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 TREVINO, JR.; JUAN L. RUIZ; DEYANRIA 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, Laredo Division, Civil Action No. 5:19-CV-48

OPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* OF THE TEXAS PRESS ASSOCIATION, TEXAS ASSOCIATION OF BROADCASTERS, FREEDOM OF INFORMATION FOUNDATION OF TEXAS, BRECHNER CENTER FOR FREEDOM OF INFORMATION, NEWS LEADERS ASSOCIATION, AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF APPELLANT PRISCILLA VILLAREAL

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INTRODUCTION

Amici curiae the Texas Press Association, Texas Association of Broadcasters, Freedom of Information Foundation of Texas, Brechner Center for Freedom of Information, News Leaders Association, and Society of Professional Journalists ("Amici"), through their undersigned counsel, move this Court for leave to file a Brief of *Amicus Curiae* in support of Appellant, Priscilla Villareal. *See* FED. R. APP. P. 29. A copy of the Brief of *Amici Curiae* is attached to this motion.[1]

IDENTITY AND INTEREST OF AMICI CURIAE

Amici are organizations that represent the interests of journalists and other citizens who rely on access to information from government agencies in fulfillment of their professional and civic responsibilities. They share a concern for the ability to gather information from public employees without fear of retaliatory arrest and prosecution, which the decision below puts at risk.

The Texas Press Association ("TPA") is a non-profit industry association representing nearly 500 daily and weekly newspapers in Texas, each of which upholds a strong tradition of journalistic integrity and community service. TPA, founded more than 130 years ago, performs numerous services on behalf of its

[1] Pursuant to FED. R. APP. P. 29(a)(4), Amici certify that counsel for Amici authored this brief in whole; that no counsel for a party authored this brief in any respect; and that no person or entity, other than amicus and its counsel, contributed monetarily to this brief's preparation or submission.

members, including advocating legislation relating to free speech and press and taking legal action to protect the First Amendment and open government.

The Texas Association of Broadcasters is a non-profit association that represents more than 1,300 television and radio stations in Texas with a tradition of community-oriented, free, over-the-air broadcasting. The Texas Association of Broadcasters was founded in 1953 and performs numerous services on behalf of its members, including advocating legislation relating to and affecting radio and television broadcasters and defending open government, as well as publishing guidebooks on various legal issues, including access to public information.

The Freedom of Information Foundation of Texas is a nonprofit organization that works to encourage a greater appreciation, knowledge and understanding of the First Amendment and helps to ensure that the public's business is conducted in public. Since its formation in 1978, the Foundation has helped citizens access government meetings and documents. The non-partisan Foundation acts as a statewide information clearinghouse and offers guidance and assistance on FOI-related issues through a network of attorneys and through public seminars and conferences.

The Brechner Center for Freedom of Information (the "Brechner Center") at the University of Florida exists to advance understanding, appreciation and support for freedom of information in the state of Florida, the nation and the world. The

Center's focus on encouraging public participation in government decision-making is grounded in the belief that a core value of the First Amendment is its contribution to democratic governance. Since its founding in 1977, the Brechner Center has served as a source of academic research and expertise about the law of gathering and sharing information, and the Center regularly appears as a friend-of-the-court in federal and state appellate cases nationwide where the public's right to informed participation in government is at stake. The Center is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

The News Leaders Association (formerly the American Society of News Editors and AP Managing Editors) is a nationwide membership organization of newsroom managers that aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate

the next generation of journalists, and protects First Amendment guarantees of freedom of speech and press.

AUTHORITY TO FILE BRIEF AMICI CURIAE

FED. R. APP. P. 29(a)(3) and its counterpart, 5TH CIR. R. 29(a)(3), contemplate the filing of amicus briefs where the participation of amici is "desirable and [where] the matters asserted are relevant to the disposition of the case." The Brief of *Amici Curiae* is desirable in this case for two primary reasons. First, while the case below specifically involves the welfare of an unconventional "citizen journalist" who shares information through the Facebook social networking platform, *Amici* can speak to the broader concern of professionals across the field of newsgathering whose ability to inform the public could be adversely affected by a ruling affirming the erroneous decision below. Second, because the decision below presents various factual and legal issues, the parties' ability to address any one of them in detail is limited. Amici are able to focus their attention specifically on the critical issue of the clearly established First Amendment right to gather and publish newsworthy information furnished by government employees without retaliation, and why that right is so central to the ability of Amici's constituents to discharge their professional and civic duties. Thus, the Brief is relevant and helpful to the Court's consideration of this case.

WHEREFORE, *amici* respectfully request for the Court to issue an order granting leave to file a Brief of *Amici Curiae* in support of Appellant, Priscilla Villareal.

DATED: September 8, 2020

Respectfully submitted,

HAYNES AND BOONE, LLP

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of FED. R. APP. P. 27(d)(2)(A) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 911 words.

2. This document 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 this document has been prepared in a proportionally spaced typeface using Microsoft Word, version 2016 in 14 pt. Times New Roman.

/s/ Laura Lee Prather
Laura Lee Prather

CERTIFICATE OF CONFERENCE

Pursuant to 5th Cir. R. 27.4, Counsel for *Amici Curiae* conferred with Counsel for Appellant and counsel for Appellees concerning this motion. Appellant consents to the appearance of Amici; however, counsel for Appellees indicated that Appellees do not consent.

/s/ Laura Lee Prather
Laura Lee Prather

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September, 2020, a copy of the foregoing has been served upon counsel for all parties to this proceeding as identified below through the court's electronic filing system as follows:

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STATEMENT OF INTEREST

This brief is filed on behalf of the Texas Press Association, the Texas Association of Broadcasters, the Freedom of Information Foundation of Texas, the Brechner Center for Freedom of Information, News Leaders Association, and Society of Professional Journalists. As set forth more fully in the accompanying Motion for Leave to File Brief of Amici Curiae, Amici are six organizations that represent the interests of journalists and other citizens who rely on access to information from government agencies in fulfillment of their professional and civic responsibilities. They share a concern for the ability to gather information from public employees without fear of retaliatory arrest and prosecution, which the decision below puts at risk.

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), none of the *Amici* has a parent corporation or issues stock. Consequently, there exists no publicly held corporation which owns 10% or more of the stock of any of the *Amici* participants. Amici's Motion for Leave to File Brief of Amici Curiae is being filed in conjunction with this brief.[1]

[1] Pursuant to Fed. R. App. P. 29(a)(4), Amici certify that counsel for Amici authored this brief in whole; that no counsel for a party authored this brief in any respect; and that no person or entity, other than amici and their counsel, contributed monetarily to this brief's preparation or submission.

I. INTRODUCTION AND BACKGROUND

This is a case about whether police officers can arrest and charge journalists for doing what any reasonable person knows to be the routine business of newsgathering – asking government employees for information – and escape responsibility for misusing their official authority by claiming ignorance. The decision below leaves journalists dangerously exposed to harassment – or worse – by law enforcement officers intent on suppressing unfavorable coverage.

Amici will not reiterate in detail the facts extensively set forth in the District Court's opinion and in the parties' briefs. In short, this case involves a campaign of harassing behavior by representatives of the City of Laredo Police Department directed toward a citizen journalist/blogger, Priscilla Villarreal, whose aggressive coverage of crime news in the Laredo community gained her nationwide recognition[2] but earned her the enmity of some within the Laredo Police Department. The Complaint sets forth a pattern of retaliation against Villarreal culminating in her arrest on spurious charges of violating a statute, Tex. Penal Code § 39.06(c) that was intended to penalize corrupt behavior like bid-rigging and cannot plausibly be applied to routine acts of journalistic fact-gathering.[3] Because this arrest is the most

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[2] *See* Derek Hawkins, *Popular Texas blogger scooped police on a story. They charged her with 2 felonies, searched her phone records*, THE WASHINGTON POST, Dec. 22, 2017.

[3] Tex. Penal Code § 39.06(c) provides that a person commits the offense of "misuse of official information" if, "with intent to obtain a benefit or with intent to

tangible and serious of the retaliatory acts – and the one that portends the greatest danger for other journalists, watchdogs and commentators – Amici will focus on the erroneous dismissal, on qualified immunity grounds, of Villarreal's First Amendment claim arising out of the unfounded arrest.

The (since-dismissed) indictment alleged that Villarreal violated Sec. 39.06(c) because she asked a police officer, Barbara Goodman, for information, without going through the formalities of filing a Texas Public Information Act request, about the high-profile death of a U.S. Border Patrol agent, for purposes of obtaining the "benefit" of notoriety and popularity for her Facebook page, which she uses as an informal news-blogging platform. The sum total of the "wrongdoing" of which Villarreal was accused was asking a government official about a matter of undeniable public concern and importance – the death of a law enforcement officer – that inevitably was soon to be publicly announced. The purportedly wrongfully obtained information – the identity of the deceased federal agent – was newsworthy information that the First Amendment entitled Villarreal to gather and publish. The court below erred in finding that a reasonable officer could have been confused about the illegality of arresting a journalist for simply asking a government official for

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harm or defraud another, he 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." In a March 28, 2018, bench ruling, a Webb County District Court judge found the statute unconstitutionally vague so that the prosecution of Villarreal could not go forward. *See* Dist. Ct. Op. at 6.

information. To the contrary, clearly established law protects the constitutional right of journalists to publish leaked information, even if the leaker has arguably acted improperly. This Court should say so unequivocally.

II. DISCUSSION AND CITATION TO AUTHORITY

A. The "Misuse of Official Information" Statute Plainly Does Not, and Constitutionally Cannot, Apply to a Journalist Gathering News

A half-century's worth of caselaw firmly establishes the First Amendment right to publish information obtained from government sources – even if those sources themselves breached a duty or even broke the law. One of the most famous cases in all of First Amendment jurisprudence, *New York Times Co. v. United States*, 403 U.S. 713 (1971), stands for exactly this proposition: That a news organization has a right to publish newsworthy information furnished by a government source (in that case, a contractor who authored the famous "Pentagon Papers" history of the Vietnam war), even when the source breached confidentiality to share the information. Appellants cannot feign ignorance of this foundational constitutional principle, which the Supreme Court has reaffirmed repeatedly, striking down statutes such as Tex. Penal Code Ann. § 39.06 when used to criminalize routine acts of gathering and publishing news. *See Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 106 (1979) (First Amendment prohibits a state from criminalizing journalistic publication of a minor's name obtained in the course of a legal proceeding); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (First Amendment precludes state from imposing

even civil remedies for the truthful publication of name of rape victim obtained from police records). The *Florida Star* case expressly recognizes the First Amendment right of journalists to use information gathered from police even if – as in that case – the police made a mistake and violated their own policies in releasing the information.[4] That is – at worst – what happened in this case: Villarreal obtained and published the identity of a suicide victim that (Appellees contend) Villarreal's police source erred in releasing.

That the Laredo officers were relying on the existence of Tex. Penal Code Ann. § 39.06 – before it was declared invalid – does not shield the officers from liability, because the statute was so obviously unconstitutional, especially when applied to a journalist. *See Lawrence v. Reed*, 406 F.3d 1224, 1232 (10th Cir. 2005) (denying qualified immunity to police officers who seized vehicles from landowner's property without the notice or hearing that due process requires, in reliance on a facially flawed ordinance authorizing the impoundment of derelict vehicles: "[O]fficers can rely on statutes that authorize their conduct—but not if the statute is obviously unconstitutional.").

Even if the police officer who disclosed information to Villarreal about the death of a Border Patrol agent was releasing information outside of her authority to

[4] *See Florida Star v. B.J.F.*, 530 So.2d 286, 287 (Fla. 1988) (noting that the identity of the rape victim was "erroneously" included in a document that police should not have released to the press).

dispense, that still cannot plausibly convert the act of asking for the information for purposes of publishing news into a crime. In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Supreme Court affirmed that journalists have a First Amendment right to publish information about matters of public concern, even if the information was obtained by a source who broke the law – in that case, a source who intercepted and recorded a phone call in which a labor-union leader suggested violence might be used against an opponent. Indeed, as the Court affirmed, the journalist's right to publish is protected even if the journalist knows, or must know, that the information was unlawfully obtained by the source (in that case, in violation of federal wiretapping law). *Id.* at 525.

Alongside the right to publish newsworthy information, the right to gather and receive that information is similarly well established. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Court reaffirmed the right to receive information as a necessary adjunct of the right to distribute it (there, in the context of advertisements for prescription drugs): "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Id*. at 1823. Thus, it is of no consequence whether the officer had a right to share the information; what matters is that, beyond question, Villarreal had a constitutional right to request and receive it. This Circuit has strongly affirmed

journalists' right to receive information: "The First Amendment's broad shield for freedom of speech and of the press is not limited to the right to talk and to print. The value of these rights would be circumscribed were those who wish to disseminate information denied access to it, for freedom to speak is of little value if there is nothing to say." *In re Express-News Corp*., 695 F.2d 807, 808 (5th Cir. 1982) (holding it was unconstitutional for a district court to prohibit interviewing jurors).

It bears emphasizing that this case involves information from and about policing activity, where the First Amendment right to gather news applies with special force. This Circuit has recognized that the activities of police are of such unique public importance that the First Amendment clearly protects the right to record police conducting official business in public. *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017). The ruling turned on the Court's recognition that the First Amendment must necessarily constrain police from limiting the universe of information about policing available to the public: "Newsgathering, for example, is entitled to first amendment protection, for 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" *Id*. at 688 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)). The Court in *Turner* emphasized the singular value of freedom to gather and share information that, as in this case, informs the public about the activities of police: "Gathering information about government officials in a form that can be readily be disseminated to others serves a cardinal

First Amendment interest in protecting and promoting the free discussion of governmental affairs." *Id*. at 689 (internal quotes and citation omitted). Asking an officer a question, which can readily be refused, is a much less intrusive manner of newsgathering than recording the police with reasonable limitations. If recordings are a protected method of newsgathering, then Villarreal's action of asking the police officer a question to report on local events should raise much less concern.

Villarreal is a citizen journalist whose Facebook page provides a valued source of information for over 120,000 followers on local news and events, at a time when mainstream news organizations are increasingly stretched too thinly to fully cover community news. An essential part of all journalistic inquiry is the ability to ask public officials relevant questions on the news they report. It would represent a gross infringement on the freedom of the press and stymie accurate newsgathering if journalists were chilled by fear of prosecution from even approaching public officials with questions.

That Villarreal's arrest lacked a good-faith basis is so obvious that qualified immunity cannot apply, even if no "identical twin" factual situation appears in the casebooks. To allow Appellants to evade consequences for such an outlandish misapplication of the statute would, perversely, "reward" government officials who invent outrageous ways of misusing their authority that no sensible person would ever have tried before. As courts have consistently held, some violations are so

palpable that common sense alone is enough to put the defendants on notice that they were acting unlawfully. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances"); *Casteel v. Piesche*k, 3 F.3d 1050, 1053 (7th Cir. 1993) (qualified immunity may be overcome either by on-point legal precedent or by "evidence that the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts"). This is such a case.

B. Journalists Do Not Engage in Illicit "Gain" Proscribable by State Law by Accepting Sponsorships or Advertisements

Police could not have reasonably believed that Section 39.06 applies to Villarreal for the additional reason that the statute penalizes exploiting ill-gotten government information for profit. The First Amendment does not permit treating a news blog, like Villarreal's Lagordiloca Facebook page, as an exchange of information for illicit financial gain.

The Texas courts have already dealt with this issue in an analogous context: A groundless argument that newspapers do not qualify for protection against nuisance suits under the state's anti-SLAPP statute, Tex. Civ. Prac. & Rem. Code §

27.001 *et seq.*,[5] because newspapers are sold for a profit. The First District Court of Appeals readily discounted the claim that, just because newspaper publishers make money, their speech arises out of a commercial sale or lease, so as to be unprotected by the statute: "To read news content to constitute statements 'arising out of the sale or lease' of newspapers would swallow the protections the statute intended to afford; such a construction does not match the statute's dual purpose of safeguarding the right to speak, associate, and to petition the government(.)" *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 89 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). *See also Virginia State Bd. of Pharmacy*, 425 U.S. at 761 ("It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement…Speech likewise is protected even though it is carried in a form that is 'sold' for profit.").

The historical use of Section 39.06 demonstrates that it exists not to penalize the incidental gain of notoriety, sponsorships, donations or other benefits that might incidentally result from being a good reporter, but the actual exchange of ill-gotten information for an undeserved benefit. In *Reyna v. State*, No. 13-02-00499-CR, 2006 WL 20772 (Tex. App.—Corpus Christi Jan. 5, 2006, pet. ref'd, untimely filed) (mem. op.) (not designated for publication), the Court of Appeals affirmed the

[5] "SLAPP" is a common shorthand for Strategic Lawsuit Against Public Participation, meaning a suit brought for the purpose of harassing or intimidating a speaker from refraining from constitutionally protected speech.

conviction under Section 39.06(a) of a city administrator who used his position to forge competing bids for city projects, to give the appearance of rewarding the lowest bid to a contractor while pocketing some of the funds for the project. In *Tidwell v. State*, No. 08-11-00322-CR, 2013 WL 6405498 (Tex. App.—El Paso Dec. 4, 2013, pet. ref'd) (not designated for publication), the court affirmed the conviction of a former county attorney who abused his position to obtain access to confidential complaints submitted to the Texas Medical Board about a county hospital, for the illicit purpose of taking retaliatory action against the nurses who filed the complaints.

These cases demonstrate the legitimate scope and purpose of Section 39.06: To prosecute corrupt government officials, and those who work hand-in-glove with them, who abuse their access to information for illegitimate ends. None of this remotely applies to Villarreal or to any blogger or journalist: Unlike a person who misuses confidential information to obtain kickbacks or to prosecute a whistleblower, Villarreal's objective (sharing newsworthy information on Facebook) was entirely lawful and legitimate. Punishing Villarreal for asking a public official for corroborating information on a newsworthy event of public concern does not serve the statute's purpose of discouraging government officials from taking advantage of their position. It instead discourages journalists from seeking information needed to properly inform the public.

At the very least, the Court should have allowed Villarreal's First Amendment claim to proceed to discovery to establish what, if anything, the arresting officers knew about the economics of Villarreal's Facebook blogging activity at the time of the arrest. The district court (Dist. Ct. Op. at 15) properly disregarded the *only* piece of evidence that Laredo police adduced to show that they suspected Villarreal earned endorsement revenues through her blogging, because that evidence came into existence two years *after* the arrest. Common experience with the Facebook platform teaches that people are not generally paid for what they post to Facebook, so Villarreal should have been entitled to discovery as to what basis, if any, police had at the time of her 2017 arrest to believe that she elicited information in exchange for financial gain. That said, for the reasons explained *supra*, her receipt of compensation analogous to ordinary advertising or sponsorship revenue cannot, even if proven, convert the routine work of reporting news into a crime.

While Villarreal's activity may understandably seem far-removed from what is traditionally understood to be journalism, the reality is that the established industry of disseminating news is undergoing rapid change. Not one of the 10 most-visited websites in the United States is a traditional news site, but five of the top 10 are platforms for user-generated social sharing of information and ideas: YouTube,

Reddit, Facebook, Twitter and Instagram.[6] The most-viewed pages on Facebook – ahead of *The New York Times*, CNN, Fox News or any other traditional news source – are the pages of The Daily Wire, a conservative blog that has been in business for only five years.[7] People increasingly are turning to nonprofit start-ups such as the *Texas Tribune* for news that they once sought through paper-and-ink newspapers. Nonprofit news websites, which (like Villarreal's Facebook page) depend on donations and sponsorships, represent a rapidly growing sector of the information economy, with some $350 million in total annual revenues.[8] The fact that Villarreal presents and distributes the information she gathers in a nontraditional way does not deprive her of the full benefit of the First Amendment. Nor is the intimidating shadow cast by the decision below limited to social-media denizens like Villarreal; a rule that allows police to make "good-faith-mistaken" arrests for seeking and

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[6] Geoff Desreumaux, *Sorry Facebook, Reddit Is Now The Third Most Popular Site In The US*, WERSM.COM (May 31, 2018), https://wersm.com/sorry-facebook-reddit-is-now-the-third-most-popular-site-in-the-us/ (last visited Sept. 8, 2020).

[7] Benedict Nicholson, *These were the top publishers on Facebook in July 2020*, NEWSWHIP (Aug. 20, 2020), https://www.newswhip.com/2020/08/top-publishers-facebook-july-2020/ (last visited Sept. 8, 2020).

[8] Christine Schmidt, *This is the state of nonprofit news in 2018*, NIEMAN LAB (Oct. 2, 2018), https://www.niemanlab.org/2018/10/this-is-the-state-of-nonprofit-news-in-2018/ (last visited Sept. 8, 2020); *see also* Chris O'Donnell, *A decade in, the Texas Tribune pursues the rest of its audience*, COLUMBIA JOURNALISM REVIEW (Sept. 5, 2018), https://www.cjr.org/united_states_project/texas-tribune-strategic-plan.php (last visited Sept. 8, 2020) (reporting that, a decade after the Austin-based nonprofit news site's launch, "a monthly average of 1.9 million people read reporting that originates in the Tribune newsroom").

publishing information from government sources will chill newsgathering across the field of reporting, no matter the platform.

C. There is No Enforceable "Prohibition" Against Disclosing Information That Has Not Been Subject to a Formal Freedom-of-Information Request

The district court fundamentally misapplied the Texas Public Information Act ("TPIA") in concluding that the Defendants could have reasonably believed that, because Villarreal did not go through the formal process of filing a TPIA request for records, the information she sought was "prohibited from disclosure under the TPIA." (Dist. Ct. Op. at 18) This holding, which was decisive to the outcome below, misapprehends the TPIA in two fundamental respects.

The statute under which Villarreal was charged requires proof that the defendant solicited or received "information that has not been made public," which is defined as "any information to which the public does not generally have access, and that is prohibited from disclosure under" the TPIA. (Tex. Penal Code § 39.06(c))). In other words, the charge could be proper only if both conditions were satisfied: The information was both inaccessible to the public *and* statutorily prohibited from disclosure. Even assuming that the first condition could be met, there was no reasonable basis to believe that the second was.

First, the TPIA is about access to *records* and not to *facts*. The TPIA says nothing at all about a *conversation* between a journalist and a government employee.

The TPIA cannot have "prohibited" the disclosure of information *verbally* furnished to Villarreal. Even assuming that Officer Goodman might have been in violation of the TPIA had she leaked a confidential police document to Villarreal, there is no evidence that any document changed hands. Hence, the TPIA simply does not come into play at all.[9]

Second, the fact that the police department might have, if presented with a formal TPIA request, discretionarily invoked statutory exemptions to withhold some of the information furnished to Villarreal conflates the concept of "exempt" information with the concept of information "prohibited from disclosure." These are not at all the same thing.

An "exempt" document can be discretionarily disclosed by the custodian. Thus, an exempt document is, by definition, not a document "*prohibited* from disclosure." That the police department might have taken advantage of TPIA exemptions to redact information if presented with a records request is simply

[9] In fact, this was the holding of the only case that the District Court relied on, erroneously, to find that a reasonable officer could have believed that the information was prohibited from disclosure. In *State v. Ford*, 179 SW 3d 117, 125 (Tex. App.—San Antonio 2005, no pet.), the court held that, because grand jury information is not within the scope of the TPIA, release of information about grand jury proceedings necessarily cannot be information that the TPIA "prohibits" disclosing. The same is true here: A verbal response to a question is not the release of a record, and the TPIA applies only to records.

irrelevant; all that matters is that nothing in the TPIA "prohibited" Officer Goodman from sharing information about a newsworthy suicide with Villarreal.[10]

Government employees – including clerks employed by this Court – answer questions for citizens every day without being compelled by a public records law to do so. The public's entitlement to seek information is in no way confined to what can be obtained by way of a formal records request. Had a reporter filed a TPIA request with the Laredo Police Department to inspect a police officer's medical records, the department could properly refuse to honor the request – but it plainly could not be a crime for the same reporter to ask the officer about her recent hospital stay, or for the officer to answer the question. To be clear, the crime with which

[10] In an instructive recent ruling, the Kentucky Court of Appeals rejected the claim that the existence of a discretionary exemption in the state public-records law means that a publisher who discloses the contents of the document can be penalized – which is the argument advanced by the Police Department in this case. In *City of Taylorsville Ethics Commission v. Trageser*, No. 2019-CA-000152-MR, 2020 WL 3400764 (Ky. Ct. App. June 19, 2020), the court found that a municipality could not seek damages against a blogger who published a previously unreleased memo from the city clerk to members of the city council. Even though the memo concerned an ongoing ethics investigation and could discretionarily have been withheld had the blogger requested it through the Open Records Act ("ORA"), the blogger in fact obtained it through other means, so the ORA exemption was immaterial. *See id.* at *5 ("The ORA is a statute that provides one mechanism for members of the general public to obtain government records through an official and orderly channel. .... Nowhere does the statute prohibit a member of the public from publishing a government document obtained by other means even if the document falls within one of the exemptions listed under the statute."). Such is the case here: Whether the information published by Villarreal might have qualified for withholding had it been contained in a public record and had Villarreal filed a request for that record is of no legal consequence, and no reasonable officer could think otherwise.

Villarreal was charged was not just *receiving* forbidden information but *requesting* it, as Section 39.06 makes it a crime merely to "solicit," even if the solicitation is unsuccessful. It is a daily occurrence for news reporters to file TPIA requests with government agencies that end up being denied on the basis of a statutory exemption. If that mere act – *asking* for information that the agency determines to be exempt from disclosure – could be grounds for arrest, then journalism would literally become illegal. Appellees knew to a certainty when they arrested Villarreal in 2017 that the law does not work that way.

III. CONCLUSION

Although the statute under which Villarreal was arrested has been declared unconstitutional by a Texas trial court, the decision is not precedential and the statute remains on the books. Accordingly, journalists, citizen watchdogs and anyone else who needs information from government agencies remain at risk of retaliatory arrest for doing nothing more than asking a question. The district court erred in allowing the police Appellees to evade responsibility on qualified immunity grounds. This Court should find that there was no reasonable basis to believe that asking a government employee for information without filing a formal request for public records could be grounds for arrest.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the typeface and volume limits of Fed. R. App. P. 32(a) and Local Rule 32.1.

1. This brief contains 4,263 words, excluding the sections exempted by Fed. R. App. P. 32(f) and Local Rule 32.2, which is less than 50 percent of that allotted for the Appellant's brief.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font for text and footnotes.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of September, 2020, a copy of the foregoing has been served upon counsel for all parties to this proceeding as identified below through the court's electronic filing system as follows:

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