No. 18-1191

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF

Section 1983 actions exist to vindicate federal rights, but qualified immunity allows state officials to effectively perform their duties "by ensuring that officials can reasonably anticipate when their conduct may give rise to liability for damages." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quotation marks omitted). Consistent with this focus on federal constitutional rights, this Court has consistently held that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision" of state law. *Davis v. Scherer*, 468 U.S. 183, 194 (1984). Thus, the Court has held that the "only" way a plaintiff seeking damages under section 1983 "may overcome the defendant official's qualified immunity" is by establishing a violation of *federal* rights that "were clearly established at the time of the conduct at issue." *Id.* at 197.

Many courts of appeals, however, have not heeded this Court's clear command. In the case below, for example, Warden Carter Davenport learned that Marquette Cummings—one of the inmates in the Warden's care—had been violently stabbed in the eye by another inmate and airlifted to UAB Hospital for emergency care. Unfortunately, by the time Cummings arrived at the hospital his condition had deteriorated to the point that hospital staff designated him a "non-survivor" and determined that he had only 10% of normal brain functioning. Hospital staff then asked Warden Davenport—as warden—for instructions on end-of-life care for Cummings, and Davenport authorized hospital staff to withdraw life support. Shortly after they did, Cummings died.

No clearly established federal law speaks to such a difficult situation, so when Cummings' estate sued the Warden for an alleged Eighth Amendment violation, qualified immunity should have applied. But instead of addressing the lack of clear federal law, the Eleventh Circuit looked exclusively to unclear state law. The federal court determined that the Warden lacked authority under state law to make this call, and on that ground alone, the court denied him qualified immunity. At least two other circuits—the Second and Sixth—have adopted this flawed approach.

Better—but still mistaken—is the approach of the Fourth and Eighth Circuits, which denies an official qualified immunity if state law clearly establishes that the official's activity was beyond the scope of her authority.

Finally, the Tenth Circuit has "repeatedly and unfailingly reviewed qualified-immunity assertions under a two-part analysis, considering '(1) [whether] the official violated a [federal] statutory or constitutional right, *and* (2) [whether] the right was "clearly established" at the time of the challenged conduct." *Stanley v. Gallegos*, 852 F.3d 1210, 1219-20 (10th Cir. 2017) (Holmes, J., concurring in the judgment) (quoting *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015)).

Respondent tries to paper over this split, but it has been repeatedly recognized by the courts of appeals. And the split was outcome determinative here, for no clearly established law—federal or state—prohibited the Warden's actions. The Court should grant the petition to finally resolve the divide over this important issue.

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

In the decision below, the Eleventh Circuit became only the latest court to recognize the circuit split over whether state officials must make a state-law showing before claiming qualified immunity, and, if so, what that showing must be. Pet.App.16a. Respondent's attempts to wish away this split fall short.

As the petition explained (at 9-16), after this Court held that "[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," *Davis*, 468 U.S. at 197, the Circuits have followed at least three different paths.

The Eleventh, Second and Sixth Circuits have applied a scope-of-duties test that requires state officials to establish that state law granted them authority to act. Thus, in this case, the Eleventh Circuit agreed that "an inmate is in the legal custody of the warden, and decision-making related to the provision of medical care for inmates falls soundly within prison officials' discretion," but the court nevertheless denied Warden Davenport qualified immunity based on its reading of the Alabama Natural Death Act, which does not mention wardens or prisoners and had never been interpreted by any court, state or federal, before this case. Pet.App.12a (quotations and citations omitted).

Officials in the Fourth and Eighth Circuits must make a similar showing, though violations of state law

deprive them of qualified immunity only if "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) (emphasis added); *see also Johnson v. Phillips*, 664 F.3d 232, 236 (8th Cir. 2011). As Judge Motz explained after an evenly divided en banc Fourth Circuit declined to review the panel decision in *Allen*, this "standard provides officials with far more protection than the standard adopted by every other court that has considered the question. All of those courts have held that officials cannot claim qualified immunity for *any* acts beyond the scope of their authority," *In re Allen*, 119 F.3d 1129, 1132 (4th Cir. 1997) (Motz, J., concurring in the denial of rehearing *en banc*) (citing decisions from the Second, Ninth, and Eleventh Circuits).

Respondent simply ignores this long- and well-recognized divide of authority. But had the Fourth and Eighth Circuit's rule applied in this case, it would have been resolved differently. However one might read Alabama's end-of-life statute, it is far from "clearly established" that it trumps the "firmly established legal principle[]" that "decision-making related to the provision of medical care for inmates falls soundly within prison officials' discretion." Pet.App.12a-13a (quotations and citations omitted). This split is reason enough for this Court to grant review.

The Tenth Circuit has set forth a third path. As Judge Holmes explained in *Stanley v. Gallegos*, 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." 852 F.3d 1210, 1219-20 (10th Cir. 2017) (Holmes, J., concurring in the judgment). That court has "repeatedly and unfailingly reviewed qualified-immunity assertions under a two-part analysis, considering '(1) [whether] the official violated a [federal] statutory or constitutional right, *and* (2) [whether] the right was "clearly established" at the time of the challenged conduct." *Id.* (quoting *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015)).

To be sure, Judge Hartz's opinion in *Stanley* maintained that the Tenth Circuit had not yet decided whether to adopt or reject a scope-of-authority exception to qualified immunity. *Id.* at 1211-12. But that is difficult to maintain after the Tenth Circuit's recent decision in *Cummings v. Dean*, which again recognized that "[w]hen a defendant raises the qualified-immunity defense, 'the onus is on the plaintiff to demonstrate (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.'" 913 F.3d 1227, 1239 (10th Cir. 2019) (quoting *Quinn*, 780 F.3d at 1004). Notably, the court stuck to this Court's two-step inquiry for qualified immunity without ever suggesting that officials must first clear a state-law threshold to claim qualified immunity's protections.

And even if the scope-of-authority question remains open in the Tenth Circuit, that court's fractured *Stanley* decision underscores the need for this Court's review. Judge Hartz carefully explained the arguments both for and against adopting a scope-of-authority exception to qualified immunity. *Stanley*, 852

F.3d at 1211-12, 1213-16. He recognized that "over half the circuit courts of appeal appear to have recognized a scope-of-authority exception to the protection of qualified immunity," *id.* at 1214, but he expressed concerned about "adopting a doctrine of such uncertain scope that is so in tension with controlling Supreme Court authority," *id.* at 1215-16. Ultimately, he did not vote to adopt the exception, but instead concluded that *if* the court were to adopt the exception, it should adopt the Fourth Circuit's "clearly established" formulation. *Id.* at 1216.

In sum, the circuits are split on the important question of how to determine whether a state official is entitled to qualified immunity. This divide is longstanding, well-theorized, and ripe for this Court's review. The Court should grant this petition.

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

This Court has explained the two steps to a qualified immunity analysis as being "whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right" and "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan,* 555 U.S. 223, 232 (2009) (*quoting Saucier v. Katz*, 533 U.S. 194, 201 (2001)). In other words, "[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." *Davis*, 468 U.S. at 197 (emphasis added).

Nonetheless, the Eleventh Circuit constructed a hurdle that resulted in the denial of qualified immunity without ever reaching either step of the analysis this Court has prescribed. Here, the alleged facts are that Warden Davenport and the hospital staff reasonably thought that he was the person who was empowered to decide when to withdraw life support.[1] But under the Eleventh Circuit's test, whether Warden Davenport has qualified immunity against an Eighth Amendment claim turned on the court's reading of a state law that had never before been interpreted by a state court, much less in the context of prisons. In Alabama, according to the court's "vanishing ink" interpretation,[2] Davenport lacks qualified immunity. In another state, a warden facing the same situation and making the same decision could have qualified immunity against the very same *federal* constitutional claim because of how his duties are defined in *state* law. That makes no sense.

As this Court has explained, "[t]he doctrine of qualified immunity protects government officials

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[1] The amended complaint alleges that: Dr. Melton relied on Warden Davenport in indicating that Cummings should not be resuscitated; "medical personnel informed Ms. Gaines that Warden Davenport authorized . . . medical personnel to stop giving Cummings medication and to disconnect the life support machine"; and, "medical personnel repeatedly conveyed that 'it was not her (Ms. Gaines') call' because the State had legal custody over Cummings and that the decision to let her son die was the Warden's decision." *See* Doc. 29 at 5.

[2] *McMahan v. Toto*, 311 F.3d 1077, 1079 (11th Cir. 2002) ("Recent events in this case illustrate that when we write to a state law issue, we write in faint and disappearing ink.") (quotations omitted).

'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*, 555 U.S. at 231 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Moreover, "qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id.* (internal citations and quotation marks omitted). Thus, as Judge Luttig recognized, "[w]hether a defendant 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." *In re Allen*, 119 F.3d at 1135 (Luttig, J., dissenting from denial of rehearing en banc).

The Eleventh Circuit has effectively held, however, that an official who has not violated any clearly established federal law must answer a section 1983 suit for violating unclear state law. That holding undermines the "breathing room" qualified immunity is intended to provide. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). And it grants "[f]ederal judges … large discretion to extract from various statutory and administrative codes those provisions that seem to them sufficiently clear or important to warrant denial of qualified immunity." *Davis*, 468 U.S. at 195. That result cannot be squared with the purposes of qualified immunity or this Court's precedents. The Court should make plain that its two-step qualified immunity analysis has just two steps and no more.

III. This case is a good vehicle to consider this important question.

Respondent argues that this case is a poor vehicle for review for two reasons, neither of which withstand scrutiny.

First, Respondent argues that Warden Davenport's actions amount to a violation of clearly established law. But this argument fails on multiple grounds, as it is based on an incomplete recitation of the alleged facts and inapposite cases.

As to the facts, Respondent has ignored its own allegations that the stabbing caused Cummings to "bleed profusely," that hospital staff told Ms. Gaines that Cummings "was only operating with 10% of normal brain functioning," and that medical personnel had "declared Cummings a non-survivor shortly after his arrival." Doc. 29 at 3-4.

It is only by ignoring these allegations that Respondent can make the remarkable assertions that neither Warden Davenport "nor medical staff had a firm assessment as to Cummings's ultimate prognosis" and that Davenport acted "before doctors could advise as to the likelihood of Cummings's recovery." Opp. at 9; *see also id.* at 10. The ultimate prognosis was that Cummings had suffered a fatal wound and would not recover.[3]

From the faulty premise that Cummings' prognosis was in doubt, Respondent argues that "an inmate

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[3] Respondent suggests in its question presented that Ms. Gaines requested that Cummings remain on life support until a brain death study was completed, but the amended complaint contains no such allegation. *See* Doc. 29.

who has been stabbed in the eye and is dependent on a life support machine has a 'serious medical need' that is 'obvious' to anyone, including a 'lay person.'" Opp. at 10 (quoting *Taylor v. Hughes*, 920 F.3d 729, 733 (11th Cir. 2019)). In so doing, Respondent strings together a few out-of-context snippets of caselaw to support its conclusion.

Hughes stated that "[a] serious medical need is one that has been diagnosed by a physician *as mandating treatment* or one that is so obvious that even a lay person would easily recognize *the necessity for a doctor's attention*." *Hughes*, 920 F.3d at 733 (internal citations and quotation marks omitted; emphasis added). Here, Cummings received prompt medical treatment from a top-flight medical facility. Respondent's amended complaint alleges that, after Cummings was stabbed, he was "quickly air lifted" to UAB Hospital where he was admitted at the emergency room and then transferred to the intensive care unit. There is no allegation of delay, though Respondent relies on cases involving delay. The gravamen of this case concerns *who* made the decision to take Cummings off life support when the medical professionals attending to him determined they could not restore him to health. That is a much different case from any of the decisions Respondent cites.

Second, Respondent argues that this case is a poor vehicle for review because "central to [Warden Davenport's] argument is his contention that the court of appeals misinterpreted *state* law." BIO.12. Respondent's contention is not only mistaken, it underscores precisely why this Court should review the decision below. As an initial matter, the issue here is not how federal courts read a state law, but that they relied on it at all to deny a federal defense. Under the Eleventh

Circuit's rule, "state law is *always* relevant and often *dispositive* of a defendant's federal right to qualified immunity," *In re Allen*, 119 F.3d at 1135 (Luttig, J., dissenting from denial of rehearing en banc). Worse still, this all occurs "*before any court even considers the only heretofore relevant question for purposes of determining the availability of qualified immunity under section 1983—whether the defendant violated the plaintiff's clearly established federal rights*." *Id.* at 1138 (emphasis in original).

In other words, Warden Davenport seeks this Court's review, not because the Eleventh Circuit misread the Alabama Natural Death Act, but because that court looked to that state law to resolve qualified immunity. The only circumstance "relevant to the issue of qualified immunity" is whether an official's conduct was objectively reasonable "as measured by reference to clearly established" federal law. *Davis*, 468 U.S. at 191. This Court will not need to construe state law; it will need only to clarify what role, if any, state law has in determining whether an official may invoke qualified immunity's federal defense.

IV. This is a poor vehicle for considering Respondent's proposed question.

Respondent's brief in opposition proposes that, if the Court grants Davenport's petition, the Court should simultaneously consider whether to "overrule the doctrine of qualified immunity." BIO.i. But this case is an exceedingly poor vehicle for reassessing the entire doctrine of qualified immunity. Neither the district court nor Eleventh Circuit considered such arguments or even whether Davenport violated clearly established federal law. If this Court is going to fundamentally rethink, for example, whether the "clearly

established" prong of qualified immunity is sound, *see* BIO.26, it should do so in a case in which lower courts have first considered whether that prong applies.

If this Court grants Davenport's petition and removes or relaxes the Eleventh Circuit's state-law impediment to qualified immunity, the lower courts will then consider the other prongs of qualified immunity. This Court could then consider whether the Eleventh Circuit's rulings on those prongs merit review. But at this juncture, any review of those yet-to-be-decided issues would be premature.

CONCLUSION

The Court should grant Davenport's petition.

Respectfully submitted,

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