No. 23-1155

# In the Supreme Court of the United States

PRISCILLA VILLARREAL,
*Petitioner,*

v.

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

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION


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## COUNTERSTATEMENT OF THE QUESTION PRESENTED

Qualified immunity protects government officials from personal liability unless they violate a "clearly established" constitutional right. Respondents arrested Petitioner, pursuant to a warrant issued by a magistrate, for a violation of a duly enacted state statute that had never been held unconstitutional by any court. Without reaching the merits of Petitioner's argument that the statute violates the First Amendment, the en banc Fifth Circuit held that Respondents did not violate a clearly established right. Did the Fifth Circuit err?

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## INTRODUCTION

Petitioner and her amici passionately cast the decision below (joined by nine Fifth Circuit judges) as an assault on basic, indisputable First Amendment rights. It is no such thing.

Under well-established law, the government is entitled to protect certain types of information from disclosure; examples include classified information, certain individually identifiable information such as that regarding finances or health, and grand jury information. Texas enacted a statute prohibiting soliciting, with the intent to obtain a benefit, non-public information from government officials unauthorized to disseminate the information. In her petition, Petitioner does not seriously dispute that she violated the statute. Instead, she says that all reasonable officials would have known that arresting her for violating the statute violated the First Amendment.

Petitioner is wrong. As of the date on which Respondents arrested Petitioner, no court had held the Texas statute to be unconstitutional or even called its constitutionality into question. Moreover, Respondents made the arrest pursuant to a warrant issued by a neutral magistrate, an independent intermediary.

Under those circumstances, the en banc Fifth Circuit was correct to affirm the district court's holding that Respondents are entitled to qualified

immunity because they did not violate any "clearly established" right when they arrested Petitioner.

Review of this fact-bound decision is not warranted. The Fifth Circuit accurately stated and faithfully applied the standard for qualified immunity adopted by this Court to the specific facts before it. State statutes are presumed to be constitutional. It would be unreasonable indeed to hold government officials personally liable for violating a "clearly established" right where they made an arrest pursuant to a duly enacted statute no court had ever held to be unconstitutional and pursuant to a warrant issued by a judicial officer.

The decision below does not create any conflict; the cases on which Petitioner relies to argue there is a conflict are easily distinguishable. Nor is this case a good vehicle for resolving the First Amendment issue raised by Petitioner. The Fifth Circuit did not decide that First Amendment question, which is difficult and complex. A decision on how the First Amendment applies in this case could have broad implications, considering the many contexts in which the government appropriately prohibits disclosure of information. This Court should not decide such an issue in the first instance, without the benefit of a lower court decision on the merits. And resolving the First Amendment issue in Petitioner's favor would not change the result in the case. Even if the statute violates the First Amendment, Respondents would still be entitled to qualified immunity because Petitioner's assertation of the right they violated was not clearly established at the time of the alleged violation.

## STATEMENT OF FACTS

Petitioner, a citizen journalist in Laredo, Texas, published a story to her Facebook page on April 11, 2017, about the death of a U.S. Border Patrol employee. Pet. App. at 4. Before publishing, instead of making an official request for information under the Texas Public Information Act, Petitioner sought to corroborate details of the story by contacting Barbara Goodman, a Laredo police officer. Goodman operated as a back-channel of information for Petitioner, confirming the name and occupation of the Border Patrol employee. *Id.* Goodman further confirmed the officer likely committed suicide by jumping from a bridge in Laredo. Pet. at 6–7. At the time of this contact, the incident was still under official investigation, and Goodman was not authorized to share non-public details of the incident. Pet. App. at 17. Based in part on Goodman's corroboration of the facts, Petitioner included in her story the name and occupation of the deceased officer and asserted he had likely committed suicide by jumping from a Laredo public overpass. *Id.* at 4.

Later, on May 6, 2017, Petitioner published a story including information about a fatal traffic accident, sharing the location of the accident and information about a family involved, including the family's last name. *Id.* at 107. Once again, before publishing the story, Petitioner sought to corroborate the details of the accident with Officer Goodman through unofficial channels of communication. *Id.*

During the summer of 2017, Respondent Deyanira Villareal, a Laredo police investigator, received a tip about Petitioner's back-channel

communications with Goodman. *Id.* at 5. A subsequent investigation revealed significant communication between Petitioner and Goodman, including text messages about both the April suicide and the May traffic accident. In the April texts, Petitioner asked Goodman about the name, age, and employment of the decedent. In the May texts, Goodman stated that the family was from Houston and that three children had been medevacked to San Antonio. *Id.* at 6–7.

Respondent Juan L. Ruiz, a Laredo police officer, then sought a warrant to arrest Petitioner for her efforts to obtain non-public information from Goodman in violation of Texas Penal Code § 39.06(c). Pet. App. at 6, 214. That statute makes it a felony if "a person . . . with intent to obtain a benefit or with intent to harm or defraud another . . . solicits or receives from a public servant information that (1) the public servant has access to by means of his office or employment; and (2) has not been made public." Tex. Penal Code § 39.06(c).

In the affidavits supporting the warrant application, Ruiz stated that the information requested by Petitioner and provided by Goodman "was not available to the public at that time." Pet. App. at 7. He further asserted that by posting this information online "before the official release by the Laredo Police Department Public Information Officer" and ahead of other news sources, Petitioner gained popularity on social media, which provided her the distinct benefit of additional exposure and traffic for these and any future publications. *Id.* Respondent Marisela Jacaman, an assistant district attorney,

approved the affidavits and they were submitted to the Webb County Justice of the Peace. *Id.* Finding probable cause, the judge issued a warrant for Petitioner's arrest for violation of § 39.06(c). *Id.*

Petitioner voluntarily surrendered, was arrested, and was released on bond the same day. *Id.* According to Petitioner, during her arrest, Respondents Enedina Martinez, Laura Montemayor, and Alfredo Guerrero—all Laredo law enforcement officers—surrounded her while laughing and taking pictures with their cell phones, showing "their animus toward [Petitioner] with an intent to humiliate and embarrass her." *Id.* at 7–8. Petitioner subsequently sought a writ of habeas corpus, which the Webb County district court granted in a bench ruling, holding that § 39.06(c) is unconstitutionally vague and therefore facially invalid. Pet. at 9.

On April 8, 2019, Petitioner filed suit in the United States District Court for the Southern District of Texas against the arresting officers and prosecutors under 28 U.S.C. § 1983, alleging among other things that her arrest violated the First Amendment.[1] Pet. App. at 8, 103. Petitioner's suit asserted multiple counts, including direct and retaliatory violations of her constitutional rights to free speech and freedom of the press. *Id.* at 8.

The district court dismissed the action as barred by qualified immunity. *Id.* While recognizing "the profound importance of the rights guaranteed to

[1] Petitioner also asserted violations of her Fourth and Fourteenth Amendment rights. Those claims were dismissed below, and Petitioner has not challenged the dismissals in this Court.

citizens," the district court held that Petitioner was unable to "overcome the claims of qualified immunity." *Id.* at 102.

A panel of the Fifth Circuit reversed the decision in part. *Id.* at 8. The court held that the defense of qualified immunity on the First Amendment claims was not applicable because the statute in question was "patently unconstitutional." *Id.* at 8–9. The panel decision was later replaced with a new opinion reaching the same conclusion. *Id.* at 9.

The en banc Fifth Circuit vacated the panel decision and granted rehearing. *Id.* at 189–90. On rehearing, the en banc Fifth Circuit affirmed the district court's judgment, holding that Respondents were entitled to qualified immunity because they did not violate clearly established law when they conducted the arrest. *Id.* at 3, 10. The en banc court concluded that Petitioner had failed to overcome qualified immunity for three separate reasons: (1) as an enacted statute, § 39.06(c) was presumptively constitutional; (2) no final decision of any court had held § 39.06 or any similar law unconstitutional; and (3) "the independent intermediary rule affords qualified immunity to the officers because a neutral magistrate issued the warrants for [Petitioner's] arrest." *Id.* at 22. The en banc court did not decide whether Respondents' actions violated the First Amendment. *Id.* at 11.

Judge Ho wrote the principal dissent. In his view, Respondents were not entitled to qualified immunity because, "if the First Amendment means anything, surely it means that citizens have the right

to question or criticize public officials without fear of imprisonment." *Id.* at 67.

## REASONS FOR DENYING THE PETITION

The Fifth Circuit's decision faithfully applied this Court's precedents and correctly concluded that Respondents did not violate clearly established law when they arrested Petitioner. The decision does not create any conflict with a decision of any other court. Moreover, this case presents a poor vehicle for resolving the First Amendment questions presented by the petition. Accordingly, review of the fact-bound decision below is not warranted.

### I. The Fifth Circuit followed the correct test as established by this Court for determining whether a right is "clearly established" and reasonably (and correctly) applied that test to the specific facts of this case.

#### A. Qualified immunity precludes liability for reasonable decisions, even if those decisions violate constitutional rights.

Qualified immunity shields public officials from suit unless their actions violate "clearly established . . . constitutional rights of which a reasonable person would have known." *Hope v. Pelzer*, 536 U.S. 730, 731, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The purpose of the qualified immunity doctrine is to protect public officials from liability where they make reasonable decisions in the course of performing their duties, even if those

decisions are later determined to have been unconstitutional. To that end, "[q]ualified immunity 'gives government officials breathing room to make reasonable but mistaken judgments.'" *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

Qualified immunity recognizes that "reasonable men make mistakes of law." *Heien v. North Carolina*, 574 U.S. 54, 61 (2014). Accordingly, qualified immunity protects an official's actions that violate a plaintiff's constitutional rights unless any "reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Qualified immunity thus provides "protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The determination whether a right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)); *accord District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (directing that rights be evaluated with a "high 'degree of specificity'" (quoting *Mullenix v. Luna*, 577 U.S. 7, 13 (2015))). Accordingly, a court must assess whether a right is clearly established "not as a broad general proposition, but in a particularized sense." *Reichle v. Howards*, 566 U.S. 658, 665 (2012) (citation and internal quotation marks omitted); *accord City of Tahlequah v. Bond*, 595 U.S. 9, 12 (2021) (per curiam) (stating that courts must not "define clearly established law at too high a level of

generality"). Although precedent with identical facts is not necessary, existing precedent must place the question "beyond debate" for the law to be clearly established. *al-Kidd*, 563 U.S. at 741.

### B. The Fifth Circuit correctly applied this Court's "clearly established" test.

The en banc Fifth Circuit accurately described this Court's "clearly established" test as meaning that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Pet. App. at 10 (quoting *Anderson*, 483 U.S. at 640). Not surprisingly, therefore, Petitioner does not dispute that the Fifth Circuit applied the correct legal standard. Instead, she argues that the Fifth Circuit misapplied that test to the specific facts of this case. That fact-bound challenge to the application of a correctly stated legal test does not warrant this Court's review.

In any event, the Fifth Circuit's determination was correct. Respondents arrested Petitioner for violating § 39.06(c) by soliciting Officer Goodman to obtain non-public information with the intent of using the information for Petitioner's benefit. Petitioner does not seriously dispute that her conduct fell within the terms of § 36.09(c).[2] Instead, Petitioner contends that her arrest clearly violated the First Amendment. Pet. at 16. It is true, of course, that the First

[2] In a few spots in the petition, Petitioner suggests that she did not violate § 39.06, *see, e.g.*, Pet. at 23 ("Villarreal alleged in detail how the Laredo officials offered no facts or circumstances showing why information about two public incidents was 'non-public.'"). But she does not make any argument to support those naked assertions.

Amendment limits the ability of law enforcement officials to make an arrest. But for at least three independent reasons, Respondents did not violate a clearly established First Amendment right by arresting Petitioner.

a. First, arresting Petitioner did not obviously violate the First Amendment because Respondents arrested Petitioner for violating a duly enacted Texas statute, Texas Penal Code § 39.06(c). State officers are entitled to presume that a state statute is constitutional. *See Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979) ("A prudent officer . . . should not [be] required to anticipate that a court would later hold the [law] unconstitutional."). That presumption rests on the recognition that, in enacting legislation, state legislators are bound by oath to support the Constitution. U.S. Const. art. VI, cl. 3 ("[T]he Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution[.]"). State officers may rely on the judgment of their legislators that a statute is constitutional rather than conducting independent analysis of that legal issue. Similar reasoning underlies the presumption of constitutionality that federal courts afford to state laws. *See Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1236 (2024) ("[T]his presumption reflects the Federal Judiciary's due respect for the judgment of state legislators, who are similarly bound by an oath to follow the Constitution.").

Permitting law enforcement officers to defer to the constitutional judgments of their state

legislatures allows them to focus on their job of enforcing the law rather than individually assessing the wisdom of the law. Officers typically should not be in the business of second guessing the constitutionality of laws duly enacted by the legislature and never held by a court to be unconstitutional. Such second guessing denies the legislature the respect it deserves and may lead to unequal enforcement as individual officers or local jurisdictions make different judgments. Instead, an officer may "enforce laws until and unless they are declared unconstitutional," *DeFillippo*, 443 U.S. at 38, without being put in the untenable position of choosing between being charged with undermining the will of the state legislature by not enforcing the law "and being mulcted in damages if he does" enforce the law, *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

This approach recognizes that "[s]ociety would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *DeFillippo*, 443 U.S. at 38. Accordingly, even if § 39.06(c) does violate the First Amendment, Respondents acted reasonably by assuming the constitutionality of a statute that no court had ever held to be unconstitutional.

b. Second, Respondents conducted the arrest pursuant to a warrant issued by a magistrate. That judicial decision to issue a warrant constitutes an independent determination that the search is supported by probable cause. *See* U.S. Const. amend. IV ("[N]o Warrants shall issue, but upon probable cause[.]"). The magistrate's decision to issue a

warrant implicitly rested on a conclusion that the arrest would comport with the First Amendment. As this Court has explained, when an arrest is for conduct involving speech, the magistrate must "examine what is 'unreasonable'" under the Fourth Amendment "in the light of the values of freedom of expression." *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).

Law enforcement officials act reasonably (and as they should) when they rely on the determination by a magistrate that an arrest would be lawful. A magistrate's determination is bound to be more reliable than that of law enforcement officers, both because the "magistrate is more qualified than the police officer to make a probable cause determination," *Malley*, 475 U.S. at 346 n.9, and because the magistrate in making his determination faces less pressure than "the hurried . . . law enforcement officer engaged in the often competitive enterprise of ferreting out crime," *United States v. Leon*, 468 U.S. 897, 913–14 (1984) (internal quotation marks omitted). Indeed, "the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner" when conducting an arrest. *Messerschmidt*, 565 U.S. at 546.

To be sure, in *Malley v. Briggs*, this Court concluded that an officer who conducts an arrest pursuant to a warrant is not entitled to qualified immunity if the warrant is based on an affidavit recounting facts that no reasonable officer would have thought supported probable cause. *See Malley*, 475 U.S. at 346 n.9. In reaching this conclusion, the Court

reasoned that, although magistrates should approve only warrants supported by probable cause, there is a risk that "a magistrate, working under docket pressures, will fail to perform as a magistrate should." *Id.* at 345–46. Regardless, "it goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable," unless "no officer of reasonable competence would have requested the warrant." *Id.* at 346 n.9.

While that reasoning applies to some constitutional protections—those about which officers of reasonable competence can be expected to have knowledge—it does not extend to determinations about the scope of the First Amendment. Law enforcement officers receive training on probable cause and other aspects of criminal justice law and apply that training every day. *See, e.g.*, *Course Curriculum Materials and Updates*, Tex. Comm'n on Law Enf't, https://www.tcole.texas.gov/course-curriculum-materials-and-updates (last visited Aug. 28, 2024) (listing curriculum of courses for Texas law enforcement officers). But they cannot reasonably be expected to have expertise in First Amendment law—one of the most complicated areas of constitutional law. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 515 (1996) ("[First Amendment] doctrine has only become more intricate, as categories have multiplied, distinctions grown increasingly fine, and exceptions flourished and become categories of their own."). Magistrates, who do have legal training and judicial

experience, are significantly better situated than law enforcement officers to evaluate the meaning of the First Amendment.

Although the award of a warrant means that qualified immunity bars all of Petitioner's claims, it is unquestionably fatal to Petitioner's claim that her arrest was unlawful retaliation, as Petitioner asserted. Pet. at 36 n.10. At the time of the arrest, prevailing law in the Fifth Circuit held that conducting an arrest pursuant to a warrant is lawful even if the official acted with malice in procuring the warrant, because the decision by the magistrate "breaks the causal chain and insulates the initiating party." *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982). Based on that holding, a reasonable officer would not think that making an arrest pursuant to a warrant could be unlawful retaliation; clearly established law in the circuit at the time was exactly to the contrary.

c. Third, at the time of the arrest, no decision cast doubt on the constitutionality of § 39.06(c). No court had held the Texas law to violate the First Amendment. Indeed, even the Texas court that invalidated the statute *after the arrest* did so on the ground that the statute was overly vague in violation of the Due Process Clause, not that it violated the First Amendment. *See* Pet. App. at 8. Nor had any decision of this Court or of the Fifth Circuit held that the First Amendment protects soliciting information protected from disclosure from government officials. Consequently, even if arresting Petitioner did violate the First Amendment, the law

at the time of the arrest did not clearly establish that First Amendment right.

Nevertheless, Petitioner argues that Respondents are not entitled to qualified immunity because the arrest "obviously" violated the First Amendment. Pet. at 21–22. In Petitioner's view, the First Amendment so plainly protects journalists' efforts to obtain information from government officials that Respondents should have disregarded both the determination of the state legislature that the statute was constitutional and the warrant issued by the magistrate. Petitioner may fervently believe the First Amendment obviously protected her conduct, but the ardor of that belief does not make it accurate—a phenomenon *The Onion* has expertly captured. *Area Man Passionate Defender of What He Imagines Constitution to Be*, The Onion (Nov. 14, 2009), https://www.theonion.com/area-man-passionate-defender-of-what-he-imagines-consti-1819571149. In fact, based on an objective review of the relevant law, the First Amendment did not obviously preclude the arrest in this case.

d. The First Amendment protects freedom of speech and of the press. These protections limit the ability of the state to regulate what a journalist publishes. For example, a state cannot restrict publication of information simply because that information was illegally obtained. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam).

By contrast, the state has significant leeway in regulating the means by which a journalist may lawfully obtain information. "[T]he First Amendment

does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). A state may, for example, prohibit its employees from disseminating information, exclude the press from grand jury proceedings, and prohibit journalists from entering government property generally not open to the public. *Id.* at 685–86.

The Texas law at issue here is of this latter sort. It does not seek to restrict what a journalist publishes, and no one is arguing that Petitioner could be punished for publishing the information she unlawfully obtained. Instead, § 39.06(c) limits the way in which anyone, including a journalist, may obtain non-public information. Specifically, the law prohibits soliciting non-public information from public employees if that individual intends to use the information for her own benefit. Tex. Penal Code § 39.06(c). The law is a restriction on how a person may gather information, not on what the person says or publishes. Section 39.06(c) therefore does not obviously violate the First Amendment.

To be sure, § 39.06(c) does limit speech insofar as it restricts solicitation, a form of speech. *United States v. Williams*, 553 U.S. 285, 298 (2008). But this Court has repeatedly recognized the First Amendment provides no protection for "solicitation . . . that is intended to induce or commence illegal activities." *Id.* The solicitation prohibited by § 39.06(c) falls squarely into that category of unprotected speech. Texas law "prohibits disclosure" by public servants of various types of sensitive information, *In re Tex. Dep't of Fam. & Protective*

*Servs.*, No. 04-24-00016, 2024 WL 1748050, at *7 (Tex. App. Apr. 24, 2024), such as information that may "interfere with the detection, investigation, or prosecution of crime" in an investigation, Tex. Gov't Code § 552.108(a)(1), reports about traffic accidents, Tex. Transp. Code § 550.065, and records concerning children, *e.g.*, Tex. Fam. Code §§ 261.201–203. Section 39.06(c) criminalizes solicitation intended to induce a public official to violate those restrictions.

Contrary to Petitioner's assertion, Pet. at 22, nothing in *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979), holds that the First Amendment protects the right to use "routine newspaper reporting techniques" to gather information. Pet. at 22. In *Daily Mail*, the Court struck down a state law prohibiting publication of a juvenile's name without a court order, stating that journalists generally have a right to publish information "lawfully obtained." 443 U.S. at 104. *Daily Mail* thus did not recognize a right to gather information. It recognized only the right to publish information. *Id.* Indeed, the Court's statement that the First Amendment protects publication of only "lawfully obtained" information suggests that the First Amendment poses no barrier to the state's ability to restrict the way in which information may be obtained. *Id.*; *see also Branzburg*, 408 U.S. at 681–82 (noting that "reporters remain free to seek news from *any source by means within the law*" (emphasis added)). Petitioner was not arrested for publishing information; she was arrested for unlawfully seeking information.

e. Even if the solicitation prohibited by § 39.06(c) did fall within the scope of the First

Amendment, a reasonable officer could still conclude that the First Amendment did not prohibit arresting Petitioner. As this Court has explained, First Amendment protections are not absolute. The government has significant leeway to regulate the time, place, and manner of speech. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). And the government may even regulate the content of otherwise protected speech if doing so is necessary to protect a compelling government interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

i. Time, place, and manner regulations are lawful if they satisfy intermediate scrutiny—that is, if "they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Playtime Theatres, Inc.*, 475 U.S. at 47. Here, a reasonable officer could conclude that § 39.06(c) satisfies this standard.

Texas law establishes a careful structure for obtaining information from government bodies. For example, a person may submit an application to an "officer for public information." Tex. Gov't Code § 552.221. If the requested information is public, the officer must promptly provide the information or make the information available for inspection. *Id.* § 552.221(b)–(c). But if the officer determines that the information may fall within an exception to the requirement of disclosing public information, she "must ask for a decision from the attorney general about whether the information is within that exception." *Id.* § 552.301. If the information falls

within one of the exceptions, the officer may not disclose it. *See generally id.* § 552.352.

These procedures protect the substantial government interest in ensuring both that the government promptly discloses information that should be disclosed and that it does not disclose confidential information protected from disclosure. Soliciting information from a government official that the official may not lawfully disclose circumvents the legitimate structure requiring inquiries to be directed through the public information officer. Prohibiting such solicitation is therefore a valid time, place, and manner restriction—or, at the very least, a reasonable officer could believe it to be so, meaning the officer is entitled to qualified immunity whether the restriction is valid or not.

ii. Even if § 39.06(c) were viewed as a limitation on the content of speech, a reasonable officer still could have concluded that enforcing it against Petitioner was consistent with the First Amendment. In particular, although the First Amendment presumptively protects the content of speech, the government may nevertheless lawfully adopt a regulation "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163.

A reasonable officer could conclude that the Texas law satisfied this standard. Texas has a strong interest in protecting non-public information. Even absent publication, such information may be misused to interfere with investigations, invade privacy, and cause distress to others. The likelihood of inappropriate dissemination or misuse is particularly acute when a person acquires the information with

the intent of using it for a personal benefit. And that is what happened here, as Petitioner's unlawful acquisition and subsequent dissemination of the border patrol officer's name and details of his death no doubt, at a minimum, invaded the privacy of the officer's family and caused the family distress.

An effective way of preventing people from acquiring non-public information to use for their own benefit is by prohibiting requesting such information from public officials for personal benefit. It was therefore entirely reasonable for an officer to believe that the First Amendment did not prohibit enforcing Texas's law against Petitioner, even if that belief were later determined to be mistaken.

## II. The Fifth Circuit's decision creates no conflict warranting this Court's review.

Petitioner argues that the Fifth Circuit's decision conflicts with decisions of the Sixth, Eighth, and Tenth Circuits. Pet. at 24. Not so.

In *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007), the Sixth Circuit held that an officer was not entitled to qualified immunity when he arrested a person for saying "God damn" while addressing the township board. *Id.* at 352. The *Leonard* court concluded that "no reasonable officer would find that probable cause exists to arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) unless and until the speaker is determined to be out of order by the individual chairing the assembly." *Id.* at 361.

The speech the Sixth Circuit deemed protected by the First Amendment was the expression of frustration at a town hall meeting. Nothing in *Leonard* suggests that the First Amendment protects efforts to induce a government official to violate the law. *Leonard* accordingly poses no conflict with the Fifth Circuit's decision in this case.

The Eighth Circuit case identified by Petitioner, *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014), similarly poses no conflict with the decision below. In *Snider*, the Eighth Circuit held that an officer was not entitled to qualified immunity for arresting a person who had desecrated an American flag to protest the United States. *Id.* at 1157. The court reasoned that no reasonable officer could have thought the arrest was constitutional in light of *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990), both of which held specifically that the First Amendment protects the burning of an American flag in protest. *Snider*, 752 F.3d at 1154–55.

Here, by contrast, no prior decision of this Court holds that the First Amendment protects solicitation of protected information from government officials. Nor could the solicitation in this case conceivably fall within the holdings of *Johnson* and *Eichman*. Here, the solicitation was not the expression of an opinion, but rather an effort to obtain information.

For similar reasons, neither of the Tenth Circuit decisions Petitioner cites creates any conflict. Both of those decisions involve arrests of people expressing opinions about others. In *Jordan v. Jenkins*, 73 F.4th 1162 (10th Cir. 2023), the court held that an officer

was not entitled to qualified immunity for arresting a person for criticizing the police, reasoning that "the First Amendment right to criticize police is well-established." *Id.* at 1171. Similarly, in *Mink v. Knox*, 613 F.3d 995 (10th Cir. 2010), the court held that officials who arrested a person for publishing an editorial parodying a professor were not entitled to qualified immunity, reasoning that "it was clearly established . . . that . . . parody and rhetorical hyperbole . . . enjoys the full protection of the First Amendment." *Id.* at 1011. Needless to say, Petitioner's efforts to obtain non-public, confidential information from the government were not parodies or criticisms.

The Fifth Circuit's decision accordingly poses no conflict warranting this Court's review.

## III. This case is a poor vehicle for the Court to review the First Amendment issue presented.

Petitioner argues that this Court should hold Respondents in fact violated the First Amendment by arresting Petitioner for violating § 39.06(c). Pet. at i. Indeed, to hold that the officers are not entitled to qualified immunity, the Court must rule on the merits of the First Amendment issue, since such a holding would require both a determination that the arrest violated the First Amendment and a further determination that the law showing the arrest to be unlawful was clearly established at the time of the arrest.

But the Fifth Circuit did not decide the First Amendment issue on the merits. Pet. App. at 11.

Instead, the Fifth Circuit held that Respondents are entitled to qualified immunity because "[n]o controlling precedent gave the defendants fair notice that their conduct, or [§ 39.06(c)]," violates the First Amendment. *Id.* This Court should not decide the First Amendment issue in the first instance. *See e.g.*, *Trump v. United States*, 144 S. Ct. 2312, 2339 (2024).

This Court should be particularly hesitant to decide the First Amendment issue here because the decision could have a much broader impact than to decide the constitutionality of § 39.06(c) as applied to Petitioner's arrest. Statutes seeking to protect legitimate governmental interests by prohibiting efforts to obtain non-public information in certain contexts are common. Examples include prohibitions on seeking classified information, prohibitions on disclosing personally identifiable information, and testimony before grand juries. *See e.g.*, 18 U.S.C. § 798 ("Whoever . . . makes available to an unauthorized person . . . classified information . . . [s]hall be fined under this title or imprisoned not more than ten years, or both."); 5 U.S.C. § 552a(i)(1) ("Any officer . . . who . . . willfully discloses [individually identifiable information protected from disclosure] . . . to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000."). And a person who solicits information or otherwise assists in a prohibited disclosure may be charged as a principal for aiding and abetting the violation. *See* 18 U.S.C. § 2 ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). The Court should have the benefit of a lower court decision

before addressing the merits of such an important issue.

To make matters worse, resolving the First Amendment issue will not affect the outcome of this case because Respondents will be entitled to qualified immunity even if their conduct did violate the First Amendment. Nine Fifth Circuit judges (and a district court judge) concluded that the arrest did not violate any clearly established law. Under this Court's qualified immunity cases, how can it be that government officials may be held personally liable for reaching the same conclusion as those ten judges?

The First Amendment issue *might* present some close questions but Respondents' right to qualified immunity does not. This Court should follow its generally wise usual practice of not unnecessarily resolving constitutional questions. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) ("Our usual practice is to avoid the unnecessary resolution of constitutional questions."); *see Ashwander v. TVA*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring).

## CONCLUSION

The petition for a writ of certiorari should be denied.

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