No. 21-1552

In The
Supreme Court of the United States

CENTRAL SPECIALTIES, INC.,

Petitioner,

v.

JONATHAN LARGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF PROFESSOR BRIAN PÉREZ-DAPLE AND THE LAW ENFORCEMENT ACTION PARTNERSHIP AS AMICI CURIAE SUPPORTING THE PETITIONER

D. ANDREW PORTINGA
MILLER JOHNSON
45 Ottawa Ave. SW
Suite 1100
Grand Rapids, MI 49503
(703) 682-9320
portingaa@millerjohnson.com

BRIAN PÉREZ-DAPLE
Counsel of Record
727 East Dean Keeton St.
Austin, TX 78705
(512) 232-1226
brian.perezdaple@law.utexas.edu

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTERESTS OF THE AMICI CURIAE[1]

Brian Pérez-Daple is a lecturer in law at the University of Texas School of Law and a former federal prosecutor. Among other subjects, he has taught courses in statutory interpretation, criminal law, and criminal procedure, with a special focus on the doctrine that governs the conduct of law enforcement officers and the consequences of various law enforcement policies.

The Law Enforcement Action Partnership (LEAP) is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials who advocate for criminal justice and drug policy reforms they believe will make our communities safer and more just. LEAP was founded by five police officers in 2002. Today, it coordinates advocacy and speaking events by over 200 criminal justice professionals who advise on police-community relations, incarceration, harm reduction, and drug policy, among other issues. Through speaking engagements, media appearances, testimony, and advice to government agencies and

---

[1] No party or counsel for a party made any monetary contribution supporting the preparation or submission of this brief. No counsel for any party wrote or authorized this brief in whole or in part. The University of Texas is not a signatory to this brief, and the views expressed here are solely those of the amici curiae. Aside from the amici and counsel listed on this brief, no person or entity has made a monetary contribution to fund the preparation or submission of this brief. Counsel for both the petitioner and respondent received timely notice of amici's intent to file this brief and consented to the filing.

policy makers, LEAP both calls for and helps to produce more practical and ethical law enforcement policies.

Both amici share an interest in the sound and consistent development of the law of qualified immunity, especially when that development would promote government accountability and transparency. They submit this brief to explain why a ruling for the petitioner would do so here and why it is important for the Court to grant certiorari to clarify the law in this area. Recently, two courts of appeals, the Tenth and Eighth Circuits, have issued opinions that conflict with the principles this Court has articulated for when officials should be immune from suit under 42 U.S.C. § 1983. To re-establish uniformity in qualified immunity jurisprudence, this Court should grant certiorari and reverse the Eighth Circuit's ruling in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Forty years ago, in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), this Court articulated the current standard for determining when a government official is entitled to qualified immunity for the performance of a discretionary job function. As it is commonly formulated, the test asks whether the official's conduct violated a "clearly established statutory or constitutional right[] of which a reasonable person

would have known." *City of Tahlequah, Oklahoma* v. *Bond*, 142 S. Ct. 9, 11 (2021). If it did not, the official receives immunity from suit. *Ibid.*

Less often repeated is a limitation on when qualified immunity is available at all: officials are not immune when they act in a way that exceeds the authority conferred by their governmental position or function. This limitation appears in *Harlow*, but it has deeper roots. At common law, and in other areas of contemporary immunity law—absolute judicial immunity, for example—officials lose their protection if they act in a clear absence of authority.

In the case on appeal, the Eighth Circuit ignored the scope-of-authority limitation and conferred immunity on a county highway engineer who conducted a traffic stop, far exceeding his lawful authority. In so doing, the court further muddied the law in the circuit courts, which had recently been stirred by a concurrence in the Tenth Circuit denying that the scope of an official's authority is relevant to qualified immunity. It is relevant, and a ruling from this Court that says so explicitly will prevent other jurisdictions from making the same mistake as the Eighth and Tenth.

Solidifying the scope-of-authority limitation will have practical benefits as well. By discouraging officials from exercising power in areas where they have no lawful authority or expertise, the limitation reduces the odds of rights violations. And because it also reduces the amount of conduct that is

immunized, it simultaneously increases the odds that victims will recover for those violations when they do occur. Other things being equal, a rule that encourages government officials to act only where they have authority is preferable to one that does the opposite.

The incentives that the limitation generates are especially important in law enforcement. Law enforcement officers are highly trained, and they wield considerable power, including the power legally to use force in ways that other people may not. In recognition of the difficulty and importance of the decisions law enforcement officers must make, often under pressure and without time for reflection, this Court's precedent shields them from liability through the qualified immunity doctrine. There is no justification for conferring the same protection on a highway engineer who chooses to exercise a highway patrolman's power, and it is prudent not to.

Given the scrutiny qualified immunity has recently received, this Court should not await further disagreement among the lower courts to correct the Eighth Circuit's error. Under the existing regime, the correct doctrinal choice is clear, and it brings with it substantial policy benefits over the alternative. The Court should grant certiorari and make clear that eligibility for qualified immunity depends on the scope of an official's authority.

REASONS TO GRANT THE PETITION

I. The Eighth Circuit's approach conflicts with *Harlow*, the common law, and this Court's immunity jurisprudence more generally.

In *Harlow* v. *Fitzgerald*, this Court settled on a formula for deciding when immunity should be given to government officials for discretionary acts they perform in satisfaction of their job duties. See 457 U.S. at 818–19 & n.34. That formula attempted to keep some continuity with both the historical and the contemporary law of immunity, the latter of which cast the immunity question in explicitly policy-driven terms. See *id.* at 806–08; see also *Wyatt* v. *Cole*, 504 U.S. 158, 170–71 (1992) (Kennedy, J., concurring) (noting that the Court's "immunity doctrine is rooted in historical analogy," even though *Harlow*'s framework "diverged to a substantial degree from the historical standards"—a divergence "justified by [] special policy concerns"). Though many have questioned the formula's wisdom as a policy and its fidelity to history, see, *e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 48, 55–61 (2018), at least one aspect of the doctrine is unquestionably consistent with pre-existing law and has been, until recently, uncontroversial: a government official should receive no immunity for actions taken far outside the scope of the authority conferred by her job.

The Eighth Circuit's decision below runs counter to that principle, putting the case at odds with immunity law old and new. Worse, it contributes to

inconsistency and confusion in the circuits and creates bad incentives for government officials. See Part II, *infra*. The Court should grant certiorari and correct the Eighth Circuit's error.

A. Immunity in a case like this one would violate *Harlow*'s compromise.

Because the government employee's authority to act so frequently goes uncontested in § 1983 cases, one of *Harlow*'s premises often goes unmentioned: an official is only eligible for qualified immunity if he was performing one of his duties when he took the action that is being challenged. This much is implicit in the balance that *Harlow* struck, and it is explicit in the language of footnote 34 of the opinion. That note says that the case's holding "applies only to suits for civil *damages* arising from actions within the scope of an official's duties. . . ." *Harlow*, 457 U.S. at 819 n.34 (emphasis original).

This limitation makes sense within the *Harlow* framework. The Court was explicit in *Harlow* about its balancing of what it called "the evils inevitable in any available alternative." *Harlow*, 457 U.S. at 813. On the one hand, for some governmental abuses, "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Id.* at 814. But on the other, the threat of liability, or even litigation, might scare government officials away from acting in the ways that would most benefit society. *Ibid.* As a compromise between these two evils, the

Court decided to shield officials from liability and litigation, but only "where an official's duties legitimately require action in which clearly established rights are not implicated." *Id.* at 819. When a governmental official acts outside the scope of his duties or authority, no protection is warranted, and none is given.

The Eighth Circuit's approach, in contrast, puts rights at risk with no countervailing benefit to governance. In the case below, the Eighth Circuit ignored the scope-of-authority limitation and held that the respondent, Jonathan Large—a county highway engineer whose job it was to set roadway weight restrictions—was entitled to qualified immunity for performing a traffic stop and detaining two truck drivers for hours.[2] That conduct clearly

---

[2] The Eighth Circuit denied that Large conducted a traffic stop or that he seized the truck drivers, see Pet. App. 11a–12a, but that is wrong (and, as the dissent pointed out, that conclusion relied on a characterization of the facts that was impermissible given the posture of the case, see *id.* at 20a n.3). A person is seized when they submit to a show of authority, even briefly, as for a traffic stop. See *Torres* v. *Madrid*, 141 S. Ct. 989, 1001 (2021) ("[A] seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement."); *Heien* v. *North Carolina*, 574 U.S. 54, 60 (2014) ("A traffic stop for a suspected violation of law is a 'seizure' of the occupants of the vehicle. . . ."). Here, the district court found that Large, "driving in a marked Mahnomen County truck, used his vehicle to block the road and motioned to the [two truck] drivers to pull over." Pet. App. 5a. "The drivers complied" and were then made to wait by the road for over three hours while Large had them investigated by the police. *Ibid.* That was a seizure. This point highlights a fact that is central to the scope-of-authority

exceeded Large's authority as an engineer. As Large himself conceded, "he did not have the authority to perform a traffic stop." Pet. App. 12a. That admission was accurate, see Pet. 3–5, 20–21; Pet. App. 22a–25a, and it should have ended the immunity discussion: Large was not eligible for protection.

Immunizing Large is inconsistent with *Harlow*'s rationale. One goal of qualified immunity is to embolden government officials to execute their duties without having their decisions distorted by the threat of personal liability should they make a mistake. See *Forrester* v. *White*, 484 U.S. 219, 223 (1988) ("When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well . . . act with an excess of caution or otherwise [] skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct."). But that protection is only appropriate when the discretion being exercised is in service of one of the tasks the official is supposed to be performing. Only then is the harm that immunity causes—making it impossible for some victims to recover damages for their injuries—counterbalanced by the avoidance of a different social cost, namely "inhibit[ing] officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987).

---

assessment: when Large pulled over the petitioner's two truck drivers, he was acting like a police officer, not a highway engineer.

B. Other areas of the law also deny immunity for conduct that clearly exceeds an official's authority.

1. The link between the scope of immunity and the scope of authority is an old one, making the Eighth Circuit's choice to ignore it all the more significant. As the petitioner notes, at common law, whether an official received immunity depended, in part, on whether the official acted within the scope of his authority. See Pet. 26–29. Officers with discretionary duties who acted in a clear absence of authority received no immunity at all. See Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1350 (2021); cf. William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online 115, 122–24 (2022) (agreeing that, at common law, immunity for quasi-judicial acts "applied only to cases within the jurisdiction of the officer," but contending that "[l]iability for jurisdictional error was strict even if the error involved a tricky question of law"). Neither did ministerial officers who acted "in excess of their delegated authority." Keller, *Qualified and Absolute Immunity*, 73 Stan. L. Rev. at 1346, 1347. Whatever breaks it may have made with the common law, by restricting eligibility for qualified immunity to actions taken within the scope of an official's authority, the *Harlow* Court was preserving a well-established aspect of immunity doctrine.

2. Like qualified immunity, other branches of immunity law tie immunity to the power a government official is legally permitted to exercise. Take judicial

immunity: Ordinarily, judges have absolute immunity from suit for their judicial actions, but they lose that protection when they act in a clear absence of jurisdiction—in a way that clearly exceeds their authority. See *Stump* v. *Sparkman*, 435 U.S. 349, 355–57 & n.7 (1978). This is different from saying a judge will lose her immunity if she simply makes an erroneous ruling. Rather, she will lose it if she exercises power in a domain where it is clear that, by rights, she has none. Twice, the Court has illustrated the distinction using these examples:

> [I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

Stump, 435 U.S. at 357 n.7 (citing *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 352 (1871)). When judges act clearly outside the scope of their authority, their absolute immunity is lost.

Some courts take the same approach to prosecutorial immunity, which is consistent with the immunity this Court has awarded to high executive officials: they are immunized for actions within the scope of their official authority, not clearly outside it.[3]

---

[3] The degree of immunity prosecutors receive also varies depending on the function they are performing when they act. A

See, *e.g.*, *Anilao* v. *Spota*, 27 F.4th 855, 863–64 (2d Cir. 2022) (summarizing the Second Circuit's rule that a prosecutor loses absolute immunity when she acts "in the clear absence of all jurisdiction," "without any colorable claim of authority"); *Snell* v. *Tunnell*, 920 F.2d 673, 696 (10th Cir. 1990) (holding that a defendant was not entitled to absolute immunity, though she was acting in a prosecutorial capacity, because she acted "without color of authority"). "As in the case of a judicial officer," this Court has said, "we recognize a distinction between action taken by the head of [an executive] department *in reference to matters which are manifestly and palpably beyond his authority*, and action having more or less connection with the general matters committed by law to his control or supervision." *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896) (emphasis added). The official who "keep[s] within the limits of his authority" ought to receive immunity. *Ibid.* By implication, the official who does not should not. Cf. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 755 (1982) ("[W]e think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official

---

state prosecutor will be absolutely immune from a § 1983 suit for conduct that is intimately tied to the initiation or presentation of a criminal prosecution, see, *e.g.*, *Imbler* v. *Pachtman*, 424 U.S. 409, 430–31 (1976), but not for administrative or investigatory actions that are not taken as an advocate in a prosecutorial capacity. For these other sorts of actions, a prosecutor is entitled to only qualified immunity. See *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 276–78 (1993) (qualified immunity for statements at press conferences); *Burns* v. *Reed*, 500 U.S. 478, 496 (1991) (qualified immunity for advice to police).

responsibility."); *Butz* v. *Economou*, 438 U.S. 478, 495 (1978) (accepting the principle that federal officers can be held liable when they "stray beyond the plain limits of their statutory authority" and act "manifestly beyond their line of duty").

C. The absolute immunity cases illustrate how the scope-of-authority limitation can work in qualified immunity cases.

1. The approach taken in these cases can be applied directly to the scope-of-immunity inquiry in qualified immunity cases, as exemplified by the Fourth Circuit's handling of *In re Allen*, 119 F.3d 1129 (4th Cir. 1997). In *Allen*, the court declined to reconsider its earlier holding that an official is not entitled to immunity when his actions are "clearly established to be beyond the scope of his official duties." *Allen*, 119 F.3d at 1129. That is because, in such a case, "obviously his acts are not 'legitimately require[d]'" by his duties—*Harlow*'s threshold for immunity. *Id.* at 1131 (quoting *Harlow*, 457 U.S. at 819). Under the Fourth Circuit's approach, close calls remain protected, just as close calls about jurisdiction do not jeopardize a judge's absolute immunity. Cf. *Bradley*, 80 U.S. at 351–52 (distinguishing actions taken "in excess of jurisdiction," which leave the judge protected by absolute immunity, from actions taken in "the clear absence of all jurisdiction over the subject-matter," which are not protected). "Only if an employee acts in a way plainly beyond the perimeter of his official duties

does he lose the right to claim immunity from suit." *Allen*, 119 F.3d at 1132.

The Fourth Circuit derived its approach from *Harlow*, not the judicial immunity cases, a fact that emphasizes the consonance between the two areas of law (and the magnitude of the error the Eighth Circuit committed in the case on appeal). The scope-of-authority limitation on qualified immunity is embedded in *Harlow*. It follows from the logic and the language of the Court's opinion, and it tracks the limitations placed on other forms of immunity that some government agents receive. Cf. 2 Sheldon H. Nahmod, *Civil Rights & Civil Liberties Litigation: The Law of Section 1983* § 8:7 (Sept. 2021 update) ("The Fourth Circuit's approach in *Allen* was sound and might be rationalized in several ways.").

Other circuits apply an even stricter limitation, requiring defendants who seek immunity to demonstrate that their conduct was within the scope of their discretionary authority, not just close to it. See, *e.g.*, *Cherry Knoll L.L.C.* v. *Jones*, 922 F.3d 309, 318 (5th Cir. 2019); see also Pet. 11–12 (describing similar tests in the Second and Eleventh Circuits). There is support for this position, too, but the Court need not decide in this appeal whether to favor this articulation of the limitation or the Fourth Circuit's. Reversing the Eighth Circuit will secure the principal benefits of the scope-of-authority limitation—better incentives for officials and greater doctrinal logic and uniformity—while leaving consideration of the differences between the two remaining approaches for

a case that better highlights the merits and demerits of each.

2. The most prominent judicial opposition to the scope-of-authority limitation on qualified immunity comes from Judge Luttig's dissent in *Allen*. See *Allen*, 119 F.3d at 1135–40; see also *Stanley* v. *Gallegos*, 852 F.3d 1210, 1219–28 & n.3 (10th Cir. 2017) (Holmes, J., concurring) (opposing the scope-of-authority limitation and explaining: "In crafting my concurrence, I am guided and persuaded by Judge Luttig's well-reasoned dissent [in *Allen*]"). There, Judge Luttig argued that a scope-of-authority limitation on qualified immunity was foreclosed by this Court's reasoning in *Davis* v. *Scherer*, 468 U.S. 183 (1984), a case holding that a state official does not lose his qualified immunity simply because his conduct violated state law. See *Allen*, 119 F.3d at 1136–39.

But the limit *Harlow* set on the scope of qualified immunity was not abandoned in *Davis*. There was no question in *Davis* that the defendants had exercised the kind of power their positions authorized them to exercise, even if the plaintiff alleged that they had violated his rights by exercising that power the way they did.[4] Consequently, there was no mention at all of

---

[4] The plaintiff in *Davis* was a former member of the Florida Highway Patrol who alleged that he had been fired in violation of his Fourteenth Amendment due process right. *Davis*, 468 U.S. at 185, 187. The defendants who were sued in their official capacities were high-ranking officials in the Florida Department of Highway Safety and the Florida Highway Patrol, at least one of whom had been involved in the decision to fire him. See *id.* at 186, 187 n.2.

the scope-of-authority question in *Davis*. It would be passing strange if, without saying so and without instigation, the Justices in *Davis* somehow set aside the limitation on immunity they had just articulated in *Harlow*—especially considering that the Court's roster in 1984, when *Davis* was decided, was the same as in 1982, when *Harlow* issued. See Members of the Supreme Court of the United States, https://www.supremecourt.gov/about/members.aspx (last visited July 8, 2022). Justice Powell was the author of the majority opinion in both cases, and the Justices concurring or in the majority were almost identical. "This Court does not normally overturn, or [] dramatically limit, earlier authority *sub silentio*." *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

This is not to say that Judge Luttig's dissent in *Allen* was completely without grounding. The holding in *Davis* did rely, in part, on efficiency concerns that may sometimes be present—though to a much lesser degree—in cases that turn on the scope of an actor's authority.[5] See *Davis*, 468 U.S. at 195–96. And, as

---

The case did not involve an argument that the defendants lacked the authority to make termination decisions.

[5] There will of course be some cases in which it is not obvious whether an official has exceeded his authority, but there will be others, like this one, when it is. If, for instance, a state fire marshal chooses to discipline a prisoner during a safety inspection of a jail, there should be little difficulty in concluding that the marshal has exceeded his authority. See, *e.g.*, Cal. Health & Safety Code § 13146(a) (listing the responsibilities and areas of authority of the California state fire marshal, all of them related to building standards and fire safety). And even if the limitation

Judge Luttig capitalized upon in his dissent, the *Davis* opinion in places characterized the qualified immunity inquiry in terms that seemed to exclude consideration of any factor other than the violation of a clearly established federal right. See, *e.g.*, *Allen*, 119 F.3d at 1136 (quoting *Davis* with added emphasis: "[a] plaintiff who seeks damages for 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*").

None of those sweeping statements from *Davis*, however, was necessary to decide the case. All were *dicta*. In the years since *Davis*, the Court has continued to take a functional approach to the granting and denial of immunity—one that determines the appropriate level of immunity by considering both the nature of the function an official was performing and whether the official was authorized to perform that function. See, *e.g.*, *Rehberg* v. *Paulk*, 566 U.S. 356, 363–64 (2012) (listing "functions that are absolutely immune from liability for damages under § 1983," including "actions taken by judges within the legitimate scope of judicial authority" and "actions taken by legislators within the legitimate scope of legislative authority"). Those cases make it clear that

---

sometimes does require resources to adjudicate, experience has proven that the task is manageable. As mentioned above, at least three circuits successfully enforce a version of the scope-of-authority limitation that is even stricter than the Fourth Circuit's, requiring defendants to prove they acted with authority before they can be immunized. See Pet. 11–13.

the link between immunity and the scope of authority survived *Davis*. If the scope of an official's authority were irrelevant to the immunity determination, there would be no need to "examine the nature of the functions with which [the official] has been lawfully entrusted" when deciding whether an official should be immunized—yet that is what the Court consistently does. *Forrester*, 484 U.S. at 224.

II. Correcting the Eighth Circuit's error will have beneficial doctrinal and practical consequences.

Applying the preceding legal principles to the case at hand yields a consistent result: a county highway engineer could be immunized for actions taken in the role of a highway engineer—imposing weight restrictions on roadways, for example—but not for actions taken as an un-deputized police officer. This outcome would have positive effects on doctrine and policy.

A. The Eighth Circuit's opinion contributes to inconsistency in the courts of appeals about the scope of the qualified immunity doctrine.

For many years, the courts of appeals that had spoken on the question were unanimous that qualified immunity extended only to actions within an official's authority—or at least, to actions that were not clearly outside it. See *Stanley*, 852 F.3d at 1214 (noting that, as of 2017, no court of appeals had explicitly rejected

the scope-of-authority limitation on qualified immunity). Recently, however, two courts of appeals have interjected the notion that the scope of authority is irrelevant to immunity: the Eighth with the case now being appealed and the Tenth with *Stanley* v. *Gallegos*, 852 at 1219–28 (Holmes, J., concurring). A decision by this Court will clarify the point and prevent other circuits from following the lead of the Eighth and the Tenth.

Clarifying the doctrine is especially important now. In recent years, qualified immunity doctrine has come under increased scrutiny, with many calling for its abolition, and some members of this Court indicating that they would like to see the doctrine re-evaluated, at a minimum. See, *e.g.*, *Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., statement respecting the denial of certiorari) ("[I]n an appropriate case, we should reconsider either our one-size-fits-all test or the judicial doctrine of qualified immunity more generally."); *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing that the Court's recent approach to qualified immunity "transforms the doctrine into an absolute shield for law enforcement officers" and "sends an alarming signal to law enforcement officers and the public"); Don R. Willett & Aaron Gordon, *Rights, Structure, and Remediation*, The Collapse of Constitutional Remedies *by Aziz Z. Huq*, 131 Yale L.J. 2126, 2197–98 (2022) (referencing "a growing, cross-ideological chorus of jurists and scholars urging recalibration of the modern qualified-immunity regime"). If the Court intends a

reassessment of the doctrine, it is important that there be a clear understanding of whether or not it protects officials who act without authority.

B. Screening for scope of authority in qualified immunity cases creates better policy incentives and increases government accountability, especially in law enforcement.

Even under the status quo, there are important practical benefits to resolving the confusion in the lower courts. By withholding immunity when officials act without jurisdiction, the scope-of-authority limitation encourages officials to act only in those areas where they have been given authority to do so. This serves democratic principles, but it also decreases the odds of rights violations and other kinds of harm. These effects are especially important for law enforcement. Reversing the Eighth Circuit's ruling will encourage officials who have limited jurisdiction to stay within the limits of their authority, and it will increase the rate of compensation for rights violations when they occur.

1. By incentivizing officials who are not law enforcement officers to stay away from engaging in acts of law enforcement, the scope-of-authority limitation should decrease the risk of constitutional violations, including unreasonable uses of force. Law enforcement officers are trained in the law and in safety techniques. To become a police officer in Minnesota, for example, where this case occurred, a person must successfully complete an educational

program with over fifty subject areas. *See* Yuri R. Linetsky, *What the Police Don't Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. Rev. 1, 32–33 (2018) (describing the Minnesota requirements). Among them are topics related to constitutional rights and criminal procedure, and many related to the use of force, including requirements that students demonstrate an ability to "make decisions about reasonable use of force" in "real-time scenario exercises." See Minnesota Board of Peace Officer Standards and Training, Learning Objectives for Professional Peace Officer Education 14–15, 54 (Dec. 15, 2021), https://dps.mn.gov/entity/post/becoming-a-peace-officer/Documents/PPOE%20Learning%20Objectives%20-%20December%2015,%202021.pdf. "All certified police officers must complete 48 hours of continuing education every three years to maintain their police certification." Linetsky, *What the Police Don't Know*, 48 N.M. L. Rev. at 33.

This training, together with the experience they acquire on the job, sets law enforcement officers apart from civilians, especially when it comes to the use of force. See Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 Vill. L. Rev. 585, 601 (2020). Their training and experience provide good reason to think that law enforcement officers will perform their jobs better than others would, and evidence shows "that police officers outperform civilians in making decisions about when and how to use force." *Ibid.* Because the scope-of-authority limitation discourages lesser- or untrained officials from performing tasks that are better left to

better-trained officers, we should expect the limitation to decrease the risk of constitutional violations, including unreasonable uses of force.

The same is true of enforcement officers with more limited authority and of other people, like social workers, who perform tasks ancillary to law enforcement (perhaps by responding to 911 calls motivated by mental health concerns). State and municipal governments have long employed specialized officers with power over only particular subject areas: park rangers, animal control officers, code enforcement officers, and the like. These officers help to enforce the laws, but the range of laws they are entitled to enforce, and the means they may use to enforce them, are restricted. Parking enforcement officers, for example, have authority only to enforce parking regulations and only through certain means, like writing citations.[6] By increasing the exposure to liability for officers who exceed their authority, the scope-of-authority limitation on qualified immunity

---

[6] See, *e.g.*, N.J. Stat. Ann. § 40A:9-154.7 (giving parking enforcement officers "the power and authority" to issue parking tickets, serve and execute process for parking offenses, cause vehicles to be towed, and collect towing and storage costs); Ohio Rev. Code Ann. § 505.541(B) (limiting the authority of parking enforcement officers to the enforcement of the parking laws); W. Va. Code § 8-14-5a(a) (identifying the "sole duties" of parking enforcement officers as "to patrol and enforce municipal parking ordinances"). Training will be limited as well. Compare Learning Objectives for Professional Police Officer Education, *supra*, with Ohio Rev. Code Ann. § 505.541(C) (requiring Ohio parking enforcement officers to receive training about parking enforcement, "human interaction skills, and first aid").

reduces the odds that someone will be hurt by an officer who exercises another type of officer's broader powers—a parking officer who decides to make a tactical vehicle intervention to stop a fleeing bank robber, for example (or a county engineer who decides to make a traffic stop). It also reduces disruptions to the coordinated work of the various types of law enforcement officers.

2. The scope-of-authority limitation also increases accountability in government, and in law enforcement in particular. For a variety of reasons, qualified immunity reduces government accountability. See, *e.g.*, Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 Nw. U. L. Rev. 1101, 1159 (2020). Circumscribing the applicability of the doctrine curtails this negative consequence, enabling more people whose rights have been violated to be compensated.

Other salutary effects flow from the pressure that the scope-of-authority limitation places on officials to refrain from exercising power where they have been given none. Because the limitation will reduce the temptation for people who are not law enforcement officers to engage in police work, it should also decrease the likelihood that someone will engage in a law-enforcement-style interaction without that incident being recorded by a body or dash camera. By 2016, nearly half the general-purpose law enforcement agencies in the United States had acquired body-worn cameras. See Shelley S. Hyland, *Body-Worn Cameras in Law Enforcement Agencies, 2016*, Bureau of Justice

Statistics 1 (Nov. 2018), https://bjs.ojp.gov/content/pub/pdf/bwclea16.pdf. The majority of those agencies had policies that required the videotaping of traffic stops and other interactions with the public. See *id.* at 6. The Mahnomen County Sheriff's Office—one of the law enforcement agencies with jurisdiction where the respondent conducted his traffic stop in this case—acquired body cameras in 2021, and as recently as April 2022, it released dash camera footage of an officer-involved shooting. See Lauren Leamanczyk & David Griswold, *Authorities release dashcam video of Mahnomen Co. deputy shooting armed woman* (April 14, 2022), https://www.kare11.com/article/news/crime/authorities-release-dashcam-video-of-mahnomen-co-deputy-shooting-armed-woman/89-855cc3ed-7987-42ac-abc8-f7c873d8c047; Mark Askelson, *Mahnomen County to Begin Using Body Cameras* (Feb. 2, 2021), https://www.rjbroadcasting.com/2021/02/02/mahnomen-county-to-begin-using-body-cameras-human-service-making-plans-to-move-into-bank-building/#page-content. A doctrine that discourages traffic stops by highway engineers will increase the proportion of law enforcement interactions that are conducted by actual law enforcement officers and recorded so that they can be reviewed later for violations of civil rights.

3. Finally, ignoring the scope-of-authority limitation, as the Eighth Circuit did here, exacerbates some of the negative aspects of qualified immunity. Even defenders of qualified immunity have expressed concern that the doctrine may cause "undesirable stagnation in constitutional law." Lawrence Rosenthal,

Defending Qualified Immunity, 72 S.C. L. Rev. 547, 613 (2020). This problem will be particularly acute in cases involving officials accused of misconduct in spheres where they do not usually operate. Specific precedent declaring their conduct illegal will not exist, so courts will be tempted to grant qualified immunity on the grounds that there was no violation of clearly established law. See *Taylor* v. *Barkes*, 575 U.S. 822, 825 (2015) (per curiam) (reiterating that, for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate"); *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009) (permitting courts to choose whether they first decide if a violation occurred or if any violation was of clearly established law). That is precisely what the Eighth Circuit did in this litigation: it avoided the question whether Large violated the petitioner's constitutional rights and ruled instead that there was no clearly established right to be free of traffic stops by county engineers. See Pet. App. 10a–11a. So long as courts adopt this approach, officials who act outside their authority will successfully—and repeatedly—evade repercussions for constitutional violations.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

D. ANDREW PORTINGA
MILLER JOHNSON
45 Ottawa Ave. SW
Suite 1100
Grand Rapids, MI 49503
(703) 682-9320
portingaa@millerjohnson.com

BRIAN PÉREZ-DAPLE
Counsel of Record
727 East Dean Keeton St.
Austin, TX 78705
(512) 232-1226
brian.perezdaple@
law.utexas.edu

JULY 11, 2022