20-40359

In The

United States Court of Appeals

For The Fifth Circuit

PRISCILLA VILLARREAL,

,

v.

C

[illegible]

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those listed in the parties' briefs, have an interest in the outcome of this case.

Amicus Curiae
Institute for Justice

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Jaba Tsitsuashvili (Institute for Justice)
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Patrick Jaicomo (Institute for Justice)
Arif Panju (Institute for Justice)

Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that amicus curiae Institute for Justice is

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SUMMARY OF ARGUMENT

This case asks whether qualified immunity shields the defendants from suit for (1) a premeditated arrest (2) based on (i) the plaintiff asking questions (ii) to a government official (iii) about nonpublic facts (iv) for some tangible or intangible benefit. Simply stated: Did reasonable officials have fair warning that the First and Fourth Amendments prohibit arresting a person for peacefully asking questions to a government official for quintessential journalistic purposes?

Of course they did. And under both the modern doctrine and the original meaning of Section 1983, qualified immunity does not shield the defendants' obvious constitutional violations, even if laundered through state law, and especially because they were premeditated.

Indeed, granting immunity here would not only reward the knowing punishment of speech and journalism, but also: countenance government control of speech and information; absurdly impute obscure statutory knowledge to ordinary individuals while allowing government officials to plead ignorance of the First Amendment; and tell officials of all stripes that they can weaponize bloated criminal codes to target and upend the lives of disfavored persons, groups, or views.

II. Indeed,

ARGUMENT

I. As a matter of law and policy, qualified immunity does not excuse obvious constitutional violations—even if laundered through state law, and especially if premeditated.

Qualified immunity is a legal fiction, but its scope remains grounded in the facts of each case. Sometimes those facts present government misconduct so obviously unconstitutional that immunity cannot attach, even without a direct factual analog in past cases, and even if a statute purports to authorize the government conduct at issue.

This

fundamental constitutional rights while weaponizing bloated criminal codes to punish and harm anyone they dislike.

A. Qualified immunity is a fair warning standard; it does not countenance obvious constitutional violations.

In assessing government conduct, judges do not "exhibit a naiveté from which ordinary citizens are free." , 139 S. Ct. 2551, 2575 (2019) (citation omitted). Accordingly, qualified immunity does not shield what reasonable officials should recognize is "obvious[ly]" unconstitutional, even without combing the federal reporter. , 536 U.S. 730, 737–46 (2002).

For all its flaws, section II, the judge-invented doctrine is not a "license to lawless conduct." , 457 U.S. 800, 819 (1982). "Where an official to know that certain conduct would violate . . . constitutional rights, he to hesitate." (emphases added).

So, as this Court recognizes, the "salient question" is "fair warning," not "danger[ously] . . . rigid[] overreliance on factual similarity" to past cases. , 536 U.S. at 741–42; , 845 F.3d 580, 600 (5th Cir. 2016) ("central concept" is "fair warning") (quoting);

, 20 F.4th 1020, 1034 (5th Cir. 2021) ("notable factual distinctions" do not preclude "reasonable warning") (quoting).

Some fair warning inquiries are nuanced. For example: In , the Supreme Court

Instead of conducting a "scavenger hunt" for factually identical cases, , 817 F.3d 1198, 1204 (10th Cir. 2016) (citation omitted), the panel majority rightly asked: What did Villarreal do, and did reasonable officials have fair warning that arresting her for it would violate the First and Fourth Amendments?

It correctly answered: "If the First Amendment means anything, it surely means that a citizen journalist has the right to ask a public official a question, without fear of being imprisoned." , 44 F.4th at 367.

For reasonable officials to reach that conclusion, passing familiarity with the phrase "abridging the freedom of speech, or of the press" (Amendment I) and our national culture should have sufficed. But "general constitutional rule[s] already identified in the decisional law" also made it obvious. , 536 U.S. at 741. It is axiomatic that "there is 'an to gather news from by means within the law.'"

information is

every reasonable official that the Constitution prohibits arresting a person for asking questions to a government employee peacefully and uncoercively.

C. Using

1. The Supreme Court has explained (under the exclusionary rule) that officials cannot avoid the consequences of constitutional violations by asserting reliance on a statute "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." , 443 U.S. 31, 38 (1979).

Under similar logic, at least seven circuits recognize that reliance on "a statute [that] authorizes conduct that is patently [illegible]

second-guess the legislature and refuse to enforce an unconstitutional statute—or face a suit for damages." , 406 F.3d at 1232–33.

Courts apply this rule to the criminalization of speech, , 477 F.3d at 361, and have held that "an officer need not understand the niceties of [constitutional caselaw] to know that [a statute] is unconstitutional," , 406 F.3d at 1233. IJ Amicus, 2020 WL 5751737, at *14–16.

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statute satisfy probable cause based on protected speech. , 443 U.S. at 39; , 44 F.4th at 375 (collecting cases).

3. But the Court need not go so far. It can simply hold (as the panel

"notwithstanding the existence of probable cause" under section 39.06(c). , 28 F.4th 54, 65 (9th Cir. 2022).

4. Finally, the statute's "benefit" requirement does not save the defendants from that conclusion. Whether facially or as applied, it still criminalizes routine newsgathering, which is not done for no reason—indeed, is done for some financial or economic gain.

The panel majority construed the facts as Villarreal seeking "not to obtain economic gain, but to be a good journalist," taking her conduct out of section 39.06(c)'s reach altogether. , 44 F.4th at 372–73. But arresting her in these circumstances would patently criminalize routine, everyday journalism—which the First Amendment obviously prohibits any statute from doing. , 443 U.S. at 39; , 848 F.3d 384, 393–94 (5th Cir. 2017).

As the panel majority held, that makes "the Fourth Amendment violation alleged here" just as "obvious for purposes of qualified immunity" as the First Amendment violation. , 44 F.4th at 375.

Therefore, there remains no close call as to the unconstitutionality of the defendants' conduct. These are precisely the circumstances in

which they "could be expected to know that certain conduct would violate

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E. Granting immunity here would be dangerous to a free society and disserve qualified immunity's purported public policy justification.

Finally, granting immunity for the defendants' misgdeEanIB-0 9 8.13 (oc).5 (ocn..3 4

And it

Because "the police almost always will have probable cause to arrest someone for something," Paul Larkin,

, 36 Harv. J. L. Pub. Pol'y 715, 720 (2013), granting immunity based on mechanic invocations of local laws would weaponize them against disfavored persons, groups, or views and allow government officials to wreck lives with impunity.

At the very least, it would tell government officials they can "duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the to behave badly" in a particular way or under a particular statute. , 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part).

* * *

In short: Using qualified immunity to launder the defendants' misconduct here through a rote search for identical caselaw or a mechanical probable cause analysis under section 39.06(c) would be to hold that reasonable government officials could—with time to consult Amendment I

Countenance what it may, the qualified immunity regime does not, thankfully, countenance that. Indeed, "with so many voices critiquing current law as insufficiently protective of constitutional rights, the last

(forthcoming), https://tinyurl.com/QI-Flawed-Fnd. It directed that officials "shall,

, be liable." Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (emphasis added).

2. The meaning of this additional text: State officials were never meant to be able to hide behind state laws—including positive statutory laws or common law immunities—to escape liability under Section 1983.

(i) The meaning of "law, statute, ordinance, [or] regulation" is essentially self-explanatory.

(ii) The 1871 Congress would have understood "custom or usage" to mean "common law," which was the source of "the vast majority of immunity doctrine" available to state actors. Reinert, , at 167–69.

(iii) "Notwithstanding" means "[w]ithout opposition, prevention, or obstruction from," or "in spite of." Webster's Complete Dictionary of the English Language 894 (1886); , 137 S. Ct. 929, 939 (2017) (ordinary meaning of "notwithstanding" is "in spite of" or "without prevention or obstruction from or by"); Bryan A. Garner, Garner's Modern English Usage 635 (4th ed. 2016) ("This usage [of notwithstanding] has been constant from the 1300s to the present day.").

Taken together, this "Notwithstanding Clause" (which the Supreme Court has never assessed) demonstrates that Congress intended the liability created by Section 1983 to apply despite the operation of state laws, including state statutes and common law immunities.

That original meaning reinforces the impropriety of shielding the defendants from liability here based on their invocation of the Texas Penal Code. section I.C.

2. The removal of the "Notwithstanding Clause" from Section 1983 did not change the statute's meaning, because the removal was not the result of "positive lawmaking." Reinert, , at 169.

Rather, the clause was dropped when Congress gathered federal laws in one place for the first time, in compiling the Revised Statutes of 1874. Congress recognized that condensing all federal laws into one

So the omission of the Notwithstanding Clause—with no indication

That is why a growing, cross-ideological chorus of Supreme Court justices,[6] federal judges,[7] and constitutional scholars[8] are sounding the

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[6] . , , 142 S. Ct. 2571, 2571–73 (2022) (mem.) (Sotomayor, J., with Breyer and Kagan, JJ., dissenting from denial of certiorari); , 140 S. Ct. 1862, 1862–65 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari) (quoted in main text,); , 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (quoted in main text,); , 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (quoted in main text,); - , 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume"); , 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity . . . we have diverged to a substantial degree from the historical standards.").

[7] ,

alarm about qualified immunity's abrogation of Section 1983 and its corrosive effects on the ability of the people to hold government officials accountable for the violence and other constitutional harms they inflict.

Justice Thomas has expressed "strong doubts about [the] qualified immunity doctrine" several times, arguing there is likely no historical justification for either "the objective inquiry into clearly established law that our modern cases prescribe" or "a one-size-fits-all, subjective immunity based on good faith." , 140 S. Ct. 1862, 1864–65 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari). He explained that "we hav0(la)10wo(d)11 Tc 0.116 Tw -32TJ-0.00411.3 (b)4.4 (e)8-0.0 by the satute [and] have 'coletey r6T (1t)-3v00.004mulate qullifie i ((l604m)1.21 along principles 0(la)1not at all embodied in the common'" law.

More voices decrying qualified immunity come from this Court. Judge Ho explained that "there is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases." , 946 F.3d at 801 (Ho, J., concurring in the judgment in part and dissenting in

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2022, I caused the foregoing En Banc Brief of Amicus Curiae Institute for Justice to be filed electronically with the Clerk of the Court using the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

December 12, 2022 /s/ Jaba Tsitsuashvili

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,492 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)ff -2.6 58.6 (u)-8.4 (d)5.3 (-2.5 (3 (-2.55 (y)-5.7 (p)-2.(3 (-2.3 (s)