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 TREVIÑO, 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, No. 5:19-cv-48

EN BANC BRIEF OF AMICI CURIAE JOURNALISTS IN SUPPORT OF APPELLANT

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

1. No. 20-40359, *Priscilla Villareal v. The City of Laredo, Texas et al.*

2. The undersigned counsel of record certifies that—in addition to the persons and entities listed in Appellant's Certificate of Interested Persons—the following listed persons or entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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No publicly traded company has an ownership interest of 10% in either of the entities listed above.

Respectfully submitted,

/s/ Thomas S. Leatherbury
Attorney of Record for Amici Curiae Journalists

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STATEMENT OF AMICI CURIAE[1]

Amici curiae are or have been independent journalists working in Texas—all of whom, like the Appellant, have been arrested or detained by police officers while reporting on law enforcement's public performance of their duties.[2] They are therefore interested in the legal safeguards protecting reporters and photographers from government reprisal.[3]

The issues presented in this case include the proper test for First Amendment retaliation claims. *See* Appellant's Brief at 2. Specifically, this Court has the

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[1] No party's counsel authored this brief in whole or in part. No party, or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made such a monetary contribution. *See* Fed. R. App. P. 29(a)(4)(E), (b)(4). Defendants-Appellees Isidro R. Alaniz, Marisela Jacaman, and Webb County oppose the filing of this brief. All other parties either consent or do not take a position on the filing of this brief.

[2] *Photojournalist arrested covering Dallas protests, camera equipment seized*, U.S. PRESS FREEDOM TRACKER (May 23, 2022), https://pressfreedomtracker.us/all-incidents/photojournalist-arrested-covering-dallas-protests-camera-equipment-seized/;

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.

[3] Adelman successfully sued Dallas Area Rapid Transit for his wrongful arrest. *Adelman v. Branch*, 784 F. App'x 261 (5th Cir. 2019); Kevin Krause, *DART agrees to pay freelance journalist arrested for snapping photos to settle lawsuit*, DALLAS MORNING NEWS (Nov. 12, 2019 5:17 PM), https://www.dallasnews.com/news/transportation/2019/11/12/dart-agrees-to-pay-freelance-journalist-arrested-for-snapping-photos-to-settle-lawsuit/.

Monacelli and Rusanowski have pending cases against the City of Dallas and others. *Monacelli v. City of Dallas*, No. 3:21-cv-02649 (N.D. Tex. filed Oct. 26, 2021); *Rusanowski v. City of Dallas*, No. 3:22-cv-01132 (N.D. Tex. filed May 23, 2022).

opportunity to reexamine whether a claimant must establish that she curtailed her own protected activity in response to a defendant's retaliatory conduct. Given their professional experiences, amici curiae are well positioned to address the practical implications of this standard for working journalists.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel unanimously affirmed the dismissal of Priscilla Villarreal's 42 U.S.C. § 1983 claim for First Amendment retaliation. *Villarreal v. City of Laredo*, 44 F.4th 363, 374 (5th Cir. 2022). It based that decision on Fifth Circuit precedent requiring a claimant to prove that her own exercise of free speech was actually curtailed because of the defendant's retaliatory conduct. *Id.* at 373–74 (citing *Keenan v. Tejeda*, 290 F.3d 252, 258–59 (5th Cir. 2002); *McLin v. Ard*, 866 F.3d 682, 697 (5th Cir. 2017)).

The Court should overrule its previous decisions using this subjective test, and instead implement an objective test requiring that a person of ordinary firmness would be chilled in her exercise of free speech. Such a test would align this Court with all other circuits that have considered this issue.

An objective test would also jettison the detrimental policy implications of the subjective test. Specifically, because the subjective test looks to the actual curtailment of the plaintiff's speech, it rewards government misconduct and encourages additional self-censorship. It also exposes government officials to inconsistent liability and leads to absurd results. An objective test would avoid these constitutional problems while still ensuring that the plaintiff suffered a sufficient injury to state a claim under Section 1983.

Villarreal was arrested and detained due to conduct protected under the First Amendment. Such retaliation would chill the speech of a person of ordinary firmness. This Court should therefore apply an objective test to reverse the dismissal of Villarreal's First Amendment retaliation claim.

ARGUMENT

I. This Court has primarily used a subjective test in evaluating First Amendment retaliation claims.

In affirming the dismissal of Villarreal's First Amendment retaliation claim, the panel relied on this Court's previous decision in *Keenan v. Tejeda*. *Villarreal*, 44 F.4th at 373. In *Keenan*, the Court adopted a test for evaluating First Amendment retaliation claims which requires plaintiffs to prove three elements:

> (1) [The plaintiffs] were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury *that would chill a person of ordinary firmness* from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiffs' exercise of constitutionally protected conduct.

290 F.3d at 258 (emphasis added).

However, despite the Court's purported adoption of an objective, "person of ordinary firmness" test, the Court added that a plaintiff must actually show that her *own* "exercise of free speech has been curtailed." *Id.* at 259. It reasoned that "§ 1983 is a tort statute and . . . '[a] tort to be actionable requires injury.'" *Id.* (quoting *Bart v. Telford*, 677 F.2d 622, 625 (7th Cir. 1982)). In *Keenan*, this Court found that the plaintiffs had had their speech actually curtailed because they "backed off from

direct involvement" in their protected activities after the governments retaliation. *Id.* at 260.

More recently, this Court reinforced its subjective test for First Amendment retaliation claims in *McLin v. Ard*. In that case, the Court determined that, although the plaintiff had alleged that the defendants caused him "great personal damage," such an allegation did not "demonstrate that he reduced or changed his exercise of free speech in any way." 866 F.3d at 697. The Court affirmed the district court's dismissal of the plaintiff's retaliation claim. *Id.* at 698.

Despite this precedent, the Court has applied the subjective test inconsistently. In *Morris v. Powell*, 449 F.3d 682 (5th Cir. 2006)—decided four years after *Keenan*—the Court held that the district court erred in dismissing an inmate's First Amendment retaliation claim on summary judgment. *Morris*, 449 F.3d at 683. Although the plaintiff inmate had not demonstrated that his First Amendment rights had been actually curtailed, the Court held that "[t]here is no doubt that [the government's actions] as a penalty for the exercise of constitutional rights *has the potential to deter the inmate* from the future exercise of those rights." *Id.* at 687 (emphasis added). In so holding, the Court did not cite *Keenan* or reference the subjective test that it had adopted in that case. Although *Morris* and its progeny primarily concern retaliation against inmates, there is no reason that the same objective test should not apply equally to those who are not incarcerated. *See Giese*

v. Jackson, No. 3:19-CV-00081, 2020 WL 3493078, at *6 (S.D. Tex. May 27, 2020), *report and recommendation adopted*, No. 3:19-CV-0081, 2020 WL 3490219 (S.D. Tex. June 26, 2020) (citing *Morris*, *Keenan*, and *McLin* in refusing to apply a subjective test to inmate's First Amendment retaliation claim).

II. This Court stands alone in its use of a subjective test for the chill element of First Amendment retaliation claims.

Although the Supreme Court has refrained from explicitly endorsing either an objective or a subjective test, *see Houston Cmty. Coll. Sys. v. Wilson*, 142 S.Ct. 1253, 1260 (2022), other circuits have uniformly implemented an objective test. *See, e.g.,*:

- **First Circuit:** *Barton v. Clancy*, 632 F.3d 9, 29 (1st Cir. 2011) (Free speech claim – "[T]he pertinent question in a § 1983 retaliation case based on the First Amendment is whether the defendant's actions would deter a reasonably hardy individual from exercising his constitutional rights.") (internal quotation and alteration omitted);
- **Second Circuit:** *Hayes v. Dahlke*, 976 F.3d 259, 272 (2d Cir. 2020) (Free speech claim – "To be an 'adverse action,' retaliatory conduct must be the type that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." (internal quotation omitted);
- **Third Circuit:** *Mirabella v. Villard*, 853 F.3d 641, 650 (3d Cir. 2017) (Free speech and freedom to petition claim – "We ask whether the act would deter a person of ordinary firmness, not whether the plaintiff was deterred.");

- **Fourth Circuit:** *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005) (Free speech claim – "We reject the . . . suggestion that this inquiry depends upon the actual effect of the retaliatory conduct on a particular plaintiff.");
- **Sixth Circuit:** *Thaddeus-X v. Blatter,* 175 F.3d 378, 396 (6th Cir. 1999) (Freedom to petition claim – "[A]n adverse action is one that would 'deter a person of ordinary firmness' from the exercise of the right at stake.");
- **Seventh Circuit:** *Surita v. Hyde*, 665 F.3d 860, 878 (7th Cir. 2011) (Free speech, freedom to assemble, and freedom to petition claim – "We apply an objective test: whether the alleged conduct by the defendants would likely deter a person of ordinary firmness from continuing to engage in protected activity.");
- **Eighth Circuit:** *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003) (Free speech claim – "The test is an objective one, not subjective. The question is not whether the plaintiff herself was deterred . . .");
- **Ninth Circuit:** *Capp v. Cnty. of San Diego,* 940 F.3d 1046, 1054 (9th Cir. 2019) (Free speech claim – "Our inquiry . . . is not whether Defendants' actions actually chilled [the plaintiff], but rather whether the alleged retaliation would chill a person of ordinary firmness from continuing to engage in the protected activity.") (internal quotation omitted);

- **Tenth Circuit:** *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001) (Free press claim – "The focus, of course, is upon whether a person of ordinary firmness would be chilled, rather than whether the particular plaintiff is chilled.");
- **Eleventh Circuit:** *Bennett v. Hendrix*, 423 F.3d 1247, 1251 (11th Cir. 2005) (Free speech claim – "[W]e join our sister Circuits in adopting an objective test for proving a retaliation claim.");
- **D.C. Circuit:** *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002) (Freedom to petition claim – "The widely accepted standard for assessing whether harassment for exercising the right of free speech is actionable . . . depends on whether the harassment is likely to deter a person of ordinary firmness from that exercise.") (internal quotations and alterations omitted).

III. This Court should join its sister circuits and adopt an objective test.

Overwhelming legal and policy considerations counsel this Court to abandon its subjective test in favor of an objective test for the chill element of a First Amendment retaliation claim.

A. The subjective test itself reinforces precisely the kind of chilling effect that retaliation claims are aimed at remedying.

Under this Court's existing precedents, a plaintiff cannot obtain relief for First Amendment retaliation unless she first curbs her own protected speech. *Keenan*, 290

F.3d at 259; *McLin*, 866 F.3d at 696–97. By forcing the individual to choose between self-censorship and a remedy, the subjective retaliation test itself incentivizes her to be silent—even if the defendant's retaliatory behavior alone would not be enough to do so. So a victim of retaliation faces two independent chilling forces on her exercise of her First Amendment rights: one from the tortfeasor, and the other from the law governing her potential claim. The most enterprising journalists would be the least likely to find a judicial remedy.[4] *See infra* at 17-18. This effect contravenes the most basic aims of the First Amendment. *See S. Christian Leadership Conf. v. Sup. Ct. of State of La.*, 252 F.3d 781, 795 (5th Cir. 2001) ("The fundamental purpose behind the First Amendment is to promote and protect the free expression of ideas, unfettered by government intrusion.").

B. The subjective test exposes government officials to inconsistent liability.

The subjective test also imposes liability on an inconsistent and unpredictable basis. As the Eleventh Circuit put it, "[a]n objective standard provides notice to government officials of when their retaliatory actions violate a plaintiff's First Amendment rights." *Bennett v. Hendrix*, 423 F.3d 1247, 1251 (11th Cir. 2005). A subjective test, on the other hand, "expose[s] public officials to liability in some

[4] In the context of Free Exercise retaliation claims, the most steadfast believers would be the least likely to obtain redress.

cases, but not in others, for the very same conduct, depending upon the plaintiff's will to fight." *Id.* at 1251–52 (quoting *Constantine*, 411 F.3d at 500).

Not only does this distinction leave officials in a state of uncertainty, it also encourages them to target the individuals that are most committed or capable of continuing their protected activity. And "[t]here is no reason to 'reward' government officials for picking on unusually hardy speakers." *Id.* at 1252; *see also Mendocino Env't Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999) ("[I]t would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity . . . .").

C. The subjective test leads to absurd results.

Because the subjective test differentiates claims by the reaction of the plaintiff—rather than an objective evaluation of the defendant's conduct—it leads to absurd results. "To illustrate by extreme example, if a police officer to whom a criminal complaint is made beat the complainant on the head with a nightstick to punish him for making the complaint, surely the law would not deny him a remedy because he continues to complain thereafter." *Est. of Morris v. Dapolito*, 297 F. Supp. 2d 680, 694 n.12 (S.D.N.Y. 2004).

The application of the subjective test in this case is similarly problematic. Villarreal was deprived of her liberty because of her protected speech. Yet the

panel's decision would deny her a remedy for retaliation simply because she continued reporting in a way "consistent with the highest traditions of fearless journalism." *Villarreal*, 44 F.4th at 374. Such absurd outcomes illustrate the flaws inherent in the subjective retaliation test.

D. A plaintiff can suffer a Section 1983 "injury" without curtailing her own speech.

In *Keenan*, this Court adopted a subjective test because "§ 1983 is a tort statute and . . . '[a] tort to be actionable requires injury.'" 290 F.3d 252 at 259 (quoting *Bart*, 677 F.2d at 625). It reasoned that, "in this context," such an injury must take the form of "the deprivation of a constitutional right." *Id.* And it concluded that no such deprivation exists absent an actual "showing that the plaintiffs' exercise of free speech has been curtailed." *Id.*

But this reasoning misconstrues the nature of the necessary injury. A First Amendment retaliation claim "depends not on the denial of a constitutional right, but on the [retaliation] [the plaintiff] received for exercising [her] rights." *Bennett*, 423 F.3d at 1253. And "[t]he reason why such retaliation offends the Constitution is that it *threatens* to inhibit exercise of the protected right." *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998) (emphasis added).

In this sense, retaliation is "akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit." *Id.* (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). As the Supreme Court has explained, "if the government

could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.'" *Perry*, 408 U.S. at 597. "Such interference with constitutional rights is impermissible." *Id.* And it would defy reason to say that a plaintiff who was unconstitutionally denied a public benefit was not "injured" unless she stopped exercising the rights at issue. Just like a benefit recipient in this scenario, a victim of retaliation is injured by the defendant's attempts to penalize her speech—irrespective of whether those attempts ultimately succeed in stifling her.

Additionally, because an objective test requires that the retaliation would chill the speech of a person of ordinary firmness, it ensures that the injury was of sufficient magnitude to support a claim. *Cf. Wilson*, 142 S. Ct. at 1261 ("[N]o one would think that a mere frown from a [government actor] constitutes a sufficiently adverse action to give rise to an actionable First Amendment claim.").

Under an objective test, Villarreal was injured: she was arrested, handcuffed, jailed, taunted, and prosecuted for her journalistic efforts. Such retaliation would chill the speech of a person of ordinary firmness, regardless of whether it had such an effect on this particular plaintiff. Villarreal pled a sufficient injury to support a Section 1983 claim for First Amendment retaliation.

CONCLUSION

This Court should join its sister circuits by overruling its decisions in *Keenan* and *McLin*, and adopting an objective test for First Amendment retaliation claims. Policy considerations support the adoption of an objective test, and this Court's previously stated reasons for avoiding its application are misplaced. The speech of a person of ordinary firmness would be chilled by the arrest and detention that occurred in this case. Therefore, this Court should reverse the dismissal of Villarreal's First Amendment retaliation claim.

Dated: December 12, 2022

Respectfully submitted,

By: */s/ Thomas S. Leatherbury*

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CERTIFICATE OF SERVICE

I certify that on December 12, 2022, I caused a true and accurate copy of the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit through the CM/ECF system. I certify that the participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Thomas S. Leatherbury
Attorney of Record for Amici Curiae Journalists

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 2,773 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the type-face requirements and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) and Fifth Circuit Rules 32.1 and 32.2 because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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