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A Call to Clarify the "Scope of Authority" Question of Qualified Immunity

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A CALL TO CLARIFY THE "SCOPE OF AUTHORITY" QUESTION OF QUALIFIED IMMUNITY

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ABSTRACT

It is no secret the doctrine of qualified immunity is under immense scrutiny. Distinguished jurists and scholars at all levels have criticized the doctrine of qualified immunity, some calling for it to be reconsidered or overruled entirely.

Amidst this scrutiny lies uncertainty in the doctrine's application. Specifically, the federal courts of appeal are split three ways on the question of whether an official exceeding the official's scope of authority under state law at the time of the alleged constitutional violation can successfully assert qualified immunity. Some courts of appeal do not require the official to demonstrate he acted within the scope of his authority. Other courts of appeal require the official to identify state law affirmatively authorizing, and narrowly tailored to, his discrete acts. Still other courts of appeal hold that the official must demonstrate he acted within the clearly established scope of his authority.

This Article suggests that the third approach requiring the official to demonstrate he acted within the clearly established scope of his authority—should be adopted. Adopting this approach would bring clarity and equilibrium to the doctrine of qualified immunity at a critical time, while also leaving the important doctrine in place. And, of all three approaches, the third approach best comports with the tradition of immunity, most closely aligns with the history and purpose of key civil rights laws, and presents the most workable rule.

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I. INTRODUCTION

Many in the civil rights bar can likely recite § 1983's key language from memory: "Every person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be* liable to the party injured . . . ."[1] Congress did not equivocate when it codified these words as federal law.[2] But liability under § 1983 is not as absolute as § 1983's plain language may suggest.

The doctrine of qualified immunity signifies one major exception to § 1983's otherwise broad terms.[3] Qualified immunity is an affirmative defense that a government official may assert when sued for money damages in the official's personal capacity under § 1983.[4] While classified as an affirmative defense, qualified

[1] 42 U.S.C. § 1983 (2019) (emphasis added).

[2] *See, e.g.*, Rehberg v. Paulk, 566 U.S. 356, 361 (2012) (noting "the broad terms of § 1983"); Dennis v. Higgins, 498 U.S. 439, 443 (1991) (same); *see also infra* Part IV.A.2.

[3] *See, e.g.*, MARTIN A. SCHWARTZ, FED. JUD. CTR., SECTION 1983 LITIGATION 143 (Kris Markrian ed., 3d ed. 2014) ("Qualified immunity may well be the most important issue in § 1983 litigation. It is certainly the most important defense, and is frequently asserted as a defense to § 1983 personal-capacity claims for damages."). It should be noted that, while qualified immunity often arises with respect to claims against state officials under § 1983, qualified immunity also arises with respect to claims against federal officials under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). *See* Butz v. Economou, 438 U.S. 478, 504 (1978) ("[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."). Under § 1983 and *Bivens*, the "qualified immunity analysis is identical." Wilson v. Layne, 526 U.S. 603, 609 (1999).

[4] *E.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009). Qualified immunity does not apply to suits against an official in the official's official capacity. *See, e.g.*, Brandon v. Holt, 469 U.S. 464, 472–73 (1985). Whereas a personal-capacity suit seeks to impose personal liability on the official, an official-capacity suit does not seek to impose personal liability on the official and is

immunity is "an *immunity from suit* rather than a mere defense to liability"[5] and thus challenges whether the particular official can even be subjected to the litigation process. Consequently, when qualified immunity is asserted, "the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense" and ensures "that officials are not subjected to unnecessary and burdensome discovery or trial proceedings."[6] Given its consequences, qualified immunity has long been the subject of scrutiny, especially in recent years.[7]

The Supreme Court has made it clear that, when qualified immunity is asserted, a plaintiff must allege or show that the official "violated a statutory or constitutional right"[8] and must further allege or show that the right at issue was "clearly established" at the time of the violation.[9] Left unresolved, however, is whether an official who was acting outside the official's scope of authority under state law at the time of the alleged constitutional violation is entitled to qualified immunity.[10] Phrased otherwise, does qualified immunity apply only to officials acting within the scope of their authority under state law at the time in question?

In response to this question, the federal courts of appeal employ three primary approaches. One approach does not require the official to demonstrate he was acting within the scope of his authority.[11] A second approach requires the official to identify state law affirmatively authorizing, and narrowly tailored to, his discrete acts.[12] A third approach holds that the official must demonstrate he acted within the clearly established scope of his authority.[13]

This Article suggests that the third approach—requiring the official to demonstrate he acted within the clearly established scope of his authority—should be adopted because it comports with the tradition of immunity, aligns with the history and purpose

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instead, "in all respects other than name, to be treated as a suit against the entity [of which the officer is an agent]." Kentucky v. Graham, 473 U.S. 159, 165–66 (1985).

[5] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

[6] Crawford-El v. Britton, 523 U.S. 574, 597–98 (1998).

[7] *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and dissenting in part) (urging the Court to "reconsider [the] qualified immunity jurisprudence"); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018) (contending that the doctrine of qualified immunity should be overruled).

[8] Reichle v. Howards, 566 U.S. 658, 663–64 (2012); Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011).

[9] *Reichle*, 566 U.S. at 663–64; *Ashcroft*, 563 U.S. at 735.

[10] *E.g.*, Stanley v. Gallegos, 852 F.3d 1210, 1214 (10th Cir. 2017) ("One recurring issue has been how to apply this doctrine when a state employee was apparently acting outside of his or her authority under state law.").

[11] *See, e.g.*, Cummings v. Dean, 913 F.3d 1227, 1243 (10th Cir. 2019) (quoting Davis v. Scherer, 468 U.S. 183, 194 (1984)), *cert. denied sub nom.* Cummings v. Bussey, No. 18-1357, 2019 WL 4921308 (U.S. Oct. 7, 2019); *see also infra* Part III.A.

[12] *See, e.g.*, Estate of Cummings v. Davenport, 906 F.3d 934, 940 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2746 (2019); *see also infra* Part III.B.

[13] *See, e.g.*, *In re* Allen, 106 F.3d 582, 594 (4th Cir. 1997), *cert. denied sub nom.* McGraw v. Better Gov't Bureau, Inc., 522 U.S. 1047 (1998); *see also infra* Part III.C.

of § 1983, and presents the most workable rule. For essential context, Part II of this Article discusses qualified immunity's background and origins, as well as relevant analytical refinements. Part III then explores the circuit split surrounding the scope of authority question. Part IV turns to address the impact of the tradition of immunity, as well as the history and purpose of § 1983, on the scope of authority question. Part V recommends that qualified immunity be accorded only to officials who can demonstrate they acted within the clearly established scope of their authority and provides an analytical framework. Finally, Part VI concludes.

II. ESSENTIAL PRINCIPLES OF QUALIFIED IMMUNITY

Although qualified immunity is under scrutiny and has been called into question by many jurists and scholars,[14] qualified immunity remains a key, and often dispositive,[15] doctrine in constitutional litigation. Qualified immunity is not explicitly rooted in the Constitution or in a federal statute.[16] It is instead "a product of judicial invention"[17] that derives from "tradition[s] of immunity"[18] at common law. As the Supreme Court has summarized the doctrine, qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law."[19] Set forth below is a discussion of qualified immunity's background and origins, as well as the doctrine's analytical refinements.

A. Background and Origins

In 1967, the Supreme Court first recognized the doctrine of qualified immunity in response to a surge of constitutional litigation filed during the civil rights era.[20] As the Court then instructed, police officers may assert "good faith and probable cause" as a qualified immunity defense in response to a claim alleging unconstitutional arrest under § 1983.[21] The Court, however, did not define the substantive requirements or

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[14] *See supra* note 7.

[15] Johnson v. Fankell, 520 U.S. 911, 915 (1997) ("[I]f it is found applicable at any stage of the proceedings, it determines the outcome of the litigation by shielding the official from damages liability."); SCHWARTZ, *supra* note 3, at 143.

[16] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and dissenting in part).

[17] Comment, *Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 906 (1984) [hereinafter *Harlow's New Standard*].

[18] Owen v. City of Indep., 445 U.S. 622, 637 (1980). *See also Ziglar*, 137 S. Ct. at 1870 (Thomas, J., concurring in part and dissenting in part) (explaining that official immunity is "available under [§ 1983] if it was 'historically accorded the relevant official' in an analogous situation 'at common law'" (quoting Tower v. Glover, 467 U.S. 914, 920 (1984))).

[19] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[20] *Harlow's New Standard*, *supra* note 17, at 906; Paul Howard Morris, *The Impact of Constitutional Liability on the Privatization Movement After* Richardson v. McKnight, 52 VAND. L. REV. 489, 504 (1999).

[21] Pierson v. Ray, 386 U.S. 547, 557 (1967).

contours of qualified immunity at that time.[22] The Court began to provide that guidance in 1974, when it confronted claims alleging deprivation of due process under § 1983 stemming from the deaths of students who participated in anti-war demonstrations at Kent State University.[23] There, the Court explained that "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."[24] The next year, 1975, the Court shed further light on qualified immunity by holding that an official was not entitled to qualified immunity unless the official acted in both objective and subjective good faith.[25] Although the objective and subjective good faith approach engendered immediate criticism,[26] the Court adhered to the objective and subjective good faith approach until 1982,[27] when it jettisoned the subjective good faith requirement in the seminal case of *Harlow v. Fitzgerald*.[28]

Harlow arose after Plaintiff A. Ernest Fitzgerald lost his job as a management analyst and was barred from future re-employment with the Department of the Air Force.[29] Fitzgerald alleged he was discharged and barred from re-employment in retaliation for providing truthful testimony before Congress in violation of the First Amendment.[30] The substance of Fitzgerald's testimony indicated that the country had sustained cost overruns of over two billion dollars on certain military aircraft and that

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[22] *See, e.g.*, *id.* at 557–58 (remanding for new trial to determine whether, *inter alia*, officers "reasonably believed in good faith that the arrest was constitutional"); *Harlow's New Standard*, *supra* note 17, at 907.

[23] Scheuer v. Rhodes, 416 U.S. 232, 234–35 (1974), *abrogated by* Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).

[24] *Id.* at 247–48.

[25] Wood v. Strickland, 420 U.S. 308, 321 (1975), *abrogated by Harlow*, 457 U.S. at 817–18.

[26] *See, e.g.*, *id.* at 327–28 (Powell, J., concurring in part and dissenting in part) (explaining that officials "will now act at the peril of some judge or jury subsequently finding that a good-faith belief as to the applicable law was mistaken and hence actionable.").

[27] *See* Gomez v. Toledo, 446 U.S. 635, 641 (1980) ("The applicable test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether '[t]he official himself [is] acting sincerely and with a belief that he is doing right'" (quoting *Wood*, 420 U.S. at 321)), *abrogated by Harlow*, 457 U.S. at 817–18; Butz v. Economou, 438 U.S. 478, 507 (1978) (explaining officials may not "with impunity discharge their duties in a way that is known to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule"), *abrogated by Harlow*, 457 U.S. at 817–18; Procunier v. Navarette, 434 U.S. 555, 564–66 (1978) (concluding that prison officials were entitled to qualified immunity because they acted in objective and subjective good faith in case involving alleged interference with prisoner's mail), *abrogated by Harlow*, 457 U.S. at 817–18.

[28] 457 U.S. 800 (1982). On the same day the Court decided *Harlow*, the Court decided Nixon v. Fitzgerald. 457 U.S. 731 (1982). *Harlow* and *Nixon* arose from the same operative set of facts, although the cases concerned different legal issues. *Harlow* concerned immunity of White House aides and *Nixon* concerned immunity of the President.

[29] *Nixon*, 457 U.S. at 739–40.

[30] *Id.* at 735–40.

"unexpected technical difficulties had arisen during the development of the aircraft."[31] Fitzgerald further alleged both Alexander Butterfield and Bryce Harlow, as White House aides to former President Richard Nixon, had conspired to bring about the termination of Fitzgerald's employment.[32] Fitzgerald eventually filed a lawsuit for money damages in the United States District Court for the District of Columbia against several defendants, including President Nixon, Butterfield, and Harlow.[33] Butterfield and Harlow moved for summary judgment on the basis of immunity.[34] The district court denied the motion for summary judgment.[35] Butterfield and Harlow appealed the district court's denial of their motion for summary judgment based on immunity.[36] The District of Columbia Circuit Court of Appeals dismissed the appeal, and the Supreme Court granted Butterfield and Harlow's petition for a writ of certiorari on the issue of immunity.[37]

The *Harlow* Court, with Justice Powell writing for the majority, addressed "the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts."[38] The Court began its analysis by noting that its decisions "consistently have held that government officials are entitled to some form of immunity from suits for damages."[39] The Court recognized that "public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability"[40] so as to foster the "vigorous exercise of official authority."[41]

Harlow recognized two kinds of immunity: "absolute" and "qualified."[42] Whether immunity is deemed absolute or qualified turns on the nature of the official's duties.[43] If the official demonstrates his duties "embrace[] a function so sensitive as to require a total shield from liability" and further demonstrates "he was discharging the protected function when performing the act for which liability is asserted," absolute immunity will apply.[44] In rejecting Butterfield and Harlow's contention for absolute immunity, the Court explained that absolute immunity is limited to specific "judicial,

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[31] *Id.* at 734, 736–38.

[32] *Id.* at 733–34.

[33] *Id.* at 739–40.

[34] Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).

[35] *Id.* at 805.

[36] *Id.* at 806.

[37] *Id.* The Author notes that, unlike many other types of interlocutory rulings, an interlocutory ruling denying qualified immunity is immediately appealable so long as the appeal can be decided as a matter of law. *See, e.g.*, SCHWARTZ, *supra* note 3, at 160.

[38] *Harlow*, 457 U.S. at 802.

[39] *Id.* at 806 (citing Nixon v. Fitzgerald, 457 U.S. 731 (1982)).

[40] *Id.* at 807.

[41] *Id.* (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 813.

prosecutorial, and legislative functions."[45] Based on the record before the Court, the Court concluded that Butterfield and Harlow failed to demonstrate their duties as White House aides warranted absolute immunity.[46]

The Court then turned to qualified immunity. *Harlow* reasoned that qualified immunity, as opposed to absolute immunity, "represents the norm" for most executive officers.[47] Qualified immunity is appropriate because it strikes a balance between "competing values."[48] These competing values are "the importance of a damages remedy to protect the rights of citizens"[49] and "the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority."[50] The Court emphasized that requiring officials to defend lawsuits is attended by the governmental and social costs of the "expenses of litigation, the diversion of official energy from pressing public issues, . . . the deterrence of able citizens from accepting of public office,"[51] and "the danger that the fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible . . . , in the discharge of their duties.'"[52] *Harlow* concluded that qualified immunity is the "best attainable accommodation between these competing values."[53]

Establishing the controlling doctrine of qualified immunity, the Court jettisoned the previously required inquiry into whether the official acted in subjective good faith.[54] The Court explained it was

> clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional

[45] *Id.* at 811.

[46] *Id.* at 808–13.

[47] *Id.*

[48] *Id.*

[49] *Id.* (citing Butz v. Economou, 438 U.S. 478, 504–05 (1978)).

[50] *Id.* (quoting *Butz*, 438 U.S. at 506).

[51] *Id.* at 814.

[52] *Id.* (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

[53] *Id.*

[54] *Id.* at 815.

> colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.[55]

Having eliminated the subjective good faith requirement, the Court emphasized that qualified immunity is a standard of objective reasonableness.[56] This standard of objective reasonableness is "measured by reference to clearly established law."[57] When the law is clearly established, the defense of qualified immunity "ordinarily should fail, since a reasonably competent public official should know the law governing his conduct."[58] As the Court further explained, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action."[59] With that guidance, the Court remanded the case for the factual determination of whether Fitzgerald could overcome Butterfield and Harlow's assertion of qualified immunity.[60]

Thus, while *Harlow* broadened the doctrine of qualified immunity in deference to the important policy concerns that are triggered when officials are sued, the Court clarified that its holding "provide[s] no license to lawless conduct."[61]

B. Analytical Refinements

The key holding of *Harlow* still controls.[62] As the Court continues to explain, "[w]hether qualified immunity can be invoked turns on the 'objective legal reasonableness' of the official's acts."[63] This "objective legal reasonableness" standard means that officials are immune from suits for "civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[64] Although this standard necessarily requires inquiry into both whether the official violated a right and whether that right was clearly established at the relevant time, the Court in *Harlow* did not address whether these inquiries should or must be resolved in a particular order. That guidance came in the 2001 decision of *Saucier v. Katz*,[65] where the Court held that the sequence of the analysis must be, first, whether a statutory or constitutional right was violated, and if so, second, whether that right was clearly established at the relevant time.[66] *Saucier*'s

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[55] *Id.* at 816–17 (internal citations omitted).

[56] *Id.* at 818.

[57] *Id.*

[58] *Id.* at 818–19.

[59] *Id.* at 819.

[60] *Id.* at 820.

[61] *Id.*

[62] *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017) (citing *Harlow*, 457 U.S. at 819).

[63] *Id.* (citing *Harlow*, 457 U.S. at 819).

[64] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting *Harlow*, 457 U.S. at 818).

[65] 533 U.S. 194 (2001).

[66] *Id.* at 200.

mandatory sequence of analysis generated criticism[67] and was overruled in 2009, when the Court decided *Pearson v. Callahan*.[68]

In *Pearson*, law enforcement in Utah received a tip that Afton Callahan was dealing methamphetamine from his trailer home.[69] Law enforcement thus arranged a sting operation with the tipster, Brian Bartholomew.[70] During the sting, Callahan sold Bartholomew one gram of methamphetamine for $100.[71] Bartholomew then "gave the arrest signal" to law enforcement.[72] Law enforcement entered Callahan's enclosed porch, which Callahan and Bartholomew occupied, observed Callahan drop a plastic bag filled with methamphetamine, and conducted a protective sweep of the premises.[73] Law enforcement seized methamphetamine and drug paraphernalia during the protective sweep before arresting Callahan.[74] Neither the protective sweep nor the arrest was authorized by a warrant.[75] After being charged with possession and distribution of methamphetamine, Callahan challenged the warrantless protective sweep and arrest.[76] A Utah trial court concluded that exigent circumstances justified the warrantless protective sweep and arrest, but the Utah Court of Appeals disagreed and vacated Callahan's conviction.[77]

Callahan then filed a civil rights lawsuit against the law enforcement officers in the United States District Court for the District of Utah, seeking money damages and alleging a Fourth Amendment violation under § 1983.[78] When the officers moved for summary judgment based on qualified immunity, the district court assumed, without deciding, that the officers violated Callahan's Fourth Amendment rights but held that Callahan failed to show the violation was of a clearly established right.[79] The Tenth Circuit Court of Appeals reversed.[80] It held that the officers had violated Callahan's Fourth Amendment rights and that the relevant Fourth Amendment right—"the right

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[67] *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part) (noting that "the rule of *Saucier* has generated considerable criticism from both commentators and judges").

[68] 555 U.S. at 236.

[69] *Id.* at 227.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 228.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 228–29.

[79] Callahan v. Millard Cty., No. 2:04-CV-00952, 2006 WL 1409130, at *9 (D. Utah May 18, 2006), *aff'd in part, rev'd in part*, 494 F.3d 891 (10th Cir. 2007), *rev'd sub nom. Pearson*, 555 U.S. at 223.

[80] Callahan v. Millard Cty., 494 F.3d 891, 899 (10th Cir. 2007), *rev'd sub nom. Pearson*, 555 U.S. at 223.

to be free in one's home from unreasonable searches and arrests"—was clearly established at the time of the violation.[81]

The Supreme Court granted the officers' petition for a writ of certiorari and "directed the parties to address whether *Saucier* should be overruled."[82] In a unanimous decision authored by Justice Alito, the Court first summarized the policies underlying qualified immunity that had been fully explored in *Harlow*.[83] The Court then turned to *Saucier*'s "rigid order of battle"[84] analysis, noting that the *Saucier* analysis "has been criticized by Members of this Court and by lower court judges, who have been required to apply the procedure in a great variety of cases and thus have much firsthand experience bearing on its advantages and disadvantages."[85] As the Court elaborated, the "rigid *Saucier* procedure comes with a price. The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case."[86] This expenditure of resources, the Court explained, undermines the aim to expeditiously resolve questions of qualified immunity by forcing parties to litigate issues that may ultimately not be germane to the case's resolution.[87] The Court further discussed how *Saucier*'s drawbacks implicate concerns of analytical efficiency, constitutional avoidance, and establishing sound precedent in the lower courts.[88] Given the drawbacks of *Saucier*, the Court in *Pearson* vested lower courts with discretion to "to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case."[89] Applying that principle to the facts of *Pearson*, the Court held that the officers were entitled to qualified immunity because they did not violate clearly established law, regardless of whether a constitutional violation occurred.[90] The Court therefore reversed the Tenth Circuit's judgment.[91]

As such, *Pearson* signifies the Court's effort to streamline the application of qualified immunity by fashioning the doctrine into a flexible, workable analysis intended to be efficiently applied on a case-by-case basis.

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[81] *Id.* at 897–98.

[82] *Pearson*, 555 U.S. at 231.

[83] *Id.*; *see supra* Part II.A.

[84] *Id.* at 234.

[85] *Id.* at 231.

[86] *Id.* at 236–37.

[87] *Id.* at 237.

[88] *Id.* at 237–38.

[89] *Id.* at 242. In deciding "which of the two prongs of the qualified immunity analysis should be addressed first," courts may consider: (1) the "conservation of judicial resources"; (2) the "development of constitutional precedent"; (3) how to best provide meaningful "guidance for future cases"; and (4) whether the briefing on constitutional questions is "woefully inadequate." *Id.* at 236–39.

[90] *Id.* at 231–32, 242.

[91] *Id.* at 242.

III. THE SCOPE OF AUTHORITY QUESTION

The Supreme Court undoubtedly brought a degree of clarity and efficiency to qualified immunity when establishing the controlling doctrine in *Harlow* and further refining the analysis in *Pearson*. While the Court has "never suggested that . . . any . . . official has an immunity that extends beyond the scope of any action taken in an official capacity,"[92] the Court has not yet resolved whether an official acting outside the official's scope of authority under state law at the time of the alleged constitutional violation is entitled to qualified immunity. Absent controlling precedent, the federal courts of appeal disagree on this question.

At one end of the spectrum, one approach does not require the official to demonstrate he was acting within the scope of his authority at the time in question.[93] At the other end of the spectrum, a second approach requires the official to identify state law affirmatively authorizing, and narrowly tailored to, his discrete acts.[94] At the middle of the spectrum, a third approach holds that the official must demonstrate he acted within the clearly established scope of his authority.[95] Each approach is discussed in turn.[96]

A. Authority Irrelevant Approach

The Fifth and Tenth Circuits do not require the official to demonstrate he acted within the scope of his authority under state law to be entitled to qualified immunity (the Authority Irrelevant Approach).[97] The case best illustrating the Authority Irrelevant Approach is the Tenth Circuit's decision in *Cummings v. Dean*.[98] In *Dean*, a class of plaintiffs who worked on public-works projects in New Mexico alleged they were undercompensated from 2013 to 2016.[99] The plaintiffs alleged their injury was traceable to the Director of the Labor Relations Division of New Mexico's Workforce

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[92] Clinton v. Jones, 520 U.S. 681, 694 (1997).

[93] *See, e.g.*, Cummings v. Dean, 913 F.3d 1227, 1243 (10th Cir. 2019), *cert. denied sub nom.* Cummings v. Bussey, No. 18-1357, 2019 WL 4921308 (U.S. Oct. 7, 2019); *see also infra* Part III.A.

[94] *See, e.g.*, Estate of Cummings v. Davenport, 906 F.3d 934, 940 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2746 (2019); *see also infra* Part III.B.

[95] *See, e.g.*, *In re* Allen, 106 F.3d 582, 594 (4th Cir. 1997), *cert. denied sub nom.* McGraw v. Better Gov't Bureau, Inc., 522 U.S. 1047 (1998); *see also infra* Part III.C.

[96] At least two other circuits have noted that an official's authority may be relevant to qualified immunity, but these circuits have not conclusively aligned with any of the three primary approaches discussed in this Article. *See* Collins v. Marina-Martinez, 894 F.2d 474, 476 (1st Cir. 1990) (referring to an official's scope of authority as a "further gloss" on the doctrine of qualified immunity); Coleman v. Frantz, 754 F.2d 719, 728 (7th Cir. 1985) ("It does seem reasonable . . . to require that a lower level public official . . . demonstrate that, based on objective circumstances at the time he acted, his actions were undertaken pursuant to the performance of his duties and within the scope of his authority.").

[97] *See, e.g.*, *Cummings*, 913 F.3d at 1243; Gagne v. City of Galveston, 805 F.2d 558, 560 (5th Cir. 1986).

[98] 913 F.3d at 1227.

[99] *Id.* at 1231.

Solutions, Jason Dean.[100] As the plaintiffs specifically alleged, Director Dean had failed to determine and publish the rates of minimum wages and fringe benefits for laborers on public-works projects as required under New Mexico's Public Works Minimum Wage Act, as amended in 2009 (the Wage Act).[101] The Wage Act required Director Dean to determine and publish the rates of minimum wages and fringe benefits "based on the wage rates and fringe-benefit rates used in collective bargaining agreements . . . , as opposed to the earlier version of the [Wage Act's] mandate to simply collect data for the 'purpose of obtaining sufficient information upon which to make [a] determination of wage rates.'"[102]

But by 2011, Director Dean had failed to determine and publish the rates required under the Wage Act.[103] Unions representing public workers thus filed a petition for a writ of mandamus[104] in New Mexico's Supreme Court.[105] In June 2011, New Mexico's Supreme Court heard oral arguments on the mandamus petition, where representations on behalf of Director Dean were made in open court that rates would be determined and published "in four or five months."[106] Based in part on those representations, New Mexico's Supreme Court denied the mandamus petition.[107] Yet, even by 2015, Director Dean had still failed to determine and publish the rates required under the Wage Act.[108] As such, the unions filed a successive petition for a writ of mandamus in New Mexico's Supreme Court.[109] On June 15, 2015, New Mexico's Supreme Court granted the mandamus petition and explained as follows:

> We hold that under the [Wage] Act [Director Dean] has a mandatory, nondiscretionary duty to set the . . . rates . . . and that [Director Dean's] failure to do so violates the [Wage] Act. We therefore issue a writ of mandamus ordering [Director Dean] to comply with the [Wage] Act and set rates . . . as

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[100] *Id.*

[101] *Id.* at 1231–32.

[102] *Id.* at 1232 (quoting N.M. Stat. § 13-4-11(B)) (2009).

[103] *Id.*

[104] Under New Mexico law:

> Mandamus lies to compel the performance of a ministerial act or duty that is clear and indisputable. A ministerial act is an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done.

N.M. Bldg. & Constr. Trades Council v. Dean, 353 P.3d 1212, 1215 (N.M. 2015) (quoting New Energy Econ., Inc. v. Martinez, 247 P.3d 286, 290 (N.M. 2011)).

[105] *Dean*, 913 F.3d at 1232–33 (citing *N.M. Bldg. & Constr. Trades Council*, 353 P.3d at 1214).

[106] *N.M. Bldg. & Constr. Trades Council*, 353 P.3d at 1214.

[107] *Id.*

[108] *Id.* at 1212, 1214.

[109] *Id.* at 1214.

> required under the [Wage] Act within thirty days of the issuance of this opinion.[110]

In August 2016, the *Dean* plaintiffs filed a lawsuit against Director Dean in the United States District Court for the District of New Mexico, seeking money damages and alleging due process violations under § 1983.[111] Director Dean filed a motion to dismiss based on qualified immunity, which the district court denied after concluding that the plaintiffs had sufficiently alleged a violation of their clearly established rights to due process.[112] In part, the district court reasoned that the plaintiffs had a protected property interest in the rates required under the Wage Act, which "clearly and unambiguously" required Director Dean's compliance.[113] Director Dean appealed that decision to the Tenth Circuit Court of Appeals.[114]

The Tenth Circuit reversed the district court and held that Director Dean was entitled to qualified immunity without inquiring into Director's Dean's authority under New Mexico law.[115] The Tenth Circuit began its analysis by addressing the plaintiffs' contention that qualified immunity was "unavailable because Director Dean's obligation to set . . . rates was a ministerial duty, rather than a discretionary function of his position."[116] The Tenth Circuit rejected that contention.[117] To be sure, the Tenth Circuit in *Dean* acknowledged that "there was no confusion" regarding Director Dean's obligation to determine and publish the rates required under the Wage Act.[118] Even so, *Dean* applied "a federal standard to determine whether Director Dean's obligations were sufficiently discretionary" and concluded that Director Dean exercised "a substantial measure of discretion" in deciding how to implement the Wage Act.[119]

The Tenth Circuit in *Dean* then addressed the requirement of qualified immunity it concluded was dispositive, namely whether the plaintiffs could establish any right allegedly violated was clearly established.[120] As to that question, the Tenth Circuit explained that the district court erroneously "equate[d] a violation of a clear obligation

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[110] *Id.*

[111] Cummings v. Dean, 913 F.3d 1227, 1231 (10th Cir. 2019), *cert. denied sub nom.* Cummings v. Bussey, No. 18-1357, 2019 WL 4921308 (U.S. Oct. 7, 2019).

[112] Cummings v. Bussey, No. 16 CV 951 JAP/KK, 2017 WL 2332636, at *7 (D.N.M. Apr. 20, 2017), *rev'd in part, appeal dismissed in part sub nom.* Cummings v. Dean, 913 F.3d 1227 (10th Cir. 2019), *cert. denied sub nom.* Cummings v. Bussey, No. 18-1357, 2019 WL 4921308 (U.S. Oct. 7, 2019).

[113] *Id.* at *8.

[114] *Dean*, 913 F.3d at 1234.

[115] *Id.* at 1241–45.

[116] *Id.* at 1241.

[117] *Id.* at 1242.

[118] *Id.* at 1243 n.4.

[119] *Id.* at 1242.

[120] *Id.*

under state law with a violation of clearly-established federal law."[121] The Tenth Circuit elaborated that "[w]hether Director Dean violated clearly-established state law . . . is an entirely separate question from whether [he] violated clearly-established federal law."[122] Because the plaintiffs "offered no authority clearly establishing that Director Dean violated their . . . rights under *federal* law," the Tenth Circuit held that Director Dean was entitled to qualified immunity.[123]

As demonstrated by *Dean*, under the Authority Irrelevant Approach, an official need not demonstrate he acted within the scope of his authority under state law to be entitled to qualified immunity.[124] By not inquiring into the official's scope of authority, the Authority Irrelevant Approach permits the official to claim qualified immunity even if the official lacked authority.[125] Indeed, *Dean* shows that the official may be entitled to qualified immunity even if the conduct in question arises from the official's derogation of clear, statutorily-mandated duties, as determined by the state's highest court.[126]

B. Specific Acts Approach

In contrast to the Authority Irrelevant Approach, the Second, Sixth, and Eleventh Circuits hold that an official who asserts qualified immunity must identify state law affirmatively authorizing, and narrowly tailored to, his discrete acts (the Specific Acts Approach).[127] The case best illustrating the Specific Acts Approach is the Eleventh Circuit's decision in *Estate of Cummings v. Davenport*.[128] *Davenport* arose after Marquette Cummings, an inmate at an Alabama prison, was stabbed in the eye with a shank by another inmate.[129] Cummings was airlifted to a hospital in Birmingham, Alabama, where he was diagnosed to be in critical condition.[130] Hospital staff informed Cummings's mother, Angela Gaines, that the Prison Warden, Carter Davenport, had instructed the hospital to "stop giving Cummings medication and to

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[121] *Id.* at 1243.

[122] *Id.*

[123] *Id.* at 1245.

[124] *Id.*; *see also* Stanley v. Gallegos, 852 F.3d 1210, 1224 (10th Cir. 2017) (Holmes, J., concurring) ("[O]fficials do not 'forfeit their immunity' defense simply because they are shown to have acted outside the scope of their authority under state law."); Gagne v. City of Galveston, 805 F.2d 558, 560 (5th Cir. 1986) (explaining that "allegations about the breach of a statute or regulation are simply irrelevant to the question of an official's eligibility for qualified immunity in a suit over the deprivation of a constitutional right," even if those allegations concern fundamental responsibilities of the official).

[125] *Dean*, 913 F.3d at 1241–45.

[126] *Id.* at 1241.

[127] *See, e.g.*, Estate of Cummings v. Davenport, 906 F.3d 934, 940 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2746 (2019); Huminski v. Corsones, 396 F.3d 53, 80 (2d Cir. 2005); Gravely v. Madden, 142 F.3d 345, 347 (6th Cir. 1998).

[128] 906 F.3d 934 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2746 (2019).

[129] *Id.* at 937.

[130] *Id.*

disconnect the life support machine."[131] Gaines attempted to intervene in an effort to keep Cummings on medication and life support.[132] But hospital staff told Gaines that Warden Davenport's instruction governed, explaining that Cummings was under the legal custody of the Alabama Department of Corrections.[133] As such, the hospital complied with Warden Davenport's instruction.[134] Cummings died one day after he was stabbed.[135]

After Cummings's death, his estate and Gaines filed a lawsuit in the United States District Court for the Northern District of Alabama alleging several claims against several defendants, including claims for money damages against Warden Davenport under § 1983.[136] Warden Davenport responded to the lawsuit by filing a motion to dismiss based on qualified immunity.[137] The district court denied his motion to dismiss, concluding that Warden Davenport had failed to demonstrate his acts—entering a do-not-resuscitate order and deciding to remove Cummings from artificial life support—were within the scope of his authority under Alabama law.[138] Warden Davenport appealed the district court's denial of his motion to dismiss based on qualified immunity to the Eleventh Circuit Court of Appeals.[139]

The Eleventh Circuit affirmed the district court.[140] The Eleventh Circuit first clarified that Warden Davenport had "the initial burden of raising the defense of qualified immunity by proving that his discretionary authority extended to his alleged actions."[141] The Eleventh Circuit referred to qualified immunity as a "formidable shield" and emphasized that "[i]f, *and only if,* the defendant [meets his initial burden] will the burden shift to the plaintiff to establish that the defendant violated clearly established law."[142] The official's threshold burden, as the Eleventh Circuit explained, turns on whether the official can show his actions "were (1) undertaken pursuant to the performance of his duties, and (2) within the scope of his authority."[143]

The Eleventh Circuit turned to Alabama state law to ascertain the scope of Warden Davenport's authority.[144] The Eleventh Circuit acknowledged Alabama caselaw

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[131] *Id.* at 937–38.

[132] *Id.* at 938.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*; Cummings v. Davenport, No. 2:15-CV-02274-JEO, 2017 WL 3242783, at *7–8 (N.D. Ala. July 31, 2017), *aff'd sub nom.* Estate of Cummings v. Davenport, 906 F.3d 934 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2746 (2019).

[139] *Davenport*, 906 F.3d at 937.

[140] *Id.* at 941–43.

[141] *Id.* at 939.

[142] *Id.* at 940.

[143] *Id.* (quoting Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1282 (11th Cir. 1998)).

[144] *Id.*

holding that "an inmate is the custody of the warden" and that "decision-making related to the provision of medical care for inmates . . . [falls] soundly within [the warden's] discretion."[145] Those broad principles, although "firmly established," were not sufficiently specific so as to "compel" the Eleventh Circuit to conclude that Alabama law affirmatively authorized Warden Davenport's discrete acts.[146]

The state law the Eleventh Circuit deemed controlling in *Davenport* was the Alabama Natural Death Act (ANDA).[147] Under ANDA, the Alabama Legislature established "a comprehensive legislative scheme for end-of-life medical decisions, including the decisions to enter a do-not-resuscitate order . . . and to withdraw artificial life support."[148] The Eleventh Circuit reviewed ANDA's comprehensive legislative scheme and, after applying the *expressio unius* canon of statutory interpretation,[149] concluded that nothing under ANDA affirmatively "empowered" Warden Davenport to enter a do-not-resuscitate order or remove Cummings from artificial life support.[150] The Eleventh Circuit reasoned as follows:

> [ANDA] specifies, in order of priority, who may make end-of-life decisions on behalf of a permanently incapacitated patient, and a prison warden is nowhere on the list.
>
> It is a familiar canon that "[t]he expression of one thing implies the exclusion of others." And [ANDA's] list of potential surrogates includes not just "one thing," but a range of specific possibilities that include a court-appointed guardian, any member of the patient's family, and a medical committee. The conclusion that "the expression of" all of these possible surrogates "implies the exclusion of others"—including a prison warden—is inescapable.[151]

Notably, the Eleventh Circuit in *Davenport* applied the *expressio unius* canon without first declaring ANDA ambiguous. In other cases, the Eleventh Circuit has instructed that, "[b]efore turning to a canon of statutory interpretation, we must find some level of ambiguity in the words of the statute."[152] Although ANDA was not

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[145] *Id.* at 941 (first quoting *Ex parte* Rogers, 82 So. 785, 785 (Ala. Ct. App. 1919); then quoting Edwards v. Ala. Dep't of Corr., 81 F. Supp. 2d 1242, 1252 (M.D. Ala. 2000)).

[146] *Id.*

[147] *Id.* at 941 (citing Ala. Code § 22-8A-1 *et seq.*).

[148] *Id.*

[149] *Expressio unius* supplies a negative inference, reasoning that Congress's inclusion of one item is the implied exclusion of that which is absent. YULE KIM, CONG. RESEARCH SERV., RL 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 16–17 (2008). But if the items Congress included are deemed "exemplary, not exclusive," NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257–58 (1995), *expressio unius* does not apply. Whether *expressio unius* is applicable thus depends on the context. *See id.*

[150] Estate of Cummings v. Davenport, 906 F.3d 934, 941 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2746 (2019).

[151] *Id.* at 942 (citations omitted).

[152] Johnson v. Governor of Fla., 405 F.3d 1214, 1229 n.30 (11th Cir. 2005). Although *Davenport* did not explicitly purport to apply the statutory interpretation rules of Alabama state courts when interpreting ANDA, the Eleventh Circuit in other cases has explained that, in

declared ambiguous, the application of *expressio unius* rendered ANDA "fatal . . . to qualified immunity."[153] Because Warden Davenport failed to identify specific, narrowly-tailored law—whether under ANDA or otherwise—affirmatively authorizing his discrete acts, the Eleventh Circuit held that Warden Davenport failed to demonstrate he was acting within the scope of his authority at the time in question.[154] The Eleventh Circuit therefore did not reach the remaining requirements of qualified immunity—*i.e.*, whether Cummings's estate and Gaines could demonstrate that Warden Davenport violated a statutory or constitutional right that was clearly established at the time of the violation.[155] Accordingly, the Eleventh Circuit affirmed the district court's denial of Warden Davenport's motion to dismiss based on qualified immunity.[156]

As demonstrated by *Davenport*, under the Specific Acts Approach, an official who asserts qualified immunity must identify state law affirmatively authorizing his discrete acts, and doubts are likely to be resolved against the official.[157] The official may not rely on established, general principles that merely govern his duties as a whole but must instead point to authority narrowly tailored to his discrete acts, even if that authority is ancillary to the established principles governing his duties as a whole.[158] If the official makes that threshold showing, the burden then shifts to the plaintiff to

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"render[ing] a decision based on interpretation of a state statute, we must decide the case as the state's highest court would." Fatt Katt Enters., Inc. v. Rigsby Constr. Inc., No. 18-11182, 2019 WL 972043, at *3 (11th Cir. Feb. 27, 2019). Even if *Davenport* had looked to the statutory interpretation rules of Alabama state courts, the rules employed by those courts suggest a statute must be declared ambiguous before canons of statutory interpretation will be used. *See Ex parte* Nat'l W. Life Ins. Co., 899 So. 2d 218, 224 (Ala. 2004) ("This ambiguity in the statutory language justifies the use of other canons of statutory construction (beyond the 'plain-meaning rule').").

[153] *Davenport*, 906 F.3d at 941.

[154] *Id.* at 942.

[155] *Id.*

[156] *Id.* at 941–43.

[157] *Id.* at 940–43; *see also* Sell v. City of Columbus, 47 F. App'x 685, 693 (6th Cir. 2002) (interpreting city code provisions, concluding that code enforcement officials failed to demonstrate they were authorized to order an emergency eviction under those provisions, and remanding for "further factual development"); Shechter v. Comptroller of N.Y., 79 F.3d 265, 270 (2d Cir. 1996) (concluding that attorneys failed to demonstrate they were acting within the scope of their authority when providing legal advice to *pro se* litigant based on attorneys' "bald assertion" of authority); Lenz v. Winburn, 51 F.3d 1540, 1547 (11th Cir. 1995) (concluding that guardian failed to demonstrate she was acting within the scope of her authority in "directly providing comfort" when nothing under the applicable state law "require[d] a guardian to care directly for the child"). *But cf.* Huminski v. Corsones, 396 F.3d 53, 80 (2d Cir. 2005) (concluding that officials were acting within the scope of their authority when serving trespass notices because that issue was undisputed); Gravely v. Madden, 142 F.3d 345, 347–48 (6th Cir. 1998) (concluding that correction officer sufficiently demonstrated he was acting within the scope of his authority when capturing an escaped inmate because state statutes and regulations "clearly contemplated the involvement of corrections officers in the apprehension of escaped inmates").

[158] *Davenport*, 906 F.3d at 941–42.

demonstrate the official violated a constitutional right that was clearly established at the time of the violation.[159]

C. Clear Scope Approach

In between the Authority Irrelevant Approach and the Specific Acts Approach, the Fourth, Eighth, and Ninth Circuits hold that an official asserting qualified immunity must demonstrate he acted within the clearly established scope of his authority under state law (the Clear Scope Approach).[160] The case best illustrating the Clear Scope Approach is the Fourth Circuit's decision in *In re Allen*.[161] *In re Allen* involved a dispute between West Virginia's Attorney General, Darrell McGraw (who had previously served on West Virginia's Supreme Court), and the Better Government Bureau Inc. (BGB), a government watchdog association.[162]

The dispute arose when Attorney General McGraw denied BGB's request for information under West Virginia's Freedom of Information Act.[163] BGB's information request concerned a complaint from Suarez Corporation Industries (SCI), which was one of BGB's most "active members and its largest source of membership dues."[164] SCI's complaint alleged that Attorney General McGraw's office had filed a lawsuit against one of SCI's subsidiaries that "raised questions about abuse of power."[165] Following the denial of BGB's request for information, BGB publicly represented it intended to open a West Virginia chapter to combat "crack politics."[166] Attorney General McGraw, in response, sought to stymie BGB's intended expansion into West Virginia by making it impossible for BGB to incorporate in West Virginia.[167] To that end, Attorney General McGraw used personal funds to incorporate "a Government Agency Corporation" he named "Better Government Bureau."[168] Further, Attorney General McGraw sent a letter to the attorneys general of the forty-nine other states, urging them to "register the name of the Better Government Bureau" to thwart BGB's activities.[169] Attorney General McGraw was ultimately effective in precluding BGB from incorporating in West Virginia.[170]

BGB filed a lawsuit in the United States District Court for the Southern District of West Virginia against Attorney General McGraw, seeking money damages and

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[159] *Id.* at 940.

[160] *See, e.g.*, Johnson v. Phillips, 664 F.3d 232, 236–37 (8th Cir. 2011); *In re* Allen, 106 F.3d 582, 594 (4th Cir. 1997), *cert. denied sub nom.* McGraw v. Better Gov't Bureau, Inc., 522 U.S. 1047 (1998); Merritt v. Mackey, 827 F.2d 1368, 1372–73 (9th Cir. 1987).

[161] 106 F.3d at 582.

[162] *Id.* at 587–88.

[163] *Id.* at 587.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 587–88.

[167] *Id.* at 588.

[168] *Id.*

[169] *Id.*

[170] *Id.*

alleging First Amendment violations under § 1983.[171] After the close of discovery, BGB uncovered key information that had not been disclosed during discovery.[172] Specifically, a secretary of Attorney General McGraw, who was later fired, provided BGB with letters in which Attorney General McGraw requested that West Virginia's Secretary of State "resist and refuse" BGB's efforts to incorporate in West Virginia in light of BGB's activities of "fraud and deceit."[173] When Attorney General McGraw moved for summary judgment based on qualified immunity, the district court concluded that Attorney General McGraw had exceeded the scope of his authority and denied the motion.[174] Attorney General McGraw appealed that ruling to the Fourth Circuit Court of Appeals.

The Fourth Circuit began its analysis in *In re Allen* by noting that the question of whether an official who exceeds the scope of his authority is entitled to qualified immunity was one of "first impression in this court."[175] The Fourth Circuit examined the common law at the time § 1983 was enacted, observing that "it was well recognized at common law that a government official who exceeded his authority enjoyed no immunity, but rather was civilly liable for money damages."[176] Moreover, the Fourth Circuit reasoned that the history and purpose of both § 1983 and qualified immunity supported limiting the doctrine's applicability to instances in which the official acted within the scope of his authority.[177] The Fourth Circuit concluded, therefore, that an official may "claim qualified immunity as long as his actions are not clearly established to be beyond the boundaries of his discretionary authority."[178] *In re Allen* further explained as follows:

> This test is objective, and examines what a reasonable official in the defendant's position would have understood the limits of his statutory authority to be.
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> * * *
>
> [A]ll the official must know is the limit of his own authority. A government official does not need an extensive background in legal history to understand that he cannot claim qualified immunity when he acts totally beyond the scope of his authority. Thus, we jeopardize no public policy goal by requiring a government official to know the outer limits of his own authority and, in

[171] *Id.* at 588–89.

[172] *Id.* at 589.

[173] *Id. See also* Better Gov't Bureau, Inc. v. McGraw, 904 F. Supp. 540, 553 n.17 (S.D.W. Va. 1995), *opinion reinstated*, 924 F. Supp. 724 (S.D.W. Va. 1996), *and aff'd sub nom*. *In re* Allen, 106 F.3d 582 (4th Cir. 1997), *cert. denied sub nom*. McGraw v. Better Gov't Bureau, Inc., 522 U.S. 1047 (1998).

[174] *In re* Allen, 106 F.3d at 590.

[175] *Id.*

[176] *Id.* at 592.

[177] *Id.*

[178] *Id.* at 593.

> turn, holding him responsible for actions clearly established to be outside those limits.[179]

Having decided that an official may claim qualified immunity so long as he does not exceed the clearly established scope of his authority, the Fourth Circuit turned to provide a governing analytical framework.[180] The threshold inquiry under *In re Allen* is whether the official can show his acts "were not clearly established to be beyond the scope of his authority."[181] Although the burden is placed on the official, the Fourth Circuit clarified that "an official's conduct falls within his authority *unless* a reasonable official in the defendant's position would have known that the conduct was clearly established to be beyond the scope of that authority."[182] Ascertaining the official's scope of authority requires analysis of the operative "statutes or regulations."[183] The analysis is not whether the official properly exercised his duties or violated the law.[184] The controlling question is instead whether "the act complained of, if done for a proper purpose, would be within, or reasonably related to," the official's scope of authority.[185] In the event the official fails to meet this threshold burden, qualified immunity must be denied regardless of whether the plaintiff can demonstrate the official violated a clearly established constitutional right.[186]

Applying these principles to the facts of *In re Allen*, the Fourth Circuit first clarified that the proper inquiry was whether Attorney General McGraw exceeded the clearly established scope of his authority by forming "his own 'government agency' corporation" under the auspices of public office, not by allegedly retaliating against BGB.[187] The Fourth Circuit then surveyed West Virginia law to ascertain the scope of Attorney General McGraw's authority.[188] The case defining Attorney General McGraw's authority under West Virginia law was *Manchin v. Browning*,[189] which Attorney General McGraw had himself authored while on West Virginia's Supreme Court approximately twelve years before the dispute with BGB arose.[190] In *Manchin*, West Virginia's Supreme Court explained that "'the powers and duties of the Attorney General' are limited to those 'specified by the constitution and by rules of law

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[179] *Id.*

[180] *Id.* at 594.

[181] *Id.*

[182] *Id.*

[183] *Id.* at 595.

[184] *Id.* at 594.

[185] *Id.*

[186] *Id.* at 594, 598.

[187] *Id.* at 595.

[188] *Id.* at 595–96.

[189] *See* Manchin v. Browning, 296 S.E.2d 909 (W. Va. 1982), *overruled by* Discover Fin. Servs., Inc. v. Nibert, 744 S.E.2d 625 (W. Va. 2013).

[190] *In re* Allen, 106 F.3d 582, 595–96 (4th Cir. 1997), *cert. denied sub nom.* McGraw v. Better Gov't Bureau, Inc., 522 U.S. 1047 (1998).

prescribed pursuant thereto.'"[191] Because Attorney General McGraw identified no constitutional provision or other state law that authorized him to form a corporation, much less a so-called government agency corporation,[192] under the auspices of public office, *In re Allen* concluded that Attorney General McGraw failed to show he acted within the clearly established scope of his authority at the time in question.[193] Accordingly, the Fourth Circuit affirmed the denial of Attorney General McGraw's motion for summary judgment based on qualified immunity.[194]

As demonstrated by *In re Allen*, under the Clear Scope Approach, the official must demonstrate he acted within the clearly established scope of his authority under state law as a threshold matter.[195] The Clear Scope Approach holds that the official's conduct falls within the scope of his authority unless a reasonable official in the official's position would have known otherwise.[196] Only if the official satisfies his threshold burden does the burden shift to the plaintiff to demonstrate the official violated a constitutional right that was clearly established at the time of the violation.[197]

IV. THE TRADITION OF IMMUNITY, HISTORY OF § 1983, AND PURPOSE OF § 1983 SHOW THAT THE CLEAR SCOPE APPROACH SHOULD GOVERN

The circuit split explored above raises two related questions. First, should qualified immunity be limited to officials acting within the scope of their authority under state law at the time in question? And if so, second, how should that determination be made? The Supreme Court has provided an analytical framework that ultimately suggests an answer to each question. Specifically, under a tradition, history, and purpose analysis, the Court has

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[191] *Id.* at 595 (quoting *Manchin*, 296 S.E.2d at 915).

[192] *Id.* at 596–98. The Fourth Circuit noted that it was unable to locate any West Virginia law recognizing a government agency corporation, reasoning that "the fact that [Attorney General McGraw] created an entity heretofore unknown to West Virginia law, with personal funds no less, further evidences that he wandered far beyond the limits of his authority." *Id.* at 597 n.5.

[193] *Id.* at 598.

[194] *Id.*

[195] *Id.* at 594; *see also* Covey v. Assessor of Ohio Cty., 777 F.3d 186, 196 (4th Cir. 2015) ("Arguably, by entering into the curtilage and house despite the presence of 'No Trespassing' signs and a regulation's explicit directive to leave, the tax assessor exceeded his discretionary authority and therefore should not be entitled to qualified immunity."); Johnson v. Phillips, 664 F.3d 232, 239 (8th Cir. 2011) (holding that "auxiliary reserve police officer" was not entitled to qualified immunity because officer exceeded the clearly established scope of his authority by conducting a search incident to arrest when the governing law deprived officer of authority to do so); Hawkins v. Holloway, 316 F.3d 777, 787–88 (8th Cir. 2003) (holding that sheriff was not entitled to qualified immunity for claim arising from threatening and pointing weapons at his employees because "[n]o reasonable official in the sheriff's shoes could have thought it within his duties to threaten his employees with deadly force"); Merritt v. Mackey, 827 F.2d 1368, 1373 (9th Cir. 1987) ("Because the [officers] *knowingly* acted outside the scope of their authority, they are not entitled to qualified immunity." (emphasis added)).

[196] *See supra* note 195.

[197] *In re* Allen, 106 F.3d at 594–98.

> accorded certain government officials either absolute or qualified immunity from suit if the tradition of immunity was so firmly rooted in the common law . . . . Additionally, irrespective of the common law support, [the Court] will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions.[198]

Set forth below is a discussion of the governing principles relevant to the tradition, history, and purpose analysis. Then, the tradition, history, and purpose analysis is applied to the Authority Irrelevant Approach, the Specific Acts Approach, and the Clear Scope Approach.

A. Governing Principles

The governing principles relevant to the tradition of immunity, history of § 1983, and purpose of § 1983 are discussed in turn.

1. Tradition of Immunity

The "tradition of immunity" inquiry is whether granting immunity to the particular official may fairly be said to have been "so firmly rooted in the common law and . . . supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine."[199] The American common law, rather than the English common law, is determinative of this inquiry.[200]

The American common law is replete with precedent limiting official immunity to acts within the scope of the official's authority. In the 1804 decision of *Little v. Bareme*,[201] for instance, the Court explained that an official operating a war ship on behalf of the United States could be "answerable in damages to any person injured" by the official's conduct when that conduct was not "strictly warranted by law."[202] There, President John Adams had ordered the official to seize a ship sailing *from* a French port, but the relevant law only authorized the seizure of ships sailing *to* French ports.[203] Chief Justice Marshall, writing for the Court in *Little*, held that the official was liable for the seizure because President Adams's order could not "legalize an act which without those instructions would have been a plain trespass."[204] Similarly, in the 1806 case of *Wise v. Withers*,[205] an official attempted to collect militia fines from

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[198] Wyatt v. Cole, 504 U.S. 158, 163–64 (1992) (internal citations omitted). *See also* Richardson v. McKnight, 521 U.S. 399, 403–12 (1997) (applying tradition, history, and purpose analysis to prison guard defendants working at private, for-profit prison); Buckley v. Fitzsimmons, 509 U.S. 259, 268–78 (1993) (applying tradition, history, and purpose analysis to prosecutor defendants); Owen v. City of Indep., 445 U.S. 622, 637–38 (1980) (applying tradition, history, and purpose analysis to municipality defendant).

[199] *Richardson*, 521 U.S. at 403 (quoting *Wyatt*, 504 U.S. at 164).

[200] Burns v. Reed, 500 U.S. 478, 493 (1991) (quoting Anderson v. Creighton, 483 U.S. 635, 644 n.5 (1987)).

[201] 6 U.S. (2 Cranch) 170 (1804).

[202] *Id.* at 179.

[203] *Id.* at 170–72.

[204] *Id.* at 179.

[205] 7 U.S. (3 Cranch) 331 (1806).

a justice of the peace, notwithstanding that the justice of the peace was exempt from militia duty and the attendant fines.[206] In an opinion authored by Chief Justice Marshall, the Court held that the official had exceeded his authority and was therefore liable for trespass.[207]

In the 1851 decision of *Mitchell v. Harmony*,[208] which concerned a taking during the Mexican and American War, the Court confronted the question of "under what circumstances private property may be taken from the owner by a military officer in a time of war."[209] Chief Justice Taney, writing for the Court, explained as follows:

> There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.[210]

But the law does not authorize a taking, Chief Justice Taney continued, merely "to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake."[211] Thus, where the official takes property "not to defend his position, nor to place his troops in a safer one, nor to anticipate the attack of an approaching enemy, but to insure the success of a distant and hazardous expedition," he exceeds his authority and faces liability.[212]

Following *Mitchell*, in the 1877 case of *Bates v. Clark*,[213] the Court confronted whether an army captain should face liability for seizing a business's liquor without authority to do so.[214] Although the captain had authority to seize liquor in "Indian country, within the meaning of the act of 1834 and the amendment of 1864,"[215] the captain's seizure did not occur in that location. In an opinion authored by Justice Miller, the Court in *Mitchell* held that the captain was liable for damages because he was "utterly without any authority . . . and [his] honest belief . . . is no defence."[216] Finally, in the 1883 case of *Cunningham v. Macon & Brunswick Railroad Co.*,[217] the Court succinctly summarized the tradition of immunity by explaining that an official "sued in tort for some act injurious to another in regard to person or property, to which

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[206] *Id.* at 335–37.

[207] *Id.* at 337.

[208] 54 U.S. (13 How.) 115 (1851).

[209] *Id.* at 135.

[210] *Id.* at 134.

[211] *Id.* at 135.

[212] *Id.*

[213] 95 U.S. 204 (1877).

[214] *Id.* at 204–05.

[215] *Id.*

[216] *Id.* at 209.

[217] 109 U.S. 446 (1883).

his defense is that he has acted under the orders of the government . . . *must show that his authority was sufficient in law to protect him*."[218]

In short, the tradition of immunity inquiry shows that an official's entitlement to immunity depends on whether the official was acting within the scope of his authority at the time in question.[219] As Judge Learned Hand summarized:

> The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been *within the scope of his powers*; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. *What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him*.[220]

Based on the above, under the tradition, history, and purpose analysis, the tradition of immunity inquiry demonstrates official immunity should be accorded only to officials acting within the scope of their authority.

2. History of § 1983

Even if the tradition of immunity suggests that an official should be accorded immunity, the Court has explained that immunity will not be granted to the official if § 1983's "history . . . counsel[s] against recognizing the same immunity."[221] Section 1983 traces its origins to the Ku Klux Klan Act of 1871 (the KKK Act). The forty-second Congress passed the KKK Act during the Reconstruction Era after the Civil War due to concerns that, "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[222] In relevant part, the KKK Act, which is substantively similar to the present language of § 1983, provided as follows:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage

[218] *Id.* at 452 (emphasis added).

[219] *See* Butz v. Economou, 438 U.S. 478, 489–91 (1978) (discussing common law cases limiting official immunity to officials acting with authority).

[220] Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (emphases added). *See also* Barr v. Matteo, 360 U.S. 564, 572 (1959) (quoting *Gregoire*, 177 F.2d at 581).

[221] Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993); Wyatt v. Cole, 504 U.S. 158, 164 (1992).

[222] Monroe v. Pape, 365 U.S. 167, 180 (1961).

> of the State to the contrary notwithstanding, be liable to the party injured in, any action at law, suit in equity, or other proper proceeding for redress.[223]

Congress employed near absolute terms when enacting the KKK Act, intending to provide a remedial scheme to vindicate constitutional violations. As Senator Allen Thurman observed, albeit in opposition to the KKK Act, "there is no limitation whatsoever upon the terms that are employed . . . they are as comprehensive as can be used."[224] And the author and sponsor of the KKK Act, Representative Samuel Shellabarger, described the KKK Act as follows:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.[225]

At face value, § 1983's plain language and legislative history do not appear to support any variety of official immunity.[226] Nevertheless, because § 1983's plain language and legislative history do not address official immunity, the Court has "infer[red] from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law."[227] By parity of reasoning, "[t]he legislative record similarly gives no indication that Congress meant to enlarge common law immunities to include officials acting outside the scope of their authority."[228]

Section 1983's plain terms and legislative underpinnings—based on what Congress made explicit and left implicit—evince Congress's intent to create an expansive remedial scheme while simultaneously preserving official immunity as it existed under the common law. Thus, under the tradition, history, and purpose

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[223] Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, § 1 (1871) (codified at 42 U.S.C. § 1983 (2019)).

[224] Monell v. Dep't of Soc. Servs., 436 U.S. 658, 685 n.45 (1978) (quoting Cong. Globe, 42d Cong., 1st Sess., App. 217 (1871)).

[225] Owen v. City of Indep., 445 U.S. 622, 636 (1980) (quoting Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)).

[226] *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 339 (1986) (observing that § 1983 "on its face admits of no immunities"); Hon. Lynn Adelman, *The Erosion of Civil Rights and What to Do About It*, 2018 WIS. L. REV. 1, 6 (2018) ("Nothing in the text of the statute and nothing in the statute's legislative history supports the qualified immunity doctrine."); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1134 (2006) (noting "the absence of any text or direct legislative history supporting judicial extrapolation of substantial immunities from suit under § 1983").

[227] Wyatt v. Cole, 504 U.S. 158, 164 (1992).

[228] *In re* Allen, 106 F.3d 582, 592 (4th Cir. 1997), *cert. denied sub nom.* McGraw v. Better Gov't Bureau, Inc., 522 U.S. 1047 (1998).

analysis, the history of § 1983 counsels against recognizing official immunity if doing so restricts the remedial scheme of § 1983 and fails to preserve official immunity as it existed under the common law.

3. Purpose of § 1983

Regardless of the tradition of immunity and history of § 1983, the Court has explained that immunity will not be granted to an official if § 1983's purpose "nonetheless counsel[s] against recognizing the same immunity[.]"[229] Section 1983 serves "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."[230] Put another way, § 1983 operates to "compensate persons injured by deprivation of federal rights and prevent[] abuses of power by those acting under color of state law."[231]

While § 1983 is decidedly remedial, the remedial scheme of § 1983 must be balanced against the "the special policy concerns involved in suing government officials."[232] These concerns are: (1) most importantly, "avoid[ing] 'unwarranted timidity' in performance of public duties";[233] (2) "ensuring that talented candidates are not deterred from public service";[234] and (3) "preventing the harmful distractions from carrying out the work of government that can often accompany damages suits."[235] These policies plainly envision ensuring the smooth operation of effective government. Indeed, these policy concerns underlie the decision in *Harlow*.[236] Guided by these policy concerns, the Court in *Harlow* explained that, requiring officials to defend lawsuits is attended by the governmental and social costs of the "expenses of litigation, the diversion of official energy from pressing public issues, . . . the deterrence of able citizens from accepting of public office,"[237] and "the danger that the fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible . . . , in the discharge of their duties.'"[238] Nevertheless, while the holding in *Harlow* is intended to afford wide latitude to officials by immunizing "all but the plainly incompetent or those who knowingly violate the law,"[239] the Court in *Harlow* emphasized that its holding "provide[s] no license to lawless conduct."[240] *Harlow* thus defined qualified immunity as an objective standard so as to balance "compensating

[229] Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993); *Wyatt*, 504 U.S. at 164.

[230] *Wyatt*, 504 U.S. at 161.

[231] Robertson v. Wegmann, 436 U.S. 584, 591 (1978).

[232] *Wyatt*, 504 U.S. at 167. *See also* Richardson v. McKnight, 521 U.S. 399, 404 (1997).

[233] Filarsky v. Delia, 566 U.S. 377, 389 (2012) (quoting *Richardson*, 521 U.S. at 408–09).

[234] *Id.* at 389–90.

[235] *Id.* at 390.

[236] Harlow v. Fitzgerald, 457 U.S. 800, 813–19 (1982).

[237] *Id.* at 814.

[238] *Id.* (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

[239] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[240] *Harlow*, 457 U.S. at 819.

those who have been injured by official conduct and protecting government's ability to perform its traditional functions."[241] In light of these principles, the purpose of § 1983 counsels against recognizing official immunity if doing so fails to properly balance the remedial scheme of § 1983 against the special policy concerns at stake when government officials are sued.

B. Tradition, History, and Purpose Analysis Applied

Having set forth the governing principles relevant to the tradition of immunity, the history of § 1983, and the purpose of § 1983, the analysis now turns to apply those principles to the Authority Irrelevant Approach, the Specific Acts Approach, and the Clear Scope Approach.

1. Authority Irrelevant Approach

Under the Authority Irrelevant Approach, the official need not demonstrate he acted with authority under state law.[242] The Authority Irrelevant Approach does not satisfy the tradition, history, and purpose analysis because it grants qualified immunity to officials even if they lacked authority, expands qualified immunity from its common law underpinnings, and fails to give proper weight to the remedial scheme of § 1983. *Dean* is illustrative.

As applied in *Dean*, the Authority Irrelevant Approach accorded qualified immunity to Director Dean without inquiring of his authority.[243] Granted, the Tenth Circuit in *Dean* did reason that Director Dean exercised a degree of discretion sufficient to assert qualified immunity.[244] *Dean* applied "a federal standard to determine whether Director Dean's obligations were sufficiently discretionary" and concluded that Director Dean exercised "a substantial measure of discretion" in deciding how to implement the Wage Act.[245] But the official's discretion is distinct from the official's authority.[246] Even if Director Dean had discretion in deciding how to implement the Wage Act, the question of *how* to implement the Wage Act is separate from *whether* the Wage Act would be implemented at all.[247] Importantly, the plaintiffs in *Dean* did not complain of how Director Dean implemented the Wage Act. They complained instead of Director Dean's failure to implement the Wage Act, thus implicating *whether* the Wage Act would be implemented, which, in turn, implicates

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[241] Wyatt v. Cole, 504 U.S. 158, 167 (1992) (citing *Harlow*, 457 U.S. at 819).

[242] *See supra* Part III.A.

[243] *See supra* Part III.A.

[244] Cummings v. Dean, 913 F.3d 1227, 1241–42 (10th Cir. 2019), *cert. denied sub nom.* Cummings v. Bussey, No. 18-1357, 2019 WL 4921308 (U.S. Oct. 7, 2019).

[245] *Id.* at 1242.

[246] *Harlow* clearly limited the controlling doctrine of qualified immunity to "discretionary functions." *See Harlow*, 457 U.S. at 818.

[247] *See* N.M. Bldg. & Constr. Trades Council v. Dean, 353 P.3d 1212, 1217 (N.M. 2015) ("[A]ny discretion conferred upon the Director is limited to the Director determining *which* CBA will be used to set the rates, not *whether* a CBA will be used.").

Director Dean's authority to decline to implement the Wage Act.[248] *Dean* readily acknowledged that "there was no confusion" regarding Director Dean's obligation to determine and publish the rates required under the Wage Act.[249] And, in resolving the mandamus petition against Director Dean, New Mexico's Supreme Court similarly made clear that Director Dean did not have authority to decline to implement the Wage Act.[250] Even so, *Dean* did not inquire of Director Dean's authority.

By granting qualified immunity to officials regardless of whether they lacked authority, the Authority Irrelevant Approach undermines the tradition of immunity. Further, both the history and purpose of § 1983 counsel against the Authority Irrelevant Approach because it expands qualified immunity from its common law underpinnings and, in doing so, fails to give proper weight to the remedial scheme of § 1983. Hence, the Authority Irrelevant Approach does not satisfy the tradition, history, and purpose analysis.

2. Specific Acts Approach

Under the Specific Acts Approach, the official must point to narrowly-tailored state law that affirmatively authorizes his discrete acts, and doubts are likely to be resolved against the official.[251] Applying the tradition, history, and purpose analysis to the Specific Acts Approach shows that the purpose of § 1983 counsels against the Specific Acts Approach for two primary reasons.

First, the Specific Acts Approach risks fostering unwarranted timidity on the part of officials, which is the most important policy concern implicated by suits against officials.[252] *Harlow* instructs that "a reasonably competent official" is expected to "know the law governing his conduct."[253] Where that law is not clearly established, "the public interest may be better served by action taken 'with independence and without fear of consequences.'"[254] Balancing the need to remedy constitutional violations against the need to encourage the vigorous exercise of official authority yields the cornerstone principle that officials should be immune from suits for money damages so long as they are not "plainly incompetent" and do not "knowingly violate the law."[255] Yet, before acting under the Specific Acts Approach, the official must both consider the established law governing his conduct and also anticipate whether

[248] *See Dean*, 913 F.3d at 1241 (acknowledging that the plaintiffs contended that Director Dean "violated Plaintiffs' procedural and substantive due-process rights by failing to determine prevailing rates for wages and fringe benefits in contravention of the [Wage Act]").

[249] *Id.* at 1243 n.4.

[250] *See N.M. Bldg. & Constr. Trades Council*, 353 P.3d at 1218 (explaining that Director Dean's "delay in setting new rates and his failure to comply with the [Wage] Act is inexcusable" because Director Dean's obligation to comply with the Wage Act was a "mandatory, nondiscretionary duty"); *see also supra* note 104 (setting forth the standard for mandamus under New Mexico law).

[251] *See supra* Part III.B.

[252] Filarsky v. Delia, 566 U.S. 377, 390 (2012) (quoting Richardson v. McKnight, 521 U.S. 399, 408–09 (1997)).

[253] Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

[254] *Id.* (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

[255] Malley v. Briggs, 475 U.S. 335, 341, 349–50 (1986).

his discrete acts may implicate any ancillary laws.[256] And the applicability of these ancillary laws may not be readily ascertainable.[257]

For example, in *Davenport*, established Alabama law designated Warden Davenport as the legal custodian of inmates and delegated to him authority to make decisions related to inmates' medical care.[258] Under those established principles, Warden Davenport acted in response to the crisis that occurred when Cummings was stabbed.[259] The Eleventh Circuit nonetheless concluded that Warden Davenport had exceeded his authority under Alabama law because ANDA, as interpreted under the *expressio unius* canon of statutory interpretation, did not affirmatively authorize his discrete acts.[260] Requiring officials to both consider the established law governing their duties and also anticipate whether their discrete acts may implicate unsettled ancillary laws—like ANDA in *Davenport*—effectively resolves doubts against the official and serves to discourage officials from swiftly making difficult yet critical decisions. The result is to risk fostering unwarranted timidity on the part of officials.

Second, the purpose of § 1983 further counsels against the Specific Acts Approach because it saddles officials with an exacting burden when proving up their authority in litigation. As noted, balancing the remedial scope of § 1983 against the concerns at stake in suits against officials evinces the important policy of minimizing the burdens of litigation on officials who are sued.[261] The Specific Acts Approach diminishes the importance of this policy by requiring the official to go beyond the established law governing his duties as a whole and to instead identify state law that affirmatively authorizes his discrete acts when proving up his authority.[262] The Specific Acts Approach therefore allocates an exacting burden to the official. Indeed, whether the official satisfies his burden may require resolution of novel questions of state law, and *Davenport* suggests that doubts are likely to be resolved against the official.[263] Given this exacting burden, the purpose of § 1983 further counsels against the Specific Acts Approach.

To be sure, the Specific Acts Approach comports with the tradition of immunity, and the history of § 1983 does not counsel against the Specific Acts Approach. As shown, the Specific Acts Approach limits qualified immunity to officials who can demonstrate they acted with authority as a threshold matter.[264] The Specific Acts Approach thus aligns with the tradition of immunity while giving effect to the remedial scheme of § 1983 and preserving official immunity as it existed under the common

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[256] *See supra* Part III.B.

[257] *See supra* Part III.B.

[258] Estate of Cummings v. Davenport, 906 F.3d 934, 941 (11th Cir. 2018) (first quoting *In re* Rogers, 82 So. 785, 785 (Ala. 1919); and then quoting Edwards v. Ala. Dep't of Corrs., 81 F. Supp. 2d 1242, 1252 (M.D. Ala. 2000)), *cert. denied*, 139 S. Ct. 2746 (2019).

[259] *Id.*

[260] *Id.* at 942.

[261] *See supra* Part IV.A.3.

[262] *See supra* Part III.B.

[263] *See Davenport*, 906 F.3d at 942 (applying *expressio unius* to ANDA to conclude that Warden Davenport acted outside the scope of his authority); *see also supra* Part III.B.

[264] *See supra* Part III.B.

law. Even so, the purpose of § 1983 counsels against the Specific Acts Approach for the reasons stated.

Because the purpose of § 1983 counsels against the Specific Acts Approach, the Specific Acts Approach fails to satisfy the tradition, history, and purpose analysis.[265]

3. Clear Scope Approach

By contrast, the Clear Scope Approach satisfies the tradition, history, and purpose analysis. For one, the Clear Scope Approach aligns with the tradition of immunity because it limits qualified immunity to officials who can demonstrate they acted within the scope of their authority and, more specifically, within the clearly established scope of their authority under state law.[266] The Clear Scope Approach also aligns with the history of § 1983. *In re Allen* shows that the Clear Scope Approach requires the official to demonstrate, as a threshold matter, that he acted with sufficient authority under state law; otherwise, qualified immunity is inapplicable.[267] The Clear Scope Approach's threshold burden gives effect to the remedial scheme of § 1983 while preserving official immunity as it existed under the common law, thereby aligning with the history of § 1983.

Moreover, the Clear Scope Approach aligns with the purpose of § 1983 because it appropriately balances the remedial scheme of § 1983 against the special policy concerns at stake when government officials are sued. While the Clear Scope Approach's threshold burden prioritizes the remedial scheme of § 1983, the nature of the Clear Scope Approach's threshold burden gives proper weight to the special policy concerns implicated by suits against officials. Unlike the Specific Acts Approach, the Clear Scope Approach does not allocate an exacting burden to the official. Instead, the Clear Scope Approach reasonably requires the official to demonstrate that "the act complained of, if done for a proper purpose, would be within, or reasonably related to,"[268] the official's scope of authority. Deference is afforded to the official, for "an official's conduct falls within his authority *unless* a reasonable official in the defendant's position would have known that the conduct was clearly established to be beyond the scope of that authority."[269] The official exceeds his "authority only if the injury occurred during the performance of an act clearly established to be outside of the limits of that authority."[270] Given this threshold inquiry and the attendant deference afforded to the official, the Clear Scope Approach avoids unwarranted timidity on the

[265] By reasoning that the Specific Acts Approach as applied in *Davenport* does not satisfy the tradition, history, and purpose analysis, the Author does not intend to express any opinion on Warden Davenport's conduct. Instead, it is the Author's opinion that a different legal test should have governed whether Warden Davenport acted with authority, and, if Warden Davenport were to have satisfied that test, the burden should have then shifted to the plaintiffs to demonstrate Warden Davenport violated a constitutional right that was clearly established.

[266] *See supra* Part III.C.

[267] *See In re* Allen, 106 F.3d 582, 590–98 (4th Cir. 1997), *cert. denied sub nom*. McGraw v. Better Gov't Bureau, Inc., 522 U.S. 1047 (1998).

[268] *Id.* at 594.

[269] *Id.*

[270] *Id.*

part of officials, ensures that qualified candidates are not deterred from public service, and minimizes the burdens placed on officials subjected to litigation.[271]

As applied in *In re Allen*, Attorney General McGraw failed to demonstrate he acted within the scope of his clearly established authority by forming a "government agency corporation" under the auspices of public office.[272] The Fourth Circuit in *In re Allen* emphasized that Attorney General McGraw, while on West Virginia's Supreme Court, had authored the key decision controlling his authority as attorney general, and Attorney General McGraw's conduct went beyond what that decision prescribed.[273] *In re Allen* further emphasized that West Virginia law did not recognize a so-called "government agency corporation."[274] Based on these facts, no reasonable official in Attorney General McGraw's position would have believed his conduct was authorized under state law.[275]

As such, in *In re Allen*, the Clear Scope Approach balanced the remedial scheme of § 1983 against the special policy concerns at stake, ascribed prevailing weight to the remedial scheme of § 1983, and ultimately denied qualified immunity.[276] While the Clear Scope Approach's threshold burden is not exacting, *In re Allen* demonstrates that it properly balances the remedial scheme of § 1983 against the special policy concerns at stake. Accordingly, the Clear Scope Approach satisfies the tradition, history, and purpose analysis.

V. RECOMMENDATION

The issue of whether qualified immunity should be accorded to an official acting outside the scope of his authority under state law is currently surrounded by three analytical approaches: the Authority Irrelevant Approach, the Specific Acts Approach, and the Clear Scope Approach. This Article recommends that the Clear Scope Approach be employed under the following analytical framework:

> *First.* The official must raise qualified immunity.[277]
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> *Second.* The official must establish his authority under state law.[278] The relevant contours of the official's authority are determined by established state law that directly and unambiguously governs the official's duties, including state constitutions, statutes, caselaw, and administrative rules.[279]

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[271] *See supra* Part III.A.3.

[272] *In re* Allen, 106 F.3d at 595–98.

[273] *Id.* at 595–96.

[274] *Id.* at 597 n.5. *See also supra* note 192.

[275] *Id.* at 598.

[276] *Id.*

[277] *See* SCHWARTZ, *supra* note 3, at 152 ("Qualified immunity is an affirmative defense that the defendant has the burden of pleading.").

[278] *In re* Allen, 106 F.3d 582, 594–95 (4th Cir. 1997), *cert. denied sub nom.* McGraw v. Better Gov't Bureau, Inc., 522 U.S. 1047 (1998).

[279] *Id.* at 595.

> Where there is a conflict between sources of authority, ordinary principles of hierarchy control.[280]
>
> *Third.* The official must demonstrate that he acted within the clearly established scope of his authority.[281] The standard is "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."[282] Deference is afforded to the official, and the "official's conduct falls within his authority unless a reasonable official in the [official's] position would have known that the conduct was clearly established to be beyond the scope of that authority."[283]
>
> *Fourth.* If the official satisfies his burden, the burden shifts to the plaintiff to demonstrate the official violated a constitutional right that was clearly established at the relevant time.[284]

Not only does the Clear Scope Approach satisfy the tradition, history, and purpose analysis, as demonstrated above,[285] but it presents a workable test. The above discussion of *Harlow* and *Pearson* evinces that efficient, workable rules are germane to properly effecting the doctrine of qualified immunity.[286] In *Harlow*, the Court jettisoned the subjective good faith inquiry because, in large part, it was difficult to apply and inefficient.[287] And in *Pearson*, the Court overruled the "rigid order of battle"[288] analysis so as to afford lower courts discretion "to determine the order of [qualified immunity] decisionmaking that will best facilitate the fair and efficient disposition of each case."[289] In keeping with both *Harlow* and *Pearson*, the Clear Scope Approach supplies workable principles that efficiently resolve whether an official may successfully assert qualified immunity.

This recommendation should not be taken to suggest that merely *violating* state law is determinative of qualified immunity. After all, the Court has clearly rejected the contention that an "official's violation of a clear statute or regulation, although not itself the basis of suit, should deprive the official of qualified immunity from damages for violation of other statutory or constitutional provisions."[290] Drawing a distinction

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[280] *See*, *e.g.*, NORMAN SINGER & SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 36:2 (7th ed. 2018) (discussing the hierarchy of different sources of law).

[281] *In re* Allen, 106 F.3d at 594.

[282] *Id.*

[283] *Id.*

[284] *See id.*; *see also* Pearson v. Callahan, 555 U.S. 223, 242 (2009).

[285] *See supra* Part IV.B.3.

[286] *See supra* Part II.

[287] Harlow v. Fitzgerald, 457 U.S. 800, 816–17 (1982).

[288] *Pearson*, 555 U.S. at 234.

[289] *Id.* at 242.

[290] Davis v. Scherer, 468 U.S. 183, 193 (1984). As *Davis* further instructed, "[n]either federal nor state officials lose their immunity by violating the clear command of a statute or

between the question of authority and a violation of state law is important, for if a violation of state law determined authority, "any illegal action would, by definition, fall outside the scope of an official's authority."[291] The Clear Scope Approach soundly makes this distinction. Specifically, under the Clear Scope Approach:

> [T]he issue is neither whether the official properly exercised his discretionary duties, nor whether he violated the law. . . . To equate the question of whether the defendants acted lawfully with the question of whether they acted within the scope of their discretion is untenable. Instead, a court must ask 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.[292]

As applied to *Dean*, the inquiry is not whether Director Dean exceeded his authority by denying the plaintiffs the wages and benefits to which they were entitled. The proper inquiry under *Dean* is instead whether Director Dean's conduct of failing to determine and publish the rates of minimum wages and fringe benefits, if done for a proper purpose, was clearly established to be beyond the scope of his authority under New Mexico law.[293] The Tenth Circuit in *Dean* did not undertake this inquiry. Under the Clear Scope Approach, this inquiry would very likely be resolved against Director Dean, given that *Dean* arose after New Mexico's Supreme Court had issued a writ of mandamus to order Director Dean to determine and publish the rates of minimum wages and fringe benefits—clear, statutorily-mandated duties of which Director Dean was indisputably aware.[294] Even so, the Tenth Circuit granted qualified immunity to Director Dean without undertaking this inquiry.

And, as to *Davenport*, the inquiry is not whether Warden Davenport exceeded his authority by interfering with Cummings's end-of-life medical care with deliberate indifference. Rather, the proper inquiry is whether Warden Davenport's conduct of entering a do-not-resuscitate order and deciding to remove Cummings from artificial life support, if done for a proper purpose, was clearly established to be beyond the scope of his authority under Alabama law.[295] The Eleventh Circuit in *Davenport* did not undertake this inquiry. Under the Clear Scope Approach, this inquiry would likely be resolved in favor of Warden Davenport in light of established Alabama law designating Warden Davenport as the legal custodian of inmates and delegating to him authority to make decisions related to inmates' medical care.[296] The Eleventh Circuit,

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regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon." *Id.* at 194 n.12.

[291] *In re* Allen, 106 F.3d 582, 594 (4th Cir. 1997), *cert. denied sub nom.* McGraw v. Better Gov't Bureau, Inc., 522 U.S. 1047 (1998).

[292] *Id.*

[293] *See* Cummings v. Dean, 913 F.3d 1227, 1231 (10th Cir. 2019), *cert. denied sub nom.* Cummings v. Bussey, No. 18-1357, 2019 WL 4921308 (U.S. Oct. 7, 2019).

[294] *Id.* at 1243 n.4; *see also supra* Part III.A.

[295] *See* Estate of Cummings v. Davenport, 906 F.3d 934, 941 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2746 (2019).

[296] *Id.* at 941 (first quoting *Ex parte* Rogers, 82 So. 785, 785 (Ala. Ct. App. 1919); then quoting Edwards v. Ala. Dep't of Corr., 81 F. Supp. 2d 1242, 1252 (M.D. Ala. 2000)).

nevertheless, denied qualified immunity to Warden Davenport after interpreting ANDA, the applicability of which was not readily ascertainable.[297]

Finally, as to *In re Allen*, the inquiry is "*not* whether [Attorney General McGraw] exceeded the scope of his authority by forming this corporation in retaliation for speech critical of him."[298] Instead, the *In re Allen* inquiry is whether Attorney General McGraw's conduct of "forming his own 'government agency' corporation under the auspices of the Attorney General's Office," if done for a proper purpose, was clearly established to be beyond the scope of his authority under West Virginia law.[299] As the Fourth Circuit in *In re Allen* correctly concluded, this inquiry must be resolved against Attorney General McGraw based on established West Virginia caselaw Attorney General McGraw had personally authored while on West Virginia's Supreme Court.[300] Thus, by drawing a distinction between the question of an official's authority and a violation of state law, the Clear Scope Approach ensures that a violation of state law does not, by itself, deprive the official of qualified immunity.

Nor should this recommendation be understood to jeopardize principles of judicial federalism by compelling federal courts to decide novel questions of state law when determining the scope of an official's authority.[301] The gravamen of the Clear Scope Approach focuses on the "clearly established" scope of the official's authority.[302] Given that the scope of authority must be clearly established and that only conduct exceeding the outer limits of the official's clearly established authority is dispositive, federal courts will not be tasked with deciding novel issues of state law under the Clear Scope Approach.

Based on the above, the Clear Scope Approach should be employed to limit qualified immunity to officials acting within the clearly established scope of their authority under state law at the time in question.

VI. CONCLUSION

Equilibrium must be brought to qualified immunity. Justice Sotomayor, joined by Justice Ginsburg, has written that qualified immunity has become an "absolute shield" that benefits only officials.[303] And Justice Thomas has written that qualified immunity no longer comports with its common law origins, calling for the Supreme Court to

[297] *Id.* at 942; *see also supra* Part III.B & note 152.

[298] *In re* Allen, 106 F.3d 582, 595 (4th Cir. 1997), *cert. denied sub nom.* McGraw v. Better Gov't Bureau, Inc., 522 U.S. 1047 (1998).

[299] *Id.*

[300] *Id.* at 595–96 (citing Manchin v. Browning, 296 S.E.2d 909 (W. Va. 1982), overruled by Discover Fin. Servs., Inc. v. Nibert, 744 S.E.2d 625 (W. Va. 2013)); *see also supra* Part III.C.

[301] *See, e.g.*, Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1524 (1997) ("The only sure way to eliminate the risk of inequitable administration is for federal courts to refrain from adopting novel rules of state law."); Erwin Chemerinsky, Federal Jurisdiction § 1.5, at 32–37 (7th ed. 2016) (discussing the relationship between federal and state courts).

[302] *See In re* Allen, 106 F.3d at 593.

[303] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

"reconsider [the] qualified immunity doctrine."[304] Many scholars have similarly criticized the current state of qualified immunity,[305] some contending it should be overruled.[306] And, uncertainty in the doctrine has produced a circuit split over whether an official's scope of authority is relevant. Even though the Court has "never suggested that . . . any . . . official[] has an immunity that extends beyond the scope of any action taken in an official capacity[,]"[307] the federal courts of appeal are nonetheless split on whether qualified immunity may be granted to officials who exceed the scope of their authority under state law.

One way to bring equilibrium to qualified immunity—while leaving the doctrine in place—is to adopt the Clear Scope Approach. Doing so would appropriately limit qualified immunity to officials who can demonstrate they acted within the clearly established scope of their authority under state law at the time in question, thereby resolving the current circuit split. Not only does the Clear Scope Approach present a workable test, but it aligns with the tradition of immunity, the history of § 1983, and the purpose of § 1983.

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[304] Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and dissenting in part).

[305] *E.g.*, Michael L. Wells, *Qualified Immunity After Ziglar v. Abbasi: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 379 (2018) (contending that the doctrine of qualified immunity should be overhauled so that the availability of qualified immunity "depend[s] on an assessment of costs and benefits, which vary depending on context").

[306] *E.g.*, Schwartz, *supra* note 7, at 1798 (contending that qualified immunity should be overruled and noting that "[t]he Court dedicates an outsized portion of its docket to reviewing—and virtually always reversing—denials of qualified immunity in the lower courts").

[307] Clinton v. Jones, 520 U.S. 681, 694 (1997).