No. 24-_____

In the Supreme Court of the United States

MARTA SANCHEZ, ET AL.,

Petitioners,

v.

ANTHONY GUZMAN, 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

Robert E. Barnes, Esq.
Counsel of Record
BARNES LAW
700 South Flower Street
Suite 1000
Los Angeles, CA 90017
(310) 510-6211
robertbarnes@barneslawllp.com

October 21, 2024 *Counsel for Petitioner*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether a civil rights plaintiff bears the burden of disproving the affirmative defense of qualified immunity for governmental defendants or whether governmental defendants bear the burden of proving their affirmative defense of qualified immunity?

PARTIES TO THE PROCEEDINGS

Petitioners (Plaintiffs-Appellants Below)

- Marta Sanchez
- The Estate of Stephanie Lopez
- Dominic Martinez

Respondents (Defendants-Appellees Below)

- Anthony Guzman
- Luke McGrath
- Joseph Carns
- Brian Martinez

RULE 29.6 STATEMENT

None of the petitioners are nongovernment corporations. Consequently. None of the petitioners have a parent corporation or shares held by a publicly traded company.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Tenth Circuit

No. 22-1322

Marta Sanchez; The Estate of Stephanie Lopez; Dominic Martinez, *Plaintiffs-Appellants,* v. Anthony Guzman, individually; Luke McGrath, individually; Joseph Carns, individually; Brian Martinez, individually, *Defendants-Appellees.*

Date of Final Opinion: June 28, 2024

Date of Rehearing Denial: July 23, 2024

U.S. District Court for the District of Colorado

No. 19-cv-01871-RMR-MEH

Marta Sanchez, et al., *Plaintiffs,* v. Anthony Guzman, et al., *Defendants.*

Date of Final Judgment: August 30, 2022

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OPINIONS BELOW

The Opinion of the Court of Appeals is published at *Sanchez, et al. v. Guzman, et al.*, 105 F.4th 1285 (10th Cir., June 28, 2024), and is found at the Appendix that is filed with this Petition (hereinafter "App.") 1a-26a.

JURISDICTION

The Court of Appeals entered its Opinion on June 28, 2024. App.1a-26a. It issued its Order Denying Rehearing on July 23, 2024. App.88a-89a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition presents a clear legal question of great public importance in which the lower courts are badly conflicted—who bears the burden of proof for the affirmative defense of qualified immunity in civil rights cases concerning Constitutional rights?

The Tenth Circuit denied a jury trial and dismissed all claims of three plaintiffs in a case concerning police officers who fired more than forty gunshots into a car occupied by three unarmed young people as it rolled away from the police officers to a slowing stop. The plaintiffs include the estate of a vehicle occupant killed by the defendant officers in the police's rain of gunfire,

a vehicle occupant rendered paraplegic by the defendant officers in the police's rain of gunfire, and a third vehicle occupant seriously injured as he exited the vehicle to try to flee the rain of gunfire. The Tenth Circuit denied them remedy while claiming that the plaintiffs had to disprove the officers' qualified immunity defense, removing any burden whatsoever from the defendant officers to justify their actions.

A. Proceedings in the District Court Below

The original complaint in the underlying civil action was filed in the District Court on June 27, 2019, naming various defendants, including Respondents. App.33a-34a. On January 17, 2020, petitioners filed an Amended Complaint, which is the operative pleading for purposes of this Petition. App.33a.

On February 4, 2022, various defendants in the civil action, including Respondents, filed motions for summary judgment. App.36a. On July 29, 2022, District Court Magistrate Judge Michael E. Hegarty (the "Magistrate Judge") filed recommendations granting Respondents' Summary Judgment Motion (the "Recommendation"). App.55a-87a. On August 12, 2022, Petitioners filed objections to the Magistrate Judge's Recommendation. App.5a. On August 30, 2022, the District Court reviewed the Recommendation and adopted all of the Magistrate Judge's findings in full. App.5a-9a. On the same day, the District Court dismissed all of Petitioners' claims with prejudice by entering the Order of Dismissal and the Judgement of Dismissal. App.28a-29a.

B. Proceedings in the Court of Appeals Below

Following briefing and oral argument, on June 28, 2024, the Opinion was entered for publication by a

Tenth Circuit panel comprised of the Honorable Jerome A. Holmes, Chief Judge, Carolyn B. McHugh and Joel M. Carson, Circuit Judges (the "Panel"). App.1a-26a. The Opinion affirmed the Order of Dismissal by the District Court. *Id.* The grounds asserted by the Tenth Court for holding that the District Court correctly applied the burden of proof for qualified immunity were as follows:

> [W]e have consistently read the Supreme Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), as only placing the burden on government officials to assert a qualified immunity defense; after that, the burden of proof shifts to the plaintiffs to show that the officials are not entitled to qualified immunity. . . . Accordingly, [Petitioners]' contrary argument here borders on the frivolous.

App.14a-15a n.3.

On July 11, 2024, Petitioners filed a Petition for Rehearing and Rehearing *En Banc* with the Tenth Circuit (the "Petition For Rehearing"). App.90a-102a. On July 23, 2024, the Tenth Circuit entered the Order Denying Rehearing, followed by the Mandate on July 31, 2024. App.88a.

REASONS FOR GRANTING THE PETITION

This is a case that deeply splits the Circuits, a reason alone for certiorari. This is a pure question of federal law greatly benefiting from this Court's clarification, another reason for certiorari, as it is lower courts' confusion concerning this court's precedents that produced the conflicts in the Circuits on this precise question. This is also a case of compelling public importance that dictates whether injured individuals may obtain remedy when government agents violate their Constitutional rights—another reason for certiorari. These three reasons for certiorari combine to provide a uniquely compelling case for certiorari, especially as it concerns a pure question of federal law that would clarify this Court's own precedents.

I. A CIRCUIT SPLIT ON THIS CRITICAL ISSUE JUSTIFIES THIS COURT GRANTING THE PETITION FOR CERTIORARI

This Court recognizes the need to grant certiorari whenever a U.S. court of appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." U.S. Sup. Ct. R. 10(a). A deep split now splits the federal Circuits on the question of who bears the burden of proof on the affirmative defense of qualified immunity for governmental defendants. Most Circuits follow the logic that the burden for an affirmative defense rests on the defendant who uniquely holds the knowledge concerning that affirmative defense. The Tenth Circuit, in conflict with those Circuits,

misunderstood this Court's precedent by requiring civil rights plaintiffs to disprove the affirmative defense.

The Tenth Circuit decision below concluded that the plaintiff bears the burden to disprove the affirmative defense of qualified immunity for governmental actors. App.13a-15a. In so holding, the Tenth Circuit relied upon prior Tenth Circuit precedent interpreting this Court's decision in *Harlow* as follows: "We have consistently read the Supreme Court's decision in *Harlow* [], as only placing the burden on government officials to assert a qualified immunity defense; after that, the burden of proof shifts to the plaintiffs to show that the officials are not entitled to qualified immunity." App.14a-15a n.3.

Importantly, the Tenth Circuit acknowledged that their burden-shifting approach conflicted with other Circuits' interpretation of this Court's precedent. Specifically, the Tenth Circuit conceded that other Circuits hold that the "party asserting the affirmative defense of qualified immunity bears the burden of persuasion on both prongs at summary judgment." *Id.* (citing *Mack v. Yost*, 63 F.4th 211, 227 (3d Cir. 2023) ("*Mack*").[1] Indeed, most Circuits disagree with the Tenth Circuit.

The First Circuit, in direct conflict with the Tenth Circuit, places the burden of proof for the affirmative defense of qualified immunity on the defendant, not the plaintiff: "Qualified immunity is an affirmative defense, and thus the burden of proof is on defendants-

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[1] *See also*: Federal Rules of Civil Procedure, Rule 8(c) ("defendant must plead any matter constituting an avoidance or affirmative defense.").

appellants." *DiMarco-Zappa v. Cabanilla*, 238 F.3d 25, 35 (1st Cir. 2001).

The Second Circuit, in direct conflict with the Tenth Circuit, places the burden of proof for the affirmative defense of qualified immunity on the defendant, not the plaintiff: "Qualified immunity is an affirmative defense for which the defendants bear the burden of proof." *Jackler v. Byrne*, 658 F.3d 225, 242 (2d Cir. 2011).

As the Tenth Circuit acknowledged, the Third Circuit, in direct conflict with the Tenth Circuit, places the burden of proof for the affirmative defense of qualified immunity on the defendant, not the plaintiff. *Mack*, 63 F.4th at 227.[2] The Third Circuit explained that "the party asserting the affirmative defense of qualified immunity" should be the same as the party that "bears the burden of persuasion on both prongs at summary judgment." *Id.*

The Sixth Circuit, in direct conflict with the Tenth Circuit, places the burden of proof for the affirmative defense of qualified immunity on the defendant, not the plaintiff. *Alexander v. Alexander*, 706 F.2d 751 (6th Cir. 1983) ("*Alexander*"). In *Alexander*, the Sixth Circuit vacated a district court's ruling granting the defendant prison officials' summary judgment motion. *Id.* The Sixth Circuit held that the district court erred by placing the burden of proving

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[2] The Panel's Opinion acknowledged that the Third Circuit in *Mack* interprets Supreme Court precedent as placing the burden on the defense asserting qualified immunity. Notably, Westlaw now contains a single "declined to follow" flag to the Third Circuit's decision in *Mack* – to the Tenth Circuit Panel's Opinion here.

qualified immunity defense on the wrong party, the plaintiff, as opposed to the defendant; instead, the defendant must bear the burden for the judicially crafted qualified immunity defense:

> While the plaintiff in a Section 1983 action bears the burden of pleading and proving that the defendant deprived him of a federal right . . . , an assertion of qualified immunity is an affirmative defense that must be pleaded and proved by the defendant official.

Alexander, 706 F.2d at 753-754 (citing *Gomez*, 446 U.S. at 640, 100 S.Ct. at 1923) (other citations omitted) (emphasis added). Notably, the *Alexander* decision was careful to point out that its holding—that qualified immunity is an affirmative defense with the burden on the defendant to prove it—was supported by this Court's decision in *Harlow*:

> Therefore, in light of *Harlow*'s modification of the qualified immunity standard and the Supreme Court's recent instruction to this circuit to apply *Harlow* retroactively, *Wolfel v. Sanborn*, 691 F.2d 270, 271 (6th Cir. 1982), we hold that a Section 1983 defendant retains the burden of pleading the qualified immunity defense, *Harlow v. Fitzgerald*, 457 U.S. at ___, 102 S.Ct. at 2737, and proving either that the law was not clearly established at the time of plaintiff's alleged injury, or, if the law was clearly established, that he neither knew nor should have known of the relevant legal standard due to extraordinary circumstances. *Id*. at ___, 102 S.Ct. at 2739. Since the district court placed the burden of proving the qualified immunity defense on

> the wrong party, we remand this case to the district court for reconsideration of this issue in light of this opinion.

Alexander, 706 F.2d at 754.

The Eighth Circuit, in direct conflict with the Tenth Circuit, places the burden of proof for the affirmative defense of qualified immunity on the defendant, not the plaintiff: "Qualified immunity is an affirmative defense for which the defendant carries the burden of proof." *Wagner v. Jones*, 664 F.3d 259, 273 (8th Cir. 2011).

The Ninth Circuit, in direct conflict with the Tenth Circuit, places the burden of proof for the affirmative defense of qualified immunity on the defendant, not the plaintiff: "Because the moving defendant bears the burden of proof on the issue of qualified immunity, he or she must produce sufficient evidence to require the plaintiff to go beyond his or her pleadings." *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005).

The D.C. Circuit, in direct conflict with the Tenth Circuit, places the burden of proof for the affirmative defense of qualified immunity on the defendant, not the plaintiff: "[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, 1057 n.25 (D.C. Cir. 1984).

Historically, it "appeared that all of the Circuits agreed that the defendant had the burden," not the plaintiff. *DeVasto v. Faherty*, 658 F.2d 859, 865 (1st Cir. 1981) ("Under [*Gomez v. Toledo,* 446 U.S. 635, 100 S.Ct. 1920 (1980) ("*Gomez*")], the defendant in a civil

rights action has the burden of pleading and proving good faith.") (emphasis added); *Tanner v. Hardy*, 764 F.2d 1024, 1027 (4th Cir. 1985) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 819, 102 S.Ct. 2727, 2738 (1982) ("*Harlow*")) ("It is a well-established principle that qualified immunity . . . is a matter on which the burden of proof is allocated to the defendants.") (emphasis added); *Barrett v. Thompson*, 649 F.2d 1193, 1201 (5th Cir. 1981) ("Qualified immunity, however, is an affirmative defense; the burden of pleading and proving it rests with the defendant.") (citing *Gomez,* 446 U.S. at 640) (emphasis added); *Bauer v. Norris*, 713 F.2d 408, 411 n.6 (8th Cir. 1983) ("We reject appellant's contention that he was entitled to a finding of good faith immunity as a matter of law. Good faith is an affirmative defense concerning which the defendant bears the burden of pleading and proof.") (emphasis added). The Tenth Circuit conceded that other Circuits hold that the "party asserting the affirmative defense of qualified immunity bears the burden of persuasion on both prongs at summary judgment." App.14a-15a n.3 (citing *Mack*, 63 F.4th at 227). (emphasis added) Contrary to the Tenth Circuit's decision below claiming the Tenth Circuit has "consistently read the Supreme Court's decision in *Harlow*" as placing "the burden of proof [] to the plaintiffs to show that the officials are not entitled to qualified immunity," even the Tenth Circuit originally agreed that the government official asserting the defense bore the burden of proof. Specifically, in *McGhee v. Draper*, 564 F.2d 902, 913 (10th Cir. 1977) (internal citations omitted), the Tenth Circuit held:

> We agree that the trial court seems to have followed the view that the burden was on the

> plaintiff to plead a lack of good faith by the board. With that view we must disagree, feeling that the burden of pleading the qualified immunity defense and of making an affirmative showing that it was applicable was on the defendants, which they satisfied.

Conversely, only a minority of Circuits follow the Tenth Circuit's current misinterpretation of this court's precedent, imposing upon plaintiffs the burden of proving that qualified immunity does not bar their claims. *McClelland v. Katy Indep. Sch. Dist.,* 63 F.4th 996, 1005 (5th Cir. 2023) (placing the burden on plaintiffs to overcome a qualified immunity defense once asserted).

The differing and diverging opinions between lower court decisions create a cross-Circuit morass of conflicting and confusing case law, with incongruous interpretations of this Court's precedent. Due to the dramatic impact that this jury-denying burden shifting imposes on civil rights plaintiffs, the coincidence of where you reside dictates the scope of Constitutional protection and judicial remedy you are afforded in America. The Tenth Circuit and Fifth Circuit cover very large swaths of America; why should civil rights plaintiffs enjoy less access to judicial remedy simply because of where they live? These decisions return civil rights enforcement to a time where, in too many courts, civil rights were only powerless words on paper. This Circuit split alone warrants this court's grant of certiorari.

II. THIS CRITICAL ISSUE IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT

This Court recognizes the need to grant certiorari whenever a "United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10(c). This critical question of Constitutional enforcement concerning this court's prior precedents—as well as the confusing Circuit conflict interpreting those precedents, leaving civil rights in "disarray" in our courts—warrants certiorari.

The Tenth Circuit's confusion stems from its misunderstanding of this Court's precedents. Over forty years ago, this Court decided the case of *Harlow v. Fitzgerald*, 457 U.S. 800, 813-814 (1982), holding:

> The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees [citations omitted]. It is this recognition that has required the denial of absolute immunity to most public officers." (emphasis added)

Just two years before the *Harlow* decision, this Court decided the case of *Gomez*, wherein this Court openly articulated the public policy supporting placing the burden on the defendant for both pleading and proving qualified immunity, due to the nature of the judicially-created defense itself:

> Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question. . . . Our conclusion as to the allocation of the burden of pleading is supported by the nature of the qualified immunity defense. As our decisions make clear, whether such immunity has been established depends on facts peculiarly within the knowledge and control of the defendant.

Gomez, 446 U.S. at 640-64 (emphasis added). Scholars concurred. As summarized by the leading, authoritative treatise: "the ultimate burden of proof remains on the defendant." 2 Nahmod, *Civil Rights & Civil Liberties Litigation: The Law of Section 1983* at § 8.1 (2022).

While they are clear about the limits on immunity, the lower courts continue to conflict on the application of the doctrine. As stated by one authoritative treatise on the subject: "[t]he Supreme Court has never clarified whether the plaintiff or the defendant bears the burden of persuasion on the defense of qualified immunity." Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U.L. REV. 557, 596 n. 214 (1983). Thus, while the qualified immunity defense has long been recognized, its application and administration continue to perplex courts and provoke substantial scholarly debate and Circuit split. As explicated by yet another authoritative treatise:

> At one time, it appeared that all of the circuits agreed that the defendant had the burden [footnote with citations omitted]. As might be

> expected, though, a circuit split has formed over time. Commentators have pointed out this open issue for over two decades, citing conflicting decisions among the federal courts, but the disarray continues.

Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U.L.J. 135, 145 (2012) (emphasis added) (footnote with citations omitted). While the Tenth Circuit claims that this Court resolved the issue in *Harlow*, other Circuits disagree. Fellow scholars agree that "disarray continues" because this Court has actually "never clarified" the issue. *Burdens of Proof, supra,* at 143. As a legal scholar recently concluded: "among those courts dealing with qualified immunity, some have spoken generally about the burden of proof, but few have recognized the widespread disagreement on the issue and contradictory forces at play." *Burdens of Proof, supra,* at 137. It is precisely such confusion, disarray, and disunity on a pure question of federal law interpreting this court's precedents that warrant certiorari in this case.

This critical question calls for this court's clarity, and this case presents the question directly and simply: who bears the burden of proof on the affirmative defense of qualified immunity for government defendants in a civil rights case? Most Circuits, scholars, and the logic of this Court's precedents provide an answer: the burden of proof for an affirmative defense sits with the defendant, but that will not be the law until this Court makes it clear that it is the law.

III. This Critical Issue Is of Great Public Importance That Justifies This Court Granting the Petition for Certiorari

Qualified immunity is an affirmative defense designed to limit the civil damages liability of governmental actors in certain situations. As its name states, qualified immunity is not an absolute defense. Rather, as explained in nearly every decision discussing the doctrine for the past forty years, qualified immunity is an affirmative defense that "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

Shifting the burden of proof for qualified immunity from knowledgeable government defendants to civil rights plaintiffs' imbalances those judicially recognized "important interests." The First Amendment protects the right to petition the government for redress of grievances. The most essential tool to protect the right to petition is federal civil rights laws that afford judicial relief and remedy when governmental actors violate ordinary citizens' Constitutional rights. As this Court already identified: "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814.

Contrary to the Tenth Circuit, and now the Fifth Circuit, this Court's precedents indicate that, for reasons of compelling public policy, the burden of pleading and proving qualified immunity is on the defendant. Circuit Courts used to agree: the nature of the affirmative defense of qualified immunity requires that the

burden be on the party asserting the defense. Citing this Court, the Ninth Circuit held:

> The argument here centers on who has the burden of proof on the immunity defense. It is clear that qualified immunity is an affirmative defense, and we think it equally clear that the burden of proving the defense lies with the official asserting it. . . . A number of other circuits have reached the same conclusion, reading *Harlow* to say that because qualified immunity is an affirmative defense the burden of proving it lies with the defendant just as the burden of pleading the defense lies on the defendant.

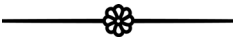
Benigni, 879 F.2d at 479-480 (9th Cir. 1988) (citing *Harlow,* 102 S. Ct. at 2736, 2738) (other internal citations omitted). In *DeNieva v. Reyes*, 966 F.2d. 480 (9th Cir. 1992) ("*DeNieva*"), the court held that the defendant government official bore the burden of proof on the elements of his qualified immunity defense. As such, the government official's declaration in support of his summary judgment motion containing: "[the] bare assertion of objective reasonableness, without any legal or factual support, cannot be construed as establishing either a disputed question of material fact or the existence of qualified immunity as a matter of law." *Id.* at 486.

This issue is compelling: it shapes access to judicial remedy for those injured by the state's actions and fundamentally defines the relationship between citizen and state. When the knowledge necessary to the affirmative defense of qualified immunity is uniquely within the possession of the defendant, shifting the burden of proof places the burden on the wrong party.

Ultimately, holding that a civil rights plaintiff bears the burden of disproving qualified immunity is tantamount to granting government officers absolute immunity for civil rights violations. It assumes immunity applies and requires a plaintiff to effectively find some exception. This Court disapproved of exactly such unbridled application of immunity to public officers in *Harlow,* stating that public policy "require[d] the denial of absolute immunity to most public officers." *Harlow*, 457 U.S. at 813-814.

The imbalance manifests in a case like this, where the Tenth Circuit burdened three young people with disproving the knowledge of the experienced police officers when those officers chose to shoot more than 40 times into a vehicle slowing to a stop and going backward away from the officers, with the officers' actions killing one, disabling another, and inflicting severe injury to a third.

Placing the burden of proving the affirmative defense of qualified immunity (a judicially created defense) onto the defendant rebalances our Constitutional republic in favor of the liberties that our civil liberty laws intend to defend.



CONCLUSION

For the reasons set forth—the split between the Circuit, an issue uniquely suited to this Court's clarity, and the critical public policy this issue determines—this petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert E. Barnes, Esq.
Counsel of Record
BARNES LAW
700 South Flower Street
Suite 1000
Los Angeles, CA 90017
(310) 510-6211
robertbarnes@barneslawllp.com

Counsel for Petitioner

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