No. _____

In the
Supreme Court of the United States

CARTER DAVENPORT,
Petitioner,
v.
THE ESTATE OF MARQUETTE CUMMINGS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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March 11, 2019

QUESTION PRESENTED

This Court has long held that a state official does not lose the federal defense of qualified immunity merely because he has acted inconsistently with a *state* law. *See Davis v. Scherer*, 468 U.S. 183 (1984). This is so even if the state official "ignores a clear legal command" found in state law. *Id.* at 194.

This case presents the following question:

Whether a state official's qualified immunity defense to a claim for money damages necessarily fails if he cannot first prove that he had authority under state law to perform the challenged act.

PARTIES AND AFFILIATES

All parties are listed in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Carter Davenport, former warden of the State of Alabama's St. Clair Correctional Facility, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The district court's memorandum opinion on qualified immunity is unpublished, but can be found at 2017 WL 3242783 (N.D. Ala. July 31, 2017), and is reprinted in the appendix at 19a-41a. The Eleventh Circuit's opinion affirming is reported at 906 F.3d 934 (11th Cir. 2018), and is reprinted in the appendix at 1a-18a.

JURISDICTION

The district court had federal question and civil rights jurisdiction. *See* 28 U.S.C. §§ 1331, 1343. The court of appeals issued the opinion under review on October 2, 2018. App. 1a. Warden Davenport filed a timely petition for rehearing, which was denied on December 11, 2018. App. 42a. This petition is timely filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

The Alabama Natural Death Act provides in pertinent part:

> (a) If no advance directive for health care has been made . . . a surrogate, in consultation with the attending physician, may . . . determine whether to provide, withdraw, or withhold life-sustaining treatment or artificially provided nutrition and hydration . . .
>
> . . .
>
> (d) Any of the following persons, in order of priority stated, when persons in prior classes are not available or willing to serve, may serve as a surrogate pursuant to the provisions of this section:
>
> (1) A judicially appointed guardian, provided the appointment specifically authorizes the guardian to make decisions regarding the withholding of life-sustaining treatment or artificially provided nutrition and hydration. Nothing in this section shall be construed to require a judicial appointment

> before a decision can be made under this chapter. In addition, this section shall not be construed to require a judicially appointed guardian who has not been specifically authorized by a court to make decisions regarding the providing, withholding, or withdrawing of life-sustaining treatment or artificially provided nutrition and hydration to make those decisions or to seek court approval to make those decisions;
>
> (2) The patient's spouse, unless legally separated or a party to a divorce proceeding;
>
> (3) An adult child of the patient;
>
> (4) One of the patient's parents;
>
> (5) An adult sibling of the patient;
>
> (6) Any one of the patient's surviving adult relatives who are of the next closest degree of kinship to the patient; or
>
> (7) If the patient has no relatives known to the attending physician or to an administrator of the facility where the patient is being treated, and none can be found after a reasonable inquiry, a committee composed of the patient's primary treating physician and the ethics committee of the facility where the patient is undergoing treatment or receiving care, acting unanimously . . . .

Ala. Code § 22-8A-11.

STATEMENT

This case is about a prison warden who authorized a hospital to end artificial life support for a brain-dead prisoner in his custody. The lower court held that the prison warden did not have the authority under state law to authorize the removal of artificial life support because of a state statute about living wills. And, because of its contested reading of this state statute, the lower court rejected the warden's qualified immunity defense to an Eighth Amendment claim under 42 U.S.C. § 1983.

1. Marquette Cummings was incarcerated at St. Clair Correctional Facility where Warden Carter Davenport was the chief warden.[1] In January of 2014, another inmate stabbed Cummings in the eye with a prison-made knife, causing him to bleed profusely and suffer severe brain damage. Cummings was airlifted to a local hospital, and Warden Davenport notified Cummings' mother about the incident.

Shortly after Cummings arrived at the hospital, medical staff declared him a "non-survivor." Hospital staff told Cummings' mother that "[he] had been stabbed in the eye and that, due to his injuries, he was only operating with 10% of normal brain functioning." Relying on a statement by Warden Davenport, medical staff placed a "DNR" designation on Cummings' chart, meaning "do not resuscitate." The medical staff did not allow Cummings' mother to have input into this decision.

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[1] These facts are taken from Cummings' amended complaint, Doc. 29, and must be taken as true because of the case's current procedural posture.

Eventually, medical staff informed Cummings' mother that Warden Davenport had authorized them to disconnect the artificial breathing apparatus. Cummings' mother objected to this decision. But the medical staff told her that "it was not her call" because the State had legal custody over Cummings. As a consequence, Cummings was taken off artificial life support and soon thereafter died.

2. Cummings' estate filed suit seeking money damages against Warden Davenport in his personal capacity. The estate claimed that Warden Davenport's decision to authorize the removal of artificial life support violated the Eighth Amendment. Warden Davenport moved to dismiss the operative complaint based on, among other things, the defense of qualified immunity.

The district court denied the Warden's motion to dismiss on qualified immunity because it concluded that the Warden was not acting within his "discretionary authority" when he authorized the removal of life support. App. 36a-39a. The district court recognized that decisions about inmate medical care normally fall under a warden's authority. App. 38a. But it held that, in this specific case, the Warden lacked authority to allow the removal of life support because "Alabama statutes indicate that making end-of-life decisions for an inmate is not within a warden's scope of authority." App. 38a.

Specifically, the district court relied on the Alabama Natural Death Act, which provides a list of "surrogates" who may make end-of-life decisions for an unconscious, hospitalized person in the absence of a living will. *See* Ala. Code §§ 22-8A-4, 6 & 11(d)(1). The Act provides the following priority order for

"surrogates:" (1) a "judicially appointed guardian, provided the appointment specifically authorizes the guardian to make decisions regarding the withholding of life-sustaining treatment or artificially provided nutrition and hydration," (2) spouse, (3) child, (4) parent, (5) sibling, (6) other relative, and (7) a committee of doctors. The district court held that "the warden was [not] a judicially-appointed guardian for Cummings" under this statute and therefore concluded "that Warden Davenport has not met his burden of showing that he was acting within the scope of his authority when he allegedly authorized or directed UAB Hospital to remove Cummings's life support." App. 39a.

3. When Warden Davenport appealed the denial of qualified immunity, the Eleventh Circuit Court of Appeals affirmed. App. 2a. Like the district court, the court of appeals held that Davenport could not rely on the defense of qualified immunity "[b]ecause Alabama law establishes that Davenport's discretionary authority did not extend to the alleged actions." App. 2a. Based on prior Eleventh Circuit precedents, the court of appeals held that qualified immunity covers only actions taken in an official's "discretionary authority." App. 9a. It further concluded that "[w]e look to state law to determine the scope of a state official's discretionary authority" for the purposes of qualified immunity. App. 10a. Applying its prior precedents to this case, the court of appeals reasoned that Alabama's Natural Death Act "controls this appeal" and "is fatal to Davenport's defense of qualified immunity." App. 12a-13a.

Warden Davenport argued that the panel should not follow the Eleventh Circuit's prior precedents in this area. In response, the court of appeals recognized

that "not every circuit court" has recognized a state-law "discretionary authority" prerequisite to qualified immunity. App. 16a. It also recognized that "not all" those circuits that have "formulated" the state-law-authority requirement would "apply it in precisely the same way as this Court." App. 16a. And, finally, it acknowledged that "the Supreme Court has never addressed the scope of an official's burden to establish that a suit against him is based on actions taken within his authority." App. 15a. But the court of appeals held that it was bound by its own precedents to give its contested reading of state law a dispositive role in the qualified immunity analysis. *See* App. 16a-17a.

ARGUMENT

The Eleventh Circuit's decision is inconsistent with this Court's precedents and deepens a circuit split about qualified immunity. "The doctrine of qualified immunity protects government officials '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.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of

the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citation omitted).

In *Davis v. Scherer*, 468 U.S. 183 (1984), this Court rejected a lower court's conclusion that a state official's "violation of [state law]—although irrelevant to the merits of appellee's underlying constitutional claim—was decisive of the qualified immunity question." *Id.* at 191. Instead, this Court held that state "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some [state-law] statutory or administrative provision." *Id.* at 194. The Court held that the only relevant consideration for qualified immunity was "the 'objective reasonableness of [an official's] conduct as measured by reference to clearly established [federal] law;'" "[n]o other 'circumstances' are relevant to the issue of qualified immunity." *Id.* at 191

Although a state-law-authority prerequisite to qualified immunity cannot be squared with *Davis*, the lower courts are nonetheless split on this issue. The Eleventh Circuit routinely denies qualified immunity based on questions of state-law authority. The Second and Sixth Circuits have adopted the Eleventh Circuit's rule. The Fourth and Eighth Circuits deny qualified immunity on state-law grounds only when the official's conduct was *clearly established* to be beyond the scope of his state-law authority. The Fifth, Seventh, and Tenth Circuits have, in light of *Davis*, rejected a state-law prerequisite to qualified immunity. The Court should grant certiorari to resolve the split and reverse.

I. The courts of appeals are split on the question presented.

There is a recognized, well-established, three-way split of authority on how a state official's scope of authority under state law factors into the federal defense of qualified immunity. The lower court expressly recognized that "not every circuit has formulated the discretionary-authority requirement as part of its qualified immunity analysis." App. 16a. And "not all of those [circuits] that have formulated it apply it in precisely the same way as [the Eleventh Circuit.]" App. 16a. On this point, at least, the court of appeals was correct. The lower courts are divided on whether a state official can lose qualified immunity when his actions are outside his state-law authority. And the Eleventh Circuit has adopted an extreme position on this question that puts it out of step even with other courts on its side of the broader circuit split. The upshot is a three-way split on the question. In other circuits to have addressed the question, Warden Davenport would have qualified immunity and would not be facing personal liability for damages.

A. The Eleventh, Second, and Sixth Circuits require state officials to establish definitively that their conduct comports with state law.

The Eleventh, Second, and Sixth Circuits require a state official to prove that he has acted within his state-law authority as a prerequisite to qualified immunity.

The Eleventh Circuit. Under the Eleventh Circuit's case law, the first step in every qualified immunity defense is for the defendant to prove that he acted within his authority under state law. App. 2a, 9a-10a.

The federal court's interpretation of the defendant's state-law authority is dispositive and "controls" the issue of qualified immunity. App. 10a-13a. "If, and only if, the defendant [establishes his authority under state law] will the burden shift to the plaintiff to establish that the defendant violated clearly established law." *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1281 (11th Cir. 1998). *See also Ingalls v. U.S. Space & Rocket Ctr.*, 679 F. App'x 935, 940 (11th Cir. 2017) ("The question is whether the executives had the authority to set the appropriate pay and fringe benefits for the Commission's employees."); *Mikko v. City of Atlanta, Georgia*, 857 F.3d 1136, 1144 (11th Cir. 2017) ("The question then is whether, in discussing Mikko's expert activities with other law enforcement officials, the prosecutors' actions were 'within, or reasonably related to, the outer perimeter of [their] discretionary duties.'").

This rule means that the Eleventh Circuit denies qualified immunity even when a state official's state-law authority is ambiguous or unclear. *See, e.g., Lenz v. Winburn*, 51 F.3d 1540 (11th Cir. 1995) (denying qualified immunity to child's guardian ad litem because she did not have clear state-law authority to retrieve a child's possessions, even though she was the child's appointed legal representative). For example, in this case, 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. This law has never been interpreted by a state court nor applied to inmates. Instead, state courts (and this Court) have consistently recognized that prison wardens have legal custody over prisoners in their charge. *See, e.g., Ex parte Rogers*, 182 So. 785 (Ala. Ct. App.

1919); *Rumsfeld v. Padilla*, 542 U.S. 426, 438 (2004). But, consistent with its precedents, the Eleventh Circuit construed an ambiguous state statute *against* the state official claiming qualified immunity. *See, e.g.*, App. 13a-14a (invoking "negative-implication cannon" to hold that the warden lacks authority).

The Second Circuit. The Second Circuit has adopted the same test as the Eleventh Circuit. *See Huminski v. Corsones*, 396 F.3d 53, 80 (2d Cir. 2005) ("To be entitled to qualified immunity, the defendants therefore have the burden of proving, first, that their conduct fell within the scope of their official duties."); *Shechter v. Comptroller of the City of New York*, 79 F.3d 265, 268 (2d Cir. 1996)("First, the defendant must show that the conduct of which the plaintiff complains falls within the scope of the defendant's official duties.").

The Sixth Circuit. Like the Second Circuit, the Sixth Circuit has adopted the Eleventh Circuit's test. *See Gravely v. Madden*, 142 F.3d 345, 347 (6th Cir. 1998)("In order to establish his entitlement to qualified immunity, Madden must first show that he was acting within the scope of his discretionary authority when the incident occurred."). *See also Sell v. City of Columbus*, 47 F. App'x 685, 695–96 (6th Cir. 2002) ("The individual defendants are entitled to immunity only if they are authorized by law to order an immediate eviction . . . . Further factual development is required to determine whether § 4509.06 of the Columbus City Code authorizes Code Enforcement Officers to order an immediate, emergency eviction.").

B. The Fourth and Eighth Circuits recognize qualified immunity unless a state official acts beyond the "clearly established" scope of his state law authority.

Like the Eleventh Circuit, the Fourth and Eighth Circuits require that a state official prove that he acted within his authority as a prerequisite to qualified immunity. But, unlike the Eleventh Circuit, those circuits withdraw qualified immunity only when it is *clearly established* that the state official lacks authority under state law. *See In re Allen*, 119 F.3d 1129 (4th Cir. 1997) (Motz, J., concurring in the denial of rehearing en banc) (recognizing that the Fourth Circuit's rule is different than the Eleventh Circuit's).

The Fourth Circuit. A panel of the Fourth Circuit addressed this issue as a question of first impression in *In re Allen*, 106 F.3d 582, 594 (4th Cir. 1997). There, it held that "an official may claim qualified immunity as long as his actions are not clearly established to be beyond the boundaries of his discretionary authority." *Id.* at 593. "[I]n order to ensure that public officials are adequately protected from liability," the Fourth Circuit held that "an official's conduct falls within his authority unless a reasonable official in the defendant's position would have known that the conduct was clearly established to be beyond the scope of that authority." *In re Allen*, 106 F.3d 582, 594 (4th Cir. 1997). Applying this rule, the panel held that the Attorney General of West Virginia had clearly exceeded his state-law authority when he incorporated an organization as an agent for the Attorney General's Office so that a pre-existing organization involved in litigation with his office could not incorporate under the same name. *Id.* at 587.

The Fourth Circuit split 5-5 on whether to rehear the case *en banc*. Then-Judge Luttig wrote a thorough dissent explaining that the panel's state-law authority requirement violated this Court's precedents. *See In re Allen*, 119 F.3d 1129, 1135 (4th Cir. 1997) (Luttig, J., dissenting from denial of rehearing en banc).

The Eighth Circuit. The Eighth Circuit later adopted the Fourth Circuit's rule. *See Hawkins v. Holloway*, 316 F.3d 777 (8th Cir. 2003). Like the Fourth Circuit, the Eighth Circuit rule is that "an official acting outside the clearly established 'scope of his discretionary authority is not entitled to claim qualified immunity under § 1983.'" *Johnson v. Phillips*, 664 F.3d 232, 236 (8th Cir. 2011).

C. The Fifth, Seventh, and Tenth Circuits have held that state officials do not lose immunity because their actions are outside their state-law authority.

The Fifth, Seventh, and Tenth Circuits have held that a state official does not lose qualified immunity merely because he cannot prove that his actions are within his scope of state-law authority.

The Fifth Circuit. In light of this Court's decision in *Davis*, the Fifth Circuit has rejected the idea that a state official loses qualified immunity because he has exceeded his authority under state law. In *Gagne v. City of Galveston*, 805 F.2d 558 (5th Cir. 1986), the Fifth Circuit rejected the argument that a police officer lost qualified immunity because "he was not engaged in a 'discretionary act'" when he disregarded "an unambiguous police department regulation" and allowed an inmate to keep his belt. *Id.* at 559. Citing *Davis*, the Fifth Circuit held that "allegations about

the breach of a statute or regulation are simply irrelevant to the question of an official's eligibility for qualified immunity in a suit over the deprivation of a constitutional right." *Id.* The Fifth Circuit reiterated its view in *Cronen v. Texas Dep't of Human Servs.*, 977 F.2d 934 (5th Cir. 1992). There, it explained that the Eleventh Circuit's rule "would emasculate the 'good faith' prong of the qualified immunity defense." *Id.* at 939. Under that "approach, [a court] would look to see whether the defendant acted contrary to law" and "[i]f he had, he would be acting outside his discretionary authority and, thus, not entitled to immunity." *Id.* Instead, the Fifth Circuit held that the right approach recognizes qualified immunity when an official "performs non-ministerial acts within the boundaries of his official capacity," which "necessarily" includes "interpret[ing] the general language of statutes and regulations and apply[ing] them to concrete circumstances." *Id.* [2]

The Seventh Circuit. The Seventh Circuit has also applied *Davis* to reject the argument that state law determines whether an official has a qualified immunity defense. In *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985), a sheriff held a prisoner in jail without an initial appearance in contravention of Indiana statutes. The court refused to "subject him to liability in this instance on the basis of his interpretation of an unclear duty under statute and warrant," which "would penalize him for an error in judgment,

[2] Some courts have counted the Fifth Circuit as being on the other side of the split because of *Rheaume v. Texas Dep't of Pub. Safety*, 666 F.2d 925, 930 (5th Cir. 1982). But that case came before this Court's decision in *Davis*. And, although the opinion includes loose language, the Fifth Circuit in *Rheaume* recognized the state official's qualified immunity defense.

contrary to the recognized purpose of qualified immunity for public officials." *Id*. at 729. Citing *Davis*, the court concluded it was sufficient that the sheriff's "actions were undertaken pursuant to the performance of his duties" based on the "objective circumstances at the time he acted" and that the "alleged violation of Indiana law does not bar his ability to claim qualified immunity." *Id.* at 728-29.

The Tenth Circuit. Lastly, the Tenth Circuit has rejected a state-law authority prerequisite for qualified immunity. The Tenth Circuit has "consistently engaged in a two-pronged inquiry centered on federal law when a defendant asserts a qualified-immunity defense," which "does not contemplate—and, indeed, makes no room for—an antecedent, potentially dispositive examination of whether the defendant acted within the scope of his authority, as defined by state law." *Stanley v. Gallegos*, 852 F.3d 1210 (10th Cir. 2017) (Holmes, J., concurring in the judgment).

Most recently in *Cummings v. Dean*, 913 F.3d 1227 (10th Cir. 2019), the Tenth Circuit held that the director of a state board was immune even though he took actions that the state supreme court later held to be outside his authority under state law. The Tenth Circuit reasoned that, even though the state supreme court held the state official had exceeded his authority under state law, the agency director's "interpretation of state law [itself] is exactly the kind of discretionary function for which the qualified-immunity defense against federal liability applies." *Id.* at 1242. After discussing this Court's decision in *Davis*, the Tenth Circuit explained that the state supreme court's determination that the director had exceeded his authority under state law was irrelevant to qualified immunity:

> While we ordinarily defer to a state court's interpretation of a state statute, ... the issue before us concerns . . . whether qualified immunity bars liability under federal law. We therefore apply a federal standard to determine whether Director Dean's obligations were sufficiently discretionary to warrant the protections of the qualified-immunity defense under federal law, and we conclude that the United States Supreme Court's language in *Davis* compels our conclusion that such protections are available here.

Id. Concluding that the district court had erroneously "equate[d] a violation of a clear obligation under state law with a violation of clearly-established federal law," the Tenth Circuit reversed the denial of qualified immunity. *Id* at 1243.

* * *

In the Tenth Circuit, a state official has qualified immunity even if the state supreme court has already held that his actions exceeded his state-law authority. In the Fourth Circuit, a state official has qualified immunity unless a reasonable official in the defendant's position would have known that the conduct was clearly established to be beyond the scope of his state-law authority. Only under the Eleventh Circuit's rule may a state official be denied qualified immunity based on a federal court's reading of an ambiguous state statute. The Court should grant certiorari to resolve this clean split on the question presented.

II. The lower court's decision is contrary to this Court's case law.

The Court should also grant certiorari because the lower court's decision directly conflicts with this Court's decisions on qualified immunity, especially *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), and *Davis v. Scherer*. In the Eleventh Circuit, every state official who claims qualified immunity must affirmatively prove, as a threshold burden to proving that he did not violate the plaintiff's clearly established constitutional rights, that he also did not exceed the scope of his authority under state law. And, under the court of appeals' decision in this case, it is not enough for a state official to prove that he acted within the statutes and official duties of his office; he must also prove that he did not violate unrelated state statutes that only arguably govern his conduct.

This rule misunderstands Section 1983 and qualified immunity. Section 1983 creates a cause of action against state officials for "violation[s] of federal rights." 42 U.S.C. § 1983. It is about enforcing *federal* law. But, because the "fear" of a lawsuit might "dampen" state officials' "unflinching discharge of their duties," this Court recognized in *Harlow* that public officials must be "shielded from liability for civil damages [under Section 1983] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 814. Nothing else is required for qualified immunity. As former-Judge Luttig explained in *In re Allen*, "[w]hether [a state official] violated state law, whether he clearly violated state law, or whether he acted outside of state law, is never determinative of this federal immunity defense, because an official may lose his immunity only if he

violates the statutory or other rights which give rise to the cause of action sued upon." 119 F.3d at 1135 (Luttig, J., dissenting from denial of rehearing en banc). It may be that state law provides a separate cause of action against the official because of his conduct, but state law does not control a federal defense to a federal cause of action.

This Court already held as much in *Davis v. Scherer*, 468 U.S. 183 (1984). Indeed, there is no meaningful difference between the lower court's holding in *Davis* and the lower court's holding in this case. In *Davis*, the court of appeals had held that an official loses his qualified immunity if he violated clear state law, even if he did not violate clearly established federal constitutional rights, just as the court of appeals held in this case that, regardless of whether an official violated clearly established federal rights, an official is not entitled to immunity if he acted outside the scope of his state law authority. The appeals court in *Davis* had reasoned, as did the court of appeals in this case, that the violation of clearly established federal rights was not the "sole way" to forfeit qualified immunity, *see id.* at 188, and it failed, as did the court of appeals here, even to discuss the issue of whether the official violated the plaintiff's federal rights, *id.* at 189.

This Court reversed in *Davis* and held that a state official does not forfeit his qualified immunity even by violating clearly established state law. *Id.* at 194. Instead, the Court held that a "plaintiff who seeks damages for a violation of constitutional or statutory rights may overcome the defendant official's qualified immunity *only* by showing that those rights were clearly established at the time of the conduct at issue." *Id.* at 197 (emphasis added). Apart from "the

'objective reasonableness of [an official's] conduct as measured by reference to clearly established law,'" "[n]o other 'circumstances' are relevant to the issue of qualified immunity." *Id.* at 191.

The Court was motivated by four rationales in *Davis* that are especially applicable here.

First, the Court explained in *Davis* that denying qualified immunity because of a state-law violation would undermine the purposes of the defense. The doctrine of qualified immunity is based on "two mutually dependent rationales," *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974), the need to "encourage[e] the vigorous exercise of official authority" as required by the public good, *Butz v. Economou*, 438 U.S. 478, 506 (1978), and the need to avoid unfairly subjecting the official to liability for the good faith exercise of discretion pursuant to a legal obligation. *Scheuer*, 416 U.S. at 240. Just like the rule rejected in *Davis*, the lower court's rule in this case would subject a state official to federal liability, even though he performed official acts in good faith. It would anomalously leave no discretion for state officials to commit good faith errors under *state law*, even though the whole point of qualified immunity is to give those officials room to make good faith errors under *federal law*.

Second, the Court in *Davis* held that allowing a state-law violation to revoke qualified immunity to a federal claim would undermine the balance struck by state law itself. The Court reasoned that violations of state-law should come with state-law remedies, not federal remedies. Officials who violate state law should be "liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages." *Id.* at

194 n. 12. If a state statute or regulation provides damages when an official acts outside of his state-law authority, then a plaintiff can sue for those damages in state court. *Id.* But, if state law does not provide damages as a remedy, then providing such damages in a federal action by eliminating a defense to a Section 1983 claim would undermine the balance struck by the applicable state law. *Id.* If, for example, the Alabama Legislature intended for violation of the Alabama Natural Death Act to come with a money-damages remedy, then the Legislature could have provided such a remedy in the Act. The lower court's decision effectively creates a remedy for a state-law violation that the state Legislature did not itself intend.

Third, the Court in *Davis* specifically pointed to prison wardens and similarly situated state employees as the kinds of employees who would be uniquely injured by allowing violations of state law to eliminate federal qualified immunity. The Court explained that it is not "always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages." *Id.* at 196. This is so because "[s]uch officials as police officers or prison wardens . . . routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them" even as they are also "subject to a plethora of rules, often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively." *Id.* The Court's hypothetical in *Davis* is exactly what happened here: a hospital asked a prison warden to make a gut-wrenching decision about the medical care to be provided to one of the inmates under his charge. The warden had neither the time nor the expertise to research all of the

permutations of state law that might arguably limit his authority.

Fourth, the lower court's rule turns every Section 1983 case into a dispute about, first and foremost, state law. As the Court explained in *Davis*, state executive officials, not federal courts, should interpret state law in the first instance. A state "law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused." *Id.* at 196 n.14. But the lower court's rule makes it "more difficult, not only for officials to anticipate the possible legal consequences of their conduct, but also for trial courts to decide even frivolous suits without protracted litigation." *Id.* at 196. As then-Judge Luttig explained in *In re Allen*, the upshot is that the federal courts "are obliged to conduct what will essentially be mini-trials on the question of whether the defendant was acting within the scope of his state law duties, a responsibility which will require these federal officers to immerse themselves in the intricacies of state statutes, regulations, and caselaw"—a task for which federal judges are not suited. *Allen*, 119 F.3d at 1137.

Indeed, the extent to which the lower court's rule entangles the federal courts in state law questions is confirmed by the lower court's holding in this case. Here, a prison warden and an inmate's doctors all believed that it was within the warden's authority to make the determination about the removal of the inmate's artificial life support. No state court has held that these prison and health care professionals were wrong. No state court has even addressed a similar question under the Alabama Natural Death Act. But the panel below disagreed with these state officials

and medical experts about state law and held an ambiguous state statute to be "fatal to Davenport's defense of qualified immunity." App. 12a. The lower court's decision cannot be squared with this Court's precedents.

III. The question is important, and this case is a good vehicle.

Finally, the Court should grant certiorari because the question presented is an important one, and this case is a good vehicle to answer it.

This is so for four reasons.

First, the lower court's rule leaves state officials susceptible to personal liability for money damages, even when they act in good faith and within clearly established constitutional limits. As this Court recognized in *Harlow*, a rule that imposes personal liability on state officials for making good-faith decisions will come with significant "social costs includ[ing] the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. It also "dampen[s] the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of these duties." *Id.* (citation and internal quotation marks omitted)(alternation in original).

Second, the facts of this case squarely present the circuit split on an issue that is often litigated. There is no question that Warden Davenport would have been able to fully litigate his qualified immunity defense under the either Tenth Circuit's or Fourth Circuit's rule. And, because there is no clearly established federal law that even arguably controls this

situation, there is little doubt the Warden's qualified immunity defense would have been successful. Moreover, issues of qualified immunity are frequently litigated in the context of inmate health care. *See generally* Christopher Quinn, *Note, The Right to Refuse Medical Treatment or to Direct the Course of Medical Treatment: Where Should Inmate Autonomy Begin and End?*, 35 New Eng. J. on Crim. & Civ. Confinement 453 (2009). And nearly all States have adopted some version of the uniform act that the lower court construed to eliminate the Warden's discretion to make end-of-life decision for incapacitated inmates under his care. *See, e.g.,* National Conference of Commissioners on Uniform State Laws, *Uniform Health Care Decisions Act*, 22 Issues L. & Med. 83 (2006-2007). Accordingly, this is an ideal vehicle to answer the question presented.

Third, the procedural posture of the case is well-suited to resolving the split of authority. The defense of qualified immunity is most frequently resolved on a motion-to-dismiss record like this one, relatively early in the litigation. "[Qualified immunity] is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Accordingly, courts are most likely to resolve issues pertaining to qualified immunity on a motion to dismiss, not after a full evidentiary hearing. Moreover, because this petition comes to the court at the motion to dismiss stage, there are no factual issues that could complicate review.

Fourth, the three-way split among the circuit courts is entrenched and has percolated for decades. Almost every circuit has addressed the question

whether a defendant must establish his state-law authority as a prerequisite to qualified immunity. The Eleventh Circuit has issued numerous published opinions on the issue. The Fourth Circuit has generated separate 5-5 en banc opinions in favor of each side of the rule. It has been thirty years since the Court decided *Davis*. There is no reason for the Court to wait before it resolves the split and answers the question presented.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

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March 11, 2019