

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 OF INDEPENDENT JOURNALISTS AS  
AMICI CURIAE IN SUPPORT OF PETITIONER**

---

PETER STEFFENSEN  
SMU DEDMAN SCHOOL OF  
LAW  
FIRST AMENDMENT CLINIC  
P.O. Box 750116  
Dallas, Texas 75275-0116

THOMAS S. LEATHERBURY  
THOMAS S. LEATHERBURY  
LAW, PLLC  
Cumberland Hill School  
Building  
1901 N. Akard St.  
Dallas, TX 75201

CATHERINE B. SMITH  
*Counsel of Record*  
GARRETT T. MEISMAN  
RYAN B. PENNER  
VINSON & ELKINS LLP  
845 Texas Ave., Suite 4700  
Houston, Texas 77002  
(713) 758-2391  
csmith@velaw.com

May 23, 2024

*Counsel for Amici Curiae*

---

---

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii
Identity and Interest of <i>Amici Curiae</i> .....	1
Summary of Argument .....	3
Argument .....	4
I. Independent journalists are an increasingly important source of news. ....	4
II. In order to serve vital public interests, independent journalists must be able to seek information from unofficial government sources.....	7
III. The threat of retribution shielded by the Fifth Circuit’s broad qualified immunity regime will chill a broad range of legitimate journalism. ....	12
Conclusion.....	15

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>Page(s)</b>
Villarreal v. City of Laredo, 94 F.4th 374 (5th Cir. 2024).....	11
 <b>Statutes:</b>	
Tex. Gov't Code § 552.101–552.163.....	14
Tex. Gov't Code § 552.108 .....	14
Tex. Gov't Code § 552.135 .....	13
Tex. Gov't Code § 552.126 .....	13
Tex. Penal Code § 39.06(c).....	14
 <b>Rules:</b>	
Supreme Court Rule 37.2 .....	1
Supreme Court Rule 37.6 .....	1
 <b>Other Authorities:</b>	
Carlson, Carolyn S. & Cuillier, David, Public In- formation Officers Exert Increasing Controls, 38(2) Newspaper Rsch. J. 198 (2017).....	8
Carlson, Carolyn S. & Kashani, Paymon, Society of Professional Journalists, Mediated Access: Crime Reporters' Perceptions of Public Infor- mation Officers' Media Control Efforts (Mar. 2016), <a href="https://www.spj.org/pdf/sunshine-week/crime-reporters-survey-report.pdf">https://www.spj.org/pdf/sunshine- week/crime-reporters-survey-report.pdf</a> .....	9

<b>Other Authorities—Continued:</b>	<b>Page(s)</b>
Carlson, Carolyn S. & Kashani, Paymon, Society of Professional Journalists, Mediated Access: Police Public Information Officers' Media Management Efforts (Mar. 2016), <a href="https://spj.org/pdf/sunshineweek/police-pios-survey-report.pdf">https://spj.org/pdf/sunshineweek/police-pios-survey-report.pdf</a> .....	10
Carlson, Carolyn S. et al., Society of Professional Journalists, Mediated Access: Journalists' Perceptions of Federal Public Information Officer Media Control (Mar. 12, 2012), <a href="https://www.spj.org/pdf/reporters-survey-on-federal-PAOs.pdf">https://www.spj.org/pdf/reporters-survey-on-federal-PAOs.pdf</a> .....	10
Cromer, Alisa, Censorship by PIO, Editor & Publisher (Oct. 18, 2021); <a href="https://www.editorandpublisher.com/stories/censorship-by-pio,204560?newsletter=205765">https://www.editorandpublisher.com/stories/censorship-by-pio,204560?newsletter=205765</a> .....	8, 10
Foxhall, Kathryn, The Growing Culture of Censorship by PIO, Columbia Journalism Review (Aug. 3, 2022), <a href="https://www.cjr.org/criticism/public-information-officer-access-federal-agencies.php">https://www.cjr.org/criticism/public-information-officer-access-federal-agencies.php</a> .....	8, 10, 11
Jenkins, Joy & Graves, Lucas, Reuters Institute for the Study of Journalism, Reuters Institute Digital News Report 2023 (2023), <a href="https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2023-06/Digital_News_Report_2023.pdf">https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2023-06/Digital_News_Report_2023.pdf</a> .....	5, 6

<b>Other Authorities—Continued:</b>	<b>Page(s)</b>
Lacy, Stephen et al., Project for Excellence in Journalism, PEJ Report on Citizen Journalism Sites (2008), <a href="https://assets.pewresearch.org/wp-content/uploads/sites/4/2008/01/citizenmediafinal.pdf">https://assets.pewresearch.org/wp-content/uploads/sites/4/2008/01/citizenmediafinal.pdf</a> .....	7
Liedke, Jacob & Gottfried, Jeffrey, Pew Research Center, U.S. Adults under 30 Now Trust Information from Social Media Almost as Much as from National News Outlets (Oct. 27, 2022), <a href="https://www.pewresearch.org/short-reads/2022/10/27/u-s-adults-under-30-now-trust-information-from-social-media-almost-as-much-as-from-national-news-outlets/">https://www.pewresearch.org/short-reads/2022/10/27/u-s-adults-under-30-now-trust-information-from-social-media-almost-as-much-as-from-national-news-outlets/</a> .....	6
Liedke, Jacob & Wang, Luxuan, Pew Research Center, News Platform Fact Sheet (Nov. 15, 2023), <a href="https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/">https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/</a> .....	6
Liedke, Jacob & Wang, Luxuan, Pew Research Center, Social Media and News Fact Sheet (Nov. 15, 2023), <a href="https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/">https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/</a> .....	6
Lipka, Michael & Shearer, Elisa, Pew Research Center, Audiences Are Declining for Traditional News Media in the U.S. – with Some Exceptions (Nov. 28, 2023), <a href="https://www.pewresearch.org/short-reads/2023/11/28/audiences-are-declining-for-traditional-news-media-in-the-us-with-some-exceptions/">https://www.pewresearch.org/short-reads/2023/11/28/audiences-are-declining-for-traditional-news-media-in-the-us-with-some-exceptions/</a> .....	5

<b>Other Authorities—Continued:</b>	<b>Page(s)</b>
LoMonte, Frank D. et al., Brechner Center for Freedom of Information, Protecting Sources and Whistleblowers: The First Amendment and Public Employees’ Right to Speak to the Media (Oct. 7, 2019), <a href="https://brechner.org/wp-content/uploads/2019/10/Public-employee-gag-orders-Brechner-issue-brief-as-published-10-7-19.pdf">https://brechner.org/wp-content/uploads/2019/10/Public-employee-gag-orders-Brechner-issue-brief-as-published-10-7-19.pdf</a> .....	9
Naseer, Sarah & Lipka, Michael, Pew Research Center, How Hispanic Americans Get Their News (Mar. 19, 2024), <a href="https://www.pewresearch.org/race-and-ethnicity/2024/03/19/how-hispanic-americans-get-their-news/">https://www.pewresearch.org/race-and-ethnicity/2024/03/19/how-hispanic-americans-get-their-news/</a> .....	7
Naseer, Sarah & St. Aubin, Christopher, Pew Research Center, Newspapers Fact Sheet (Nov. 10, 2023), <a href="https://www.pewresearch.org/journalism/fact-sheet/newspapers/">https://www.pewresearch.org/journalism/fact-sheet/newspapers/</a> .....	5
Nicholson, Eric, DART Cop Arrests Barking Dog Avi Adelman for Taking Photos at Rosa Parks Plaza, Dallas Observer (Feb. 12, 2016, 4:00 AM), <a href="https://www.dallasobserver.com/news/dart-cop-arrests-barking-dog-avi-adelman-for-taking-photos-at-rosa-parks-plaza-8022504">https://www.dallasobserver.com/news/dart-cop-arrests-barking-dog-avi-adelman-for-taking-photos-at-rosa-parks-plaza-8022504</a> .....	1
Public Information Officers, Society of Professional Journalists, <a href="https://www.spj.org/pios.asp">https://www.spj.org/pios.asp</a> (last visited May 7, 2024) .....	8

<b>Other Authorities—Continued:</b>	<b>Page(s)</b>
Ross, Bella, Opinion: Social Media Is the New Information Frontier. Here’s How It Can Make Journalism Better, San Diego Union-Tribune (Oct. 12, 2022), <a href="https://www.sandiegouniontribune.com/opinion/commentary/story/2022-10-12/social-media-journalism">https://www.sandiegouniontribune.com/opinion/commentary/story/2022-10-12/social-media-journalism</a> .....	7
SEJ Asks “Who’s in Charge?” at EPA, Society of Environmental Journalists (Mar. 21, 2014), <a href="https://www.sej.org/publications/watchdog-tipsheet/sej-asks-whos-charge-epa">https://www.sej.org/publications/watchdog-tipsheet/sej-asks-whos-charge-epa</a> .....	11
St. Aubin, Christopher & Naseer, Sarah, Pew Research Center, Local TV News Fact Sheet (Sept. 14, 2023), <a href="https://www.pewresearch.org/journalism/fact-sheet/local-tv-news/">https://www.pewresearch.org/journalism/fact-sheet/local-tv-news/</a> .....	5
St. Aubin, Christopher, Pew Research Center, Audio and Podcasting Fact Sheet (June 15, 2023), <a href="https://www.pewresearch.org/journalism/fact-sheet/audio-and-podcasting/">https://www.pewresearch.org/journalism/fact-sheet/audio-and-podcasting/</a> .....	5
Vaughn, Jacob, Journalists Speak Out on Treatment During Police Brutality Protests, Dallas Observer (Sept. 9, 2020, 4:00 AM), <a href="https://www.dallasobserver.com/news/dallas-journalists-arrested-police-brutality-protests-11940815">https://www.dallasobserver.com/news/dallas-journalists-arrested-police-brutality-protests-11940815</a> .....	1

## IDENTITY AND INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* Avi Adelman and Steven Monacelli, like Petitioner Priscilla Villarreal, are independent journalists—i.e., journalists that are not influenced by government or corporate interests. And like Ms. Villarreal, *amici* have been arrested or detained by police officers while reporting on law enforcement’s public performance of their duties.<sup>2</sup> They are therefore interested in the legal safeguards protecting reporters and photographers from government reprisal.

*Amici curiae* are concerned by the impact that the Fifth Circuit’s decision will have on journalists in Texas and other states that may criminalize routine newsgathering activities. This brief brings useful information to this Court’s attention by explaining the efforts that government agencies across the country have already taken to restrict media communications,

---

<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Additionally, pursuant to Rule 37.2, *amici curiae* state that counsel of record for each party received timely notice of *amici curiae*’s intent to file this brief.

<sup>2</sup> Jacob Vaughn, *Journalists Speak Out on Treatment During Police Brutality Protests*, Dallas Observer (Sept. 9, 2020, 4:00 AM), <https://www.dallasobserver.com/news/dallas-journalists-arrested-police-brutality-protests-11940815>; Eric Nicholson, *DART Cop Arrests Barking Dog Avi Adelman for Taking Photos at Rosa Parks Plaza*, Dallas Observer (Feb. 12, 2016, 4:00 AM), <https://www.dallasobserver.com/news/dart-cop-arrests-barking-dog-avi-adelman-for-taking-photos-at-rosa-parks-plaza-8022504>.



and by exploring the likely chilling effect of the Fifth Circuit's decision. Because of *amici curiae's* careers in journalism and personal experience, they are well-positioned to address these issues.

## SUMMARY OF ARGUMENT

Given the rising popularity of the internet as a source of information, many consumers are turning to independent journalists like Priscilla Villarreal for news. These journalists, in addition to reporting the news, often play an investigative role by seeking out information about current events from government personnel.

But governments have not taken kindly to the spotlight. Countless public entities at federal, state, and local levels have implemented policies forbidding their employees from communicating with journalists without the involvement of a “public information officer.” These officials play a powerful role in controlling and shaping the media narrative by monitoring interviews, vetting questions from the press, drafting prepared statements, and sometimes even reviewing journalists’ work before publication. Unsurprisingly, journalists must often confront the difficult task of going around these public information officers if they wish to get a full picture of the truth.

While such policies (despite their questionable legality) already provide government agencies with a shield against unwelcome media scrutiny, the Fifth Circuit in this case has given them a sword. Not only may governments curate the information that they release to the public, but now they can wield criminal enforcement powers against any journalist that probes too far.

The threat of such coercive action—sanctioned by the Fifth Circuit’s decision—is bound to chill journalistic activities protected under the First Amendment.

This is especially true because the Texas criminal statute at issue is written in broad terms: journalists will likely feel uncertainty about what qualifies as information that “has not been made public.” Many journalists may therefore refrain from asking difficult questions of government officials altogether, depriving the public of accurate information about matters of public concern. To avoid this outcome, this Court should reverse the Fifth Circuit’s judgment.

### ARGUMENT

Independent journalists like Priscilla Villarreal are an important source of news in today’s information economy, and in an effort to report thoroughly on government activities, these journalists must often seek information directly from public employees. But in recent decades, government agencies across the country have been implementing policies that make it difficult to access such information without interference from public information officers. Here, the Fifth Circuit exacerbated that problem by allowing governments to target inquisitive journalists with criminal enforcement powers under a moribund statute. This decision is bound to chill routine newsgathering activities protected under the First Amendment, and it should be reversed.

#### **I. Independent journalists are an increasingly important source of news.**

In recent years, traditional sources of news—particularly newspapers, radio, and local television—

have gradually lost their audiences.<sup>3</sup> By some estimates, total U.S. daily newspaper circulation fell by more than 66% between 1990 and 2022.<sup>4</sup> The percentage of Americans listening weekly to traditional radio shrank by around 10% between 2009 and 2022.<sup>5</sup> And average viewership of local evening news among some of the top affiliate networks dropped from just over four million in 2016 to just over three million in 2022.<sup>6</sup> These declines have led some traditional news outlets to conduct multiple rounds of large-scale layoffs.<sup>7</sup>

---

<sup>3</sup> Michael Lipka & Elisa Shearer, Pew Research Center, *Audiences Are Declining for Traditional News Media in the U.S. – with Some Exceptions* (Nov. 28, 2023), <https://www.pewresearch.org/short-reads/2023/11/28/audiences-are-declining-for-traditional-news-media-in-the-us-with-some-exceptions/>.

<sup>4</sup> Sarah Naseer & Christopher St. Aubin, Pew Research Center, *Newspapers Fact Sheet* (Nov. 10, 2023), <https://www.pewresearch.org/journalism/fact-sheet/newspapers/>.

<sup>5</sup> Christopher St. Aubin, Pew Research Center, *Audio and Podcasting Fact Sheet* (June 15, 2023), <https://www.pewresearch.org/journalism/fact-sheet/audio-and-podcasting/>.

<sup>6</sup> Christopher St. Aubin & Sarah Naseer, Pew Research Center, *Local TV News Fact Sheet* (Sept. 14, 2023), <https://www.pewresearch.org/journalism/fact-sheet/local-tv-news/>.

<sup>7</sup> Joy Jenkins & Lucas Graves, Reuters Institute for the Study of Journalism, *Reuters Institute Digital News Report 2023* 108, (2023), [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2023-06/Digital\\_News\\_Report\\_2023.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2023-06/Digital_News_Report_2023.pdf).

Meanwhile, the prevalence of newer online news sources is on the rise, with a growing majority of Americans stating that they prefer to obtain news via digital devices.<sup>8</sup> More than half of American adults consume news through social media platforms, most commonly Facebook, YouTube, and Instagram.<sup>9</sup> And younger adults are especially likely to trust information obtained on these platforms.<sup>10</sup>

This changing media environment presents new opportunities for independent journalists—i.e., those that are unencumbered by government or corporate for-profit interests. Compared to traditional media, online modes of communication pose virtually no barriers to entry. Any budding journalist with a free blog or social media account can build a following and contribute to the marketplace of ideas. The internet especially has given a platform to minority voices that

---

<sup>8</sup> Jacob Liedke & Luxuan Wang, Pew Research Center, *News Platform Fact Sheet* (Nov. 15, 2023), <https://www.pewresearch.org/journalism/fact-sheet/news-platform-fact-sheet/>; see also Jenkins & Graves, *supra* note 7, at 109 (showing internet as most popular source of news in 2023).

<sup>9</sup> Jacob Liedke & Luxuan Wang, Pew Research Center, *Social Media and News Fact Sheet*, (Nov. 15, 2023), <https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/>.

<sup>10</sup> Jacob Liedke & Jeffrey Gottfried, Pew Research Center, *U.S. Adults under 30 Now Trust Information from Social Media Almost as Much as from National News Outlets* (Oct. 27, 2022), <https://www.pewresearch.org/short-reads/2022/10/27/u-s-adults-under-30-now-trust-information-from-social-media-almost-as-much-as-from-national-news-outlets/>.

were historically underrepresented in traditional media.<sup>11</sup>

The benefits of increased access extend to journalists and the public alike. Journalists are less dependent on gatekeepers at institutional news outlets who limit the kinds of information that they are willing to publish.<sup>12</sup> And members of the public are presented with a wider assortment of facts and perspectives that are not constrained by the agendas of traditional news providers. In short, independent journalists form a growing and important part of the modern information economy.

**II. In order to serve vital public interests, independent journalists must be able to seek information from unofficial government sources.**

Unlike established news organizations, independent journalists like Ms. Villarreal often lack

---

<sup>11</sup> Bella Ross, *Opinion: Social Media Is the New Information Frontier. Here's How It Can Make Journalism Better*, San Diego Union-Tribune (Oct. 12, 2022), <https://www.sandiegouniontribune.com/opinion/commentary/story/2022-10-12/social-media-journalism>; see also Sarah Naseer & Michael Lipka, Pew Research Center, *How Hispanic Americans Get Their News* (Mar. 19, 2024), <https://www.pewresearch.org/race-and-ethnicity/2024/03/19/how-hispanic-americans-get-their-news/> (noting that Latino Americans are particularly likely to prefer getting their news from digital devices).

<sup>12</sup> See Stephen Lacy et al., Project for Excellence in Journalism, *PEJ Report on Citizen Journalism Sites 2*, (2008), <https://assets.pewresearch.org/wp-content/uploads/sites/4/2008/01/citizenmediafinal.pdf>.

access to well-developed channels for obtaining information, and instead must cultivate a network of contacts from scratch. These sources can include eyewitnesses, experts, activists, and (most relevantly here) government employees. Although the challenge of developing contacts is an obstacle for new journalists, it also can help prevent journalist–source relationships from undermining the completeness and authenticity of media narratives.

But over the past few decades, government entities have worked to implement policies shielding themselves and their staff from unwelcome media attention. Gone are the days when journalists could walk the halls of government agencies, asking questions of employees in their offices.<sup>13</sup> Instead, many journalists have noticed “a relatively rapid trend toward prohibiting staff members from communicating to journalists without reporting to some authority, often public information officers,” commonly known as “PIOs.”<sup>14</sup> This trend has been most obvious in the federal government,<sup>15</sup> but such

---

<sup>13</sup> Kathryn Foxhall, *The Growing Culture of Censorship by PIO*, *Columbia Journalism Review* (Aug. 3, 2022), <https://www.cjr.org/criticism/public-information-officer-access-federal-agencies.php>; Alisa Cromer, *Censorship by PIO*, Editor & Publisher (Oct. 18, 2021); <https://www.editorandpublisher.com/stories/censorship-by-pio,204560?newsletter=205765>.

<sup>14</sup> *Public Information Officers*, Society of Professional Journalists, <https://www.spj.org/pios.asp> (last visited May 7, 2024).

<sup>15</sup> Carolyn S. Carlson & David Cuillier, *Public Information Officers Exert Increasing Controls*, 38(2) *Newspaper Rsch. J.* 198, 204–208 (2017).

“gag orders” are also common in state and local governments across the country—from cabinet-level agencies to public schools and police departments.<sup>16</sup>

Despite these policies’ shaky constitutional footing,<sup>17</sup> they often succeed in their aim of curbing communications between public employees and journalists. According to one study of reporters covering crime, nearly 60% of respondents stated that they could successfully interview police officers without the involvement of a public information office only some of the time or rarely. Around 26% of the same group said that they never could. And more than half of those reporters stated that a PIO had prevented them from interviewing front-line officers or investigators in a timely manner.<sup>18</sup> In a related study of journalists covering federal agencies, 76% of respondents said that they must obtain approval from public information officers most or all the time before interviewing agency employees, and 69% stated that

---

<sup>16</sup> Frank D. LoMonte et al., Brechner Center for Freedom of Information, *Protecting Sources and Whistleblowers: The First Amendment and Public Employees’ Right to Speak to the Media* 3, 9–14 (Oct. 7, 2019), <https://brechner.org/wp-content/uploads/2019/10/Public-employee-gag-orders-Brechner-issue-brief-as-published-10-7-19.pdf>.

<sup>17</sup> *Id.* at 3–9.

<sup>18</sup> Carolyn S. Carlson & Paymon Kashani, Society of Professional Journalists, *Mediated Access: Crime Reporters’ Perceptions of Public Information Officers’ Media Control Efforts* 2–3 (Mar. 2016), <https://www.spj.org/pdf/sunshineweek/crime-reporters-survey-report.pdf>.



an agency had prohibited them from interviewing its employees.<sup>19</sup>

When PIOs do allow journalists to interact with public employees, it is often under carefully controlled conditions. PIOs may monitor interviews,<sup>20</sup> limit the number of questions asked, insist that questions be submitted in advance, rely on prepared statements, require officials to speak off the record, or demand the opportunity to review the journalist's work before publication.<sup>21</sup>

Under these constraints, journalists going through the proverbial “front door” of government agencies are likely to experience delays in receiving information—or miss it entirely—leading to very real public harms. For example, agency officials might not be forthcoming about flaws in the government's response to a public health crisis with “millions of lives at stake,” or they could withhold details about harmful practices in the manufacture of regulated consumer

---

<sup>19</sup> Carolyn S. Carlson et al., Society of Professional Journalists, *Mediated Access: Journalists' Perceptions of Federal Public Information Officer Media Control* 5 (Mar. 12, 2012), <https://www.spj.org/pdf/reporters-survey-on-federal-PAOs.pdf>.

<sup>20</sup> *Id.* at 6 (53% of respondents saying that federal agency officials monitor their interviews most or all of the time); Carolyn S. Carlson & Paymon Kashani, Society of Professional Journalists, *Mediated Access: Police Public Information Officers' Media Management Efforts* 16 (Mar. 2016), <https://spj.org/pdf/sunshineweek/police-pios-survey-report.pdf> (nearly 80% of law enforcement public information officers agreeing that they feel it necessary to monitor interviews with their police officers).

<sup>21</sup> Foxhall, *supra* note 13; Cromer, *supra* note 13.

goods,<sup>22</sup> or they might drag their feet in explaining a chemical spill that contaminates the drinking water of an entire community.<sup>23</sup>

The Fifth Circuit en banc majority in this case downplayed the importance of journalists “getting a scoop” before information is widely known. *Villarreal v. City of Laredo*, 94 F.4th 374, 388 (5th Cir. 2024) (en banc). But especially in situations where time is of the essence, prompt journalistic efforts to shed light on agency activities are vital to the public interest and serve as a “check on the power of the government.” *Id.* at 399–400 (Graves, J., dissenting). It is therefore critical that journalists can go beyond the curated government narrative by seeking direct, unsupervised interactions with public employees.

Gag orders and PIOs make this task difficult enough. But under the Fifth Circuit’s decision in this case, journalists must now fight the battle against censorship on two fronts. On one side, they must navigate policies creating increasingly thick barriers to communication with government employees; on the other, they can face criminal penalties if they succeed in uncovering information that the government would prefer to hide. If the Fifth Circuit’s decision is allowed to stand, the outlook for the freedom of the press and freedom of information appears grim indeed.

---

<sup>22</sup> See Foxhall, *supra* note 13.

<sup>23</sup> *SEJ Asks “Who’s in Charge?” at EPA*, Society of Environmental Journalists (Mar. 21, 2014), <https://www.sej.org/publications/watchdog-tipsheet/sej-asks-whos-charge-epa>.

**III. The threat of retribution shielded by the Fifth Circuit's broad qualified immunity regime will chill a broad range of legitimate journalism.**

Journalists working to hold governments accountable become familiar with closed doors and empty mailboxes. When official channels are closed off or slow to respond, journalists must develop alternative sources to perform their job—a public service indispensable to our democracy. If using alternative sources exposes journalists to the risk of official retribution, journalists will become little more than conduits for government public relations copy.

The Laredo police department is not unique in its policy limiting the authority to release information to a small number of officials. Nor is Texas unique in having statutes that criminalize conduct tied to information gathering. What is unique is the propensity for those two factors—tightly controlled authority to disseminate public information and readily available, statutory prosecutorial pretext—to cut off independent scrutiny of government conduct.

The risk of crossing the hazy boundaries of constitutionally indeterminate criminal statutes is bound to slow or stop a broad range of ordinary, legitimate journalistic activity. Independent journalists like Ms. Villarreal are especially vulnerable to this effect, given that they may lack the institutional backing of a larger news outlet in the event that they are prosecuted. And the chilling effect will likely extend beyond borderline cases. A police officer intent on shutting down unflattering

portrayals of their conduct can find a close-enough statute to serve as a pretext for arrest. And under the Fifth Circuit's rule, the full risk of unconstitutional enforcement is borne by the journalist, even if the officer was motivated not by a duty to uphold the rule of law, but a desire to subvert it for convenient ends. Thus, the standard of conduct for journalists is decoupled from the guarantees of the First Amendment and fixed to the vagaries of power-wielding government workers.

To report or not to report? For Texan journalists, the answer will almost certainly turn on whether doing so will draw the ire of law enforcement. Given that section 39.06(c) of the Texas Penal Code prohibits, in addition to solicitation, *receipt* of nonpublic information, are journalists liable if they publish a tip left in their voicemail by a public official? Can journalists ask schoolteachers about working conditions in the local public schools?<sup>24</sup> Or directives to remove certain books from libraries? What if the superintendent is friendly with the local sheriff—how likely is it that a journalist would publish critical stories about the school district if there is even a small hint that the sourcing of their story might run afoul of an obscure criminal statute that can only be

---

<sup>24</sup> See TEX. GOV'T CODE § 552.135 (designating certain information held by school districts as confidential). Education reporters will also have to avoid inquiring into the identity of candidates for open superintendent positions. See *id.* § 552.126 (designating superintendent candidate identities as confidential).

interpreted by reference to a subsection buried in the Government Code?

Even some of the most mundane newsgathering routines could conceivably be illegal under section 39.06(c). Journalists reporting on an active investigation of public corruption allegations at city hall might now think twice before calling city staff or even elected councilmembers for comment on—or even to confirm the existence of—the investigation.<sup>25</sup> They might also start declining calendar invites to official press conferences lest they ask the wrong question and get cuffed for solicitation of nonpublic information.<sup>26</sup>

At the very least, Texas journalists will want to become familiar with the seventy-six subsections of the Texas Public Information Act that enumerate the act's exceptions.<sup>27</sup>

Under the Fifth Circuit's decision, governments are not limited to regulating the information that they disseminate to the public; they can also criminalize efforts to obtain information through unsanctioned channels. Indeed, section 39.06(c) could be read

---

<sup>25</sup> See TEX. GOV'T CODE § 552.108.

<sup>26</sup> There is no clear reason why the Fifth Circuit's decision would be any different had Ms. Villarreal engaged in her allegedly criminal questioning at a public press conference instead of a private phone call. "Solicits" and "receives" share the same position in the statute's sentence structure. See TEX. PENAL CODE § 39.06(c) ("A person commits an offense if, with [requisite intent], he *solicits* or receives . . . information that . . . has not been made public." (emphasis added)).

<sup>27</sup> See TEX. GOV'T CODE § 552.101–552.163.

broadly to criminalize the solicitation of most information from unsanctioned government sources—*i.e.*, anyone outside of a designated public information office. Any uncertainty about the scope of criminal statutes governing the release, receipt, or publication of government information effectively becomes an authorization to retaliate against disfavored journalists. A rigged game can only attract players convinced they can still win. But under the Fifth Circuit’s decision, governments are incentivized to display, in intimate detail, the trap that awaits journalists who decide to play.

The Fifth Circuit’s formulation of the qualified immunity doctrine transforms the public information officer into a leviathan, casting a cloud over any free speech protection that threatens its agenda. Independent journalists, lacking the legal and financial resources of large media organizations, are exposed to the full force of its retribution.

### CONCLUSION

For the reasons explained herein, the Fifth Circuit’s judgment should be reversed.

Respectfully submitted,

PETER STEFFENSEN  
SMU DEDMAN SCHOOL OF  
LAW  
FIRST AMENDMENT CLINIC  
P.O. Box 750116  
Dallas, Texas 75275-0116

THOMAS S. LEATHERBURY  
THOMAS S. LEATHERBURY  
LAW, PLLC  
Cumberland Hill School  
Building  
1901 N. Akard St.  
Dallas, TX 75201

May 23, 2024

CATHERINE B. SMITH  
*Counsel of Record*  
GARRETT T. MEISMAN  
RYAN B. PENNER  
VINSON & ELKINS LLP  
845 Texas Ave., Ste. 4700  
Houston, Texas 77002  
(713) 758-2391  
csmith@velaw.com

*Counsel for  
Amici Curiae*