans and their allies, the Forty-Second Congress enacted Section 1983, providing a right to sue "[e]very person" who under color of state law deprives another person of "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Among the abuses this landmark statute was enacted to combat was retaliation by state and local officials against those who exercised their freedom of speech to denounce the Confederacy, slavery, and its

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Appellant consents to the filing of this brief. Appellees do not consent. A motion requesting leave to file has been docketed herewith.

vestiges. Rather than protecting those individuals, state and local officials were instead targeting them for baseless prosecutions and arrests.

Relying on Section 1983, Priscilla Villarreal, a Laredo-based citizen-journalist reviled by local law enforcement for her reporting on police misconduct, now seeks redress because she was arrested and prosecuted simply for exercising her First Amendment right to ask a police officer a question. Officers spent months digging up a statute to purportedly authorize her arrest—a statute which had never before been enforced in its twenty-three years of existence, ROA.181-82, and which was ultimately held unconstitutional by a state court judge, ROA.179. Notwithstanding all that, the court below held that the officials who Villarreal sued were entitled to qualified immunity because it was not "clearly established" that arresting a journalist for asking a question violates the First Amendment. That decision is at odds with the text and history of both Section 1983 and the First Amendment, and it should not stand.

One of Congress's goals in enacting Section 1983 was to put an end to the stifling of speech inflicted by unconstitutional state laws and biased state law enforcement. As one of the "crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era," *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982) (quotation marks omitted), the statute was passed, in part, to curb retaliation by state and local officials against those who spoke out against

slavery, racism, and abuses of authority in the South. This problem took two forms. First, Southern officials were selectively withholding the law's protection from those individuals—particularly Black citizens and Union supporters—while crimes of the Ku Klux Klan went unpunished. Second, state and local officials were retaliating against them directly, by instigating prosecutions designed to punish, intimidate, and bully them into silence. While all this went on, fresh in the minds of members of Congress were the pre-war slave codes, which had criminalized abolitionist speech and writing with penalties up to and including death.

To address these attacks on freedom of speech, retaliatory arrests, and other constitutional violations, Congress empowered victims to seek redress in federal courts through Section 1983, using categorical language that makes "no mention of defenses or immunities," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment). As one member put it: "Suppose that . . . every person who dared to lift his voice in opposition . . . found his life and his property insecure. . . . In that case I claim that the power of Congress to intervene is complete and ample." Cong. Globe, 42d Cong., 1st Sess. 333 (1871).

Given that qualified immunity is at odds with Section 1983's text and history, courts should be especially careful to respect the limits on the doctrine that the Supreme Court has prescribed to prevent it from acting as a complete barrier to recovery. The district court did not do this. Instead, the court below decided that

because it could not find a directly on-point case barring arrest and prosecution for simply asking a question, Defendants were entitled to qualified immunity. And although the panel majority recognized the error of that decision, the panel dissent might have gone even further, suggesting that because Defendants relied on a state statute and a warrant in effectuating Villarreal's arrest, their qualified immunity defense was essentially untouchable by a reviewing court.

"That not only misunderstands qualified immunity—it's an alarming theory of [the judicial] role under the Constitution." *Villarreal v. City of Laredo*, 44 F.4th 363, 381 (5th Cir. 2022) (Ho, J., concurring). What is more, once again, the historical backdrop of Section 1983 belies the dissent's logic. Nineteenth-century tort law decisions that inform analysis of immunities under Section 1983 reveal the bedrock rule, inherited from English common law, that government officials who deprived individuals of their legal rights were held strictly liable for damages in tort. That was so even in cases where, like Defendants here, officials committed torts in reliance on the orders of a superior, or based on the misconstruction of a governing statute, or even based on an unconstitutional statute. In all three cases, even good faith was no defense to compensatory damages.

In sum, the decision of the district court is at odds with the text, history, and common-law backdrop of Section 1983, and nothing in Supreme Court precedent requires it. This Court should reverse.

ARGUMENT

I. Section 1983 Was Enacted to Make Real the First Amendment's Promise to Protect the Speech of All People, Even Those Who Criticize Authorities.

A. As the Supreme Court has stated, "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Yet Villarreal alleges that "Defendants arrested and sought to prosecute [her] for doing precisely that"—seeking out the news by asking a police officer a question. *Villarreal*, 44 F.4th at 371. According to Villarreal, these officials wanted to teach her a lesson: stop criticizing the Laredo Police Department and local prosecutor's office, or face criminal punishment. Despite the "obvious" nature of this constitutional violation, *id.*, the district court granted Defendants qualified immunity, focusing on the elements of the state statute that Defendants invoked rather than Villarreal's constitutional right, and reasoning that the absence of another factually on-point decision doomed Villarreal's case before she could even seek discovery. That result subverts the core purposes of the First Amendment and undermines the goals of the Congress that enacted Section 1983 to make real that Amendment's safeguards.

The First Amendment forbids "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The Amendment

was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). As reflected in James Madison's first draft of the speech and press clauses, the Framers viewed the people's "right to speak, to write, or to publish their sentiments" as "one of the great bulwarks of liberty." 1 Annals of Cong. 451 (1789). Those views reflected "developing ideas of popular sovereignty—in contrast to parliamentary sovereignty—[which] made it crucial for ordinary individuals to be able to criticize their government." Jack M. Balkin, *Nine Perspectives on* Living Originalism, 2012 U. Ill. L. Rev. 815, 835 (2012). Indeed, "the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that [was] embarrassing to the powers-that-be," *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring)—material not unlike Villarreal's occasional postings of perceived law enforcement misconduct to her Facebook page as a citizen-journalist.

At our nation's Second Founding, the First Amendment took on newfound importance, as a new generation of Framers sought to ensure "that the new constitutional order would protect against the lynchings, murders, and prosecutions inflicted post hoc upon abolitionists and slaves in retaliation for their speech and expressive activities denouncing slavery or resisting the slave regime." William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 Tex. L. Rev. 1065,

1075 (2021). Before the Civil War, Congress instituted a gag rule on abolitionist petitions and banned "incendiary" publications. Akhil Reed Amar, *The Bill of Rights* 235 (1998). In at least one state, writing or publishing abolitionist literature was punishable by death. *Id.* at 161. Southern states also passed laws criminalizing anti-slavery utterances, even if plainly religious or political in inspiration. *Id.* at 160. As Frederick Douglass wrote, these laws reflected the principle that "[o]ne end of the slave's chain must be fastened to a padlock in the lips of northern freemen . . . else the slave himself will become free." David W. Blight, *Frederick Douglass: Prophet of Freedom* 272 (2018) (internal citation omitted).

Slave codes throughout the South also expressly targeted the freedom of speech, undermining the First Amendment's promise. Importantly, these laws did not just target disfavored speech itself; rather they provided a means to prosecute other forms of speech—even things as simple as praying or interacting with non-slaves—by disfavored *speakers*. For example, Alabama's slave code barred "any slave, without a written permission from the owner, master, or overseer of said slave," from "be[ing] found in company with a free negro or person of color, in the dwelling-house or outhouse of said free negro or person of color." Ala. Slave Code § 36 (1833). Georgia's slave code outlawed "the assembling of negroes under pretense of divine worship," J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 Notre Dame L. Rev. 1077, 1108 (1994) (quoting statute), and

Virginia prohibited preaching by free or enslaved African Americans altogether, *see* Henry Walcott Farnam, *Chapters in the History of Social Legislation in the United States* 194 (2000). As Representative James Wilson put it during debates on the Thirteenth Amendment, "[t]he Constitution may declare the right" to "freedom of speech and press," but "slavery ever will . . . trample upon the Constitution and prevent enjoyment of the right." Cong. Globe, 38th Cong., 1st Sess. 1202 (1865). Thus, under the shadow of slavery, "[t]he press has been padlocked, and men's lips have been sealed. . . . Submission and silence were inexorably exacted." *Id.*

On top of these legal measures, private mobs, often supported by Southern governments, "suppressed and retaliated against Black and antislavery speech through violence and other extralegal means." Carter, *supra*, at 1084-85. As one Senator explained, these acts perpetuated slavery itself, as "[s]lavery cannot exist where its merits can be freely discussed." Cong. Globe, 38th Cong., 1st Sess. 1439 (1864); *see also* Cong. Globe, 39th Cong., 1st Sess. 1013 (1866) (Rep. Plants) ("[T]he system would not be secure if men . . . were permitted to discuss [slavery] in any form, and hence the freedom of speech and the press must be suppressed as the highest of crimes."); *id.* at 1066 (Rep. Price) ("[F]or the last thirty years, a citizen of a free State dared not express his opinion of slavery in a slave State."); Frederick Douglass, A Plea for Free Speech in Boston (Dec. 9, 1860),

https://lawliberty.org/frederick-douglass-plea-for-freedom-of-speech-in-boston/ ("Slavery cannot tolerate free speech.").

After the Civil War, with these abuses fresh in memory and with Southern states still refusing to respect individual liberties, Americans ratified the Fourteenth Amendment and "fundamentally altered our country's federal system," *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (quoting *McDonald v. Chicago*, 561 U.S. 742, 754 (2010)), adding to the Constitution a new guarantee of liberty meant to secure "the civil rights and privileges of all citizens in all parts of the republic," Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. xxi (1866). Those rights and privileges included the freedom of speech. Indeed, during debates on the Fourteenth Amendment, advocates emphasized that without its protections, "[f]reedom of speech, as of old, is a mockery." Cong. Globe 39th Cong., 1st Sess. 783 (1866); *see also id.* at 1617 (without the Fourteenth Amendment, "[t]here is neither freedom of speech, of the press, or protection to life, liberty, or property"); Carter, *supra*, at 1087 ("[C]ongressional Republicans who drafted the Reconstruction Amendments . . . were intimately familiar with the suppression of the constitutional right of free speech as a tool to maintain slavery and racial subjugation.").

But this turned out to be insufficient. Several years after the Fourteenth Amendment's ratification, Southern states were still "permit[ting] the rights of

citizens to be systematically trampled upon." Cong. Globe, 42d Cong., 1st Sess. 375 (1871). Recognizing the need for some means of enforcing the rights newly guaranteed by the Constitution, Congress passed "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes," ch. 22, 17 Stat. 13 (1871), the first section of which is codified as 42 U.S.C. § 1983.

The immediate catalyst for this legislation was Southern government officials' tacit support of the reign of terror being carried out by the Ku Klux Klan, *see Wilson v. Garcia*, 471 U.S. 261, 276 (1985), which sought to suppress the speech and association rights of formerly enslaved people and their allies, retaliating against those who advocated equality or supported federal policies. Congress learned, for example, that after a citizens' meeting was called "to protest against the outrages" being committed in Mississippi, Klan members sought revenge, and "[a]t their instigation warrants were issued for the arrest of peaceable and well-disposed negroes upon the charge of 'using seditious language.'" Cong. Globe, 42d Cong., 1st Sess. 321; *see also id.* at 155 (testimony describing attack in which the Klan "made all the colored men promise they would never vote the Radical ticket again"); *id*. at 157 (testimony that Blacks "were killed because they were summoned as witnesses in the Federal courts"); *id*. at 321 (testimony that the Klan "wanted to run them all off because the principal part of them voted the Radical ticket" and that

"[t]hey have been trying to get us to vote" the other way). As one Congressman put it, "our fellow-citizens are being deprived of the enjoyment of the fundamental rights of citizens" because of "their opinions on questions of public interest." *Id*. at 332.

Section 1983, however, "was not a remedy against the Klan," but against "those who represent[ed] a State in some capacity" and "were unable or unwilling" to enforce the law with an even hand. *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973) (quoting *Monroe v. Pape,* 365 U.S. 167, 175-76 (1961) (brackets omitted)). Congress recognized that laws were being applied selectively across the South to target disfavored groups and their speech and writings in various forms. While "outrages committed upon loyal people through the agency of this Ku Klux organization" went unpunished, one Senator noted, "[v]igorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid." Cong. Globe, 42d Cong., 1st Sess. 505. The fundamental problem was that biased state officials, by systematically tolerating or condoning attacks on people who expressed unpopular viewpoints, were "denying decent citizens their civil and political rights." *Wilson*, 471 U.S. at 276.

In addition to selectively refusing to protect citizens from private violence, states were also retaliating against the expression of disfavored views more directly. A significant problem during Reconstruction was the instigation of "baseless civil

and criminal prosecutions to punish and intimidate those who had been loyal to the Union during the Civil War or who tried to enforce national policy." David Achtenberg, *With Malice Toward Some:* United States v. Kirby, *Malicious Prosecution, and the Fourteenth Amendment*, 26 Rutgers L.J. 273, 275 (1995); *see* Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., at xviii ("prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere"); *Mitchum v. Foster*, 407 U.S. 225, 240 (1972) ("state courts were being used to harass and injure"). These groundless suits "had proved potent instruments of harassment" because of the arrests they triggered, and by 1871, Congress had enacted multiple new laws responding to the problem by expanding habeas corpus and the ability to remove state prosecutions to federal court. Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 829 (1965).

Abuses continued, however. To address them and other violations of fundamental liberties, Congress enacted Section 1983, allowing victims to go to federal court to vindicate their federal constitutional rights. In light of this urgent purpose, it is no surprise that Section 1983's text is broad and categorical. The statute "on its face admits of no defense of official immunity," but rather "subjects

to liability '[e]very person' who, acting under color of state law, commits the prohibited acts" in violation of federal law. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting 42 U.S.C. § 1983).

B. Nevertheless, the Supreme Court has fashioned limits on the scope of Section 1983, through the doctrine of qualified immunity. To defeat qualified immunity, a plaintiff must plausibly allege that defendants violated his or her constitutional rights, and that their conduct was objectively unreasonable in light of clearly established law. *See, e.g.*, *Powers v. Northside Indep. Sch. Dist.*, 951 F.3d 298, 306 (5th Cir. 2020).

As the panel majority noted, the "crucial question" in this analysis is "whether 'a reasonable official would understand that what he is doing violates [a constitutional] right.'" *Villarreal*, 44 F.4th at 369-70 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In other words, all that is required to defeat qualified immunity is that the officials responsible for the alleged infringement had "fair warning that their conduct violated the Constitution." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The Supreme Court "do[es] not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Rather, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (quoting *Hope*, 536 U.S. at 741).

In this case, that constitutional rule could not be clearer. The Supreme Court has long held that expressive conduct critical of the police is protected by the First Amendment, including "verbal criticism and challenge directed at police officers" while they are performing their duties. *Houston v. Hill*, 482 U.S. 451, 461 (1987); *see id.* at 463 n.12 (tracing this principle to the common law). Even yelling "obscenities and threats" at an officer who is interacting with a third party has long been recognized as constitutionally protected activity, provided that these words do not "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 461-62 (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974)). As long as that line is not crossed, expression directed at police officers is "protected against censorship or punishment." *Id.* at 461; *see, e.g.*, *Lewis*, 415 U.S. at 132-33.

Likewise, the Supreme Court has also long recognized that the First Amendment protects the "right to gather news 'from any source by means within the law,'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg*, 408 U.S. at 681-82), as well as "the creation and dissemination of information" more broadly, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

Because it is well established that the First Amendment allows individuals to gather information through lawful means, to disseminate that information, and even to verbally confront police officers, it should be obvious to any reasonable official

that simply asking a law enforcement officer to confirm a fact for a news story is "protected against censorship or punishment." *Houston*, 482 U.S. at 461. That is so even if the person who asks the question happens to be an individual with disfavored viewpoints—someone who, like Villarreal, has engaged in criticism of law enforcement conduct in the past. Indeed, under those circumstances, the need for robust First Amendment protections is especially salient, given that Section 1983 was passed, in large part, in response to the denial of that Amendment's protections to individuals with disfavored viewpoints.

This Court should end its analysis there. Consistent with the text and history of Section 1983, enacted to effectuate the guarantees of the Bill of Rights for all people, this Court should hold that the obviousness of Defendants' infringement on Villarreal's freedom of speech precludes their reliance on the shield of qualified immunity. The fact that Defendants relied on a warrant or on a statute when they arrested Villarreal for exercising her First Amendment rights does not alter that analysis. Indeed, as the next Section will explain, the panel dissent's emphasis on those facts not only misconstrues contemporary qualified immunity jurisprudence but also subverts the nineteenth-century strict liability principles that inform analysis of Section 1983 cases and any relevant immunities.

II. The Panel Dissent's Conclusion that Reliance on a Warrant or a State Statute Should Shield Officials from Liability Is Contrary to the Strict-Liability Backdrop of Nineteenth Century Tort Law, Which Informs Analysis of Section 1983 Claims.

Despite the obviousness of Defendants' constitutional violation—arresting and seeking to prosecute a local journalist for merely asking a police officer a question—the panel dissent asserts that Defendants' reliance on a warrant and a statute purportedly authorizing their conduct should immunize them from liability.

This is wrong under modern immunity doctrine. As the Supreme Court has explained, "the fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness." *Messerschmidt v. Millender*, 565 U.S. 535, 547 (2012). Rather, a court must deny qualified immunity if it is "obvious that no reasonably competent officer would have concluded that a warrant should issue." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). So too for an unconstitutional statute—or even one that an official misconstrued in good faith. If that misconstruction reflects "plain[] incompeten[ce]," *id.*, or if, as the panel majority put it, the statute "is 'so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws,'" *Villarreal*, 44 F.4th at 372 (quoting *Carey v. Nev. Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002)), qualified immunity is no defense. That is especially so where, as here, Defendants had months to recognize that their application of a state statute would result in a constitutional violation, and where it

appears that Defendants used that statute in a pretextual fashion specifically for the purpose of punishing Villarreal for her exercise of a constitutional right, ROA.169-72.

Historical immunity principles also undermine the dissent's logic. Indeed, the idea that the presence of a warrant or statute on its own might preclude liability is at odds with a series of nineteenth century decisions reflecting the bedrock rule, inherited from English common law, that government officials who deprive individuals of their legal rights may be held to account for damages in tort. While these decisions are not dispositive, they constitute a crucial part of the "considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it" that the Supreme Court has urged courts to engage in when deciding Section 1983 cases. *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976); *cf. Tower v. Glover*, 467 U.S. 914, 920 (1984) (even "[i]f an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871," immunity may still be inappropriate if "§ 1983's history or purposes nonetheless counsel against recognizing the same immunity").

Much like the officials in this case who claim qualified immunity because of their reliance on a warrant issued by a magistrate, officers who relied on orders from superiors were still held accountable for their torts at common law, as demonstrated in early Supreme Court decisions. Thus, an officer who wrongly seized a ship upon

the orders of his superiors was "answerable in damages" to the ship's owner because the mistaken orders could not "legalize an act which without those instructions would have been a plain trespass." *Little v. Barreme*, 6 U.S. 170, 178-79 (1804); *accord Tracy v. Swartwout*, 35 U.S. 80, 95 (1836). And in another case, an officer who seized an individual's property to satisfy a fine, based on the orders of a court that lacked jurisdiction over that individual, was liable in tort for trespass. *Wise v. Withers*, 7 U.S. 331, 335-37 (1806); *accord Dynes v. Hoover*, 61 U.S. 65, 80-81 (1857).

Similarly, much like the officers in this case, who (at best) misconstrued the Texas statute they invoked as applying to Villarreal's conduct, nineteenth-century officials who misinterpreted statutes were held strictly liable for their torts—even if the complained-of conduct was done in good-faith reliance on those misinterpretations. For instance, in *Bates v. Clark*, 95 U.S. 204 (1877), which involved an action for trespass, the defense turned on whether the whiskey confiscated by government officials was "seized in Indian country," within the meaning of the relevant statute. *Id.* at 205. While the Court acknowledged that the definition of "Indian country" involved a difficult question of law, and so the officials may have acted reasonably, they were "utterly without any authority in the premises; and their honest belief that they had is no defence in their case more than in any other." *Id.* at 209. So too in *Murray v. The Charming Betsy*, 6 U.S. 64, 122-

26 (1804). There, Chief Justice Marshall construed a complicated federal statute narrowly so as to comport with international law principles and bar the seizure of a ship, making the officer who engaged in the improper seizure liable to the owner for compensatory damages, although his "correct motives" in acting "according to the best of his judgment" shielded him from punitive damages, *id.* at 124; *accord Shanley v. Wells*, 71 Ill. 78, 81 (1873) ("If [a] plaintiff was assaulted and beaten, or imprisoned," by a law enforcement officer, "without authority of law," the plaintiff was "entitled to recover, whatever may have been the defendant's motives.").

And time and again, state courts deciding common law tort claims around the time of Section 1983's enactment refused to grant immunity to officers who acted in reliance on an unconstitutional statute—regardless of whether, as here, they should have known better. As one court put it, "[n]o question in law is better settled . . . than that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void." *Sumner v. Beeler*, 50 Ind. 341, 342 (1875) (permitting recovery for false arrest, imprisonment, and prosecution under an unconstitutional law). Thus, a justice of the peace, who issued a warrant under an unconstitutional statute, was liable for damages to the person arrested. *Kelly v. Bemis*, 70 Mass. 83, 83 (1855); *see id.* ("Under a government of limited and defined powers, where, by the provisions of the organic law, the rights and duties of the several departments of the government are carefully distributed and restricted, if

any one of them exceeds the limits of its constitutional power, it acts wholly without authority itself, and can confer no authority upon others. The defendant could derive no power or jurisdiction from a void statute."). So too for an officer who arrested a citizen pursuant to an unconstitutional vagrancy law, *Shanley*, 71 Ill. at 83, as well as officers in countless other analogous situations, *see, e.g.*, *Fisher v. McGirr*, 67 Mass. 1, 51 (1854) (officer liable for seizing and destroying liquor under an unconstitutional law); *Campbell v. Sherman*, 35 Wis. 103, 108 (1874) (officer liable for seizing steamboat under unconstitutional law); *Gross v. Rice*, 71 Me. 241, 257-58 (1880) (officer liable for holding prisoner pursuant to unconstitutional law).

The Supreme Court quickly adopted this logic when faced with early suits to enjoin state action. Take, for example, the Court's approach to a case arising out of Ohio's imposition of a tax on a branch of the Second Bank of the United States in *Osborn v. Bank of United States*, 22 U.S. 738 (1824). The Bank sued in trespass, seeking remedies at common law against various officers involved in collecting the tax. In resolving the case, the Court began with the premise that the Ohio law authorizing the tax could not shield the officers from liability, given that the Court had recently held in *McCulloch v. Maryland*, 17 U.S. 316 (1819), that such state taxes on instrumentalities of the United States were unconstitutional. This point, the Court noted, was so self-evident that counsel for the Ohio officials conceded it. *Osborn*, 22 U.S. at 868 ("The counsel for the appellants are too intelligent, and have

too much self respect, to pretend, that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot."). In other words, "the defendants could derive neither authority nor protection from the act which they executed," *id.*, as the Constitution "set a limit to lawful official action, and officials who exceeded constitutional limits (however well-intentioned) were thought to enjoy no residual discretion within which to act lawfully"—that is, no immunity from suit, James E. Pfander, *Zones of Discretion at Common Law*, 116 Nw. U. L. Rev. Online 148, 167 (2021).

In short, whether an officer relied on others' orders, the misconstruction of a statute, or an unconstitutional statute, they were held strictly liable for conduct that resulted in the deprivation of a legal right, even if the officer had a good-faith belief in the legality of his or her actions. As the Supreme Court has said, "It would be a most dangerous principle to establish, that the acts of a ministerial officer . . . injurious to private rights, and unsupported by law, should afford no ground for legal redress." *Tracy*, 35 U.S. at 95.

* * *

Qualified immunity is a judge-made doctrine, unmoored from Section 1983's text and history, yet "grounded in the acknowledgment that officers must make split-second judgments about the appropriate use of force in chaotic, highly dangerous situations." *Winzer v. Kaufman County*, 916 F.3d 464, 479 (5th Cir. 2019) (citing

Graham v. Connor, 490 U.S. 386, 397 (1989)). This is not that case. Here, officials took their time to dig up an obscure Texas statute and weaponized it to punish a disfavored journalist—all for the simple act of asking a police officer a question. If Section 1983 and the First Amendment rights it protects mean anything, this court should not immunize that conduct.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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Dated: December 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on December 12, 2022.

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Executed this 12th day of December, 2022.

/s/ Brianne J. Gorod
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5228 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

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