NO. 18-_____

In the Supreme Court of the United States

RANDY CUMMINGS ET AL.,

Petitioners,

v.

CELINA BUSSEY, SECRETARY OF THE NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS, AND JASON DEAN, AS THE DIRECTOR OF THE LABOR RELATIONS DIVISION OF THE NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS, IN THEIR INDIVIDUAL CAPACITIES,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JAMES M. PIOTROWSKI
COUNSEL OF RECORD
PIOTROWSKI DURAND, PLLC
P.O. BOX 2864
1020 W. MAIN STREET, SUITE 440
BOISE, ID 83701
(208) 331-9200
JAMES@IDUNIONLAW.COM

SHANE YOUTZ
STEPHEN CURTICE
JAMES A. MONTALBANO
YOUTZ & VALDEZ, P.C.
900 GOLD AVENUE S.W.
ALBUQUERQUE, NM 87102
(505) 244-1200
SHANE@YOUTZVALDEZ.COM
STEPHEN@YOUTZVALDEZ.COM
JAMES@YOUTZVALDEZ.COM

APRIL 24, 2019 *COUNSEL FOR PETITIONERS*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

For purposes of the qualified immunity defense to a 42 U.S.C. § 1983 action, this Court has determined that "government officials performing discretionary functions"—as opposed to purely ministerial tasks—"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). Thus began the "ministerial exception" to qualified immunity.

The Supreme Court of the State of New Mexico has determined that certain 2009 amendments to the New Mexico "Little Davis-Bacon Act" imposed on the relevant state officials a "mandatory, non-discretionary duty" to set prevailing wages for public works projects at the level set forth in collective bargaining agreements, and that doing so was purely a ministerial act. *N.M. Bldg. & Constr. Trades Council v. Dean*, 353 P.3d 1212, 1218 (N.M. 2015). The decision below, however, interpreted the same state law provisions as the New Mexico Supreme Court and concluded the opposite; it found that those statutes granted discretion to the administrative agency to set wage rates for public works projects. Thus, it found that the "ministerial exception" to qualified immunity did not apply and that the law was not "clearly established" at the time Defendants failed to follow the state law provisions.

The questions presented by this petition are:

1. Whether a federal court interpreting a state statute can conclude that it grants the state agency discretion such that the "ministerial exception" to

qualified immunity does not apply, where the highest court of the state concluded that the statute in question imposed a "mandatory, non-discretionary duty" on the agency to follow its mandates and that doing so was purely a ministerial act?

2. Whether a federal court interpreting a state statute can find that the law governing employees' property right—defined by state law—in prevailing wages was not "clearly established" at the time of the violation where the highest court of the state concluded that it was?

PARTIES TO THE PROCEEDINGS

Petitioners are Randy Cummings; Cruz Gallegos; Robert J. Garcia; Richard Gonzales; Eloy A. Jaramillo; David Larranaga; Joseph Lopez; Rick Lopez; David Montano; Angelo Rinaldi; Chris Sweeney; Josh Tillinghast; Tomas Trujillo; Jeffrey S. Wade; Joshua Hoselton; Charles W. Lees; Jaime Marquez; Robert Mendoza; Armando Anchondo; Gustavo Berrospe; Reyes Cabriales; Sergio Escobedo; Jason Head; Nick Hinojos; Robert G. Hitzman; Michael Lopez; Jose Rodriguez; Sergio A. Rojo; Richard Tenorio; Cesar Torres; Grant Willis; Harold Brown; Rene Carrillo; Henry Nez, Jr.; Kurt Johnson; Jesus Aguilar-Murillo; Martin F. Alvarez; Arthur Archuleta; Enrique Corona; Ronald Hubbard; Andrew M. Lugo; Henry Lujan; David Carr; D. Jeremiah Cordova; Kevin Charvea; Nathan Espalin; Levi Gutierrez; Dennis Moore; Robert Moreno; Levi Olivas; Thomas D. Payne; and Bryan Wheeler, on behalf of themselves and all others similarly situated. All were Plaintiffs-Appellees/Cross-Appellants in the Court of Appeals.

Respondent Jason Dean, as the Director of the Labor Relations Division of the New Mexico Department of Workforce Solutions, in his individual capacity, was the Defendant/Appellant/Cross-Appellee in the Court of Appeals.

Respondent Celina Bussey, as Secretary of the New Mexico Department of Workforce Solutions, in her individual capacity, was the Defendant/Cross-Appellee in the Court of Appeals.

RULE 29.6 DISCLOSURE STATEMENT

Petitioners, as natural persons, are not non-governmental corporations subject to Supreme Court Rule 29.6.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 913 F.3d 1227. (App.1a). The decision of the United States District Court for the District of New Mexico is unpublished, but can be found at 2017 WL 2332636. (App.35a).

JURISDICTION

The District Court had jurisdiction over this case under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3), as the Complaint alleged violations of federal law, specifically 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution. The Court of Appeals for the Tenth Circuit issued its Opinion and Judgment on January 24, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

A. Federal Statute

In relevant part, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdic-

> tion thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

B. State Statute

Prior to its 2009 amendment, the relevant section of the New Mexico Public Works Minimum Wage Act (sometimes colloquially referred as its "Little Davis-Bacon Act") provided:

> For the purpose of making wage determinations, the director of the labor and industrial division of the labor department shall conduct a continuing program for the obtaining and compiling of wage-rate information and shall encourage the voluntary submission of wage-rate data by contractors, contractors' associations, labor organizations, interested persons and public officers. Before making a determination of wage rates for any project, the director shall give due regard to the information thus obtained. Whenever the director deems that the data at hand are insufficient to make a wage determination, the director may have a field survey conducted for the purpose of obtaining sufficient information upon which to make determination of wage rates. Any interested person shall have the right to submit to the director written data,

views and arguments why the wage determination should be changed.

2005 N.M. Laws, Ch. 253, § 1
(amending NMSA 1978, § 13-4-11(B)).

In 2009, this section was amended to read:

The director shall determine prevailing wage rates and prevailing fringe benefit rates for respective classes of laborers and mechanics employed on public works projects at the same wage rates and fringe benefit rates used in collective bargaining agreements between labor organizations and their signatory employers that govern predominantly similar classes or classifications of laborers and mechanics for the locality of the public works project and the crafts involved; provided that:

(1) if the prevailing wage rates and prevailing fringe benefit rates cannot reasonably and fairly be determined in a locality because no collective bargaining agreements exist, the director shall determine the prevailing wage rates and prevailing fringe benefit rates for the same or most similar class or classification of laborer or mechanic in the nearest and most similar neighboring locality in which collective bargaining agreements exist;

(2) the director shall give due regard to information obtained during the director's determination of the prevailing wage rates and the prevailing fringe benefit rates made pursuant to this subsection;

(3) any interested person shall have the right to submit to the director written data,

personal opinions and arguments supporting changes to the prevailing wage rate and prevailing fringe benefit rate determination; and

(4) prevailing wage rates and prevailing fringe benefit rates determined pursuant to the provisions of this section shall be compiled as official records and kept on file in the director's office and the records shall be updated in accordance with the applicable rates used in subsequent collective bargaining agreements.

2009 N.M. Laws, Ch. 206, § 3
(amending NMSA 1978, § 13-4-11(B)).

STATEMENT OF THE CASE

1. As the District Court noted, the following facts are taken from the allegations in the Complaint or from agency or court documents undisputed by the parties, of which the District Court took judicial notice. (App. 37a). Since 1937, the New Mexico Legislature has required that public works projects in New Mexico of a sufficient size be done pursuant to a contract which guarantees the employees working on those projects the prevailing wage for their type of labor. *See* NMSA 1978, § 13-4-10 through-17 (1937, as amended through 2011) (first enacted by 1937 N.M. Laws Ch. 179). Prior to 2009, those prevailing wages were to be determined by wage rate information compiled by Defendants. In 2009, however, the Legislature "dramatically and deliberately changed the

process for setting wage rates" by requiring that they "now be based upon [Collective Bargaining Agreements]." *N.M. Bldg. & Constr. Trades Council v. Dean*, 353 P.3d 1212, 1216 (N.M. 2015).

Specifically, the relevant section of the Public Works Minimum Wage Act ("PWMWA") provided prior to 2009:

> For the purpose of making wage determinations, the director of the labor and industrial division of the labor department shall conduct a continuing program for the obtaining and compiling of wage-rate information and shall encourage the voluntary submission of wage-rate data by contractors, contractors' associations, labor organizations, interested persons and public officers. Before making a determination of wage rates for any project, the director shall give due regard to the information thus obtained. Whenever the director deems that the data at hand are insufficient to make a wage determination, the director may have a field survey conducted for the purpose of obtaining sufficient information upon which to make determination of wage rates. Any interested person shall have the right to submit to the director written data, views and arguments why the wage determination should be changed.

2005 N.M. Laws, Ch. 253, § 1 (amending Section 13-4-11(B)). In 2009, this section was amended to read:

> The director <u>shall determine</u> prevailing wage rates and prevailing fringe benefit rates for respective classes of laborers and mechanics

employed on public works projects at the same wage rates and fringe benefit rates used in collective bargaining agreements between labor organizations and their signatory employers that govern predominantly similar classes or classifications of laborers and mechanics for the locality of the public works project and the crafts involved; provided that:

(1) if the prevailing wage rates and prevailing fringe benefit rates cannot reasonably and fairly be determined in a locality because no collective bargaining agreements exist, the director shall determine the prevailing wage rates and prevailing fringe benefit rates for the same or most similar class or classification of laborer or mechanic in the nearest and most similar neighboring locality in which collective bargaining agreements exist;

(2) the director shall give due regard to information obtained during the director's determination of the prevailing wage rates and the prevailing fringe benefit rates made pursuant to this subsection;

(3) any interested person shall have the right to submit to the director written data, personal opinions and arguments supporting changes to the prevailing wage rate and prevailing fringe benefit rate determination; and

(4) prevailing wage rates and prevailing fringe benefit rates determined pursuant to the provisions of this section shall be compiled as official records and kept on file in the director's office and the records shall be

> updated in accordance with the applicable rates used in subsequent collective bargaining agreements.

2009 N.M. Laws, Ch. 206, § 3 (amending Section 13-4-11(B)), (emphasis added).

Under New Mexico state law, "It is widely accepted that when construing statutes, 'shall' indicates that the provision is mandatory, and we must assume that the Legislature intended the provision to be mandatory absent a[] clear indication to the contrary." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 206 P.3d 135, 143 (N.M. 2009). Despite that fact, the Petitioners in *Dean* had to go to the New Mexico Supreme Court twice to get Defendants to comply with their duty to protect the property interests of employees working on public works projects. As the NM Court noted in *Dean*:

> This is the second time the New Mexico Building and Construction Trades Council has petitioned this Court for mandamus in the matter of DWS compliance with Section 13-4-11(B). In June 2011, this Court denied a petition for writ of mandamus in order to give the Secretary 'four or five months' to set prevailing wage and prevailing benefit rates under the Act as amended in 2009.

Dean, 353 P.3d at 1214.

The NM Court only denied the petition in 2011 because counsel for the Secretary indicated that she would have the rates set in that time frame during oral argument before the Court:

> I would say this could conceivably be done

> in four or five months, which I don't think is unreasonable, especially since the Secretary has assured me, and I'm assuring the Court, that she's intent on getting this done. I don't think it requires a writ of mandamus to get it done. But, whatever the Court desires, I'm confident she'll get it done.

Id. Yet, as of the date of the New Mexico Supreme Court's decision (June 15, 2015), "because wages are still not determined under the amendments to the Act that became effective on July 1, 2009, the rates have been the same as those determined by the director in 2009." *Id.* Indeed, those 2009 rates were determined "using the pre-2009 amended wage survey method even though the amended Act became effective on July 1, 2009." *Id.*

It is highly relevant that the 2015 *Dean* case was a petition for a writ of mandamus. As the NM Court noted in Dean, under New Mexico state law, mandamus will only lie "to compel the performance of a ministerial act or duty that is clear and indisputable." *Id.* at 1215 (quoting *New Energy Econ., Inc. v. Martinez*, 247 P.3d 286, 290 (N.M. 2011) (emphasis added)). Moreover, a "ministerial act is an act which an officer performs under a given set of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done." *Id.* (quotation marks and quoted authority omitted). As a result, the NM Court did not simply resolve a dispute as to the meaning of an ambiguous term or requirement; rather, it compelled the Director to comply with the plain meaning of Section 13-4-11(B) and to comply with

the Legislature's "mandatory, nondiscretionary duty on the Director to set prevailing wage and prevailing benefit rates solely according to CBAs." *Dean*, 353 P.3d at 1217.

The NM Court further noted that "It has been over five years since the Act was amended, and the Director still has not set prevailing wage and prevailing benefit rates according to CBAs." *Id.* at 1218. As a result, "Public works projects have continued since 2010 with mechanics and laborers being paid wages using wage and benefit rates that are now five years old. Semantics aside, wages have been 'set' for the purposes of the Act, and after five years with no increase in wage rates, these stale wages are prejudicing the right of every mechanic and laborer on a public works project to be paid a wage rate consistent with applicable CBAs." *Id.* Because the "Legislature issued a clear mandate, and the Director must comply[,]" the NM Court found the "stagnant" wages caused by "the Director's delay in issuing new rates under the amended Act" to be "inexcusable." *Id.* Because "[t]o countenance any further delay would be unacceptable and irresponsible" the Court required the Director to "take immediate action to set prevailing wage and prevailing benefit rates that comply with the Act and reflect current economic realities." *Id.* It thus issued a writ of mandamus utilizing its original jurisdiction under N.M. Const. art. VI, § 3 (providing the New Mexico Supreme Court "original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions").

As noted, from 2009-2015, Defendants or their predecessors refused to comply with their "mandatory,

nondiscretionary duty [under the PWMWA] . . . to set prevailing wage and prevailing benefit rates solely according to CBAs." *Dean*, 353 P.3d at 1217. As a result, "after five years with no increase in wage rates, these stale wages are prejudicing the right of every mechanic and laborer on a public works project to be paid a wage rate consistent with applicable CBAs." *Id.* at 1218 (emphasis added). The Supreme Court rejected Defendants' claim that Plaintiffs' injury as a result was "speculative": "Public works projects have continued since 2010 with mechanics and laborers being paid wages using wage and benefit rates that are now five years old. Semantics aside, wages have been 'set' for the purposes of the Act, and after five years with no increase in wage rates, these stale wages are prejudicing the right of every mechanic and laborer on a public works project to be paid a wage rate consistent with applicable CBAs." *Id.* This litigation ensued.

2. Plaintiffs filed their Complaint on August 23, 2016, and an Amended Complaint on the same day. The Complaint alleged that Plaintiffs have a protected property interest in and a legitimate claim of entitlement to receiving a prevailing wage under the PWMWA, which property right is protected by the Fourteenth Amendment to the United States Constitution. It further alleged that Defendants had violated their substantive and procedural due process rights by refusing to set the prevailing wage rates as required by the 2009 amendments to the PWMWA for six years. Plaintiffs sought class treatment of their claims. Defendants answered the Complaint on October 4, 2016. Defendants filed a Motion to Dismiss Plaintiffs' Complaint Based Upon Qualified Immunity on December 15, 2016. Pursuant to an Unopposed Motion, the

District Court stayed all discovery pending resolution of that motion on December 22, 2016. The Motion was fully briefed, and the District Court entered its Memorandum Opinion and Order Granting in Part and Denying in Part the motion on April 20, 2017. (App.35a).

The District Court determined that Plaintiffs had a constitutionally-protected property right in CBA-level wage rates on public works projects under the provisions of the PWMWA, because the relevant statute was not merely procedural, but rather a substantive restriction on the actions of Defendants. (App.46a). It further found that Defendant Jason Dean violated their substantive due process right in that property interest through his inexplicably five-year delay in implementing the statute, particularly after the 2011 assurance to the New Mexico Supreme Court that the wages would be corrected in a matter of months. (App. 50a). The District Court agreed that Plaintiffs alleged sufficient facts regarding the actions of Defendant to shock the conscience of the Court, implicating the substantive due process protections of the Constitution. Specifically, Defendant's "inaction may have been excusable in 2009 and 2010 when nonunion contractors were challenging the Act. But by June 2011 the relevant legal dispute was essentially resolved when, to avoid a writ of mandamus, the Secretary's counsel informed the New Mexico Supreme Court that the Director could set new wage and benefit rates within four or five months because the Secretary was 'intent on getting this done.'" (App.50a). (quoting *Dean*, 353 P.3d at 1214).

The District Court also found that Plaintiffs' substantive due process right to prevailing wages was

"clearly established" by the plain meaning of the PWMWA:

> This is not a case where qualified immunity depends upon the applicability of some broader legal standard to a specific set of facts, so that case law approving the application should reasonably be required before officials can be held liable. There is no dispute that Plaintiffs are the intended beneficiaries of the Act, which controls the minimum wages and benefits that may be paid under state contracts. The only reasonable interpretation of the Act is that it guarantees that those minimum wage and benefit rates must be equivalent to the rates negotiated in CBAs. Additionally, Defendants must have known this when they agreed in front of the New Mexico Supreme Court in 2011 to set those rates accordingly and asserted that mandamus was not necessary because they were "intent on getting this done."

(App.55a-56a).

3. Both parties appealed to the United States Court of Appeals of the Tenth Circuit. Plaintiffs are not pursuing their appeal to this Court, but do seek review of the Court of Appeals' reversal of the District Court's ruling that Defendant is not entitled to qualified immunity on Plaintiffs' substantive due process claim. (App.33a). The Court of Appeals made two determinations that merit review by this Court. First, it rejected the claim that qualified immunity was categorically unavailable to Defendant because the task of setting prevailing rates after the 2009 amendment to the

PWMWA was—as the New Mexico Supreme Court determined—ministerial. (App.28a). It found, contrary to the New Mexico Supreme Court and the District Court, that the PWMWA required Defendant to exercise "a substantial measure of discretion in interpreting" the PWMWA and in setting rates. (App.27a). Even though the Court of Appeals conceded that it would "ordinarily defer to a state court's interpretation of a state statute" it ultimately interpreted the PWMWA in a way directly contrary to the New Mexico Supreme Court, which had determined that Defendant's duties under the act were ministerial, mandatory and nondiscretionary such that it could compel their performance through a writ of mandamus. (App.28a)

Second, the Court of Appeals determined that the law was not "clearly established" at the time of Defendant's acts and failures to act. It found the District Court's reasoning to the contrary flawed "because it equates a violation of a clear obligation under state law with a violation of clearly-established federal law. Whether Director Dean violated clearly-established state law in failing to set CBA-based rates, however, is an entirely separate question from whether that failure violated clearly-established federal law." (App. 29a). At the same time, however, it found that defendant had waived any argument that its obligation under state law was ambiguous "once the secretary's counsel represented to the New Mexico Supreme Court [in 2011] that DWS would update the prevailing rates." (App. 29a, n.4).

It is of this failure to defer to New Mexico state law—as determined by the highest court in New Mexico—that Plaintiffs seek review on certiorari.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for three reasons.

First, the "ministerial exception" to qualified immunity announced in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and further described in *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984), has had uneven application in the Circuit Courts of Appeal, and the decision below appears in conflict with at least two other Circuit Court of Appeals which, even in the absence of a controlling determination of state law, applied the doctrine. This case, with its undisputed facts, presents a perfect vehicle for that clarification.

Second, the interplay between federal law—enforced through 42 U.S.C § 1983 and subject to the jurisprudence regarding qualified immunity—and state law—which defines and determines the scope of a property right and the obligations and duties of state officials—is an important question of federal law in our constitutional system that should be settled by this Court.

Third, and perhaps most importantly, the decision below results in an intolerable conflict between federal law and state law as interpreted by the state court of last result. For, under state law as determined by the New Mexico Supreme Court, the New Mexico PWMWA imposes a "mandatory non-discretionary" duty upon Defendant to act in way identified by the NM Court as ministerial. At the same time, under federal law as determined by the Court of Appeals below, the exact

same statute grants the exact same Defendant discretion to act in a non-ministerial way.

I. THE MINISTERIAL EXCEPTION TO QUALIFIED IMMUNITY HAS NOT BEEN EVENLY APPLIED BY THE CIRCUIT COURTS OF APPEAL, AND THE DECISION BELOW APPEARS TO CONFLICT WITH AT LEAST TWO OTHER CIRCUITS.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Court determined that "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 . . . ." Implicitly, then, a government officials whose tasks are purely ministerial should not be entitled to the defense for failing to act. Then, in *Davis v. Scherer*, 468 U.S. 183, 196 n.14 (1984), this Court noted that "[a] 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." The law in question in *Davis* was a state law; the question was whether that law granted discretionary authority to a state official—in which case the defense applied—or whether it required the performance of a ministerial task—in which case it did not.

The various Circuit Courts of Appeal have not consistently applied these principles. For example, the Eleventh Circuit places the burden first on the government official to demonstrate that he "engaged in a 'discretionary function' when he performed the acts of which plaintiff complains." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir.

2004). A defendant who cannot meet that burden is not entitled to the defense, but if that initial burden has been met, the burden shifts to the plaintiff to show that the defendant is not entitled to qualified immunity. *Id.* The Second and Eighth Circuits, on the other hand, have questioned whether the distinction between ministerial and discretionary functions even exists. *Varrone v. Bilotti*, 123 F.3d 75, 82 (2d Cir. 1997); *Sellers by and Through Sellers v. Baer*, 28 F.3d 895, 902 (8th Cir. 1994) (noting its belief that the exception "is a dead letter").

Yet, the doctrine has been applied in a relatively straightforward manner by the Fifth and Ninth Circuits, in ways that appear to conflict with the decision below. In *Brooks v. George County*, 84 F.3d 157 (5th Cir. 1996), the Court examined Mississippi state law when evaluating a qualified immunity defense. That state law provided that "[a]ny person being held in the county jail in default of bail to await trial . . . may on application to the sheriff of the county, be allowed to work on . . . county public works as other convicts are worked and at the same wage. The board of supervisors shall settle with prisoners so working at their regular meetings monthly." *Id.* at 163-64 (quoting Miss. Code Ann. § 47-1-13). The state law further provided that the sheriff "shall keep a well bound alphabetical jail docket," required that he "promptly enter under the proper initial the name, age, color and sex of each convict, the date of his or her commitment, each day worked on the county farm[,]" and further required him to "submit his docket to the board of supervisors at each of their regular meetings." *Id.* at 164 (quoting Miss. Code Ann. § 47-1-21). The Sheriff "did not keep a record of the days Brooks worked on

public property and failed to present such a record to the board of supervisors at its meetings, precluding the board of supervisors from paying wages to Brooks." *Id.* Even though the Fifth Circuit did not have the benefit of a final decision from the highest court in Mississippi, it examined the quoted statutes, interpreted them according to their plain meaning, and denied the qualified immunity defense because "Mississippi law, as quoted above, imposes on Sheriff Howell a non-discretionary duty to keep records of work performed by pretrial detainees and to transmit those records to the board of supervisors so that pretrial detainees can be paid." *Id.* at 165.

Similarly, in *Groten v. California*, 251 F.3d 844 (9th Cir. 2001), the Ninth Circuit applied the "ministerial" exception by examining the relevant state statute and determining whether it granted any discretion to the defendant or instead required a certain outcome. The state law in question required the defendant to provide materials to an applicant for a particular type of real estate license. Even though the Court conceded that "the Fourteenth Amendment right to due process in the application procedure may not have been clearly established at the time of the alleged violations," it nonetheless denied the qualified immunity defense because the plaintiff "alleged that the appellees refused to give him the proper application materials and did not allow him to apply for the licenses which he sought." Thus, concluded the Court, "[t]hese ministerial acts are unshielded by qualified immunity, which protects "only actions taken pursuant to discretionary functions." *Id.* at 851.

Neither the *Brooks* court nor the *Groten* court had the benefit of a conclusive determination of the state's highest court on the meaning of the state statutes at hand. Nonetheless, based on the clarity of those statutes, they were able to determine that the "ministerial exception" to qualified immunity applied. In the decision below, the Court of Appeals did have the benefit of the New Mexico Supreme Court's final construction of the PWMWA. Yet, contrary to that decision, it interpreted the PWMWA anew and concluded that the it did not impose "mandatory, nondiscretionary" duty on the Defendant, and that Defendants' compliance with the statute was not ministerial.

II. THE INTERPLAY BETWEEN STATE AND FEDERAL LAW IN THE QUALIFIED IMMUNITY CONTEXT IS AN IMPORTANT QUESTION OF FEDERAL LAW IN OUR CONSTITUTIONAL SYSTEM THAT SHOULD BE SETTLED BY THIS COURT.

As this case demonstrates, the interplay between state and federal law arises in the context of qualified immunity to a § 1983 action in at least two ways. First, whether a state law imposes a non-discretionary obligation on a state official or grants it discretionary authority should be a question of state law. However, it is to be determined by a federal court deciding, as a matter of federal law, whether the ministerial exception to qualified immunity applies. *See, e.g.*, *Estate of Cummings v. Davenport*, 906 F.3d 934, 950 (11th Cir. 2018) (petition for certiorari docketed) ("We look to state law to determine the scope of a state official's discretionary authority . . . ."). Second, property rights are defined by state law. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course,

are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."). Yet, a federal court must decide as a matter of federal law whether those rights were "clearly established" at the time of the complained-of action or failure to act for purposes of the qualified immunity defense. There is no question that federal courts are thus called upon to interpret state law in the qualified immunity context. How they do so, and to what extent they must rely upon pronouncements of the states' highest courts is directly at issue in this case.

Here, the Court of Appeals was called upon to decide whether the New Mexico PWMWA imposed a mandatory, non-discretionary duty upon the Defendant and whether his actions under the statute were ministerial. The decision below, reversing the District Court, concluded that the PWMWA granted Defendant discretion and that his actions under the statute were not ministerial In so doing, however, it interpreted the state statute in a way that was directly contrary to the interpretation of the Act by the state's highest court. It did so while noting that it would "ordinarily defer to a state court's interpretation of a state statute." (App.27a-28a) (citing *United States v. DeGasso*, 369 F.3d 1139, 1145 (10th Cir. 2004), for the proposition that "It is axiomatic that state courts are the final arbiters of state law."). It chose not to defer, however, "because the issue before us concerns not whether mandamus is available under New Mexico law, but whether qualified immunity bars liability under federal law." (App.28a). Whether it is proper for a federal court, in the guise of deciding a federal qualified immunity

defense, to interpret a state law contrary to the final decision of the state's highest court is squarely presented by this case. The proper balance between state and federal interpretations of state laws is an important question of federal law in our constitutional system that should be settled by this Court.

III. THE DECISION BELOW RESULTS IN AN INTOLERABLE CONFLICT BETWEEN FEDERAL LAW AND STATE LAW AS INTERPRETED BY THE STATE COURT OF LAST RESORT.

Were the decision below to stand, it would create an intolerable legal oddity. For, under state law as determined by the New Mexico Supreme Court, Defendant had since 2009—and as he conceded in 2011—a mandatory, non-discretionary duty to set wages for public works projects as determined by collective bargaining agreements. Under state law, the process of setting those rates was ministerial. Yet, as a matter of federal law, the same statutes grant a measure of discretion to Defendant, making his actions non-ministerial and making his clear deprivation of Plaintiffs' property interest in prevailing wages not "clearly established." That is, the same state law either does, or does not, impose a mandatory, non-discretionary duty on Defendant and does, or does not, require Defendant to perform purely ministerial functions. The answer, apparently, depends only on which court—state or federal—makes that determination. By creating this legal oddity, the Tenth Circuit has decided an important federal question in a way that conflicts with a decision by a state court of last resort. Review of that decision through the writ of certiorari is entirely appropriate.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES M. PIOTROWSKI
COUNSEL OF RECORD
PIOTROWSKI DURAND, PLLC
P.O. BOX 2864
1020 W. MAIN STREET, SUITE 440
BOISE, ID 83701
(208) 331-9200
JAMES@IDUNIONLAW.COM

SHANE YOUTZ
STEPHEN CURTICE
JAMES A. MONTALBANO
YOUTZ & VALDEZ, P.C.
900 GOLD AVENUE S.W.
ALBUQUERQUE, NM 87102
(505) 244-1200
SHANE@YOUTZVALDEZ.COM
STEPHEN@YOUTZVALDEZ.COM
JAMES@YOUTZVALDEZ.COM

COUNSEL FOR PETITIONERS

APRIL 24, 2019