No. _____

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

PETITION FOR A WRIT OF CERTIORARI

ANYA BIDWELL
Counsel of Record
PATRICK JAICOMO
ALEXA L. GERVASI
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
abidwell@ij.org

Counsel for Petitioner

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

QUESTION PRESENTED

In 2017, the Tenth Circuit acknowledged that "over half the circuit courts of appeal appear to have recognized a scope-of-authority exception to the protection of qualified immunity." *Stanley* v. *Gallegos*, 852 F.3d 1210, 1214 (10th Cir. 2017).

In 2019, the Tenth Circuit expressly departed from that emerging consensus. *Cummings* v. *Dean*, 913 F.3d 1227, 1245 (10th Cir. 2019).

In the case below, the Eighth Circuit joined the Tenth in this departure and, as a result, granted qualified immunity to a county engineer who conducted traffic stops, in clear violation of his authority under Minnesota law.

The question presented is:

Whether, before proceeding to the qualified immunity analysis, courts must determine that a government official was acting within the scope of his authority.

PARTIES TO THE PROCEEDING

Petitioner is plaintiff Central Specialties, Inc. Respondent is defendant Jonathan Large. Mahnomen County was named as a defendant in the district court and the Eighth Circuit but is not a party to the proceedings here.

CORPORATE DISCLOSURE STATEMENT

Central Specialties, Inc. has no parent corporation; no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Central Specialties, Inc.* v. *Jonathan Large; Mahnomen County*, No. 20-3027, 8th Cir. (Jan. 11, 2022) (denying rehearing and rehearing en banc);
- *Central Specialties, Inc.* v. *Jonathan Large; Mahnomen County*, No. 20-3027, 8th Cir. (Nov. 24, 2021) (affirming grant of summary judgment for defendants); and
- *Central Specialties, Inc.* v. *Jonathan Large; Mahnomen County*, No. 17-cv-5276, D. Minn. (Aug. 31, 2020) (granting defendants' motion for summary judgment on all of plaintiff's claims).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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INTRODUCTION

This Court designed qualified immunity to provide breathing room for officials to exercise their lawful authority. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). It is not a "license to lawless conduct." *Id*. at 819. That's why *Harlow* explicitly cabined qualified immunity to "suits for civil damages arising from actions within the scope of an official's duties." *Id.* at 819 n.34.

Prior to 2019, all circuits that weighed in on the matter followed *Harlow*'s guidance, requiring defendants invoking qualified immunity to first show that they acted within the scope of their authority. Some circuits, like the Second, Fifth, and Eleventh, looked to state law for evidence that the challenged conduct was performed within the scope of defendants' duties. Others, like the Fourth and Ninth, looked at whether defendants knew or should have known that the challenged conduct exceeded the scope of duties provided by state law. But regardless of the specific test employed, all agreed that defendants could only proceed to the qualified immunity analysis once this threshold inquiry was resolved in their favor.

In 2019, the Tenth Circuit split from the consensus. Instead of first asking whether officials demanding qualified immunity acted within the scope of their authority, it went straight to the qualified immunity test itself. *Cummings* v. *Dean*, 913 F.3d 1227, 1245 (10th Cir. 2019).

The Eighth Circuit followed. In the case below, it granted qualified immunity to a county engineer who

blocked petitioner's trucks "from traveling on a county highway," ordered them to stop, and detained them for over three hours, even though the engineer "had no authority to make traffic stops, enforce traffic laws, seize vehicles * * * or detain drivers," and even though the county engineer knew that making traffic stops was outside the scope of his authority. Pet. App. 12a, 25a. Just like the Tenth Circuit, the Eighth Circuit skipped the scope-of-authority inquiry and went straight to qualified immunity. Not surprisingly, it found "no cases" in the Eighth Circuit that spoke to the constitutionality of county engineers making warrantless stops of trucks and their drivers. *Id*. at 13a.

Now that the split has developed among the circuits, only this Court can restore uniformity. *Harlow* makes it clear: Qualified immunity is not available to shield actions taken outside the scope of official duties. 457 U.S. at 819 n.34. The Tenth and Eighth Circuits should fall in line.

OPINIONS BELOW

The Eighth Circuit's opinion (Pet. App. 1a–26a) appears at 18 F.4th 989. The district court's summary judgment ruling (Pet. App. 27a–50a) appears at 482 F. Supp. 3d 886.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2021. Petitioner timely filed a petition for panel rehearing and rehearing en banc, which was denied on January 11, 2022. Justice Kavanaugh granted a 60-day extension of the period for filing this petition to June 10, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction 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[.]"

Subdivision 3, Section 163.02 of the Minnesota Statutes provides: "The county board, or the county engineer if so authorized by the board, may impose weight and load restrictions on any highway under its jurisdiction."

Subdivision 1, Section 163.07 of the Minnesota Statutes provides: "The county board of each county shall appoint and employ * * * a county highway engineer who may have charge of the highway work of the

county and the forces employed thereon, and who shall make and prepare all surveys, estimates, plans, and specifications which are required of the engineer."

Subdivision 56, Section 169.011 of the Minnesota Statutes defines "police officer" as: "every officer authorized to direct or regulate traffic or to make arrests for violations of traffic rules."

Subdivision 1(c), Section 626.84 of the Minnesota Statutes defines "peace officer" as: "an employee or an elected or appointed official of a political subdivision or law enforcement agency who is licensed by the board, charged with the prevention and detection of crime and the enforcement of the general criminal laws of the state and who has the full power of arrest, and shall also include the Minnesota State Patrol, agents of the Division of Alcohol and Gambling Enforcement, state conservation officers, Metropolitan Transit police officers, Department of Corrections Fugitive Apprehension Unit officers, and Department of Commerce Fraud Bureau Unit officers, and the statewide coordinator of the Violent Crime Coordinating Council" and "a peace officer who is employed by a law enforcement agency of a federally recognized tribe, as defined in United States Code * * * and who is licensed by the board."

STATEMENT

1. Petitioner Central Specialties, Inc. ("CSI") is a Minnesota road construction company. Pet. App. 2a.

Respondent Jonathan Large ("Large") is a county engineer for Mahnomen County, Minnesota. *Id.* at 1a.

Large's job is clearly defined by state law, which places him in "charge of the highway work of the county and the forces employed thereon." *Id*. at 22a (emphasis omitted); Minn. Stat. § 163.07, subdiv. 1. The law also requires Large to "make and prepare all surveys, estimates, plans, and specifications which are required of the engineer." Pet. App. 22a–23a; Minn. Stat. § 163.07, subdiv. 1. And he "may impose weight and load restrictions on any highway under [his] jurisdiction." Pet. App. 23a; Minn. Stat. § 163.02, subdiv. 3. Nothing in the law authorizes a county engineer to pull over vehicles traveling on highways or detain their drivers. See *State* v. *Horner*, 617 N.W.2d 789, 793–94 (Minn. 2000) (holding that even "special deputies" authorized "to enforce water safety laws" do not have the authority to perform highway stops).

In late 2016, the state of Minnesota contracted with CSI to perform road work on a state highway, including in Mahnomen County. Pet. App. 2a. This contract roused new disagreements in an already contentious relationship between CSI and Large, centering on the number of roads that would be designated as haul roads and CSI's ability to use non-haul roads as a return route for its empty trucks. *Id*. at 3a–4a.

This tension came to a head on July 17, 2017, when CSI told Large and the Minnesota transportation department that it intended to use a non-haul

road, Highway 10, to bring home its empty semitrucks. *Id*. at 4a. The following morning, Large persuaded the Mahnomen County Board of Commissioners to approve his request to change the weight restriction on Highway 10 from five-ton axle weight to five-ton total weight, making even empty semitrucks run afoul of the weight limit.[1] *Id.* at 4a; 55a–56a. CSI was notified of this change at 1:19 p.m. *Id.* at 5a.

Shortly after 2:00 p.m., Large used his Mahnomen County vehicle to block two CSI trucks from proceeding on Highway 10, detaining the trucks and their drivers for over three hours and ordering them to wait for law enforcement to arrive. *Ibid*. Non-CSI trucks, also obviously overweight under the new weight restrictions, continued to drive on Highway 10—freely passing the detained CSI trucks without issue. *Id.* at 5a–6a.

In this three-hour period, Large called law enforcement officers at the local sheriff's office, asking them to come weigh the trucks. They declined, citing the lack of capacity to handle the situation. Pet. App. 5a. Large then called the White Earth Tribal Police, which too declined, citing their lack of authority. *Ibid*. Finally, Large's calls were answered by the state troopers, who weighed the trucks and issued a citation to

[1] For comparison purposes, according to one state's information booklet, an average unloaded delivery truck, which is smaller than a semitruck, weighs six tons. Pennsylvania Department of Transportation, *Approximate Vehicle Weights*, https://www.dot.state.pa.us/public/pdf/InfoBridge/Approximate%20vehicle%20weights.pdf.

one of the drivers for exceeding the five-ton total weight limit. *Ibid.* The following day, state troopers dismissed the citation. *Id.* at 57a.

2. As relevant to this petition, CSI sued Large under Section 1983 for unreasonably seizing its trucks and singling them out for the stop. Pet. App. 6a. Foreshadowing the question now presented to this Court, CSI's complaint noted that Large was "not entitled to qualified immunity" because "[h]is authority as the County Highway Engineer does not include the power or discretion to conduct traffic stops." *Id.* at 57a. During his deposition, Large admitted that he did not have the legal power to stop or detain the trucks. *Id*. at 12a.

Yet, at the close of discovery, Large moved for summary judgment, asserting qualified immunity. The district court granted the motion, finding that CSI "failed to put forth any authority or evidence demonstrating there is a bright-line rule that only a law enforcement officer may request that commercial activity on a public road come to a brief halt while compliance with local laws is confirmed." *Id*. at 39a.

3. CSI then appealed the grant of qualified immunity to the Eighth Circuit, which affirmed. Instead of first determining whether Minnesota law gives county engineers the authority to seize and detain trucks or their drivers, the court discarded this threshold inquiry by stating at the outset: "Our [qualified immunity] inquiry begins and ends with the clearly established prong." Pet. App. 10a. It then applied this

prong to "the rights [CSI] alleges were violated," holding that it was not "clearly established that Large, a county engineer tasked with oversight of all county roads, could not prevent trucks that he had reason to believe were operating above the posted weight limit from passing over and damaging the roadway or could not call law enforcement to investigate compliance with the new, reduced weight restrictions." *Id*. at 11a.

The court further explained, emphasizing its exclusive focus on the clearly established test, "we find *no* cases considering this issue or even cases considering remotely similar facts. We thus find that there was no clearly established right." *Id*. at 13a (emphasis in the original).

Judge Grasz dissented, criticizing the majority's singular focus on the clearly established test without first considering Minnesota law and "whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties." *Id*. at 21a (quoting *In re Allen*, 106 F.3d 582, 594 (4th Cir. 1997)).

More, the dissent argued, the panel majority's holding conflicted with earlier Eighth Circuit precedent that had adopted the Fourth Circuit's scope-of-authority exception to qualified immunity. *Id.* at 21a (citing *Johnson* v. *Phillips*, 664 F.3d 232, 236 (8th Cir. 2011)); see also Part IB, *infra*, at 18 n.4.

In Judge Grasz's view, had the majority followed its own precedent, it would have looked at Large's authority under Minnesota law and recognized that

county engineers in Minnesota are only authorized to "have charge of *the highway work*," "make and prepare all surveys, estimates, plans, and specifications," and "impose weight and load restrictions." *Id*. at 22a–23a; see also Statutory Provisions Involved, *supra*, at 3–4. They are not authorized to "mak[e] traffic stops, enforc[e] traffic laws, or seiz[e] and detain[] vehicles to investigate potential weight limit violations." *Id*. at 22a. "Nowhere is there a slightest hint in Minnesota law," Judge Grasz explained, "that a county engineer is a peace officer * * * [who] ha[s] authority to make arrests or seizures of persons on public highways." *Id*. at 23a. Therefore, "qualified immunity is not applicable here." *Id*. at 21a.

To hold otherwise, the dissent went on to note, is to "implicitly cloak[]" county engineers "with near-absolute immunity for their actions since there are no existing cases circumscribing or defining the scope of [the majority's] newly discovered, unwritten law enforcement authority." *Id*. at 20a.

REASONS FOR GRANTING THE PETITION

I. The circuits are split over the question presented.

As the Tenth Circuit has acknowledged, a clear majority of the circuits recognizes a "scope-of-authority" exception to qualified immunity. *Stanley* v. *Gallegos*, 852 F.3d 1210, 1214 (10th Cir. 2017). But two—the Tenth and, now, the Eighth—do not.

The Court should grant this petition for certiorari and resolve the split.

A. Seven circuits require defendants invoking qualified immunity to first show that they acted within the scope of their authority.

In *Harlow*, this Court "emphasize[d] that our decision applies only to suits for civil damages arising from actions within the scope of an official's duties." 457 U.S. at 819 n.34. Thirty-five years later, in *Ziglar* v. *Abbasi*, this Court continued to hold firm: "Government officials are entitled to qualified immunity with respect to 'discretionary functions' performed in their official capacities." 137 S. Ct. 1843, 1866 (2017) (citing *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987)).

Yet, "the Supreme Court has never [squarely] addressed the scope of an official's burden to establish that a suit against him is based on actions taken within his authority." *Estate of Cummings* v. *Davenport*, 906 F.3d 934, 943 (11th Cir. 2018) (Pryor, J.).

As a result, the circuits that require defendants to show that they acted within the scope of their authority, in order for qualified immunity to become available to them, disagree on how this burden is satisfied.

i. The Second, Fifth, and Eleventh Circuits require defendants invoking qualified immunity to establish that state law grants them the specific authority to perform the challenged conduct.

In the Second, Fifth, and Eleventh Circuits, defendants must show that "the *specific acts at issue* were performed within the scope of their official duties." *Shechter* v. *Comptroller of New York*, 79 F.3d 265, 270 (2d Cir. 1996) (emphasis in the original). This means that defendants must point to state law affirmatively authorizing the specific conduct underlying the plaintiff's claims. *Estate of Cummings*, 906 F.3d at 940.

This approach is well demonstrated by *Estate of Cummings* v. *Davenport*, where the Eleventh Circuit, in a decision authored by Judge Pryor, declined to apply qualified immunity to a prison warden who ordered a doctor to end a dying prisoner's life because the Alabama Natural Death Act "grants [him] no authority to enter a do-not-resuscitate order or to order the withdrawal of artificial life support on behalf of a dying inmate." *Id*. at 941. The warden argued that his actions were within his authority because "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." *Ibid*. (cleaned up). The Eleventh Circuit rejected this argument, stating that this broad decision-making authority does not "compel the conclusion that an Alabama warden has the authority" to order a dying prisoner's

end of life. *Ibid.* (cleaned up). Because the legislative act that specifically dictates how to make end-of-life decisions on behalf of permanently incapacitated patients provided a list of "who may make end-of-life decisions" and "a prison warden is nowhere on the list," the Eleventh Circuit held that the warden had no authority to order the doctor to end the dying prisoner's life and he, therefore, could not invoke qualified immunity. *Id*. at 941–42.

The Fifth Circuit takes a similarly strict approach to the scope-of-authority analysis. In *Cherry Knoll L.L.C.* v. *Jones*, it declined to apply qualified immunity to a city manager who recorded land plats after a property owner—not yet ready to proceed with the project—nonetheless prepared the maps and delivered them to the city for safekeeping. 922 F.3d 309, 311 (5th Cir. 2019). After looking to relevant law, the Fifth Circuit determined that "none of the ordinances authorize the City, or any of its officials, to file approved plats." *Id*. at 319. As a result, the city manager did not "satisfy his burden of establishing that the challenged conduct was within the scope of his discretionary authority." *Id*. at 318. Just like in *Estate of Cummings*, the defendant pushed back, pointing to "the various City ordinances" delineating "the various steps a landowner/applicant must complete in order to obtain the City's approval of a subdivision plat." *Id*. at 319. But just like the Eleventh Circuit in *Estate of Cummings*, the Fifth Circuit in *Cherry Knoll* was not satisfied that those general propositions of law could overcome the lack of explicit

authorization in the ordinances for city managers to record plats. Because no statute or ordinance granted such authority, the court determined that the city manager acted outside his duties and, so, the qualified immunity defense was not available to him. *Ibid*.[2]

ii. In the Fourth and Ninth Circuits, the test is whether the official knew or should have known that the challenged act was outside the scope of his authority.

In contrast to the circuits discussed above, the Fourth and Ninth Circuits focus not on what the law actually says but rather on a more general consideration: what an official would or should have understood it to say. In the Fourth and Ninth Circuits, in other words, defendants must establish that they neither

[2] The Second Circuit similarly requires defendants "to demonstrate that the *specific acts at issue* were performed within the scope of their official duties." *Shechter*, 79 F.3d at 270 (emphasis in the original). Meanwhile, the Sixth Circuit specifies that "the defendants bear the initial burden of coming forward with facts that show they were acting within their discretionary authority at the time in question," *Mackey* v. *Dyke*, 29 F.3d 1086, 1095 (6th Cir. 1994), and, according to the D.C. Circuit, "[i]t is clear that the scope of authority requirement is a prerequisite to any application of official immunity, whatever the level of protection asserted or the nature of the claim involved," *Gray* v. *Bell*, 712 F.2d 490, 502 (D.C. Cir. 1983). Neither the Sixth nor D.C. Circuit, however, has outlined precisely how a defendant can satisfy that burden.

knew nor should have known that the challenged act fell outside the scope of their duties.

In its decision, *In re Allen*, for example, the Fourth Circuit refused to consider whether qualified immunity would shield a West Virginia Attorney General who formed a corporation—"Better Government Bureau"—to block the actual Better Government Bureau from being able to register in West Virginia under its own name. 106 F.3d at 588. In the court's view, before proceeding to the qualified immunity analysis, it had to answer a threshold question: whether the act of forming a corporation, "if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties." *Id*. at 594. If the answer was yes, then the court could proceed to qualified immunity. If the answer was no, then the defense of qualified immunity did not apply.

To determine that, the court turned "to an analysis of West Virginia law," looking for evidence that it "empower[ed] the Attorney General to form a * * * corporation." *Id*. at 595, 597. Finding none, the court concluded that the Attorney General "performed an act a reasonable official in his position" would have understood to be in clear excess of his authority. *Id*. at 598. As a result, the official could not avail himself of *Harlow*'s protections.[3] In *Estate of Cummings*, the

[3] In addition to articulating its scope-of-authority test, the Fourth Circuit provided a general defense of this threshold scope-of-authority requirement, outlining three reasons why it must exist. First, according to the court, "government officials at [common

Eleventh Circuit contrasted its approach with *In re Allen*. 906 F.3d at 943. Both cases looked to the relevant state law. But the deciding issue in *In re Allen* was whether, given this state law, a reasonable official would have understood the challenged actions to be within the scope of his authority, whereas the court in *Estate of Cummings* focused on the text of the law itself, without inquiring into how a reasonable official would have interpreted it. *Id*. at 942.

The Ninth Circuit, like the Fourth, focuses on the official's perception of his own authority. In *Merritt* v. *Mackey*, the court denied qualified immunity to two government officials who threatened to pull government funding from a nonprofit unless it fired a certain employee. 827 F.2d 1368, 1370 (9th Cir. 1987). Before proceeding to qualified immunity, the Ninth Circuit asked whether the officials' actions fell within the scope of their authority. *Id.* at 1373. But, unlike the first group of circuits that look to affirmative law to answer this question, the Ninth Circuit was satisfied by the officers' own testimony, wherein they, like Large here, acknowledged that "they knew they had no

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law] had no immunity for acts that were outside the scope of their authority." *In re Allen*, 106 F.3d at 591; see Part IIB, *infra*, at 25–27. Second, neither the history nor purpose of Section 1983 "suggests that Congress intended government officials acting clearly beyond the scope of their authority to be immune from suits for money damages." *Id*. at 592; see Part IIB, *infra*, at 27–28. Finally, the scope-of-authority requirement comports with "the policies that underlie *Harlow,*" which provides that officials who perform an act "clearly established to be beyond the boundaries of his discretionary authority" do not get to invoke qualified immunity. *Id*. at 593; see Part IIA, *infra*, at 21–23.

authority" to act as they did. *Ibid*. And because the officials "knowingly acted outside the scope of their authority," the court easily determined that they were "not entitled to qualified immunity." *Ibid*.

B. The Eighth and Tenth Circuits discard the scope-of-authority inquiry.

In the Eighth and Tenth Circuits, qualified immunity is available even when officials lack actual or reasonably perceived authority to perform the challenged conduct. It doesn't matter whether officials knew or should have known that what they were doing exceeded their authority. Nor does it matter whether the law affirmatively authorizes this conduct. In other words, neither court asks, as a threshold matter, whether the challenged conduct falls outside the scope of official duties before proceeding to the qualified immunity test.

The Tenth Circuit's decisions in *Stanley* and *Dean* illustrate this departure from the scope-of-authority requirement.

Stanley v. *Gallegos* involved a land dispute between a district attorney and a property owner, which resulted in the lock on the gate to the property being cut twice, pursuant to the district attorney's orders. 852 F.3d 1210, 1212 (10th Cir. 2017). When the property owner sued, the district attorney unsuccessfully claimed qualified immunity, with the district court holding that he "clearly overstepped his state-law authority." *Ibid*.

The Tenth Circuit reversed. *Id*. at 1216. Acknowledging that "over half the circuit courts of appeal appear to have recognized a scope-of-authority exception to the protection of qualified immunity" and "[n]one have explicitly rejected this exception," *id*. at 1214, the court nonetheless warned that "we should be quite circumspect before embracing" this exception, *id*. at 1215. That's because, in the Tenth Circuit's view, "it is unclear how to draw the line between conduct that violates state law * * * and conduct that is unauthorized by state law," making "[d]ifficult line-drawing questions * * * inevitable." *Ibid*. This concern came straight out of Judge Luttig's dissent from the denial of en banc review in *In re Allen*, where he warned that requiring courts to perform scope-of-authority inquiries would make "state law * * * always relevant and often dispositive of a defendant's federal right to qualified immunity." See Part IIA, *infra*, at 23–25.

Rather than embracing the scope-of-authority inquiry, the Tenth Circuit explained that "were this court to recognize a scope-of-authority exception," it would have adopted the Fourth Circuit's test, see Part IA, *supra*, at 13–14, and looked to state law to determine what a reasonable official would have understood his scope of authority to be. *Stanley*, 852 F.3d at 1216. Because a reasonable official could have understood the New Mexico law to authorize his conduct, qualified immunity was available. *Ibid*.

Judge Holmes dissented from the majority's "decision to apply a variant of the 'scope-of-authority exception to qualified immunity' * * * in resolving this case."

Id. at 1220. In his view, *Harlow* "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." *Id*. at 1219–20 (emphasis omitted); but see Part IIA, *infra*, at 22–23.

Two years after *Stanley*, Judge Holmes authored the unanimous decision in *Cummings* v. *Dean*, expressly departing from the rest of the circuits. 913 F.3d 1227, 1245 (10th Cir. 2019). Without looking at the scope of authority inquiry, the court granted qualified immunity to a New Mexico department of labor director who knowingly failed to discharge his duties to set and publish minimum-wage rates. *Ibid*. To overcome qualified immunity, plaintiffs had to show "authority clearly establishing that Director Dean violated their substantive due-process rights under federal law by failing to discharge his state-law obligation." *Ibid*. Their failure to do this ensured qualified immunity for the defendant.

The Eighth Circuit, in the decision below, joined this departure from the scope-of-authority requirement. The court acknowledged that the county engineer—respondent Large—"used his [official] vehicle to block the road and motioned to the drivers to pull over." Pet. App. 5a. The court further acknowledged that, in his deposition, Large agreed "that he did not have the authority to perform a traffic stop." *Id*. at 12a. Moreover, the summary judgment record showed that Large, with a show of authority, told one of the drivers that they "had to wait until law enforcement arrived,"

which resulted in a three-hour detention of the trucks. *Id*. at 20a n.3.

But in analyzing whether Large was entitled to qualified immunity, the Eighth Circuit looked neither to the text of the statute that provided him with his authority nor to what Large knew or should have known with regard to this authority. Instead, the court proceeded straight to the qualified immunity analysis, imposing a burden on CSI to show "it was clearly established that Large, a county engineer tasked with oversight of all county roads, could not prevent trucks that he had reason to believe were operating above the posted weight limit from passing over and damaging the roadway or could not call law enforcement to investigate compliance with the new, reduced weight restrictions." *Id* at 11a. Because—unsurprisingly, given that Large was acting outside the scope of any actual or perceived authority—there were "no cases considering this issue, or even cases considering remotely similar facts * * * there was no clearly established right" and qualified immunity applied. *Ibid*.[4]

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[4] Notably, both the court below and Tenth Circuit originally agreed that this Court's precedent required them to deny qualified immunity in cases where officials exceeded their authority. In 2012, for example, the Eighth Circuit held that an "Auxiliary Reserve Police Officer" was not entitled to qualified immunity because the officer exceeded his authority by conducting a search incident to arrest when the governing law deprived the officer of authority to do so. *Johnson* v. *Phillips*, 664 F.3d 232, 239 (8th Cir. 2011). Similarly, in 2003, it denied qualified immunity to a sheriff for a claim arising from threatening and pointing weapons at his employees because "[n]o reasonable official in the sheriff's shoes

C. The circuit split is outcome-determinative in this case.

Had the case below been brought in any of the seven circuits that require the scope-of-authority inquiry, Large would not have been granted qualified immunity.

Under the standard articulated by the Fourth and Ninth Circuits, which focuses on what an official would or should have understood his authority to be, Large would have not been able to show that under Minnesota law "the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties." *In re Allen*, 106 F.3d at 594. Large himself admitted as much. Pet. App. 12a. And even if he hadn't, as emphasized by the dissent, "[n]owhere is there the slightest hint in Minnesota law * * * that a county engineer is a peace officer * * * [who] ha[s] authority to make arrests or seizures of persons on public highways." Pet.

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could have thought it within his duties to threaten his employees with deadly force." *Hawkins* v. *Holloway*, 316 F.3d 777, 787–88 (8th Cir. 2003).

The Tenth Circuit, too, repeatedly reached similar conclusions. Most recently in *Robbin* v. *City of Santa Fe*, it stated that "qualified immunity * * * may be inappropriate when an official "'performs an act clearly established to be beyond the scope of his discretionary authority.'" 583 Fed. Appx. 858, 864 (10th Cir. 2014) (citing *In re Allen*, 106 F.3d at 593); see also *Cox* v. *Cache Cty*., 664 Fed. Appx. 703 (10th Cir. 2016); *Elwell* v. *Byers*, 699 F.3d 1208, 1212 n.3 (10th Cir. 2012) (explaining that *Harlow* requires determining "the discretionary-function question," though because the answer is "quite obvious in many cases, it is frequently omitted from qualified immunity analysis").

App. 23a. Accordingly, no reasonable official in Large's position would have thought that performing traffic stops would have been within the bounds of his authority.

Under the standard articulated by the other circuits recognizing the scope-of-authority inquiry, Large would have also lost, because the text of the relevant Minnesota law is clear and unambiguous: County engineers only "have charge of the highway work," "make and prepare all surveys, estimates, plans, and specifications," and "impose weight and load restrictions." See Statutory Provisions Involved, *supra*, at 3–4. Just as in *Estate of Cummings*, where the Eleventh Circuit looked at the Alabama Natural Death Act and concluded that it grants the prison guard no authority to make end-of-life decisions, 906 F.3d at 941, the court here would have looked at the relevant statutes and found no law enforcement duties as part of a mandate for county engineers.

Under the rule articulated below, however, Large could avail himself of qualified immunity simply because there are no cases about county engineers detaining trucks.

II. The Eighth and Tenth Circuits' decisions improperly depart from *Harlow*.

The Eighth and Tenth Circuits incorrectly omit the threshold scope-of-authority inquiry. To begin with, their refusal to look at the scope of authority runs contrary to *Harlow*'s explicit cabining of qualified immunity to "suits for civil damages arising from actions

within the scope of an official's duties" and undermines the balance between immunity and accountability that the court adopted post-*Harlow*. Just as importantly, this refusal is inconsistent with the historic common-law approach and with the adoption of these common-law principles to early Section 1983 jurisprudence.

A. The decision below undermines the post-*Harlow* balance between protecting officials who exercise their duties and providing a remedy.

When the *Harlow* Court created modern-day qualified immunity, it did not discard the common law's scope of authority inquiry. Instead, it made that inquiry a prerequisite to qualified immunity's clearly established test. According to *Harlow*, only "government officials performing discretionary functions" are "generally * * * shielded from liability for civil damages." 457 U.S. at 818. Therefore, qualified immunity "applies only to suits for civil damages arising from actions *within the scope of an official's duties*." *Id*. at 819 n.34 (emphasis added). "[W]here an official's duties legitimately require action * * * the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Id*. at 819. But where an official has no legitimate authority, his actions do not serve the public interest at all.

In *Harlow*, a government analyst sued two senior White House aides for causing him to lose his job in retaliation for his Congressional testimony about

considerable cost-overruns at the Defense Department. *Harlow*, 457 U.S. at 802–03 (citing *Nixon* v. *Fitzgerald*, 457 U.S. 731, 734 (1982)). The aides claimed absolute immunity and eventually appealed this issue to this Court, which denied it, stating that such a blanket immunity "sweeps too far." *Id*. at 806, 810.

In its stead, the Court articulated a more limited immunity in recognition that the aides were "entrusted with discretionary authority in such sensitive areas as national security and foreign policy" and therefore needed to be protected to ensure "the unhesitating performance of functions vital to the national interest." *Id*. at 812.

This new qualified immunity was a redesign of the good-faith immunity the Court articulated fifteen years earlier, see Part IIB, *infra*, at 27–28, and was rooted in the "balance between the evils inevitable in any available alternative." *Harlow*, 457 U.S. at 813. It protected government officials from "the costs of trial or * * * the burdens of broad-reaching discovery," even at the expense of denying a remedy, but only when a social cost of allowing such a remedy would be too high. *Id*. at 817–18. One such unacceptable social cost was the "'dampen[ing] [of] the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching *discharge of their duties*.'" *Id.* at 814 (emphasis added) (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)); Peter Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. Ct. Rev. 281, 324–27 (1980).

In other words, *Harlow* accepted the bargain outlined by Judge Learned Hand's *Biddle* decision: some wrongs done by dishonest officers would go unredressed, but that was a tolerable price to pay to ensure that "those who try to do their duty" are not subject "to the constant dread of retaliation." *Biddle*, 177 F.2d at 581. Indeed, in *Abbasi*, the Court explained that qualified immunity is a way "to accommodate these two objectives." 137 S. Ct. at 1866. Government officials get qualified immunity but only "with respect to 'discretionary functions' performed in their official capacities.'" *Ibid*. If the official acts outside of these parameters, like respondent in this case, the price is no longer tolerable. The deal is off.

* * *

The Eighth and Tenth Circuits' resistance to applying the plain language of *Harlow* may stem from a reluctance to hinge an issue of federal law on interpretations of state statutes. See *Stanley*, 852 F.3d at 1216. In fact, this reluctance was at the heart of Judge Luttig's unsuccessful attempt to persuade the Fourth Circuit to change its mind on requiring a threshold scope-of-authority inquiry. *In re Allen*, 119 F.3d 1129, 1135–40 (4th Cir. 1997) (Luttig, J., dissenting from the denial of rehearing en banc).

According to Judge Luttig, such a requirement would "erect[ ] this new framework within which state law is *always* relevant and often *dispositive* of a defendant's federal right to qualified immunity," which is inconsistent with a Supreme Court precedent stating

that "a state official does not forfeit his qualified immunity *even by violating clearly established state law*." *Id*. at 1135–36 (emphasis in the original).

Judge Luttig was referring to this Court's decision in *Davis* v. *Scherer*, which granted qualified immunity to a supervising official who terminated the plaintiff's employment without a formal hearing even though a state regulation specifically required it. 468 U.S. 183 (1984). According to this Court, "[n]either federal nor state officials lose their immunity by violating the clear command of a statute or regulation." *Id*. at 194 n.12. After all, when a court determines whether a defendant violated a "clearly defined" constitutional right, it is irrelevant that "[the] official conduct also violated some statute or regulation." *Id*. at 195.

For Judge Luttig, this means that a consideration of any violation of state law—including whether the official acted outside the scope of authority, as defined by state law—hinges liability on state law and is prohibited. *In re Allen*, 119 F.3d at 1136.

But *Davis* does not stand for this principle. *Davis* only says that the basis for liability—the clearly established right that was violated—cannot be a state-law right. The scope-of-authority inquiry does not challenge that fact. When an official acts outside of his authority but doesn't violate the Constitution—which a district court might determine here, if this Court allows the case to go back down—a court would simply find that the plaintiff did not have a claim; it just wouldn't rely on the qualified immunity standard to do

so. Conversely, officials can violate state law and still be entitled to qualified immunity if, as in *Davis*, they act within the scope of their authority. 468 U.S. at 195.

In other words, by holding that an official performing his job can be entitled to qualified immunity even if he violated state law, *Davis* did not undermine *Harlow*'s scope-of-authority inquiry. It simply prohibited the basis for liability to be solely a state-law right. This Court should grant review and remove any lingering doubt on that score.

B. The decision below is inconsistent with historic common law and this Court's pre-*Harlow* qualified immunity jurisprudence.

By discarding the scope-of-authority inquiry, the Eighth and Tenth Circuits not only disregarded *Harlow*; they also split from the common law.

At common law, government officials had no protection from lawsuit when they acted outside the scope of their authority. Take an action in trespass. A plaintiff could sue a government official for intruding on his property, just like he would any other private defendant. James E. Pfander & David Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 134 (2009). It would be then up to the official to defend his specific actions by "show[ing] that his authority was sufficient in law to protect him." *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U.S.

446, 452 (1883). The plaintiff would then have a chance to rebut this showing by establishing that either the official "exceeded his authority or that it was not validly conferred." *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940). Even if the official did not exceed his authority but committed a positive government wrong, he would not be protected from lawsuit, though he would be "entitled to indemnity." James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1919 (2010).

Importantly, to determine the scope of authority, courts looked to the actual law that authorized the conduct in question, just as the Second, Fifth, and Eleventh Circuits do today, see Part IA, *supra*, at 10–12, and not to what an official would have perceived or did perceive his scope of authority to be—the method preferred by the Fourth and Ninth Circuits, see Part IA, *supra*, at 12–15. In *Wise* v. *Withers*, for example, a government official who collected a militia fine from a justice of the peace, even though justices of the peace were exempt from such fines, was held liable in trespass because he was without authority to perform the specific act of collecting from the justice of the peace. 7 U.S. (3 Cranch) 331, 337 (1806).

Bates v. *Clark* neatly encapsulates the scope-of-authority requirement at common law. In *Bates*, whiskey merchants brought a trespass action against army officers who seized their product. 95 U.S. 204, 205 (1877). In defense, the officers "pleaded their official character,

that the place where the seizure was made was Indian country, and it was, therefore, their duty to seize the whiskey." *Id*. at 204–05. After examining the statute that defined the Indian country, the Court disagreed. Reasoning that the officers "were utterly without any authority" to seize whiskey in what was actually an Indian territory, the Court held that they committed "a trespass by forcibly seizing and taking away another man's property." *Id*. at 209.[5]

This common law approach survived the enactment of Section 1983, which—if not abolishing official immunity altogether[6]—at the very it least did not *enlarge* it. See *Malley* v. *Briggs*, 475 U.S. 335, 339, 342 (1986) (stating that Section 1983 must be read "in

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[5] Neither *Bates* nor *Wise* was an aberration. Throughout the nineteenth century, this Court and others routinely decided cases that hinged on the scope of authority. See, *e.g*., *Callender* v. *Marsh*, 18 Mass. (1 Pick.) 418, 430–34 (1823) (if it is determined that "an alteration of the street * * * is not within the powers of the surveyor to make * * * the plaintiff would have been entitled to damages"); *Mitchell* v. *Harmony*, 54 U.S. (13 How.) 115, 135 (1851) (when a military officer takes property "to insure the success of a distant and hazardous expedition," he exceeds his authority and will be held liable). This scope-of-authority requirement was imported from English cases like *Leader* v. *Moxton*, (1733) 95 Eng. Rep. 1157 (KB), in which the showing that government officials exceeded their authority was sufficient to subject the officials to liability.

[6] See, *e.g*., Cong. Globe, 42nd Cong., 1st Sess., App. 68 (1871) (Sen. Allen Thurman stating that Section 1983 had "no limitation whatsoever upon the terms that are employed"). Indeed, as enacted, Section 1983 confirmed that official liability was available "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." Ku Klux Klan Act, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. 1983).

harmony with general principles of tort immunities" and that "we are guided in interpreting Congress' intent by the common-law tradition").

The Court's Section 1983 jurisprudence is in accord. In *Procunier* v. *Navarette*, for example, this Court held that Section 1983 immunity for a state prison official depended upon "the scope of discretion and responsibilities of the office." 434 U.S. 555, 561–62 (1978). Similarly, in *Wood* v. *Strickland*, qualified immunity was available to a public-school official only for "action he took within his sphere of official responsibility" so that he understood that he would "not be punished" for this responsibility's "good-faith fulfillment." 420 U.S. 308, 318, 321 (1975). This is consistent with the Court's general pronouncements on qualified immunity at the time, including in *Scheuer* v. *Rhodes*, where "a qualified immunity [was] available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office." 416 U.S. 232, 247 (1974).

III. The question presented is exceptionally important.

The Court should grant certiorari in this case because the question presented is of exceptional importance. It strikes at the heart of *Harlow*'s stated policy justification for creating qualified immunity. *Harlow*'s protection of government officials only makes sense if individual rights are weighed against "an official's duties [that] legitimately require action." 457

U.S. at 819. Otherwise, qualified immunity is a "license to lawless conduct." *Ibid*.

Additionally, the rejection of the scope-of-authority inquiry pushes the clearly established test into absurdity. This Court has repeatedly admonished the lower courts that the concept of clearly established law must be considered with a high degree of specificity. See Pet. App. 10a (quoting *Mullenix* v. *Luna*, 577 U.S. 7, 12 (2015) (per curiam)). This means that if there is no threshold consideration of the scope of authority, officials who act outside it—those least deserving of qualified immunity—will be the ones most likely to be protected by it. As this case proves, it is much easier to find a case where a police officer violated someone's rights by detaining them without a warrant than a county engineer doing the same. As a result, those acting outside of their authority are cloaked with "near-absolute immunity for their actions" and perversely receive a greater degree of protection than those who do their job. Pet. App. 20a.

This Court should intervene now to restore uniformity and ensure that qualified immunity does not produce perverse results and is consistent with *Harlow*'s balance of accountability and public policy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANYA BIDWELL
Counsel of Record
PATRICK JAICOMO
ALEXA L. GERVASI
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
abidwell@ij.org

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Counsel for Petitioner