No. 24-378

In the Supreme Court of the United States

MUZAFAR A. BABAKR,
Petitioner,

v.

JACOB T. FOWLES *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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September 30, 2024

QUESTIONS PRESENTED

Under Federal Rules of Civil Procedure, a moving party is allowed an out-of-time filing if they establish excusable neglect. Fed. R. Civ. P. 6(b)(1)(B).

Under Federal Rules of Civil Procedure, summary judgment is appropriate only if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The questions presented, over two of which the courts of appeals are openly and squarely split, are:

Whether the four *Pioneer* factors set out by this Court for the test of excusable neglect carry unequal weight such that the third one outweighs all three other factors and must be the only factor to be considered for determining excusable neglect.

Whether the burden-shifting framework of summary judgment is altered when qualified immunity is raised such that the nonmoving party should bear the initial summary judgment burden.

Whether summary judgment should be granted where the evidence of the movant is contradictory.

LIST OF PARTIES TO THE PROCEEDINGS

I, Petitioner Muzafar Babakr, was the plaintiff in the district court and the appellant in the court of appeals.

Respondents Drs. Holly T. Goerdel, Jacob T. Fowles; Dorothy M. Daley; Steven W. Maynard-Moody; Charles R. Epp; Rosemary O'Leary, in their official and individual capacities; Drs. Heather Getha-Taylor; Carl Lejuez; Kristine Latta, in their individual capacities; Estate of Reginald L. Robinson; and University of Kansas, an agency of the State of Kansas were defendants in the district court and the appellees in the court of appeals.

RELATED PROCEEDINGS

This case arises out of the following proceedings:

- *Babakr v. Fowles*, No. 2:20-cv-2037 (D. Kan.) (judgment entered Jan. 13, 2023)

- *Babakr v. Fowles*, No. 23-3026 (10th Cir.) (judgment entered Apr. 5, 2024)

- *Babakr v. Fowles*, No. 23-3026 (10th Cir.) (rehearing decision entered May 23, 2024)

There are no related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

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The Tenth Circuit's opinion is unreported but is available at 2024 WL 1479693 and is reproduced at App.1a–20a. Its decision on rehearing is not reported in the Federal Reporter but is reproduced at App.21a–22a. The district court's decision granting the motion for summary judgment is unreported but is available at 2023 WL 183837 and is reproduced at App.23a–38a.

JURISDICTION

The Tenth Circuit entered judgment on April 5, 2024, and denied rehearing on May 23, 2024. On August 21, 2024, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to September 30, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 6(b)(1)(B) provides:

EXTENDING TIME. [O]n motion made after the time has expired if the party failed to act because of excusable neglect.

Federal Rule of Civil Procedure 56(a) provides:

> MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of

law. The court should state on the record the reasons for granting or denying the motion.

INTRODUCTION

This petition raises three distinct issues. First, Federal Rule of Civil Procedure 6(b)(1)(B) provides that out-of-time filings are acceptable if a party shows excusable neglect. This Court has held that the test for excusable neglect is an "equitable" one, taking into account four factors, including: (1) "the danger of prejudice to the [nonmoving party]," (2) "the length of the delay and its potential impact on judicial proceedings," (3) "the reason for the delay, including whether it was within the reasonable control of the movant," and (4) "whether the movant acted in good faith." *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993). These four factors came to be known as the "*Pioneer* factors."

Second, under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate only if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Summary judgment motions are ruled on a burden-shifting framework. Even in the context of qualified immunity summary judgment motions, this Court explained that the movant bears the "initial burden" of establishing entitlement to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 819 (1982).

Third, when ruling on summary judgment motions brought under Rule 56(a), this Court has instructed that the facts should be viewed in the light most favorable to the party opposing the motion. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

Here, I made an analysis of all "four" *Pioneer* factors for the test of excusable neglect to file my response to respondents' motion for summary judgment out-of-time. But, the Tenth Circuit affirmed the district court's decision striking my motion to file the response out-of-time by considering only a "single" *Pioneer* factor, the third factor. In so holding, the Tenth Circuit explained that considering the third *Pioneer* factor is sufficient for a "finding" of inexcusable neglect. App.11a.

As for summary judgment burden-shifting framework, the Tenth Circuit held that because the respondents—the movants—raised qualified immunity, the burden shifted to me, the nonmoving party, to establish that they had violated clearly established statutory or constitutional rights of which a reasonable person would have known. Absent my response, the Tenth Circuit held that the legal burden never shifted to the movants. App.17a–18a. Accordingly, it affirmed the grant of respondents' motion for summary judgment on my claims of First Amendment retaliation, procedural and substrative due process violations, and civil conspiracy under §1983 and a pendent common law civil conspiracy, which arose from the same nucleus of operative facts. App.17a–19a.

In not considering all four *Pioneer* factors, the Tenth Circuit ran afoul of this Court's decision in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*. *Pioneer* explicitly rejected a single-factor approach for the test of excusable neglect. 507 U.S. at 395. Because of the need for an "equitable" multi-factor test—not a

"single-factor" test—*Pioneer* held that courts should consider the four factors. *Id.*

In placing the "initial burden" of summary judgment on me, the nonmovant, the Tenth Circuit fell afoul of this Court's decision in *Harlow v. Fitzgerald*. *Harlow* explained that qualified immunity is an affirmative defense to which the movant bears the burden of proof. 457 U.S. at 815, 819. Placing the initial burden of summary judgment on the "nonmoving party" reduces no burden on public officials. And where, as here, a claim seeks injunctive relief in addition to damages, courts should have more reason placing the "initial burden" on the movant.

By failing to view the facts and draw all reasonable inferences in my favor, the Tenth Circuit flouted the clear command in *Tolan*. All that the Tenth Circuit did was to point to the existence of genuine issue of material fact, without considering it in its analysis. App.18a.

There is now a square and irrevocable circuit split on whether courts consider only the third *Pioneer* factor or all four of them when determining "excusable neglect." Six circuits—the Third, Fifth, Seventh, Ninth, Eleventh, and Federal—consider all "four" of the *Pioneer* factors in determining excusable neglect. In direct conflict, seven circuits—the First, Second, Fourth, Sixth, Eighth, Tenth, and D.C.—consider only the "third" factor in determining excusable neglect, the reason for delay.

Circuits are also intractably split over whether the movant or the nonmoving party bears the "initial burden" of summary judgment when "qualified immunity" is raised. The circuits are split three ways. The First, Second, Third, Ninth, and D.C. Circuits

place the initial summary judgment burden on the "movant" when qualified immunity is raised. Conversely, the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits place the "initial burden" on the nonmoving party. Finally, the Fourth and Eighth Circuits adopt a hybrid approach of splitting the burden between the movant and the nonmoving party—with the Fourth Circuit placing the burden of proof for the second prong of qualified immunity on the movant and the Eighth Circuit placing the burden of the first prong on the movant.

These divisions cannot stand. The *Pioneer* factors cannot be applied differently for the same test of excusable neglect merely because the motion is filed in different circuits. Likewise, which party bears the "initial burden" of summary judgment when qualified immunity is raised should not be different depending on the circuit in which the nonmoving party responds to summary judgment.

Because the answer to these questions is vitally important to all litigants pertinent to these issues, this Court should grant certiorari, vacate, and remand. Resolving questions that divide circuit courts is one of the strongest justifications for this Court's discretionary jurisdiction. S. Ct. R. 10. The Tenth Circuit's factual findings is not just erroneous—it's "outlandishly" so. The same grounds on which certiorari was granted in *Tolan* also exist here. As shown below, the Tenth Circuit left out some of the most important material facts in its factual recitation. This is not a case where there is only a scintilla of evidence for submitting the case to a jury. On the contrary, both the district court and the Tenth Circuit

below stated that there is genuine issue of material fact.

STATEMENT OF THE CASE

A. Legal Background

1. Fed. R. Civ. P. 6(b)(1)(B) provides that out-of-time filings are allowed "if the party failed to act because of excusable neglect." The definition of excusable neglect was a question left open in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). To answer that question, this Court granted certiorari in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership* and has set out an equitable "four-factor" test taking into account four factors. 507 U.S. 380, 395 (1993).[1]

Pioneer thus replaced a "single-factor" analysis of focusing only on the reason for the delay with a flexible "four-factor" analysis. "Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," the Court reasoned, "we conclude that the determination is at bottom an equitable one," *Id.*

2. Fed. R. Civ. P. 56(a), formerly codified as Rule 56(c), provides that summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the

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[1] *Pioneer* arose in a bankruptcy context under Federal Rule of Bankruptcy Procedure 9006(b)(1). Courts since then have applied the test in different contexts. *Crue v. Aiken*, 370 F.3d 668, 681 (7th Cir. 2004) (applying *Pioneer* to Fed. R. Civ. P. 6(b)(1)(B)); *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 849-50 (11th Cir. 1996) (applying *Pioneer* to Fed. R. Civ. P. 60(b)(1)); *Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004) (applying *Pioneer* to Fed. R. App. P. 4(a)(1)(A)).

movant is entitled to judgment as a matter of law." If the movant does not meet their "initial burden," the burden will not shift to the nonmoving party "*even if no opposing evidentiary matter is presented.*" *Adickes v. Kress Co.*, 398 U.S. 144, 160 (1970) (emphasis in original). Like any other motion for summary judgment, even when qualified immunity is raised, this Court has explained in *Harlow v. Fitzgerald* that the movant—not the nonmovant—bears the "initial burden of proof" of summary judgment. 457 U.S. at 815, 819. *accord Hunter v. Bryant*, 502 U.S. 224, 233 (1991) (Stevens, J., dissenting).

3. Fed. R. Civ. P. 56(a) summary judgment evidence must be viewed in the light most favorable to the nonmoving party and all reasonable inferences should be drawn in his favor. *Tolan*, 572 U.S. at 657. In *Tolan*, the Court "intervened" because of "a clear misapprehension of summary judgment standards." *Id.* at 659.

B. Procedural Background

1. In 2020, I filed the Complaint and the claims that proceeded to summary judgment were Title VI retaliation, First Amendment retaliation, procedural due process violation, substantive due process violation, civil conspiracy under §1983, and civil conspiracy under common law. R.I 608–15.[2]

Respondents moved for summary judgment on all six claims. I moved to defer but respondents opposed the motion and the district court denied the motion. I never opposed any of respondents' motions for time extension even though they are represented by

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[2] Record on Appeal "R.", Supplemental Record on Appeal "S.R.", and Volume "I, II, or III" refer to the record on appeal submitted to the Tenth Circuit.

counsel who has access to at least a dozen in-house attorneys, paralegals, support staff, advanced legal research databases, and outside attorneys. But, because of respondents' objection, the district court only partially granted my motions for time extension to respond to their summary judgment. Because my motions for time extension were only partially granted, my response was not ready by the deadline set by the district court. I filed a last motion for time extension; the district court, however, denied it.

I moved to file the response out-of-time but the district court denied the motion. The district court did not do an analysis of the *Pioneer* factors set out by this Court for the test of determining excusable neglect under Rule 6(b)(1)(B). R.II 638–39. I moved to reconsider but it was denied.

The district court then granted respondents' motion for summary judgment. Respondents raised qualified immunity for the §1983 claims—First Amendment retaliation, procedural and substantive due process violations, and civil conspiracy. The district court reasoned that because it struck my response, summary judgment was proper on these claims because I did not meet the initial burden. It held that "[w]hen a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." App.35a. The district court did not reach the merits of the summary judgment motion on these claims. App.36a. Thus, the district court did not consider any fact or evidence other than "qualified immunity" by respondents. The district court recited the facts of the case drawing from

respondents' facts. App.26a–31a. But, the district court viewed the facts in the light most favorable to respondents and drew all inferences—even inferences not supported by facts—in respondents' favor. App.32a–37a.

2. A panel of the Tenth Circuit affirmed the decisions. As for the "excusable neglect" test, the Tenth Circuit below cited *Pioneer* and identified the four factors that must be considered for a determination of excusable neglect under Rule 6(b). App.10a. However, it hewed to its precedent that the third factor, the reason for delay, including whether it was within my reasonable control, is alone sufficient for a finding of inexcusable neglect. *Id.*

I argued that the district court abused its discretion in not considering all four *Pioneer* factors in determining whether I had established excusable neglect or not to file my response to the summary judgment out-of-time under Rule 6(b). The decision below didn't consider or analyze the other three *Pioneer* factors—the danger of prejudice to the respondents, the length of the delay and its potential impact on the judicial proceedings, and whether I acted in good faith. App.12a.

Regarding the respondents' summary judgment qualified immunity defense for the §1983 claims, like the district court, the Tenth Circuit placed the "initial burden" of Rule 56(a) on me—the nonmoving party. In the absence of my response, the court concluded that the Rule 56 burden did not "shift" to the movants, the respondents. App.17a–18a.

The Tenth Circuit reasoned: "If, and only if, [I] meet this two-part test [do] [the respondents] then bear the traditional burden of the movant for

summary judgment—showing that there are no genuine issues of material fact and that [they are] entitled to judgment as a matter of law." App.17a. According to the Tenth Circuit, the respondents were only required to assert "qualified immunity."

Thus, the respondents did not need to establish that they are entitled to qualified immunity by carrying their Rule 56 "initial burden" other than raising "qualified immunity." "Merely" asserting qualified immunity, the court concluded, was sufficient for the Rule 56 burden to "shift" to me—the nonmoving party. App.17a–18a.

The Tenth Circuit viewed the Rule 56 summary judgment evidence in the light most favorable to the respondents and drew all inferences in their favor. App.3a–6a. Respondents' own account of facts is more balanced in that it contains not just the favorable facts but also some unfavorable facts to their position. R.II 12–48. The Tenth Circuit considered only the favorable facts and evidence to the respondents' position. App.3a–6a. A comparison between the respondents' facts on summary judgment, R.II 12–48, and the Tenth Circuit's recitation of facts, App.3a–6a, shows that the Tenth Circuit not only did not view the facts in my favor, it also *omitted* the unfavorable facts to the respondents' position. Both courts below alluded to the fact that there is genuine issue of material fact. The district court stated that "by failing to respond to [respondents'] Motion, [I] ha[ve] waived this claim and any arguments [I] might have made in support of it." App.37a. And the Tenth Circuit stated, "[my] focus on what [I] claim[] were genuine issues of material fact is unavailing" because I did not respond to respondent's summary judgment. App.18a. I moved

for an en banc rehearing and panel rehearing. However, the Tenth Circuit denied both rehearing en banc, as well as panel rehearing. App.22a.

REASONS FOR GRANTING THE PETITION

One of the common grounds why this Court grants certiorari is to resolve circuit splits on important questions of federal law and rules. Two of the questions here have created acknowledged nationwide circuit splits and the answer to these questions affects all litigants pertinent to the issues. Additionally, this case is an ideal vehicle to resolve the splits because the questions are mostly purely legal questions that are fully vetted. The Tenth Circuit answered the three questions incorrectly. All "four" of the *Pioneer* factors must be considered when determining excusable neglect under Rule 6(b)(1)(B). The "movant" bears the initial burden of Rule 56 even when qualified immunity is raised. Finally, Rule 56 evidence must be viewed in the list most favorable to the "nonmoving party" and all inferences should be made in their favor. This Court should grant certiorari and resolve these untenable conflicts to secure uniformity of Federal Rules of Civil Procedure.

I. The question of the application of the *Pioneer* test for determining excusable neglect is an important, frequently recurring issue over which circuits are split.

The circuits are intractably divided over the application of the "test" of the *Pioneer* factors. The Third, Fifth, Seventh, Ninth, Eleventh, and Federal Circuits consider all "four" of the *Pioneer* factors for the test of determining "excusable neglect."

1. Start with the Third Circuit. It opines that all four of the *Pioneer* factors need to be considered when determining excusable neglect. *See, e.g.*, *Drippe v. Tobelinski*, 604 F.3d 778, 785 (3d Cir. 2010); *George Harms Const. Co., Inc. v. Chao*, 371 F.3d 156, 164 (3d Cir. 2004).

The Fifth Circuit, too, held that all *Pioneer* factors need to be "considered" for the excusable neglect test. *Coleman Hammons Constr. Co. v. Occupational Safety & Health Review Comm'n*, 942 F.3d 279, 283 (5th Cir. 2019); *Stotter v. Univ. of Texas*, 508 F.3d 812, 820 (5th Cir. 2007). As well, the Seventh Circuit rules that courts "must" consider all four *Pioneer* factors including "'the danger of prejudice [to the non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.'" *Whitfield v. Howard*, 852 F.3d 656, 660 (7th Cir. 2017) (quoting *Pioneer*, 507 U.S. at 395). It also reasoned that courts abuse their discretion by not considering these factors. *Robb v. Norfolk & Western Railway Co.*, 122 F.3d 354, 363 (7th Cir. 1997).

The Ninth Circuit's precedent also "mandates" that the *Pioneer* factors must all be considered in ruling whether a party established excusable neglect or not. *M.D. v. Newport-Mesa Unified Sch. Dist.*, 840 F.3d 640, 642 (9th Cir. 2016); *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 2010); *Mendez v. Knowles*, 535 F.3d 973, 980 (9th Cir. 2008). The Eleventh Circuit has similar reasoning concerning the "requirement" to balance all the *Pioneer* factors. *Connecticut State Dental v. Anthem Health*, 591 F.3d 1337, 1356 (11th Cir. 2009); *Cannabis Act. Network v.*

City of Gainesville, 231 F.3d 761, 767 (11th Cir. 2000). Finally, the Federal Circuit also requires consideration of all four *Pioneer* factors for determining excusable neglect. *Information Systems Networks Corp. v. U.S.*, 994 F.2d 792, 796 (Fed. Cir. 1993).

2. In direct conflict, the First, Second, Fourth, Sixth, Eighth, Tenth, and D.C. Circuits adopt a "whittled down" approach of the four-factor test whereby they consider only "one factor" for determining excusable neglect, the "third factor."

The First Circuit "has repeatedly noted that "[t]he four factors do not carry equal weight; the excuse given for the late filing must have the greatest import." *Tubens v. Doe*, 976 F.3d 101, 106 (1st Cir. 2020). The Second Circuit also focuses on "'the reason for the delay, including whether it was within the reasonable control of the movant'" despite "the existence of the four-factor test in which three of the factors usually weigh in favor of the party seeking the extension.'" *Alexander v. Saul*, 5 F.4th 139, 149 (2d Cir. 2021). In the Fourth Circuit, "'[t]he most important of the[se] factors . . . for determining whether 'neglect' is '[excusable]' "is the reason for the delay." *Justus v. Clarke*, 78 F.4th 97, 108 (4th Cir. 2023).

Similarly, the Sixth Circuit focuses only on the reason for delay to the exclusion of the other *Pioneer* factors. *Nafziger v. McDermott Intern., Inc.*, 467 F.3d 514, 523 (6th Cir. 2006). The Eighth Circuit, too, focuses only on the third *Pioneer* factor. *Albright ex rel. Doe v. Mountain Home Sch. Dist.*, 926 F.3d 942, 951 (8th Cir. 2019). That is because "[t]he four *Pioneer* factors do not carry equal weight" and "the reason-for-

delay factor will always be critical to the inquiry." *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000). Though acknowledging that this Court "has said that neglect need not be "caused by circumstances beyond the control of the movant" to be excusable" and a "finding of sufficient innocence on the part of the movant is not a condition precedent to our obligation to consider the other equitable factors," the Eighth Circuit's "focus" is on the reason for delay. *Id.*

Likewise, the Tenth Circuit posits that the "third" *Pioneer* factor "outweigh[s] any countervailing factors, such as the alleged absence of prejudice to [the nonmovant]." *Marcus Food Co. v. DiPanfilo*, 671 F.3d 1159, 1173 (10th Cir. 2011). The Tenth Circuit applied the same standard here. App.12a. The D.C. Circuit also focuses on the third *Pioneer* factor. *Morrissey v. Mayorkas*, 17 F.4th 1150, 1162 (D.C. Cir. 2021). It is irrelevant if "all the other 'excusable neglect' factors—prejudice to the other party, length of any delay, and the movant's good faith—weigh in [a party's] favor.'" *Id.* at 1172.

This circuit split is acknowledged by courts and commentators. Some circuits "have transformed *Pioneer* from a balancing test into a completely different kind of framework, a de facto two-step inquiry in which the reason-for-the-delay prong precludes the consideration of any other factors." James Mooney, *Deadlines in Civil Litigation: Toward a More Equitable Framework for Granting Extensions*, 37 YALE L. & POL'y REV. 683, 698 (2019). The Second Circuit reasoned that they "focus[] on ... 'the reason for the delay, including whether it was within the reasonable control of the movant,'"

despite "the existence of the four-factor test in which three of the factors usually weigh in favor of the party seeking the extension.'" And "[s]everal of our sister circuits follow the same approach." *Alexander*, 5 F.4th at 149 (collecting cases). "Prior to the *Pioneer* decision, the courts of appeals were split over the proper interpretation of excusable neglect." Sue Patton Mosley, *Bankruptcy-Excusable Neglect-Late Filings of Bankruptcy Proofs of Claims Are Not Limited to Those beyond the Filer's Ability to Control*, 16 UALR L. J. 47, 52 (1994). But, the circuit split that *Pioneer* attempted to resolve "continues" in the post-*Pioneer* cases. In "pre-*Pioneer*" cases, some circuits adopted a "narrow approach" of considering only the reason for delay, which this Court enumerated as the third factor when deciding *Pioneer*, while other circuits adopted a more flexible approach and considered other factors. *Pioneer*, 507 U.S. at 387 n.3. In "post-*Pioneer*" cases, some circuits, including the Sixth Circuit from which *Pioneer* emanated, place so much importance on the third factor as to exclude the other three, while other circuits consider all four factors for determining excusable neglect.

3. The importance of the proper application of the *Pioneer* equitable test—including all four factors—can't be overemphasized. All litigants, plaintiffs, or defendants may be in a position of missing a deadline. Where the *Pioneer* factors are not all "considered," many *meritorious* motions will be "denied." As was the case here, an "entire case" may be lost due to not conducting the "four-factor" *Pioneer* test. The *Pioneer* test is utilized in "myriad" contexts in different cases—bankruptcy, civil, criminal—under different rules such as Fed. R. Civ. P. 6(b)(1)(B), Fed. R. Civ. P.

60(b)(1), and Fed. R. App. P. 4(a)(1)(A). Not only federal courts, but State Supreme Courts also utilize the test as a "guide" in decisions on the issue of "excusable neglect." *See, e.g.*, *PioneClark v. Baker*, 146 A.3d 326, 332 (Vt. 2016); *Puckrein v. Jenkins*, 884 A.2d 46, 57 (D.C. 2005); *Humphries v. Lewis*, 67 P.3d 333, 337 (Okla. 2003).

As a recurring issue, it's beyond any iota of a doubt that courts deal with missed deadlines daily. A basic search revealed nearly 300 cases adjudicating "excusable neglect" only in the first eight months of 2024, to say nothing of countless cases where courts "accept" out-of-time filings without doing any analysis. Circuits employing the equitable "four-factor" test have expressly rejected the whittled down "single-factor" test. On the other side, the First, Second, Fourth, Sixth, Eighth, Tenth, and D.C. Circuits have "refused" calls to abandon their seemingly "single-factor" test and adopt the traditional "four-factor" after this Court's decision in *Pioneer*.

II. Whether the nonmoving party bears the initial burden in a motion for summary judgment based on qualified immunity is an important and widely recurring issue over which circuits are split.

There is a well-recognized and entrenched conflict of authority as to which party bears the summary judgment "initial burden" when "qualified immunity" is raised. The circuits are split three ways on this question. The First, Second, Third, Ninth, and D.C. Circuits place the initial burden on the "movant."

1. In the First Circuit, the movant bears the initial burden. "Because qualified immunity is an

affirmative defense to liability, the burden is on the defendants to prove the existence of circumstances sufficient to bring the defense into play." *Alston v. Town of Brookline*, 997 F.3d 23, 50 (1st Cir. 2021).

In the Second Circuit, too, the movant "bear[s] the burden of "demonstrating that no rational jury could conclude (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct."' *Vasquez v. Maloney*, 990 F.3d 232, 238-37 (2d Cir. 2021). The position of the Third Circuit is that "[a]t summary judgment, the burden is on the officer to establish an entitlement to qualified immunity." *Peroza-Benitez v. Smith*, 994 F.3d 157, 165 (3d Cir. 2021). As well, the Ninth Circuit places the initial burden of qualified immunity-summary judgment on the moving party. "'Qualified immunity is an affirmative defense that the government has the burden of pleading and proving.'" *Lam v. City of Los Banos*, 976 F.3d 986, 997 (9th Cir. 2020).[3] Similarly, in the D.C. Circuit, "[q]ualified immunity is an affirmative defense based on the good faith and reasonableness of the actions taken and the burden of proof is on the defendant officials." *Reuber v. United States*, 750 F.2d 1039, 1058 n.25 (D.C. Cir. 1984).

2. In contrast, the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits place the initial burden on the "nonmoving party" when the movant raises qualified immunity.

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[3] The Ninth Circuit does not apply a consistent standard in the allocation of the initial burden. Some of its cases place the initial burden on the nonmoving party. *Isayeva v. Sacramento Sheriff's Dep't*, 872 F.3d 938, 946 (9th Cir. 2017).

In the Fifth Circuit, "'[a] qualified immunity defense alters the usual summary judgment burden of proof' because, to overcome qualified immunity, Plaintiffs "must rebut the defense by establishing a genuine [dispute of material fact] as to whether the official's allegedly wrongful conduct violated clearly established law.'" *Everard v. Valenciano*, 93 F.4th 903, 907 (5th Cir. 2024); *accord Solis v. Serrett*, 31 F.4th 975, 980 (5th Cir. 2022); *Kokesh v. Curlee*, 14 F.4th 382, 392 (5th Cir. 2021).

The Sixth Circuit also holds that "'[w]hen a defendant invokes qualified immunity in a motion for summary judgment, the plaintiff must offer sufficient evidence to create a genuine dispute of fact that the defendant violated a clearly established right.'" *Tanner v. Walters*, 98 F.4th 726, 731-32 (6th Cir. 2024).

Similarly, in the Seventh Circuit, "[o]nce the defense is raised, the plaintiff bears the burden of defeating it by showing that (1) the defendants violated a constitutional right and (2) the constitutional right was clearly established at the time of the violation." *Garcia v. Posewitz*, 79 F.4th 874, 879 (7th Cir. 2023). In the Tenth Circuit, "'[w]hen a defendant asserts the defense of qualified immunity, the onus is on the plaintiff to demonstrate (1) that the official conduct violated a statutory or constitutional right, *and* (2) that the right was clearly established at the time of the challenged conduct.'" *Lowther v. Children Youth & Family Dep't*, 101 F.4th 742, 756 (10th Cir. 2024) (emphasis in original). Cases are legion in the Tenth Circuit in which the summary judgment initial burden is "placed" on the nonmovant when qualified immunity is raised. *Palacios v.*

Fortuna, 61 F.4th 1248, 1256 (10th Cir. 2023); *Shepherd v. Robbins*, 55 F.4th 810, 815 (10th Cir. 2022); *A.M. v. Holmes*, 830 F.3d 1123, 1134 (10th Cir. 2016). Here, consistent with its precedent, the Tenth Circuit held that the initial burden is on me to prove that qualified immunity is unavailable. App.17a–18a.

In the Eleventh Circuit, the movant needs only to show that he was acting within "the scope of his discretionary authority," for "'[t]he burden ... [to] shift[] to the plaintiff to show that qualified immunity is not appropriate'" by "show[ing] first, that the defendant violated a constitutional right and, second, that the right was "clearly established.'" *Davis v. Waller*, 44 F.4th 1305, 1312 (11th Cir. 2022).

3. Two circuits, the Fourth and the Eight, adopt a hybrid approach whereby they "split" the summary judgment initial burden when qualified immunity is raised.

The Fourth Circuit places the initial burden of the second prong of qualified immunity on the movant. "'In the Fourth Circuit, we have a split burden of proof for the qualified-immunity defense. The [nonmoving party] bears the burden on the first ... prong, and the [movant] bears the burden on the second ... prong.'" *Jones v. Solomon*, 90 F.4th 198, 207 (4th Cir. 2024). The Eight Circuit places the burden of the first prong on the movant—establishing that there has been no violation of a constitutional or statutory right. "The burden falls on the party asserting qualified immunity[the movant] to establish the relevant predicate facts[the first prog]." *Clinton v. Garrett*, 49 F.4th 1132, 1143 (8th Cir. 2022). The nonmoving party needs to "produce evidence sufficient to create a genuine issue of fact regarding whether the [movant]

violated a clearly established right [the second prong].'" *Piper Partridge v. City of Benton*, 70 F.4th 489, 493 (8th Cir. 2023).

This circuit split is recognized by both courts and commentators. As the Fourth Circuit pointed out, "[w]ho bears the burden on qualified immunity turns out to be a surprisingly tricky question." *Stanton v. Elliott*, 25 F.4th 227, 234 n.5 (4th Cir. 2022). The Fifth Circuit also recognized its "departure" from other circuits, noting that its "rule [of placing summary judgment initial burden on the nonmovant when qualified immunity is raised] has not enjoyed universal acceptance," *Saldana v. Garza*, 684 F.2d 1159, 1163 n.14 (5th Cir. 1982) (collecting cases).

Commentators have also recognized the split, too. "[F]ive circuits[the Fifth, Sixth, Seventh, Tenth, and Eleventh] place the burden of persuasion as to both [prongs] in the qualified immunity inquiry on the [nonmoving party]." On the other hand, "five circuits[the First, Second, Third, Ninth, and D.C.] place the burden of persuasion as to [both prongs] in the qualified immunity inquiry on the [movant]." And "[f]inally, two circuits [the Fourth and the Eighth] appear to split the two major steps as between the parties." Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. Ill. U. L.J. 135, 143–45 (2012). Thus, circuits are split as to "which party bears the burden of persuasion on the qualified immunity defense." Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U. L. Rev. 1, 69–70 (1997). And "courts of appeals ... have [not] reached agreement on the proper placement of the burden of proof." Kit Kinports, *Qualified*

Immunity in Section 1983 Cases: The Unanswered Questions, 23 GA. L. REV. 597, 635 (Spring 1989).

4. Which party bears Rule 56(a) "initial burden" when qualified immunity is raised is an especially important question. The answer to that question affects all parties responding to summary judgment based on qualified immunity. Unless the movant discharges their initial burden, the burden should not be "shifted" to the nonmoving party. Placing the initial burden on the nonmoving party changes the role of the nonmoving party to the movant. Suppose the nonmoving party believes that the movant's case is so weak that they do not need to respond. In a typical Rule 56 setting, this is acceptable because unless the movant satisfies their initial burden, the burden will not shift to the nonmoving party even if the nonmoving party does not respond to the motion. But, where qualified immunity is raised, the nonmoving party "must" respond because their role is changed from being a "nonmoving party" to becoming a "movant."

As a recurring issue, courts nationwide rule daily on summary judgment motions based on qualified immunity. Qualified immunity is raised in countless contexts where public officials are sued at court. In only the first eight months of 2024, a basic search revealed about 1800 cases adjudicating motions for summary judgment where qualified immunity was raised. Therefore, it is of paramount significance for this Court to decide this question.

Only this Court can resolve the two clear, intractable conflicts—the *Pioneer* test and summary judgment burden-shifting framework. The two questions discussed above are not questions over

which only a limited number of circuits are divided. These are questions over which all circuits across the nation are divided. Further, this case provides the Court with the ideal opportunity to provide much-needed resolution on these questions and restore national uniformity in the application of the federal rules of civil procedure in question. The Court should seize the opportunity and grant certiorari.

The *Pioneer* test over which the circuits are split is the same test. Similarly, the burden shifting framework of summary judgment when qualified immunity is raised is the same burden shifting scheme. The difference in the application of the *Pioneer* test is outcome-determinative. Considering all four factors gives a different result than considering only one factor in this case and perhaps elsewhere. Placing the summary judgment initial burden on the nonmoving party is outcome-determinative in this case and likely elsewhere. Shifting the summary judgment burden to the nonmoving party without first ensuring that the movant has met their initial summary judgment burden will give a different outcome from a case where the burden isn't shifted to the nonmoving party unless the movant has satisfied their initial burden, even if the nonmoving party's response was not before the court.

III. Whether summary judgment is proper where the facts of the movant are contradictory is an important question.

While the Tenth Circuit did not consider respondents' facts when ruling on the four §1983 claims to which qualified immunity was raised, its recitation of facts, App.3a–6a., defies the clear

command in *Tolan*. When considering the summary judgment facts and evidence, this Court has clearly explained that the facts should be viewed in the light most favorable to the nonmoving party. *Torres v. Madrid*, 141 S. Ct. 989, 994 (2021).

1. Courts rule on summary judgment motions daily. Therefore, its importance can't be questioned. A lack of response to summary judgment doesn't end the case where, as here, the movants' own evidence is so contradictory as to warrant denial of summary judgment. *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1503 (D.C. Cir. 1989). There are numerous inconsistencies, incoherencies, and implausibilities in respondents' own version of facts and evidence sufficient to deny the motion. The Tenth Circuit either left out those facts or considered them in its analysis without regard to the fact that they are unsupported by or contradicted by other evidence. The Tenth Circuit should have viewed the evidence in the light favorable to me. *Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2240 n.1 (2021). If "the record blatantly contradicts [a] [party's] version of events so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a summary judgment motion." *Scott v. Harris*, 550 U.S. 372, 372 (2007). Courts disregard factual statements of a party whose version of facts is blatantly contradicted by the record. *Sauceda v. City of San Benito, Tex.*, 78 F.4th 174, 181 (5th Cir. 2023); *Kohorst v. Smith*, 968 F.3d 871, 876 (8th Cir. 2020).

2. If those unsupported or contradicted facts were not omitted in the decision below, the decision would yield a different result if the respondents were to bear their Rule 56 initial burden. For example, the factual

recitation states that my "grievance was denied" and "the University Judicial Board (Board)" has in turn "dismissed [my] appeal." App.5a. But, there is contradictory evidence that my grievance was accepted by both the College and the Board. R.II 336. The Tenth Circuit also chose to consider the fact I was placed on probation because I had "not made satisfactory progress towards [my] degree." App.5a. But, it conspicuously omitted the contradictory evidence, which states: "[I] continued to make progress toward earning [my] Ph.D. in Public Administration at the University of Kansas School of Public Affairs and Administration during the 2016-17 Academic Year." R.II 415.

3. The factual recitation also states that I was provided with an advisor, Dr. Maynard-Moody, and was asked to sit for the exam. App.5a. But, there is contradictory evidence that Dr. Maynard-Moody strongly declined to serve as my advisor when I asked him. R.II 212. And I was never provided with an advisor. Instead, as the evidence shows, Dr. Maynard-Moody was simply a member of a "committee of advisors," R.II 164, (In his role as advisor he will work with an advisory committee), an idea never heard of. I have been maintaining that no reasonable jury would find it plausible that a student has a committee/group of advisors but no individual advisor because a committee/group is larger than one. Respondents so far couldn't, can't, and will never ever be able to explain how a student can have more than one advisor but not a single advisor. To make matters worse, this committee of advisors has all declined to serve as my advisor. App.5a; R.II 212, 246. Thus, my position is this: I have asked but no one has accepted to take me on as his/her student. The school's position

is this: Three faculty members, who all declined to serve as my advisor when I asked them, agreed to be my "committee of advisors" without my asking them to do so for only one semester and for only one task. The mind stops making sense out of the school's position. This dubious claim of a "committee of advisors" for one semester and for one task makes sense only when taken as a civil conspiracy, as I argued; hence, why two counts of civil conspiracy—one under §1983 and one under common law—proceeded to summary judgment while civil conspiracy claims "rarely" proceed to summary judgment. Regarding the exam, as a senior doctoral student who had already obtained a Master's degree in Public Administration, on a Fulbright scholarship, and had been inducted to the Pi Alpha Alpha Honor Society with a 3.97 GPA and 3.8 GPA in my doctoral program, R.II 284, I was, am, and will *always* be ready to sit for my exam.

All that I asked and continue to ask is to have someone who is a specialist in my area, Organization Theory, to take me on as their student, assuming there was/is someone who has the academic credential to serve as my advisor or evaluate my exam. Most of the faculty, whether current or former, do not have any degree in Public Administration, let alone a specialization in Organization Theory. KU, School of Public Affairs and Administration, *Faculty*, https://spaa.ku.edu/people/faculty (last visited Sept. 27, 2024); KU, School of Public Affairs and Administration, *Faculty*, http://web.archive.org/web/20170721092923/http://kupa.ku.edu/faculty (July 21, 2017).

When considering only these few examples of contradictory evidence, even without more, it is not difficult to safely conclude that respondents did not meet their initial summary judgment burden and, hence, the burden would not shift to me if the respondents were to bear their Rule 56 initial burden.

IV. This case is an ideal vehicle for reaching the questions presented.

1. This case provides the ideal vehicle for resolving the two entrenched, frequently recurring, and squarely presented circuit splits over the *Pioneer* test and summary judgment burden shifting framework based on qualified immunity. The split over both issues carries enormous consequences for litigants nationwide and unacceptably threatens the uniformity of Rules 6(b) and 56(a). Only this Court can resolve the conflict and provide much-needed national uniformity. This Court's intervention is imperative because the "standard" that governs the *Pioneer* test, the summary judgment burden shifting framework, and the failure of courts to view facts in the light most favorable to the nonmoving party, are routinely outcome-determinative—as this case underscores.

2. Unlike circuit splits that involve a limited number of circuits, the excusable neglect standard and summary judgment burden shifting have split all circuits. These circuit splits are particularly intolerable because unlike circuit splits that affect certain groups of people or entities, these conflicts affect all litigants regarding the issues of excusable neglect and the burden shifting framework in summary judgment based on qualified immunity. The questions presented here are thus unusually

important and this case is the ideal vehicle for resolving them. Suffice it to say that both the district and the Tenth Circuit stated that there is genuine issue of material fact in this case. App.18a, 37a. And the arguments were exhaustively litigated and vetted below.

3. No further percolation is needed given that all circuits have decided myriad cases on all the questions. Many otherwise meritorious filings are denied because courts do not apply the *Pioneer* four-factor test. And the burden of proof will "shift" to the nonmoving party even where the movant has not met their initial burden. Many otherwise meritorious cases are lost because courts fail to view summary judgment facts in the light most favorable to the nonmoving party and make inferences in their favor.

4. Given the longstanding division among the federal courts of appeals on these questions, this Court should take this opportunity to decide the questions presented here. These issues are ripe and cry out for definitive resolutions from this Court. These conflicts are going to be difficult to live with. The consequences of giving the greatest import to the third *Pioneer* factor and placing the initial burden of summary judgment on the nonmoving party when qualified immunity is invoked are not limited to that case but have broader legal ramifications. Rule 56 is a very important rule because motions brought under the rule are dispositive. And a movant must satisfy their initial burden before shifting the burden to the nonmoving party. Rule 6(b) is also important because it determines whether a certain filing, in this case response to a dispositive motion, will be accepted or not. The issues are recurrent and will continue unless this court exercises its supervisory power.

V. The decision below is wrong.

1. The Tenth Circuit's focus on the third *Pioneer* factor while excluding the other three factors is incorrect. Under Rule 6(b), out-of-time filings are accepted if the movant shows excusable neglect. *Pioneer* defined the excusable neglect standard as "equitable." 507 U.S. at 395. Courts thus need to consider the four factors. *Stutson v. United States*, 516 U.S. 193, 197-98 (1996) (remanding case in light of *Pioneer*).

In discussing the case's procedural history, the decision below states that I filed the Complaint about two years after dismissal. App.6a. But, the decision ignores the fact that the first time the district court determined this case was pending for too long was in ruling on respondents' motion for extension of time. S. R. 22. And while I filed the lawsuit on January 21, 2020, it was not until July 16, 2020, that respondents moved to dismiss. R.I 170. The decision also states that the district court noted I was undiligent in discovery when ruling on the motion to defer. App.7a. But, despite respondents' un-cooperativeness, discovery was not extended save for a 21-day extension to give respondents time to prepare their summary judgment motion. R.I 15. There is no delay when deadlines are not extended. The decision then states that my filings routinely exceeded page limits. App.7a. But, my filings never exceeded the page limits. The summary judgment page limit was a not a local rule. It was a standing order of only the district judge to whom the case was reassigned after the late Judge Crow ruled on the motion to defer. And even that standing order stated that a party can exceed the 50-page limit upon motion.

For the four-factor *Pioneer* test, the decision reasoned that the district court considered the reason for delay, which was sufficient. App.12a. In a footnote, the decision states that I did not do a *Pioneer* analysis and the district court did not do it, either. App.11a. I made a full analysis of the *Pioneer* factors. R.III 1–6. But, the district court didn't even mention the *Pioneer* factors, let alone analyze them. R.II 638–39. And the district court didn't state that dilatory conduct and failure to work on the response until the motion to defer was denied were reasons for a finding of inexcusable neglect, *id.*, as stated in the decision, App.11a.

The decision then states that the reason for delay was not out of my control. App.13a. But, it also states that "[t]he [district] court's finding focused on the *result* of [my] conduct, not [my] intent, concluding that [my] pattern of seeking extensions at every step of the litigation caused delay, not that [I] *wanted* to cause delay." *Id.* (emphasis in original). What distinguishes excusable from inexcusable neglect is the intent. Apparently convinced that the district court misapprehend my position as wanting to delay the case, the Tenth Circuit tried to distinguish between "wanting to" and "resulting in" delay. But, the result of every extension is delay; it is the intent behind the extension that determines whether neglect is excusable or not. If the neglect is found to be inexcusable, the court thinks that the movant wants to cause delay to achieve some other purpose(s). But, if the neglect is found to be excusable, the court thinks that the movant doesn't want to delay the case, but something beyond their control prevents the filing by the deadline.

When ruling on the motion to file out-of-time or the motion to reconsider, the district court did not state that a pattern of seeking extensions caused delay, R.II 638–39, 649–52, as the decision states, App.13a. While I filed motions of time extensions in different stages of the case because I alone prosecute the case like a solo practitioner, respondents also filed many time extensions throughout, R.I 3–20, though they are represented by counsel who works with a team of at least a dozen in-house attorneys, paralegals, and support staff.

Respondents are represented by salaried counsel and I proceed pro se. Accordingly, no party has financial incentives in delaying the case. And no reasonable person would think that I myself hurt my own case. Additionally, it is defendants who have dilatory motive—not plaintiffs. Left to their own devices, plaintiffs would rather immediately obtain relief and sometimes plaintiffs obtain injunctive (immediate) relief. The decision then states that I had five months to respond to the summary judgment but spent half of it on other filings, was given three extensions, and the district court noted that no further extensions would be granted. App.13a. But, the three motions were only partially granted due to respondents' objections. The district court's note of no further extension was the result of misunderstanding my position. That is why it did not even rule on the third motion for time extension until respondents stated that they did not oppose it. R.I 18. The district court misapprehended my position because for the third motion for time extension, defense counsel asked me to assure them that my third motion would be the last one as a condition for not opposing my

motion. I told defense counsel and stated in my third motion that I could not guarantee that my response would be ready by the new due date because what happens in the future is beyond my control. I wanted to not be in a situation where I make a commitment and then fail to keep it for reasons beyond my control. But, the district court construed this statement as wanting to delay the case. Tellingly, neither the courts below nor respondents addressed this point.

Respondents agreed to the November 25, 2022 due date. Thus, if my third motion had been granted fully, given that respondents did not oppose it, my response could have been filed on time. In any event, Rule 6(b) should be applied liberally so that cases are decided on their merits. *Rachel v. Troutt*, 820 F.3d 390, 394 (10th Cir. 2016). This was the first time that I could not meet a court order and everyone may miss a deadline once. *Jennings v. Rivers*, 394 F.3d 850, 857 (10th Cir. 2005). And it was not missing the deadline without me doing anything. Rather, I filed a motion before the final deadline, but the motion was denied. I worked hard prosecuting the case all through. To lose this otherwise meritorious case for just an out of my control 12-day delay when the district court misapprehended my position, had the effect of dismissal with prejudice. Rule 1 places "justice" before "speed", so cases are ruled on their merits and parties have their day in court. And cases should be disposed on their "merits". *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Regardless, if all four *Pioneer* factors are not considered, the court abuses its discretion. *M.D.*, 840 F.3d at 643; *Cheney*, 71 F.3d at 850.

2. The Tenth Circuit's decision that the "initial burden" of summary judgment was on me, the nonmoving party, App.17a–18a, is wrong. Neither the text of Rule 56(a), nor this Court's precedent, carve out a different burden shifting standard when qualified immunity is raised. Thus, it is the movant who bears the initial burden of summary judgment even when qualified immunity is asserted. *Crawford-El v. Britton*, 523 U.S. 574, 586-87 (1998); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). And if the movant does not satisfy their initial burden, the burden does not shift to the nonmoving party. *Peroza-Benitez*, 994 F.3d at 165; *Vasquez*, 990 F.3d at 238.

Placing the initial summary judgment on the nonmoving party serves no policy or interest. Staying or limiting discovery, *see Siegert v. Gilley*, 500 U.S. 226, 232 (1991), early resolution of qualified immunity, *see Hunter*, 502 U.S. at 227, and the collateral order doctrine, *see Wyatt v. Cole*, 504 U.S. 158, 166 (1992); *Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985), enormously protect public officials from the "burden" of litigation. However, no "burden" is reduced on public officials by placing the summary judgment "initial burden" on the nonmovant. Placing the initial burden on the nonmoving party would have protected public officials from the "burden of litigation" if the movant were only to "invoke" qualified immunity. Then courts would see if the "nonmoving party" met the "initial burden" and only then would they have asked the movant to bear their burden. In reality, that is not what happens. Public officials do not, without anything more, just raise qualified immunity. Instead, they take the time to

"bear" their initial burden by setting off facts, evidence, and arguments.

Placing the initial burden on the nonmoving party changes the "position" of the nonmoving party to the movant and is unpractical. The nonmovant responds to, and does not initiate, the motion. If the movant does not present facts and arguments other than "qualified immunity," to what then will the nonmovant respond? Rather, as it always happens, the movant presents factual statements, supports them with evidence, and presents arguments—bears the initial burden. Even courts will not comprehend the response without reviewing the motion first, which necessitates that the movant bears the summary judgment initial burden. For example, a response could state, "controverted." This requires the court to read the motion to know to which factual statement does the response point.

While respondents did not specify it and the courts below did not address it, qualified immunity is not available to the extent a claim seeks injunctive relief "instead of or in addition to damages." *Pearson v. Callahan*, 555 U.S. 223, 242 (2009). And where, as here, injunctive relief is sought, courts have more reasons to place the Rule 56 initial burden on the movant. The main purpose of this lawsuit is injunctive relief—not damages. Through a scholarship from Iraqi Kurdistan, I funded my education. R.II 284. Accordingly, the injunctive relief such as reinstatement into the doctoral program is far more important for me than damages.

3. Summary judgment motions should not be lightly granted because they are dispositive—they are trial on paper. To have a somewhat balanced version

of facts, respondents themselves included some unfavorable facts to their position, especially facts about the crystal-clear contradiction of whether I had made academic progress or not. But, the Tenth Circuit omitted these material facts. App.3a–6a. The Tenth Circuit failed to view the evidence in my favor in its recitation of facts in blatant disregard of *Tolan*. "By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh[ed] the evidence" and resolved disputed issues in favor of the moving party." *Tolan*, 572 U.S. at 657); *accord Thomas ex rel. Thomas v. Nugent*, 572 U.S. 1111 (2014) (remanding case in light of *Tolan*).

At the end of the day, courts should consider all four *Pioneer* factors when determining excusable neglect under Rule 6(b)(1)(B). The movant bears Rule 56(a) initial burden even when qualified immunity is raised. Finally, a movant's contradictory evidence precludes summary judgment.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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