CORPORATE DISCLOSURE STATEMENT

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slavery, racism, and abuses of authority in the South. This problem took two forms.

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

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:

uppose 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

Cong. Globe, 42d Cong., 1st Sess. 333 (1871).

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

defense was essentially untouchable by a reviewing court.

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 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

ARGUMENT

I. Section 1983 Was Enacted to Promise to Protect the Speech of All People, Even Those Who Criticize Authorities.

A. 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 , 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 reasoning that the absence of another factually on-point decision doomed 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 safeguards.

press; or the right of the people peaceably to assemble, and to petition the

political and social changes desi *Roth v. United States*, 354 U.S.

1075 (2021). Before the Civil War, Congress instituted a gag rule on abolitionist petitions . 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 Fred

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

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,

have been sealed. . . . Subm *Id.*

(1871). Recognizing the need for some means of enforcing the rights newly

of the Fourteenth Amendment to the Constitution of the United States, and for Other

U.S.C. § 1983.

The immediate catalyst

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.

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 while they are performing their duties.

II. 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.

arresting and seeking to prosecute a local journalist for merely asking a police officer a question the panel dissent asserts that 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

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

the orders of his superiors

would have been *Little v. Barreme*, 6 U.S. 170, 178-79 (1804);

accord Tracy v. Swartwout, 10 U.S. 80, 81 (1810).

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

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. a case arising out of

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*, 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 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).

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,

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

Tracy, 35 U.S. at 95.

* * *

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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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.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 12th day of December, 2022.

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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 tha612 7366c1