No. 18-1191

In the Supreme Court of the United States

CARTER DAVENPORT,

Petitioner,

v.

ESTATE OF MARQUETTE F. CUMMINGS, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Marquette F. Cummings, a prisoner at St. Clair Correctional Facility, was stabbed in the eye by another inmate. He was airlifted to a hospital, where he was placed on life support. Cummings was breathing, and he responded to verbal cues provided by his mother. Notwithstanding Cummings's being responsive—and despite the fact that doctors had yet to order a brain death study—petitioner Carter Davenport, the warden of the prison, directed the hospital to enter a do-not-resuscitate order and to remove Cummings from the life support machine. Cummings's mother begged the hospital not to terminate care, especially before a brain death study could be conducted. The hospital followed petitioner's directives, disconnecting Cummings from the life support machine, and Cummings died.

Cummings's Estate brought this Section 1983 suit against Davenport. The Estate claims that Davenport's directive to remove the life support machine—over the objections of Cummings's mother—violated Cummings's constitutional rights. The district court denied Davenport's motion to dismiss on the basis of qualified immunity. The court of appeals, in a decision by Judge William Pryor, affirmed the denial of the motion to dismiss.

The petition, raised in an interlocutory posture, presents two questions:

1. Whether the court of appeals properly applied standard qualified immunity law to the particulars of this case.

2. Whether the Court should overrule the doctrine of qualified immunity.

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STATEMENT

A fellow inmate stabbed Marquette F. Cummings in the eye. He was airlifted to a hospital, where he was connected to a life support machine. Cummings was breathing, and he was responsive to his mother's verbal cues. But, prior to doctors even ordering a brain death scan, petitioner Carter Davenport—the prison warden—directed the hospital to enter a do-not-resuscitate order and to disconnect the life support machine. The hospital complied, and Cummings promptly died.

Cummings's Estate brought this lawsuit, arguing that Davenport's conduct violated the Eighth Amendment, which precludes prison officials from acting with deliberate indifference to a known and serious medical issue. Davenport sought to dismiss this lawsuit on the basis of qualified immunity. The district court denied that motion, and the court of appeals affirmed that denial on Davenport's interlocutory appeal. This petition follows. The Court should deny review.

First, the question presented by the petition is wholly academic to the disposition of this case at this juncture. The courts below correctly concluded that, because Davenport acted outside the scope of his discretionary authority, qualified immunity does not apply at all. But even if Davenport could invoke the qualified immunity defense, it would be meritless here given the allegations in the complaint. The facts alleged here—that petitioner Davenport directed a hospital to remove Cummings from life support even though Cummings was breathing, Cummings was responsive to his mother's verbal cues, and no brain death study had yet been conducted so as to determine Cummings's prognosis—plainly state a clearly

established violation of federal law. It is difficult to conjure a more shocking example of deliberate indifference to a known medical need. There is thus no basis to dismiss the complaint at this early time.

Second, in any event, the court of appeals properly resolved this case, and there is no circuit split warranting review. All courts apply materially the same law: if an official acts *outside* the scope of his or her discretionary authority, then qualified immunity does not apply. Conversely, if the official acts *within* the scope of his or her discretionary authority, but violates state law while doing so, qualified immunity may attach. The question, accordingly, is not whether the official violates state law; it is whether that state law at issue delimits the scope of the official's discretionary authority. This broadly applied approach accords with this Court's longstanding holdings with respect to qualified immunity.

Third, if anything, the Court should either overturn qualified immunity as a whole or revisit the doctrine and substantially narrow it. There is broad agreement among Members of this Court, judges across the lower courts, and academics that the current scope of qualified immunity vastly exceeds immunity defenses that were available at common law at the time of the enactment of Section 1983. If (contrary to fact) petitioner were correct that qualified immunity applies in a case as drastic as this one, that would eviscerate the rights of citizens to be free from extraordinary constitutional violations. That should not be the law.

A. Factual background.

Cummings was an inmate at St. Clair Correctional Facility in Springville, Alabama. Pet. App. 3a.

At about 7:40 a.m. on January 6, 2014, another inmate stabbed Cummings in the eye with a "shank." *Ibid.* Cummings was airlifted to the University of Alabama at Birmingham Hospital, where he was transferred to the intensive care unit. *Ibid.*

Angela Gaines, Cummings's mother, soon thereafter learned of the attack on her son. Pet. App. 3a. Her frantic calls to the prison to learn of Cummings's status went unanswered. *Ibid.* In the afternoon, the prison warden, petitioner Carter Davenport, informed Gaines that Cummings had been transported to a hospital, but he refused to identify which one. *Ibid.* Several hours later, he told Gaines that Cummings was at the University Hospital. *Ibid.*

Gaines immediately went to see her son. Pet. App. 4a. Cummings was responsive to his mother's verbal cues, such as "blink if you can hear me." *Ibid.* Indeed, "Cummings would continually respond" to such verbal cues from his mother, "compl[ying] to his mother's request every time." COA App. 216 (Amended Complaint). Gaines insisted that her son stay on life support because "he was still breathing and responding to verbal commands." Pet. App. 4a-5a.

Petitioner Davenport, however, instructed the hospital that "'no heroic measures' would be taken to save [Cummings's] life." Pet. App. 4a. Per Davenport's instruction, Dr. Sherry Melton "entered a do-not-resuscitate order for Cummings at about 9:17 p.m." *Ibid.* Davenport directed medical personnel "to stop giving Cummings medication and to disconnect the life support machine." *Ibid.* This was all done "before a brain death study was even ordered." COA App. 217 (Amended Complaint).

"Gaines repeatedly begged that her son remain on life support because he was still breathing and responding to verbal commands." COA App. 217 (Amended Complaint). But, over Gaines's vigorous protestations, hospital staff followed Davenport's directives. The hospital staff "repeatedly conveyed that 'it was not her (Ms. Gaines'[s]) call' because the State had legal custody over Cummings and that the decision to let her son die was the Warden's decision." Pet. App. 5a. In sum, "Cummings's removal from life support was '[b]ased on this directive from Warden Davenport.'" *Ibid.*

On January 7, 2014, the hospital—acting on Davenport's order—removed Cummings from life support. Pet. App. 4a. He died shortly thereafter. *Ibid.*

B. Proceedings below.

Respondent, Cummings's Estate, brought this Section 1983 suit, claiming that petitioner Davenport violated Cummings's constitutional rights. Petitioner moved to dismiss the complaint.

1. The district court granted petitioner's motion to dismiss in substantial part but denied the motion as to respondent's Eighth Amendment claim. Pet. App. 19a-41a. The district court dismissed the claims brought by Gaines herself (*id.* at 27a), the official-capacity claims against petitioner Davenport (*id.* at 27a-30a), the failure-to-protect claim (*id.* at 30a-36a), and the wrongful-death claim (*id.* at 39a-40a). The district court, however, denied the motion to dismiss as to respondent's claim that Davenport violated Cummings's Eighth Amendment rights. *Id.* at 36a-39a; COA App. 202-205.

The court reasoned that "[d]eliberate indifference to an inmate's serious medical needs violates the Eighth Amendment's prohibition against cruel and unusual punishment." COA App. 202 (citing *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976)). "A prison official violates the Eighth Amendment by 'intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.'" *Ibid.* (quoting *Estelle*, 429 U.S. at 104-105). Likewise, "the Eleventh Circuit has 'consistently held that knowledge of the need for medical care and an intentional refusal to provide that care constitutes deliberate indifference.'" *Ibid.* (quoting *Adams* v. *Poag*, 61 F.3d 1537, 1543 (11th Cir. 1995)).

Respondent has alleged that hospital "medical personnel removed Cummings from life support based on Warden Davenport's 'directive.'" COA App. 203. "Accepting [respondent's] allegations as true, as the court must at this stage in the case, they allow the court to infer that Warden Davenport knew Cummings needed medical care and intentionally refused to provide that care by authorizing termination of Cummings's life support." *Ibid.* This also "support[s] an inference that Davenport interfered with Cummings's medical treatment by directing [the hospital] to terminate Cummings's life support." *Ibid.*

The court denied petitioner's request for qualified immunity at the motion-to-dismiss stage. The court concluded that a defendant may not raise a qualified immunity defense if he is "acting wholly outside the scope of his discretionary authority." COA App. 204 (quoting *Harbert Int'l, Inc.* v. *James*, 157 F.3d 1271, 1281 (11th Cir. 1998)). Respondent alleges that petitioner Davenport's conduct was out-

side the scope of his discretionary authority. *Ibid.* "[A]t this stage of the case," the district court concluded, petitioner Davenport has not established that "he was acting pursuant to the performance of his duties or within the scope of his authority when he allegedly authorized or directed UAB Hospital to remove Cummings's life support." *Ibid.*

Following the filing of an amended complaint, the district court again denied a motion to dismiss. Pet. App. 36a-39a. The court reasoned that petitioner Davenport "did not cite any authority suggesting that a warden's authority to make decisions regarding the provision of medical care for inmates extends to making end-of-life decisions for inmates." *Id.* at 38a. To the contrary, "Alabama statues indicate that making end-of-life decisions for an inmate is not within a warden's scope of authority," unless the inmate has established the warden as his "health care proxy" or a court has appointed the warden as the inmate's "guardian." *Ibid.* (citing Ala. Code §§ 22-8A-4, -6, -11(d)(1)).

2. The court of appeals, in an opinion by Judge William Pryor, affirmed. Pet. App. 1a-18a.

The court identified that, to invoke qualified immunity, a defendant must demonstrate "that the challenged actions were within the scope of his discretionary authority." Pet. App. 9a (quotation marks omitted). This includes assessing whether the employee was "performing a legitimate job-related function * * * through means that were within his power to utilize." *Ibid.* (quotation marks omitted). State law informs "the scope of a state official's discretionary authority." *Id.* at 10a. This stems from the fact that qualified immunity exists to shield an officer in the performance of her "discretionary functions." *Id.* at

16a (quoting *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1866 (2017)). In circumstances where officials lack authority to act, they are not performing discretionary functions to which qualified immunity applies. *Id.* at 15a-16a.

The court concluded that "[t]he Alabama Natural Death Act * * * compels the conclusion that the office of a prison warden grants no authority to enter a do-not-resuscitate order or to order the withdrawal of artificial life support on behalf of a dying inmate." Pet. App. 11a. Rather, Alabama law provides that adults may create living wills directing end-of-life care or identifying competent individuals to make such decisions. *Ibid.* In the absence of such a living will, the Act provides for a judicially appointed guardian, with priority going to close family members, including parents. *Ibid.* If no family members are available, state law provides for the appointment of a committee of medical professionals. *Id.* at 11a-12a. A "prison warden is nowhere on the list." *Id.* at 13a. See also *id.* at 13a-14a (construing Alabama state law).

Pursuant to state law, "Davenport could outrank Cummings's relatives in the hierarchy of priority—or figure in the hierarchy at all—only if a court appointed him Cummings's guardian." Pet. App. 12a. Davenport never had such authority. *Ibid.* Thus, state law "establishes that Davenport lacked the discretionary authority to instruct the University Hospital to enter a do-not-resuscitate order for Cummings or to withdraw his artificial life support." *Ibid.*

The court rejected petitioner's contention that qualified immunity is proper "because he had some general authority to make medical decisions for inmates." Pet. App. 14a. "If Davenport categorically

lacked the authority to enter a do-not-resuscitate order or to withdraw Cummings's life support," a court "cannot hold that he is entitled to qualified immunity simply because he had some authority to make *other* medical decisions." *Id.* at 15a.

Finally, the court of appeals held that it lacked jurisdiction to review petitioner's contention that respondent failed to state an Eighth Amendment claim. Pet. App. 17a-18a. "Consider[ing] whether the amended complaint states a claim would be an inappropriate adventure into 'the merits of the action,' which are 'completely separate' from this interlocutory appeal." *Id.* at 18a.

3. Petitioner sought rehearing en banc. See Pet. App. 42a-43a. The court of appeals denied the petition, with no judge having requested a poll. *Id.* at 43a.

REASONS FOR DENYING THE PETITION

Further review is unwarranted. This is a poor vehicle for review: petitioner's qualified immunity defense is meritless for reasons separate from those addressed by the petition, and the petition turns on a dispute regarding the meaning of state law. Beyond that, there is no conflict among the circuits, and the decision below is correct. If anything, the Court should reverse qualified immunity as a whole.

A. This a poor vehicle for review.

1. Certiorari is unwarranted because the question presented has no bearing on this case's ultimate disposition. Even if petitioner were correct regarding the question presented (he is not), his qualified immunity defense would still fail. The issue posed by the petition would therefore not resolve this case at

this early, interlocutory stage. Review, if any, should await development of a record, at which point all questions regarding qualified immunity might be fully addressed.

On a motion to dismiss, "the Court accepts as true the facts alleged in the complaint." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1852 (2017). Those allegations are stark: petitioner Davenport ordered the hospital to disconnect Cummings from life support. Pet. App. 4a; COA App. 217. Petitioner did so "before a brain death study was even ordered" (COA App. 217), meaning that neither petitioner nor medical staff had a firm assessment as to Cummings's ultimate prognosis. Moreover, when petitioner ordered Cummings to be removed from life support, Cummings "was still breathing and responding to verbal commands." *Ibid.*

Taken together, the allegations are that petitioner Davenport ordered the hospital to remove life support—leading directly to Cummings's death—notwithstanding that Cummings was still breathing and was responsive to his mother, and before doctors could advise as to the likelihood of Cummings's recovery. Even assuming, for sake of argument, that petitioner Davenport *had* full discretion to direct Cummings's medical treatment at the time, he still would not be entitled to qualified immunity.

It is long established that a prison official's "[d]eliberate indifference to a serious [medical] need is a constitutional violation because it 'constitutes the unnecessary and wanton infliction of pain * * * proscribed by the Eighth Amendment.'" *Taylor* v. *Hughes*, 920 F.3d 729, 733 (11th Cir. 2019) (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976)). In turn, "[a] serious medical need is 'one that has been diag-

nosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Ibid.* When subjectively aware of the "serious medical need," prison officials may not provide "an objectively insufficient response." *Kuhne* v. *Florida Dep't of Corr.*, 745 F.3d 1091, 1094 (11th Cir. 2014) (alteration incorporated) (quoting *Taylor* v. *Adams*, 221 F.3d 1254, 1258 (11th Cir. 2000)).

Suffice it to say, an inmate who has been stabbed in the eye and is dependent on a life support machine has a "serious medical need" that is "obvious" to anyone, including a "lay person." *Hughes*, 920 F.3d at 733. What is more, directing the termination of that care is "an objectively insufficient response." *Kuhne*, 745 F.3d at 1094. Davenport's decision was a deliberate choice to allow Cummings to die—rather than to sustain his life via medical care. And Davenport did so before Cummings's prognosis was known, while Cummings was breathing, and while Cummings was responsive to verbal cues. It is hard to imagine a more clear-cut situation in which a prison official's choice was "an objectively insufficient response" to a known and "serious medical need."

There is hardly anything novel about this conclusion. In *Hughes*, for example, the court of appeals concluded that a prison official violates clearly established constitutional rights by ignoring a prisoner who spent "several hours moaning, crying out in pain, and begging for medical help." 920 F.3d at 733. It follows that it was clearly established law that prison officials may not direct the *termination* of *life-saving* care.

In *Goebert* v. *Lee County*, 510 F.3d 1312, 1331 (11th Cir. 2007), the court of appeals identified "the

well established right of prisoners to timely treatment for serious medical conditions." Thus, when a prison official failed to respond to an inmate's complaint that she was leaking amniotic fluid—which ultimately resulted in the death of her fetus—the court found qualified immunity unavailable. The official "had reason to know that [the inmate] had a serious medical problem that needed attention," but he failed to respond. *Ibid*. Once again, the facts here are yet more pronounced.

Indeed, the court of appeals holds that "a defendant who delays necessary treatment for non-medical reasons may exhibit deliberate indifference." *Farrow* v. *West*, 320 F.3d 1235, 1246 (11th Cir. 2003). See also *Brown* v. *Hughes*, 894 F.2d 1533, 1538 (11th Cir. 1990) ("[A]n unexplained delay of hours in treating a serious injury states a prima facie case of deliberate indifference."). If the *delay* of necessary medical care constitutes deliberate indifference, *terminating* life-sustaining care is certainly a constitutional violation.

Scores of cases confirm that the right at stake here was clearly established long before petitioner's conduct. See, *e.g.*, *Hill* v. *Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1186 (11th Cir. 1994) ("'A finding of deliberate indifference necessarily precludes a finding of qualified immunity; prison officials who *deliberately* ignore the serious medical needs of inmates cannot claim that it was not apparent to a reasonable person that such actions violated the law.'"); *Greason* v. *Kemp*, 891 F.2d 829, 834 n.10 (11th Cir. 1990) ("[O]ne simply cannot say that a prisoner has a clearly established constitutional right to adequate psychiatric care but that that right is not violated by a particular treatment amounting

to grossly inadequate care unless some prior court has expressly so held on 'materially similar' facts. Such an approach would add an unwarranted degree of rigidity to the law of qualified immunity.").[1]

In sum, petitioner's qualified immunity defense is meritless for reasons wholly apart from the question presented by the petition. This case—especially at this interlocutory juncture—does not warrant further review.

2. What is more, certiorari is unwarranted because central to petitioner's argument is his contention that the court of appeals misinterpreted *state* law. See, *e.g.*, Pet. 10-11, 21-22. Petitioner complains that "there are serious questions about whether the Alabama Natural Death Act covers prison inmates at all and, if it does, whether a prison warden counts as a court-appointed surrogate under the Act." Pet. 10.

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[1] The court of appeals has oft held that, when inmates have serious medical needs and prison officials do nothing, officials violate well established constitutional rights. See, *e.g.*, *McElligott* v. *Foley*, 182 F.3d 1248, 1257 (11th Cir. 1999) ("Despite the repeated complaints about the pain he was suffering from, a jury could find that Dr. Foley and nurse Wagner basically did nothing to alleviate that pain, essentially letting Elmore suffer even as his condition was deteriorating."); *Lancaster* v. *Monroe Cty.*, 116 F.3d 1419, 1427 (11th Cir. 1997), overruled on other grounds by *LeFrere* v. *Quezada*, 588 F.3d 1317 (11th Cir. 2009) ("Because there is evidence Rankins knew Lancaster had an urgent medical need but intentionally delayed obtaining treatment for Lancaster while leaving him on the top bunk bed, a jury could find that Rankins was deliberately indifferent to Lancaster's serious medical needs."). Affirmatively *terminating* life support in these circumstances is plainly a well established violation of federal constitutional rights.

But the court of appeals did not view this as an open question. Pet. App. 8a-17a. Rather, state law designates individuals "who may make end-of-life decisions on behalf of a permanently incapacitated patient, and a prison warden is nowhere on the list." *Id*. at 13a.

Petitioner's argument otherwise (Pet. 10-11, 21-22) reduces to a disagreement regarding the construction of state law. But such a dispute is certainly not an issue that warrants this Court's review. Instead, the Court's "normal practice" is to "defer" to the court of appeals's "interpretation and application of state law." *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1415 (2019). See also *Pembaur* v. *Cincinnati*, 475 U.S. 469, 484 n.13 (1986) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals.") (collecting cases).

B. There is no circuit conflict warranting review.

Petitioner's assertion of a circuit conflict is mistaken. To the contrary, courts broadly recognize that the scope of an official's authority cabins the assertion of the qualified immunity defense. Petitioner agrees that this principle is recognized in the Second, Fourth, Sixth, Eighth, and Eleventh Circuits. See Pet. 9-13. It likewise prevails in the Fifth, Seventh, and Tenth Circuits.

1. In the authority on which petitioner relies, the Fifth Circuit recognizes squarely that, for a public official to "establish his entitlement to the [qualified immunity] defense," "he must show that the conduct in question occurred while he was acting 'in his official capacity and within the scope of his discretion-

ary authority.'" *Cronen* v. *Texas Dep't of Human Servs.*, 977 F.2d 934, 939 (5th Cir. 1992) (quoting *Garris* v. *Rowland*, 678 F.2d 1264, 1271 (5th Cir. 1982)). Moreover, "[a]n official acts within his discretionary authority when he performs non-ministerial acts *within the boundaries of his official capacity*." *Ibid.* (emphasis added).[2] That is precisely the law applied by the court below. See Pet. App. 9a.

In fact, a recent published decision of the Fifth Circuit—decided after the filing of the petition in this case—confirms beyond all doubt that the Fifth Circuit applies the same law as the court below. In *Cherry Knoll, L.L.C.* v. *Jones*, 922 F.3d 309, 318 (5th Cir. 2019), the court identified that, to establish qualified immunity, "[t]he defendant official must first satisfy his burden of establishing that the challenged conduct was within the scope of his discretionary authority." In that case, "the threshold inquiry ends [the court's] analysis because [the official] has not satisfied his burden to show that the challenged conduct was within the scope of his discretionary authority." *Ibid.*

In *Cherry Knoll*, the court of appeals relied on the showing by the plaintiff that, per "state law and the City's charter and ordinances, the City (and its officials) had no authority to file plats affecting private property without the consent of the landowner." 922 F.3d at 319. Because the official could not show that he was authorized to engage in the challenged

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[2] See also, *e.g.*, *Bazan ex rel. Bazan* v. *Hidalgo Cty.*, 246 F.3d 481, 489 (5th Cir. 2001) ("The defendant official must initially plead his good faith and establish that he was acting within the scope of his discretionary authority.") (quoting *Salas* v. *Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992)).

act as a matter of state law, the official "failed to meet his burden of showing that the filing of the Subdivision Plats was within the scope of his discretionary authority." *Ibid.*

Petitioner's reliance on *Cronen* is mistaken. There, the court simply rejected the assertion that *any* violation of state law would establish that an official acts outside his or her "discretionary authority." *Cronen*, 977 F.2d at 939. The court concluded that food stamp regulations did not remove certain decision-making from the official's discretion; "[i]n carrying out their duties, [officials] necessarily must interpret the general language of statutes and regulations and apply them to concrete circumstances." *Ibid.* In sum, the official was acting *within* the scope of his authority, even if exercising that authority in a way that ultimately violated state law. This also explains *Gagne* v. *City of Galveston*, 805 F.2d 558, 560 (5th Cir. 1986), where the Fifth Circuit found that an official was "engaged in routine tasks" within the scope of his authority.

These results accord with the analysis below, which held that a "government official can prove he acted within the scope of his discretionary authority by showing 'objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority.'" Pet. App. 10a. In fact, this essential principle derived from a *Fifth Circuit* case—*Barker* v. *Norman*, 651 F.2d 1107, 1121 (5th Cir. Unit A July 1981)—decided prior to the division of that circuit.

There is, accordingly, no material difference between the law of the Fifth and Eleventh Circuits. The only question is the application of that settled

law to the particulars here. And the court of appeals properly understood Alabama law: "the Act makes clear that Alabama has not given prison wardens" authority "to make end-of-life decisions." Pet. App. 15a.

2. Nor is there a conflict with the Seventh Circuit. There, as elsewhere, "[g]overnment officials *performing discretionary functions* are entitled to qualified immunity from suit 'as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.'" *Kiddy-Brown* v. *Blagojevich*, 408 F.3d 346, 352 (7th Cir. 2005) (emphasis added) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987)). See also *Seiser* v. *City of Chi.*, 762 F.3d 647, 658 (7th Cir. 2014) ("Qualified immunity bars a civil claim for damages against a government official *when the official is performing a discretionary function* and her conduct does not violate clearly established rights of which a reasonable person would have known.") (emphasis added); *Davis* v. *Owens*, 973 F.2d 574, 576 (7th Cir. 1992) ("The Supreme Court has extended qualified immunity to police officers *exercising discretionary authority* if their actions meet the 'objective reasonableness' standard set forth in *Harlow*.") (emphasis added).

All of this authority postdates *Coleman* v. *Frantz*, 754 F.2d 719 (7th Cir. 1985), on which petitioner places sole reliance. See Pet. 14-15. What is more, in *Coleman*, the Seventh Circuit identified the same legal rule applied below—that a public official is entitled to qualified immunity only upon demonstrating "that, based on objective circumstances at the time he acted, his actions were undertaken pursuant to the performance of his duties and *within the*

scope of his authority." 754 F.2d at 728 (emphasis added).

At issue in *Coleman* was a sheriff's delay in bringing an individual before a judge. The court of appeals specifically found that the sheriff's actions *were* "undertaken pursuant to the performance of his duties and within the scope of his authority." *Coleman*, 754 F.2d at 728. That is because the state law at issue did not restrict the scope of the official's authority. *Ibid*. While the sheriff was "under a duty to take the accused plaintiff before a judge," state law "contained no time limit nor specific procedures for the Sheriff to follow in accomplishing the task," and the warrant itself "did not instruct the Sheriff as to the proper mode of meeting his obligation." *Ibid*. *Coleman*, accordingly, is entirely consistent with the result reached here.

3. The Tenth Circuit also applies the basic principle that, "[u]nder the qualified immunity doctrine, 'government officials *performing discretionary functions*[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established [federal] statutory or constitutional rights of which a reasonable person would have known.'" *Riggins* v. *Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009).

In *Cummings* v. *Dean*, 913 F.3d 1227 (10th Cir. 2019), the principal authority on which petitioner relies (Pet. 15-16), the court reiterated this law at the outset of its holding. Once again, there was no dispute that this is a threshold requirement of an official's entitlement to qualified immunity. *Id.* at 1241. Instead, the court of appeals reasoned that part of the discretionary authority of the director of the Labor Relations Division of the New Mexico Depart-

ment of Workforce Solutions in publishing prevailing rates for wages and fringe benefits is interpreting certain state regulations. *Ibid.* That is because the official's very job was "implementation of the Act" in question, which "required him to interpret the language of a state statute." *Ibid.* In fact, "the Act left to Director Dean a substantial measure of discretion in interpreting its terms": the law expressly "leaves to the director substantial discretion to determine the method of collecting and aggregating data, *and* * * * the timetable for doing so." *Id.* at 1242.

Dean thus establishes the unexceptional principle that not *all* violations of state law defeat an invocation of qualified immunity. As we have said, that accords with the decision below. The focus of the decision below is the "*scope* of a state official's discretionary authority." Pet. App. 10a (emphasis added). When acting *within* the scope of that authority, actions that violate state law may nonetheless trigger qualified immunity. *Id.* at 9a-11a. But, when *outside* the scope of that authority, qualified immunity is inapplicable.

That is the key distinction between *Dean* and this case. In *Dean*, the official was *within* the scope of his authority. Not so here. Petitioner Davenport's job is not the implementation of the Alabama Natural Death Act. When Davenport acted in contravention of that Act's clear terms, he acted outside the scope of his authority. Pet. App. 10a-11a.

Petitioner's citation (Pet. 15) to Judge Holmes's opinion in *Stanley* v. *Gallegos*, 852 F.3d 1210, 1219-1220 (10th Cir. 2017), is mistaken. Judge Holmes wrote to lodge *disagreement* with the approach taken by the "Lead Opinion" in that case. *Ibid.* Nothing

about Judge Holmes's opinion constitutes a holding of that court.

Judge Hartz's opinion for the court, moreover, recognized that "it is not surprising that over half the circuit courts of appeal appear to have recognized a scope-of-authority exception to the protection of qualified immunity." *Stanley*, 852 F.3d at 1214. Crucially, for present purposes, the Judge Hartz opinion acknowledged that the Fifth Circuit is among these courts and that "[n]one [of the courts of appeals] have explicitly rejected the exception." *Ibid.*

C. The decision below is correct.

1. The court of appeals properly concluded that qualified immunity does not attach when public officials act outside the scope of their "discretionary authority." Pet. App. 9a. Historically, "when a government official * * * act[ed] totally beyond the scope of his authority, he received no immunity at common law and is entitled to none under [Section] 1983." *In re Allen*, 106 F.3d 582, 594 (4th Cir. 1997).

This Court has long held that qualified immunity applies to public officials's performance of their "discretionary functions." *Ziglar*, 137 S. Ct. at 1866 (quoting *Anderson*, 483 U.S. at 638). That is, under the doctrine of qualified immunity, "government officials *performing discretionary functions* generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added).

Indeed, "[t]he conception animating the qualified immunity doctrine * * * is that 'where an official's duties legitimately require action in which clearly es-

tablished rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences.'" *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985) (quoting *Harlow*, 457 U.S. at 819). But where an official acts *outside* the scope of his or her discretionary authority, the same public interest considerations are not implicated.

This understanding of qualified immunity dates to this Court's foundational authorities. This Court has instructed that "the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity" is whether the issues in question have been "committed by law to [the official's] control or supervision." *Scheuer* v. *Rhodes*, 416 U.S. 232, 247 (1974) (quoting *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896)). See also *Procunier* v. *Navarette*, 434 U.S. 555, 561-562 (1978) (holding that Section 1983 immunity is dependent upon "the scope of discretion and responsibilities of the office").

Understood this way, qualified immunity ensures that there is "no license to lawless conduct." *Harlow*, 457 U.S. at 819 (emphasis added). When officials act outside the scope of their discretionary authority, as established by state law, officials cannot properly claim the defense of qualified immunity.

This result is compelled by historical immunity doctrines. See *In re Allen*, 106 F.3d at 591-592. In construing the reach of qualified immunity, the Court looks to immunity doctrines that applied at the time of Section 1983's enactment. See, *e.g.*, *Wyatt* v. *Cole*, 504 U.S. 158, 163-164 (1992); *Malley* v. *Briggs*, 475 U.S. 335, 339-340 (1986).

In pre-Section 1983 tort cases, official liability often turned on whether the officer was acting within the bounds of his authority. For example, in *Mitchell* v. *Harmony*, the Court distinguished acts that were authorized by law from those that were not: if a government officer seized property lawfully, "the government is bound to make full compensation to the owner; but the officer is not a trespasser." 54 U.S. (13 How.) 115, 134 (1851). In circumstances where the officer acts beyond his authority, even "in his zeal for the honor and interest of his country, * * * [he] has trespassed on private rights." *Id.* at 135. Several other cases confirm the point. See, *e.g.*, *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (commander of American warship liable for seizure of Danish cargo ship on high seas because captain acted beyond scope of congressional grant of authority); *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331, 337 (1806) (collector of militia fines commits trespass by attempting to collect fine from person exempt from military service); *Bates* v. *Clark*, 95 U.S. 204, 209 (1877) (holding officials liable where they "were utterly without any authority in the premises").

The Court has previously evaluated this authority, identifying the rule that "a federal official was protected for action tortious under state law only if his acts were authorized by controlling federal law." *Butz* v. *Economou*, 438 U.S. 478, 490 (1978). Thus, "[t]o make out his defence he must show that his authority was sufficient in law to protect him." *Ibid.* (quoting *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U.S. 446, 452 (1883)). The Court thus adopted the same effective rule identified by the court of appeals here: qualified immunity does not "abolish the liability of federal officers for actions manifestly beyond their line of duty." *Id.* at 495.

As the Fourth Circuit concluded after exhaustively investigating this historical evidence, in enacting Section 1983, nothing "suggests that Congress intended government officials acting clearly beyond the scope of their authority to be immune from suits for money damages." *In re Allen*, 106 F.3d at 592. While Congress did not abolish then-existing defenses, "[t]he legislative record similarly gives no indication that Congress meant to *enlarge* common law immunities to include officials acting outside the scope of their authority." *Ibid.*

This result also accords with the notice function that underlies qualified immunity. Because qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments," it turns on whether "a reasonable official would understand that *what he is doing* violates that right." *Carroll* v. *Carman*, 135 S. Ct. 348, 350 (2014) (emphasis added) (quoting *Anderson*, 483 U.S. at 640). "Where an official could be expected to know that certain *conduct* would violate statutory or constitutional rights," the law is clearly established. *Harlow*, 457 U.S. at 819 (emphasis added). That is, the "salient question" for the "clearly established" prong of the qualified immunity test "is whether the state of the law at the time of an incident provided fair warning to the defendants that *their alleged conduct* was unconstitutional." *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1866 (2014) (emphasis added) (quotation marks and alteration omitted). State law may properly bear on that question.

2. Contrary to petitioner's assertion (Pet. 18-21), *Davis* v. *Scherer*, 468 U.S. 183 (1984), does not control. There, the Court specifically recognized—and did not reject—the contention that qualified immuni-

ty is limited to "the performance of discretionary * * * functions." *Id.* at 196 n.14. In *Davis*, the underlying state law at issue "left to [the official] a substantial measure of discretion." *Ibid.* That was a case where the "authority" exercised "remains discretionary however egregiously it is abused." *Ibid.*

This case is different because, as the court of appeals concluded (Pet. App. 10a-14a), Alabama law left petitioner Davenport with *no* discretion to direct end-of-life care for Cummings. There was not, accordingly, an abuse of a warden's discretion; the warden acted outside the scope of his discretion altogether.

Respondent's claim, moreover, is not that petitioner "breach[ed]" some "legal duty created by" state law. *Davis*, 468 U.S. at 196 n.14. *Davis*'s caution, then, that the breach of a state regulation "would forfeit official immunity only if that breach itself gave rise to the [plaintiff's] cause of action for damages" (*ibid.*) is inapplicable here. Rather, the argument is that petitioner acted in a manner wholly outside his legitimate authority, and thus qualified immunity does not attach from the start. Nothing in *Davis* compels a conclusion otherwise.

The Court has previously characterized just what *Davis* held. *Davis* addressed the "entirely discrete question: Is qualified immunity defeated where a defendant violates *any* clearly established duty, including one under state law, or must the clearly established right be the federal right on which the claim for relief is based? The Court held the latter." *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994) (citing *Davis*, 468 U.S. at 193-196 & n.14). Therefore, the sole "discrete" question answered in *Davis* is whether a defendant official's properly asserted claim of qualified

immunity may be "defeated" or "overcome" because the official has violated some other statute or regulation. *Id.* at 514-515.

Indeed, the *Davis* plaintiff did not—and could not—make the "claim that the defendants were not entitled to immunity at all." *In re Allen*, 119 F.3d 1129, 1134 (4th Cir. 1997) (Motz, J., concurring in the denial of rehearing en banc). Thus, as Judge Motz concluded, "*Davis* does not address, let alone decide, whether a government employee, who commits acts clearly established to be beyond the scope of his official authority, may claim qualified immunity *in the first instance*." *Id.* at 1133.

Finally, one essential premise of the holding in *Davis* is that there was no demonstrated violation of "clearly established constitutional rights." 468 U.S. at 191-193. As we have shown (see pages 9-12, *supra*), the allegations here certainly make out a violation of Cummings's clearly established constitutional rights.

D. The Court should overturn qualified immunity as a whole.

The Court should deny this petition—it is a poor vehicle for review, there is no conflict warranting review, and the decision below is correct.

If, however, the Court grants review, it should reverse qualified immunity in its entirety. While the court of appeals was bound to apply qualified immunity, this Court may revisit that doctrine. And there is good reason for doing so. As Justice Thomas recently explained, there is significant and "growing concern" about the validity of the Court's "qualified immunity jurisprudence." *Ziglar*, 137 S. Ct. at 1870 (Thomas, J., concurring in part and concurring in the

judgment). See also William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 46-49 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1800 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 11-12 (2017).

Justice Kennedy similarly observed that the Court's jurisprudence has "diverged to a substantial degree from the historical standards" of common law immunity and that the modern immunity doctrine improperly turns on "freewheeling policy choice[s]." *Wyatt* v. *Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring). According to Justice Scalia, the Court's "treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when [Section] 1983 was enacted." *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). And Justice Sotomayor recently criticized "a one-sided approach to qualified immunity," which "transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). See also *A.M.* v. *Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J.) ("Respectfully, I would have thought this authority sufficient to alert any reasonable officer in this case that arresting a now compliant class clown for burping was going a step too far.").

Lower courts have echoed this criticism of qualified immunity. Judge Willet, for example, "register[ed] [his] disquiet over the kudzu-like creep of the modern immunity regime." *Zadeh* v. *Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willet, J.). While "the entrenched, judge-made doctrine of qualified immun-

ity seems Kevlar-coated, making even tweak-level tinkering doubtful," Judge Willet urges that "immunity ought not be immune from thoughtful reappraisal." *Ibid*. Judge Willett thus "add[ed] [his] voice to a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence." *Id*. at 499-500.

Indeed, lower courts have broadly underscored the importance of revisiting the reaches of the qualified immunity doctrine. See *Morrow* v. *Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019) (Oldham, J.) ("Some—including Justice Thomas—have queried whether the Supreme Court's post-*Pierson* qualified-immunity cases are 'consistent with the common-law rules prevailing [when Section 1983 was enacted] in 1871.'"); *Rodriguez* v. *Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018) (Kleinfeld, J.) ("Some argue that the 'clearly established' prong of the analysis lacks a solid legal foundation."); *Thompson* v. *Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018) (Hamilton, J.) ("Scholars have criticized [the qualified immunity] standard."); *Thompson* v. *Clark*, 2018 WL 3128975, at *10 (E.D.N.Y. 2018) (Weinstein, J.) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny.").

In an extended analysis, Judge James Browning expressed substantial concern about qualified immunity. "Factually identical or highly similar factual cases are not * * * the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way." *Quintana* v. *Santa Fe Cty. Bd. of Comm'rs*, 2019 WL 452755, at *37 n.33 (D.N.M. 2019) (Browning, J.). Police officers do not study the precise fact patterns of specific cases; instead, "in their training

and continuing education, police officers are taught general principles." *Ibid.*

Expressing his "disagree[ment]" with overreaching qualified immunity, Judge Browning opined that "[t]he most conservative, principled decision is to minimize the expansion of the judicially created clearly established prong, so that it does not eclipse the congressionally enacted [Section] 1983 remedy." *Quintana*, 2019 WL 452755, at *37 n.33. See also *Gallegos* v. *Bernalillo Cty. Bd. of Cty. Comm'rs*, 2018 WL 3210531, at *21 n.40 (D.N.M. 2018) (Browning, J.) (same).

In this case, a prison warden directed the removal of life support from an inmate—notwithstanding that the inmate was breathing, he was responsive to verbal cues from his mother, and no brain death study had yet been ordered. Qualified immunity does not shield such official conduct from review. If, contrary to fact and law, the qualified immunity doctrine actually suggested dismissal of this lawsuit at this stage, that would be confirmatory evidence that qualified immunity needs to be revisited and, at a minimum, pared back substantially. Otherwise, qualified immunity would eviscerate the constitutional rights of citizens.

Prior to considering the application of qualified immunity to this case, the Court should revisit that doctrine entirely—reversing or substantially narrowing it.[3]

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[3] Likewise, if (contrary to law and fact) *Davis* actually supported the broad proposition that petitioner asserts, *Davis* should give way to a sensible construction of qualified immunity that accords with the underlying history of immunity doctrines.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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