No. 21-1552

IN THE

Supreme Court of the United States

CENTRAL SPECIALTIES, INC.,

Petitioner,

v.

JONATHAN LARGE,

Respondent.

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

BRIEF OF PETER H. SCHUCK AS AMICUS CURIAE IN SUPPORT OF PETITIONER

HELGI C. WALKER
MATT GREGORY
Counsel of Record
TODD W. SHAW
JOHN H. HEYBURN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3635
mgregory@gibsondunn.com

Counsel for Amicus Curiae

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES *(continued)*

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Peter H. Schuck is the Simeon E. Baldwin Professor Emeritus of Law at Yale Law School. For more than forty years, Professor Schuck has studied and written on issues related to the liability of public officials for civil damages. His works on the subject include *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281 (1980), which this Court relied on in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 n.22, 819 n.35 (1982), to create the modern doctrine of qualified immunity.

After *Harlow*, Professor Schuck studied and published analyses of qualified immunity, including *Suing Government: Citizen Remedies for Official Wrongs* (1983), and *Suing Government Lawyers for Giving Dubious Legal Advice in a National Security Crisis: Notes on How (Not) to Became a Banana Republic*, 8 U. St. Thomas L.J. 496 (2011).

Professor Schuck submits this amicus brief because the decision below departs radically from this Court's established qualified immunity framework, deepening a split among the courts of appeals on whether courts must first determine that a govern-

---

[1] Pursuant to Rule 37, *amicus curiae* affirms that all parties received timely notice of and have consented to the filing of this brief, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or his counsel made a monetary contribution to this brief's preparation or submission.

ment official was acting within the scope of his authority before proceeding to the qualified immunity analysis. This Court recently reaffirmed that "Government officials are entitled to qualified immunity with respect to '*discretionary* functions' performed in their *official* capacities." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1866 (2017) (emphases added). The decision below is inconsistent with this Court's qualified immunity jurisprudence and disturbs the careful balance between accountability and immunity that it strikes.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court designed qualified immunity to ensure that officials could continue "the unflinching discharge of their duties." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (quotation marks omitted). In doing so, the Court struck a careful balance between accountability and immunity. To reduce the social costs of inaction, the Court immunized government officials from damages claims based on their exercise of "discretionary functions" performed "within the scope of [their] duties," so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 819 n.34. The Court's subsequent decisions reflect that qualified immunity is meant to be neither so narrow as to impede the smooth functioning of government by causing government officials to refrain from doing their difficult jobs, nor so expansive as to encourage government officials to abuse their positions without fear of consequence.

Crucial to this balance is the scope of the official's authority. The costs of unlawful government action

might be acceptable when officials act within their defined duties and make reasonable mistakes, for "claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole." *Harlow*, 457 U.S. at 814 (citing Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S. Ct. Rev. 281, 324–27). But those costs are unacceptable when officials abuse their positions and act beyond the scope of their official duties, and in those cases, "damages may offer the only realistic avenue for vindication of constitutional guarantees." *Id*. The Court has therefore repeatedly recognized that to accommodate these competing concerns qualified immunity extends only to government officials who act within the scope of their authority. *See, e.g.*, *Ziglar*, 137 S. Ct. at 1866 (citing *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987)).

The decision below reflects a serious departure from this framework that disrupts the careful balance that *Harlow* created and its progeny maintained. This Court should intervene to restore that balance.

I. The reasoning underlying *Harlow* does not extend to officials acting outside the scope of their authority.

In *Harlow*, this Court "established" "the general principle of qualified immunity," *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987), relying in part on amicus's scholarly work, *see Harlow*, 457 U.S. at 814 & n.22, 819 n.35 (citing Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281

(1980)). In doing so, this Court placed a critical limitation on the defense: qualified immunity is available only when officials act within the scope of their authority.

A. Qualified immunity for government officials strikes a delicate " balance between the evils" to reach "the best attainable accommodation of competing values." *Harlow*, 457 U.S. at 813–14. On the one hand, damages lawsuits impose costs on government officials and society, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* at 814. The ever-looming threat of these suits creates incentives for government officials to refrain from action that might subject them to personal liability—even where their conduct is lawful and serves the public.

On the other hand, "damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814. For many plaintiffs, "it is damages or nothing." *Id.* (quoting *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment)); *see also* Schuck, *Suing Our Servants*, 1980 Sup. Ct. Rev. at 290 ("[C]ertain kinds of official misconduct . . . can probably be identified and punished only by such after-the-injury remedies," i.e., "a damages action.").

To balance these values, *Harlow* immunized government officials from damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known." 457 U.S. at 818. The Court reasoned that officials who have an obligation to serve the public should not be dissuaded from making the difficult "judgments surrounding discretionary action." *Id*. at 816. But neither should officials be given a "license to lawless conduct." *Id.* at 819. Qualified immunity seeks to balance these concerns by keeping "insubstantial claims" from going to trial while preserving a path for meritorious suits to proceed. *Id*. at 818.

Central to *Harlow* and the doctrine of qualified immunity are the limitations on *when* the defense is available in the first place. *Harlow* held that qualified immunity "applies only to . . . actions *within the scope of an official's duties*." 457 U.S. at 819 n.34 (emphasis added). The Court reiterated this limitation throughout the opinion. *See id.* at 815 (noting that qualified immunity applies to actions taken "within [one's] sphere of official responsibility"); *id*. at 818 (limiting immunity to "government officials performing discretionary functions").

B. This rule makes perfect sense in light of *Harlow*'s underlying rationale: officials should not be dissuaded from "the vigorous exercise of [their] *official authority*." 457 U.S. at 807 (emphasis added) (quoting *Butz* v. *Economou*, 438 U.S. 478, 506 (1978)). The key phrase, of course, is *official authority*. *Harlow*'s rationale crumbles where officials act outside the scope of their authority.

This case illustrates the point. The people of Minnesota, acting through their elected officials, have made a number of choices about how to delegate the powers of the State. Some powers have been granted

to county engineers, others to police officers, and still others to prosecutors, DMV clerks, and park rangers. The delegation of *some* powers of the State, however, does not give an officer free reign to assume *any and all* powers he or she chooses. Rather, "[t]he rule of law requires that officials be bound by the rules that a democratic society has imposed upon its public servants." Schuck, *Suing Our Servants*, 1980 Sup. Ct. Rev. at 281.

Accordingly, the public interest is not served when a county engineer disregards these rules, assumes the powers delegated to a police officer, and undertakes a traffic stop that is squarely outside of his official remit. The Minnesota Legislature is free to authorize county engineers to carry service revolvers, investigate crimes, and execute traffic stops. But it has not chosen to do so.

C. Nor did *Harlow* pull the threshold scope-of-authority limitation on qualified immunity out of thin air. Rather, *Harlow* built on this Court's earlier cases, none of which "purported to abolish the liability of federal officers for actions manifestly beyond their line of duty." *Butz*, 438 U.S. at 495; *see also Barr* v. *Matteo*, 360 U.S. 564, 572 (1959) ("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" (citation omitted)); *Procunier* v. *Navarette*, 434 U.S. 555, 561 (1978) ("[A] qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office" (quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 247 (1974))); *Wood* v. *Strickland*, 420 U.S. 308, 318 (1975) (same).

Even for those officials whose "special functions or constitutional status requires complete protection from suit," so-called "absolute immunity," that immunity only extends to actions taken "in their [authorized] functions." *Harlow*, 457 U.S. at 807. For example, legislators are immune only "in their legislative functions," and judges are immune only "in their judicial functions." *Id.* But those officials remain "accountable when they stray beyond the plain limits of their statutory authority." *Butz*, 438 U.S. at 495.

Harlow also built on the common law, which held officials liable for actions that fell outside the official scope of their duties. *See* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1350–51 (2021) (collecting cases, and noting that "the common law . . . categorically denied immunity to discretionary actions when officers *clearly* lacked jurisdiction or delegated authority"). This common law rule migrated from English to American courts, and is expressed in a number of this Court's early cases. *See In re Allen*, 119 F.3d 1129, 1130 (4th Cir. 1997) (Motz, J., concurring in the denial of rehearing en banc) ("At common law an official's immunity was limited to acts within the scope of his authority.").

* * *

In sum, the threshold scope-of-authority test is not mere dicta that the lower courts may lightly cast aside. Rather, it was integral to *Harlow*'s holding, has deep roots in this Court's precedents and the common law, and is a linchpin of the qualified immunity defense.

II. Extending qualified immunity to officials acting outside the scope of their authority undermines this Court's post-*Harlow* decisions.

Like *Harlow* itself, much of the Court's later qualified immunity jurisprudence emphasizes the doctrine's applicability to officials who exercise discretionary functions performed in their *official* capacities. *See, e.g.*, *Wood* v. *Moss*, 572 U.S. 744, 758 (2014) (qualified immunity "shield[s] officials from harassment, distraction, and liability *when they perform their duties*") (citation omitted; emphasis added); *Filarsky* v. *Delia*, 566 U.S. 377, 389 (2012) (qualified immunity prevents "unwarranted timidity in performance of *public duties*") (quotation marks omitted; emphasis added); *Anderson*, 483 U.S. at 638 (qualified immunity available to "government officials performing *discretionary functions*") (emphasis added). Dispensing with this requirement thus not only runs afoul of *Harlow*, but upsets the balance this Court has maintained in subsequent decisions.

Take *Wyatt* v. *Cole*, 504 U.S. 158 (1992), where this Court ruled that private defendants subject to § 1983 liability cannot invoke qualified immunity. *Id.* at 159. In doing so, the Court reasoned that "extending *Harlow* qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively *in their jobs*." *Id.* at 168 (emphasis added).

Ziglar v. *Abbasi*, 137 S. Ct. 1843 (2017), is similar. There, the Court described its qualified-immunity jurisprudence as holding "that Government officials are

entitled to qualified immunity with respect to '*discretionary* functions' performed in their *official* capacities." *Id.* at 1866 (quoting *Anderson*, 483 U.S. at 638) (emphases added).

III. Extending qualified immunity to officials acting outside the scope of their authority would upset *Harlow*'s careful balance.

Extending qualified immunity to acts outside the scope of an official's duty would undermine the policy considerations that underlie qualified immunity, many of which are discussed in amicus's scholarly work.

A. Several key features distinguish official conduct taken pursuant to a government official's duty to act—i.e., actions within the scope of the official's duties and authority—from the kind of private interactions that tort law is designed to manage. The decisions of "street-level" officials are made "momentarily[,] with broad discretion and little guidance[,] with little information[,] under great stress and uncertainty[,] in unfriendly surroundings[, and] under severe resource constraints." Schuck, *Suing Our Servants*, 1980 Sup. Ct. Rev. at 323. This magnifies both the risk of official error and the likelihood that such an error will cause harm. *Id.* At the same time, the opportunity cost of official *inaction* is significant from the public's perspective, and thus, in many cases, the fact that the official is compelled by duty to act reflects the public's judgment that the benefits are worth the risks. *Id.* Yet because the risk of personal liability looms larger than the diffuse costs of foregone action, rational, self-protective behavior by individual officials may bring serious harms to society.

Harlow drew upon these considerations and crafted a Goldilocks approach to official immunity—neither so narrow as to impede the smooth functioning of government, nor so expansive as to enable flagrant abuses of power. This approach rests on finely tuned policy judgments about when officials should "be made to hesitate" and when their hesitation will harm the public interest. 457 U.S. at 819. Where "an official's duties legitimately require action in which clearly established rights are not implicated," the costs of hesitation to the public at large outweigh the benefits of avoiding good-faith errors in judgment. *Id.*

But where, as here, an official lacks *any* duty or authority to act, and the official instead unilaterally takes on authority the government has not given him, there is no policy rationale for encouraging the official to act without hesitation. No public interest is served by officials diving headfirst into murky constitutional waters without clearly delineated authority as a mandate and guide. To the contrary, when a government official acts outside his lane, and has no duty to act, the balance flips.

B. A key guidepost in determining whether qualified immunity is appropriate, therefore, is the scope of an official's authority. Consider, for example, cases involving police misconduct, where qualified immunity's "clearly established" test is akin to a "fair notice" requirement. *E.g.*, *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004). When a police officer arrests a suspect, qualified immunity protects her from personal liability if she reasonably (but incorrectly) believes there is probable cause and lacks clear notice otherwise. But the same officer would plainly have notice that she cannot take a suspect's money on the ground that she

is collecting highway tolls on a toll-free road—police officers lack authority to impose highway tolls, and therefore there is no reason to grant the officer qualified immunity simply because a reasonable person could conclude that highway tolls are constitutional. In contrast to actions taken with the scope of the officer's authority, neither the public nor the courts have any articulable interest in immunizing that kind of arbitrary and unlawful conduct.

Consider, too, the scope of immunity available to police relative to other government officials. Police officers' duties often require them to make split-second decisions on the use of deadly force, navigating a "hazy border" in "an area of the law in which the result depends very much on the facts of each case." *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1152–53 (2018) (per curiam) (quotation marks omitted). But few other government officials are in such situations, and certainly not the county engineer in this case.

To illustrate, take any of this Court's qualified immunity cases involving police officers and substitute "DMV clerk" or "county engineer" for "police officer." It is highly unlikely, for example, that this Court would grant qualified immunity to a DMV clerk on her way home from work who confronted "a woman [who] was engaging in erratic behavior with a knife" and then "shot [the woman] four times through [a] fence." *Kisela*, 138 S. Ct. at 1150–51. Unlike police officers, DMV clerks are not entrusted with the power and duty to use deadly force when necessary. Thus, there is no reason to immunize DMV clerks from liability for unlawful shootings simply because a police officer could have reasonably believed that duty compelled him to intervene.

The upshot is that the scope of authority is always part of the balance that justifies qualified immunity. For the law to provide legal cover for official conduct that violates the Constitution, it is essential to first know that the conduct was within the official's job description. And the most straightforward way to assess the public interest is to look to the scope of an official's authority under state or federal law. The government is then free to expand or contract the kinds of powers granted to particular officers as policymakers deem fit.

In the mine run of cases, the scope-of-authority inquiry is easy—Section 1983 cases involving police officers, for example, virtually always include issues that are within a police officer's unique duties, such as the duty to use force when necessary. Only in truly exceptional cases—say, a county engineer who takes it upon himself to initiate lengthy traffic stops, as happened here—will the issue even be litigated.

C. Finally, any contraction in individual liability for government officials should be accompanied by both a "substantial expansion of government liability" and a "strengthening of systems of administrative control." Schuck, *Suing Our Servants*, 1980 Sup. Ct. Rev. at 345. Here, extending qualified immunity to officials who exceed their scope of authority weakens administrative control by immunizing officials who have ignored the limits placed on their power by policymakers.

The latter point is particularly important as it relates to official authority. "The capacity of agencies to achieve the desired mix of deterrence and vigorous de-

cision making . . . depends primarily upon their ability . . . to influence the conduct of their employees." Schuck, *Suing Our Servants*, 1980 Sup. Ct. Rev. at 361. Police departments, for example, are well-positioned to train officers on how to conduct lawful traffic stops, when to use force, and how much force to use. They are similarly well-positioned to apply their expertise in disciplining officers who make unlawful traffic stops or use excessive force.

But a police department is unlikely to be in a position to train or discipline a county engineer or school teacher who usurps the duties of police officers and violates the Constitution in the process. A regime in which government officials are given free rein to exceed the scope of their authority and still benefit from qualified immunity will not only deprive victims of compensation and fail to deter unlawful abuses of authority; it will lead to even more constitutional violations by immunizing officials who lack the training and accountability that otherwise enables the government to control their behavior.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HELGI C. WALKER
MATT GREGORY
Counsel of Record
TODD W. SHAW
JOHN H. HEYBURN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 887-3635
mgregory@gibsondunn.com

Counsel for Amicus Curiae

July 6, 2022