# Balancing the Burden of Qualified Immunity: How to Better Address the Original Intentions of this Limited Defense to § 1983 Claims

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ABSTRACT

*The doctrine of qualified immunity was born in a time of turmoil in the United States. A Supreme Court-created defense meant to shield government officials from petty lawsuits, qualified immunity has become a highly criticized doctrine. This criticism is representative of the ever-growing concern that government officials, especially police officers, are far too often immune from punishment. This Note summarizes the historical background and significance of the qualified immunity doctrine within the sphere of the Civil Rights movement and its evolution into the pro-police doctrine it has become today. This Note further discusses the current circuit split concerning where the burden of proof lies in qualified immunity cases. If this doctrine is to continue, the Supreme Court must resolve this split and should return to a burden that more squarely addresses the goals of qualified immunity propagated by the Supreme Court: one that is shared between litigants, requiring the plaintiff to allege a constitutional violation and a government official defendant to show why their conduct was not clearly established, thus entitling them to a qualified immunity defense.*

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## INTRODUCTION

Derrek Monroe died in the custody of the Coleman County, Texas Sheriff's department.[1] On September 29, 2017, Mr. Monroe arrived at the Coleman County jail and completed a screening form expressing he "wished he had a way to" kill himself.[2] This form also indicated that Mr. Monroe was previously diagnosed with "some sort of schizophrenia"[3] and received psychiatric services for this as well as other instances of mental illness.[4] Subsequently, the Jail Administrator put Monroe on temporary suicide watch.[5] But, the next day, Monroe "attempted to commit suicide by hanging."[6] Jail policy mandated that an inmate with mental disabilities be transferred to a facility better equipped to manage them if that transfer was required for the inmate's protection.[7] But the staff at Coleman County Jail ignored those policies. Instead, Sheriff Codgill and her jailer, Jesse Laws, continued to hold Mr. Monroe in his cell, deciding not to seek emergency admission at a facility providing mental health treatment.[8]

At 8:37 a.m. the next morning, Mr. Monroe wrapped the telephone cord in his cell around his neck and strangled himself.[9] Laws watched Mr. Monroe strangle himself and made a phone call to Jail Administrator Mary Jo Brixey and Sheriff Codgill but did not call emergency medical services.[10] Within a

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1 Cope v. Cogdill, 3 F.4th 198, 202 (5th Cir. 2021).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.* at 203.

6 *Id.*

7 *Id.* at 226 (Dennis, J., dissenting).

8 *Id.* at 203 (majority opinion).

9 *Id.*

10 *Id.*; Cope v. Coleman Cnty., No. 6:18-CV-015-C, 2019 WL 11715574, at *2 (N.D. Tex. Apr. 25, 2019).

minute or two, Mr. Monroe's body stopped moving. Laws continued to look into the cell but never unlocked or entered it.[11] Once Brixey arrived, Laws finally entered the cell, unwrapped the cord from Mr. Monroe's body but did not attempt to resuscitate him.[12] Video surveillance of these events captured the entirety of Mr. Monroe's suicide.[13] He died the next day.[14]

Mr. Monroe's mother, Patsy Cope, brought a wrongful death claim against Coleman County, Sheriff Leslie Codgill, Jailer Jesse Laws, and Jail Administrator Mary Jo Brixey.[15] Ms. Cope claimed "deliberate indifference by the Defendants . . . [who] allegedly acted intentionally and with a conscious indifference to Mr. Monroe's rights guaranteed by the Fourteenth Amendment"[16] and brought suit under 42 U.S.C. § 1983, Civil Action for Deprivation of Rights. The United States District Court for the Northern District of Texas denied the individual Defendants' Motion for Summary Judgement on the Issue of Qualified Immunity, finding that it was a question of fact for the jury whether the defendants' conduct rose to the level of "deliberate indifference" that constitutes a deprivation of civil rights.[17]

The United States Court of Appeals for the Fifth Circuit reversed and found that all three defendants were entitled to qualified immunity, the doctrine that shields government officials from prosecution for official acts.[18] Under the Fifth Circuit's interpretation of the current state of the qualified immunity doctrine, plaintiffs must establish that the officials in question knew of the specific substantial and significant risk at issue but blatantly disregarded that risk.[19] Here, this would require Ms. Cope to establish that the guards and jail officials knew of the "substantial and significant risk" that Mr. Monroe posed to himself "but effectively

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11 *Cope*, 2019 WL 11715574, at *2 ("The video shows Laws looking into Monroe's cell several times over the next few minutes and checking his watch (obviously concerned at the amount of time that was passing while Monroe continued to have the phone cord around his neck).").

12 *Cope*, 3 F.4th at 203. After they entered his cell, Laws and Brixley called paramedics, who attempted to resuscitate Mr. Monroe at around 8:54 a.m.—seven minutes after the cell was opened and roughly twenty minutes after Mr. Monroe began to strangle himself with the cord. *Id.*

13 *See Cope*, 2019 WL 11715574, at *1–2.

14 *Cope*, 3 F.4th at 203.

15 *Cope*, 2019 WL 11715574, at *1.

16 *Id.*

17 *Id.* at *5.

18 *Cope*, 3 F.4th at 212; *see* McDonnell v. United States, 579 U.S. 550, 574 (2016) (defining an "official act" as "a decision or action on a 'question, matter, cause, suit, proceeding, or controversy'" that a public official makes).

19 *Cope*, 3 F.4th at 204–06.

disregarded it."[20] To establish this knowledge, "the plaintiff must 'identify[] a case in which an officer acting under similar circumstances was held to have violated the [Constitution], and . . . explain[] why the case clearly proscribed the conduct of that individual officer.'"[21] "While an exact case on point is not required, the confines of the officers' violation must be 'beyond debate.'"[22] Here, although Laws conceded he was aware that Mr. Monroe was potentially suicidal,[23] the Fifth Circuit still found that Laws's "decision to wait for Brixey before entering the cell did not violate any *clearly established* constitutional right" as the plaintiffs could not produce evidence of a previous case that established that waiting to provide emergency services to an inmate actively committing suicide violated the Constitution.[24] Consequently, the Fifth Circuit held that the defendants were entitled to qualified immunity.[25]

The Fifth Circuit freely recognized that Laws had knowledge of Mr. Monroe's risk of harm and that "[c]alling for emergency assistance was a precaution that Laws knew he should have taken, and failing to do so was both unreasonable and an effective disregard for the risk to Monroe's life."[26] But, because a case like this had never established this specific right before, the court concluded that Laws was entitled to qualified immunity.[27] In looking at previous caselaw to determine whether the law was clearly established, the Fifth Circuit looked to *Dyer*, a case where "officers were aware that the detainee was 'in the grip of a drug-induced psychosis' and had repeatedly 'struck his head violently against the interior of the patrol car[,]'" but where officers never sought any medical care for the detainee.[28] There, the court found "that existing precedent showed that officers who, 'despite being aware of the detainee's dire condition [and] did nothing to secure medical help' at all, were on 'fair warning' that their behavior was deliberately indifferent."[29] Differentiating Laws's actions from the officers in *Dyer* because Laws at least did "*something* . . . albeit not as promptly as should have been done[,]" the court found that, even though Laws failed to

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20 *Id.* at 207 (quoting Jacobs v. W. Feliciana Sheriff's Dep't, 228 F.3d 388, 395 (5th Cir. 2000)).

21 *Id.* at 205 (quoting Joseph *ex rel.* Estate of Joseph v. Bartlett, 981 F.3d 319, 345 (5th Cir. 2020)).

22 *Id.* (quoting Baldwin v. Dorsey, 964 F.3d 320, 326 (5th Cir. 2020)).

23 *Id.* at 207–08.

24 *Id.* at 208 (emphasis added).

25 *Id.*

26 *Id.* at 209.

27 *Id.*

28 *Id.* (quoting *Dyer v. Houston*, 964 F.3d 374, 381–85 (2020)).

29 *Id.*

call the paramedics immediately, because "[the Fifth Circuit] has not spoken directly on whether failing to call for emergency assistance in response to a serious threat to an inmate's life constitutes deliberate indifference," Laws was entitled to the qualified immunity defense.[30]

In *Cope*, the Fifth Circuit made clear that, following this decision, "promptly failing to call for emergency assistance when a detainee faces a known, serious medical emergency—e.g., suffering from a suicide attempt—constitutes unconstitutional conduct."[31] In other words, failing to call for emergency services now constitutes a "clearly established right" that, if violated, would remove an official from the protection of the qualified immunity defense. Unfortunately, the establishment of this precedent comes too late for Mr. Monroe's family.

Cases like Mr. Monroe's are far too common under today's qualified immunity jurisprudence.[32] However, even with confusion about qualified immunity among the circuits, the Supreme Court consistently declines to address questions about the doctrine.[33] Specifically, the Court has never

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30 *Id.* at 209 (citing Shepard v. Hansford Cnty., 110 F. Supp. 3d 696, 711, 713 (N.D. Tex. 2015)); *id.* ("Existing case law, therefore, was not so clearly on point as to 'place[] the statutory or constitutional question beyond debate[,]' and we conclude that the right was not clearly established." (quoting Morgan v. Swanson, 659 F.3d 359, 372 (5th Cir. 2011) (en banc))).

31 *Id.*

32 *See, e.g.*, Baxter v. Bracey, 751 Fed. App'x 869, 872 (6th Cir. 2018) (granting qualified immunity to police officers who set their police dog on an unarmed burglary suspect who attempted to hide, but, at the time of apprehension, was sitting down with his hands up because prior Sixth Circuit case law had only identified releasing a police dog on a suspect who was laying down and had not attempted to hide as "violating clearly established law"); Corbitt v. Vickers, 929 F.3d 1304, 1308, 1313–23 (11th Cir. 2019) (granting qualified immunity to a police officer who shot a ten-year-old boy—an "innocent bystander" who was lying on the ground in response to the officer's order—in the leg when aiming to shoot at the family's dog without any necessity or threat of harm from the animal because the plaintiff could not provide the court "any materially similar case" that established a Fourth Amendment violation).

33 *See, e.g.*, Baxter v. Bracey, 751 Fed. App'x 869 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862 (2020) (mem.) (denying certiorari in case questioning whether a police officer who allegedly violated plaintiff's Fourth Amendment rights when using a police dog to arrest a suspect was entitled to qualified immunity); Zadeh v. Robinson, 928 F.3d 457 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) (mem.) (denying certiorari in case questioning whether the director of a state medical who allegedly violated plaintiff's Fourth Amendment rights when executing an administrative subpoena on plaintiff's office was entitled to qualified immunity); Corbitt v. Vickers, 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) (mem.) (denying certiorari in case questioning whether officer who accidently shot a child when intending to shoot the family dog was entitled to qualified immunity because a child's right to not be accidentally shot was not clearly established); Cope v. Codgill, 3 F.4th 198 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2573 (2022) (mem.) (denying certiorari in case questioning whether jail administrators who allegedly failed to take measures to protect plaintiff from harming himself were entitled to qualified immunity); Brennan v. Dawson, 752

addressed the issue of whether it is the plaintiff's or defendant's burden to overcome a qualified immunity defense apart from making clear that this decision is within the discretion of lower courts.[34] Consequently, plaintiffs continue to suffer in circuits where they bear this burden. Many plaintiffs, like Ms. Cope, are forced to watch as courts acknowledge the wrongdoing and unreasonableness of an official's actions, yet still reward these actions by holding these officials entitled to immunity.

Although qualified immunity itself was born of good intentions meant to protect government employees from frivolous lawsuits, today's application of the doctrine has resulted in a defense that too often protects officials blatantly acting in bad faith.[35] Therefore, to address this inequity, instead of placing the full burden on plaintiffs to establish both wrongdoing and a clearly established right, the Supreme Court should resolve the circuit split that currently exists and treat qualified immunity as an affirmative defense, placing the burden on the government official to prove their entitlement to a qualified immunity defense. By following the analysis used by the Fourth Circuit and splitting the burden of proof between plaintiffs and defendants, the Court can more effectively achieve the dual goals of qualified immunity: protecting government officials from frivolous lawsuits while still providing justice to individuals whose rights have been violated.

Part I of this Note will first examine the historical background of the qualified immunity defense and the state of the doctrine today. Part II will further examine the current circuit split that exists today concerning the burden of proof in qualified immunity cases. Part III will argue that the majority of circuits incorrectly place the burden on plaintiffs in qualified immunity cases. Additionally, this Note will advocate instead for courts to treat qualified immunity as an affirmative defense by first requiring the plaintiff to establish the constitutional violation and then shift the burden to the official to prove that the violation was not clearly established, therefore

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Fed. App'x 276 (6th Cir. 2018), *cert. denied*, 141 S. Ct. 108 (2020) (mem.) (denying certiorari in case questioning whether county sheriffs who allegedly violated plaintiff's Fourth Amendment rights by searching the curtilage of plaintiffs' home without a warrant and arresting plaintiff without probable cause were entitled to qualified immunity).

34 *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) ("[J]udges of the district courts and the courts of appeal should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances.").

35 *See* Joanna Schwartz, *Qualified Immunity Is Burning a Hole in the Constitution*, POLITICO (Feb. 19, 2023, 7:00 AM), https://www.politico.com/news/magazine/2023/02/19/qualified-immunity-is-burning-a-hole-in-the-constitution-00083569 [https://perma.cc/4BKK-R2Q5] ("Although a 'good faith' defense was the impetus for qualified immunity, today, officers are entitled to qualified immunity even if they act in *bad faith*, so long as there is no prior court decision with nearly identical facts.").

entitling them to the affirmative defense of qualified immunity. This split burden follows the standard articulated by the Fourth Circuit while also adhering more closely to the standard originally created for qualified immunity cases than current practice. Finally, this Note will include an additional suggestion for a return to the common law standard used in evaluating the applicability of immunity defenses, requiring officials to show that their actions were done reasonably and in good faith.

## I. BACKGROUND: WHAT IS QUALIFIED IMMUNITY AND WHERE DID IT COME FROM?

The doctrine of qualified immunity shields government officials who are sued in their personal capacity from liability as long "as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[36] This Note will focus solely on qualified immunity as a defense to suits filed under Title 42 Section 1983, Civil Action for Deprivation of Rights, more commonly known as Section 1983 claims.[37] This law opened the door for individuals to bring suit against government officials who have violated their federal constitutional rights.[38] With this right to sue came the creation of the qualified immunity defense that—more often than not—protects government officials from these claims.[39] The following sections will provide a brief overview of where qualified immunity came from and its evolution over the last half-century.

### *A. Qualified Immunity and the Ku Klux Klan*

The first version of qualified immunity was created in 1967 by the Supreme Court as a limited defense to Section One to the Civil Rights Act of 1871—also referred to as the "Ku Klux Act."[40] Following the ratification of the Fourteenth Amendment, promises of civil rights and equality were continually challenged by the terrorism of the Ku Klux Klan, predominantly

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36 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

37 42 U.S.C. § 1983.

38 *See* Scott Michelman, *Happy 150th Anniversary, Section 1983!*, ACLU D.C. (Apr. 20, 2021, 4:15 PM). https://www.acludc.org/en/news/happy-150th-anniversary-section-1983 [https://perma.cc/2BPN-DFL9].

39 From 2017–2019, appellate courts granted qualified immunity to police officers in fifty-seven percent of cases where the official attempted to assert the defense. *See* Andrew Chung et al., *For Cops Who Kill, Special Supreme Court Protection*, REUTERS INVESTIGATES (MAY 8, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-scotus [https://perma.cc/V6UE-HE7Z].

40 April Rodriguez, *Lower Courts Agree—It's Time to End Qualified Immunity*, ACLU (Sept. 10, 2020), https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity [https://perma.cc/F9GQ-2E74].

in the Reconstruction South.[41] Many members of the Ku Klux Klan were simultaneously members of law enforcement, making it nearly impossible to enforce the newly established laws of the Reconstruction Era.[42] This fear that the federal government would not have the ability to "end and prevent terror in the South" led Congress to adopt the Ku Klux Act of 1871.[43] This Act granted a private right of action for victims of racial violence to bring lawsuits for damages in federal court to enforce the constitutional protections guaranteed within the Act.[44] Section One of this Act, subsequently codified in the United States Code as Section 1983, provides the vehicle into court for the majority of litigants bringing claims against government officials for constitutional violations.[45] By "uniquely target[ing] state officials who 'deprived persons of their constitutional rights," Section 1983 "had the Klan 'particularly in mind"[46] in order to "respond to 'the reign of terror imposed by the Klan upon black citizens and their white sympathizers in the Southern States.'"[47] However, in several decisions after the 1871 passage of the Ku Klux Act, the Supreme Court began limiting both the Fourteenth Amendment's reach and the statutes that had been passed in order to strengthen it.[48]

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41 *See* Paul B. Gardner, *Private Enforcement of Constitutional Guarantees in the Ku Klux Act of 1871*, 2 CONST. STUD. 81, 82–83 (2016); *see also* Jamison v. McClendon, 476 F. Supp. 3d 386, 398–402 (S.D. Miss. 2020) (discussing the establishment of the Ku Klux Klan in 1866 and its spread throughout the Reconstruction South, resulting in huge waves of murder, arson, and terrorism towards Black Americans).

42 *See Jamison*, 476 F. Supp. 3d at 399 (citing Robin D. Barnes, *Blue by Day and White by (K)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 IOWA L. REV. 1079, 1099 (1996)); Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L.J. 155, 156–57 (1995) ("The Klan overwhelmed civil government and the administration of civil and criminal justice in portions of the Southern states.").

43 Gardner, *supra* note 41, at 82–83 (noting that the Civil Rights Act created a private enforcement mechanism against state actors in part because the Ku Klux Klan terrorized freed slaves "often with the encouragement and complicity of local authorities"); *see also Jamison*, 476 F. Supp. 3d at 397 ("The Reconstruction-era Congress passed legislation to protect the freedoms granted to those who were recently enslaved.").

44 Gardner, *supra* note 41, at 82.

45 Rodriguez, *supra* note 40.

46 *Jamison*, 476 F. Supp. 3d at 400 (quoting Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 485 (1982)).

47 *Id.* at 399 (quoting Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (mem.) (Thomas, J., dissenting from the denial of certiorari)).

48 *See Jamison*, 476 F. Supp. 3d at 402–09 (chronicling the narrowing of the "scope and effectiveness of Section 1983" after the Supreme Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961)).

### *B. The Lack of Qualified Immunity at Common Law*

While Section 1983 addresses constitutional violations, there is no constitutional basis nor common law basis for the immunity used to defend officials accused of these violations.[49] Considered a "nominal[] interpretation of our principal federal civil rights statute," Section 1983 makes no mention of any type of immunity, especially not qualified immunity.[50] Before the Supreme Court's creation of the modern qualified immunity doctrine, constitutional claims generally did not allow for any defense to liability outside of legality.[51] For example, in an 1804 decision, Chief Justice John Marshall acknowledged the good-faith intentions behind a ship captain's decision to unlawfully seize a Danish ship but still held that the Captain's actions were unlawful, regardless of their good-faith basis.[52] Here, the only defense to a constitutional violation was that the actions taken were actually lawful.

However, after the passage of Section 1983, this requirement of legality seemed to fade into a less stringent standard for escaping liability. Still, until 1880, the Court continued a practice of "holding officers liable for injuries resulting from the enforcement of unconstitutional acts."[53] In 1915, the Supreme Court again rejected any "good-faith defense" to constitutional violations in *Myers v. Anderson*,[54] holding that under Section 1983, the only relevant issue in addressing an official's liability was whether their actions were unconstitutional or not, without ever needing to reach a decision on whether their actions contained malice.[55] This line of cases demonstrates the founding-era Supreme Court's desire to hold officials accountable for unconstitutional violations. But beginning in the 1960s, the modern-era Supreme Court began to degrade this legality-only defense that seemed to apply in constitutional violation cases.

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49 JAY SCHWEIKERT, QUALIFIED IMMUNITY: A LEGAL, PRACTICAL, AND MORAL FAILURE 3 (2020), https://www.cato.org/sites/cato.org/files/2020-09/PA%20901_1.pdf [https://perma.cc/CK2H-PMDG] ("Qualified immunity lacks any valid legal foundation.").

50 *Id.*

51 *Id.* at 4 ("And as many scholars over the years have demonstrated, these Founding Era lawsuits did not generally permit a good-faith defense to constitutional violations . . . . In other words, the officer's only defense was legality, not good faith.").

52 *See id.* (citing Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804)).

53 *Id.* (quoting Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 MINN. L. REV. 585, 585 (1927)).

54 238 U.S. 368 (1915).

55 *See* SCHWEIKERT, *supra* note 49, at 4–5 (citing *Myers*, 238 U.S. at 371, 378–79).

### *C. Qualified Immunity in the 20th Century*

In the 1967 case *Pierson v. Ray*,[56] the Supreme Court examined the applicability of qualified immunity under Section 1983 to police officers who falsely arrested a group of Black and white clergymen taking a prayer pilgrimage from New Orleans to Detroit in order to promote racial equality and integration.[57] The officers claimed they "should not be held liable if they acted in good faith and with probable cause in making an arrest under a statute they believed to be valid."[58] In analyzing the officers' claims, the Court looked to the common law and found that police officers were not absolutely immune from Section 1983 claims because the common law never granted that type of immunity.[59] But, in looking to the common law, the Court attempted to read qualified immunity in harmony with principles of basic tort immunities and defenses.[60] Finding that the "common-law action for false arrest and imprisonment" afforded law enforcement officers a "defense of good faith and probable cause," the Supreme Court extended that standard to actions under Section 1983, at least in the context of constitutional violations that mirrored these common law actions.[61]

In *Pierson*, the Court held that good faith and probable cause were available as a defense to a Section 1983 claim, entitling officials to qualified immunity. However, the Court found that there were still questions of fact a jury needed to determine concerning whether the officers did actually arrest petitioners in good faith such that the arrest was constitutional.[62]

Since *Pierson*, the Supreme Court's qualified immunity jurisprudence has shifted away from a focus on the good-faith defense and instead to an objectively reasonable standard that has allowed officers to claim qualified immunity in cases that seem objectively unreasonable. In *Harlow v. Fitzgerald*,[63] now seen as the seminal case concerning qualified immunity,[64] the Court rejected the good-faith requirement and instead found that good

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56 386 U.S. 547 (1967).

57 *Id.* at 552.

58 *Id.* at 555.

59 Ziglar v. Abbasi, 582 U.S. 120, 157 (2017) (Thomas, J., concurring) (characterizing the *Pierson* decision).

60 *Pierson*, 386 U.S. at 553–57; *see also Ziglar*, 582 U.S. at 1870 (Thomas, J., concurring).

61 *Pierson*, 368 U.S. at 557; *see also* Jamison v. McClendon, 476 F. Supp. 3d 386, 403 (S.D. Miss. 2020) (interpreting *Pierson* as holding "that officers should be shielded from liability when acting in good faith—at least in the context of constitutional violations that mirrored the common law tort of false arrest and imprisonment").

62 *Pierson*, 386 U.S. at 557 (1967).

63 457 U.S. 800 (1982).

64 *See* Teressa E. Ravenell & Riley H. Ross III, *Qualified Immunity and Unqualified Assumptions*, 112 J. CRIM. L. & CRIMINOLOGY 1, 5 (2022).

faith should be irrelevant to an official's entitlement to qualified immunity.[65] The Court's jurisprudence continues not only to reflect a desire to leave the doctrine relatively undisturbed and within the discretion of the lower courts,[66] but it has also emphasized that the applicability of the qualified immunity defense is a question of law, and, therefore, it is most easily resolved at the summary judgement stage.[67]

In *Harlow*, the Court asserted that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgement."[68] Specifically, the Court identified summary judgement as the appropriate time for a judge to determine both "the currently applicable law" and "whether the law was clearly established at the time an action occurred,"[69] and highlighted that determining the threshold immunity question at summary judgment would spare government officials from "the costs of trial" and "the burdens of broad-reaching discovery,"[70] consistent with its earlier holding in *Butz v. Economou*.[71]

Also in *Harlow*, the Court recognized how the qualified immunity defense for government officials reflects an attempt at balancing two competing values: "the importance of a damages remedy to protect the rights of citizens" versus "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[72] However, the current state of the qualified immunity doctrine seems to give more weight to protecting officials than to allowing citizens an avenue for protecting their rights.[73]

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65 *Harlow*, 457 U.S. at 818–19; *see* Schwartz, *supra* note 35.

66 *See supra* note 33.

67 *Harlow*, 457 U.S. at 818; Crawford-El v. Britton, 523 U.S. 574, 600 (1998) (acknowledging that in most cases "summary judgement serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial").

68 *Id.*

69 *Id.*

70 *Id.* at 817–18.

71 438 U.S. 478 (1978).

72 *Harlow*, 457 U.S. at 807 (quoting *Butz*, 438 U.S. at 504–06).

73 *See* Jamison v. McClendon, 476 F. Supp. 3d 386, 403–04 (S.D. Miss. 2020) (noting that "[a] review of our qualified immunity precedent makes clear that the Court has dispensed with any pretense of balancing competing values" and collecting cases that demonstrate a strong deference to public officials in the qualified immunity context).

### *D. Qualified Immunity Today*

Modern qualified immunity jurisprudence continues to reflect the Court's attempt to balance these values. In *Ziglar v. Abbasi*,[74] the Court laid out the current state of the qualified immunity defense when determining that the invocation of qualified immunity "turns on the 'objective legal reasonableness' of the official's acts."[75] This reasonableness of official action "must be 'assessed in light of the legal rules that were clearly established at the time [the action] was taken.'"[76] The Supreme Court, along with every circuit, has made it clear that "[t]he dispositive question is 'whether the violative nature of particular conduct is clearly established.'"[77] In sum, officials will only be found to have violated a right that was clearly established if there is a case "directly on point"[78] where "'in the light of pre-existing law,' the unlawfulness of the officer's conduct" is "apparent."[79]

The Court reasoned that subjecting officers to liability for violations of law that were not clearly established would "disrupt the balance that [its] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties."[80] As a practical matter, it would be challenging for officials "[to] reasonably anticipate when their conduct may give rise to liability for damages." For these reasons, the state of the qualified immunity doctrine today gives officials significant "breathing room to make reasonable but mistaken judgements about open legal questions."[81] However, this results in a defense jurisprudence that protects officials from almost all actions, regardless of their level of atrocity.[82]

The Supreme Court's commentary on what is required to deem a right "clearly established" has not made the question any clearer for lower courts. In *Mullenix v. Luna*,[83] the Court reiterated that a previous case does not have

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74 582 U.S. 120 (2017).

75 *Id.* at 151 (quoting *Harlow*, 457 U.S. at 819).

76 *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987)).

77 *Id.* (quoting Mullenix v. Lua, 577 U.S. 7, 12 (2015) (per curiam)).

78 *Id.* (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

79 *Id.* (quoting *Anderson*, 483 U.S. at 640).

80 *Id.* at 151–52 (quoting Davis v. Scherer, 468 U.S. 183, 195 (1984)).

81 *Id.* at 150 (quoting *Ashcroft*, 563 U.S. at 743).

82 *Id.* at 152 (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)) ("To determine whether a given officer falls into either of those two categories, a court must ask whether it would have been clear to a reasonable officer that the alleged conduct 'was unlawful in the situation he confronted.' If so, then the defendant officer must have been either incompetent or else a knowing violator of the law, and thus not entitled to qualified immunity. If not, however—*i.e.*, if a reasonable officer might not have known for certain that the conduct was unlawful—then the officer is immune from liability.").

83 577 U.S. 7 (2015).

to consist of exactly the same facts, but existing precedent must still put the existing constitutional question beyond debate.[84] Most lower courts find that the right must be sufficiently established so that *every* reasonable official would understand that their actions violate a plaintiff's rights.[85] Recently, "clearly established" appears to mean that existing precedent must have definitively resolved the statutory or constitutional question, making it indisputable that an official knew their actions were unconstitutional.[86]

In practice, this interpretation of "clearly established" results in cases where government officials "cannot be held liable unless *every* reasonable officer would understand that what he is doing violates the law"—i.e., that it was "beyond debate that [the officer] broke the law."[87] This results in courts refusing to find clearly established violations of rights because of "minor factual distinctions" between the established law and the current case before them.[88] Furthermore, as pointed out by the Fifth Circuit, it is inconsequential whether "we are morally outraged, or the fact that our collective conscience is shocked by the alleged conduct . . . [because it] does not mean necessarily that the officials should have realized that [the conduct] violated a constitutional right."[89] This analysis has resulted in a significant departure from the common law standard that required an officer to prove their actions were done in good faith considering that today, "[e]ven evidence that the officer acted in bad faith is now considered irrelevant."[90] It is important to note that, although qualified immunity is a defense to constitutional violations, the analysis concerning the "clearly established" requirement is neither in the Constitution nor a federal statute but was solely created by the Supreme Court in *Harlow*.[91]

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84 *Id.* at 11–12; *see also* Jamison v. McClendon, 476 F. Supp. 3d 386, 404–05 (S.D. Miss. 2020) (charting the history of the "clearly established' requirement").

85 According to the Supreme Court in *Wilson v. Layne*, 526 U.S. 603 (1999), parties could look to "a consensus of cases of persuasive authority" to show that a reasonable official should have known their actions were unlawful. *Id.* at 617.

86 *See Jamison*, 476 F. Supp. 3d at 405–09 (collecting cases demonstrating the "fool's errand" of "ask[ing] people who love to debate whether something is debating").

87 *Id.* at 404 (quoting McCoy v. Alamu, 950 F.3d 226, 233 (5th Cir. 2020)).

88 *See generally* Baxter v. Bracey, 751 F. App'x 869 (6th Cir. 2018) (finding officers' actions releasing a police dog against an unarmed individual raising his hands in the air were not clearly established as unconstitutional because closest previous case addressed officers releasing a police dog on an individual lying on the ground, not with his hands in the air).

89 *Id.* at 404–05 (quoting Foster v. City of Lake Jackson, 28 F.3d 425, 430 (5th Cir. 1994)).

90 *Id.* at 405.

91 *Id.* at 404 (characterizing the Supreme Court's decision in *Harlow v. Fitzgerald* as inventing the "clearly established" requirement as a hurdle for plaintiffs to overcome in order to overcome the qualified immunity defense).

From the common law standard stemming from tort immunities requiring officials to demonstrate good faith to the intended protections against the Ku Klux Klan and the "clearly established" standard seen today, the Supreme Court has consistently had its hands in the formation of the qualified immunity mess lower courts must attempt to interpret. The "good faith" and "probable cause" standard first articulated in *Pierson*[92] has stretched to the qualified immunity doctrine seen today: "An officer who has violated the Constitution cannot be held liable for damages unless the violation was 'so clearly established' in the law that any reasonable officer would have known that their actions were unlawful."[93] As the Supreme Court has reiterated, under today's qualified immunity doctrine, the defense "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[94]

### *E. Qualified Immunity at the Earliest Stages of Litigation*

Determining whether an official is entitled to the qualified immunity defense should be done at the "earliest possible stage in litigation."[95] Consequently, most of the qualified immunity analysis is done at the motion to dismiss or summary judgement stage.[96] Although these stages of litigation require the moving party to meet different legal standards, both stages occur before the merits of the case are reached.[97]

Under Federal Rule of Civil Procedure 12(b)(6), an opposing party can file a motion to dismiss for failure to state a claim for which relief can be granted.[98] To survive this motion to dismiss, the plaintiff must plead sufficient facts to "state a claim to relief that is plausible on its face."[99] In practice, this requires courts to take the sum of a plaintiff's factual allegations, disregarding any legal conclusions, to determine whether they

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92 Pierson v. Ray, 386 U.S. 547, 557 (1967).

93 Rodriguez, *supra* note 40.

94 Ziglar v. Abbasi, 582 U.S. 120, 152 (2017) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

95 Pearson v. Callahan, 555 U.S. 223, 232 (2009) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991)).

96 SCHWEIKERT, *supra* note 49, at 9 ("Qualified immunity is most frequently raised by defendants at the summary judgement stage . . . .").

97 *Dispositive Motions in Federal Court*, Practical Law Litigation, THOMSON REUTERS (2023) ("[M]otions to dismiss[] and motions for summary judgement all may result in the disposition of claims without a trial.").

98 FED. R. CIV. P. 12(b)(6).

99 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

amount to a plausible complaint against the defendant.[100] In qualified immunity cases, this means plaintiffs must be able to plead allegations that sufficiently establish the defendant's violation of their constitutional right and that the right was clearly established at the time the violation occurred.[101]

In contrast, summary judgement is granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgement as a matter of law."[102] Courts are required to view evidence in the light most favorable to the nonmoving party and are prohibited from making any credibility determinations at this stage.[103] To survive a motion for summary judgement, the nonmovant must identify actual admissible evidence, including depositions, affidavits, or other materials, that demonstrates there is a dispute of material fact for the case to continue.[104]

At the summary judgment stage, the plaintiff claiming a Section 1983 civil rights violation must establish with admissible evidence that there is a factual dispute about whether a government official is entitled to qualified immunity or not. This means that a court must look at the plaintiff's allegations that "(1) the official violated a statutory or constitutional right, and [whether] (2) that right was 'clearly established' at the time of the challenged conduct."[105]

The Supreme Court made clear in *Pearson v. Callahan* that lower courts have discretion to determine which of these qualified immunity prongs are analyzed first at the summary judgement stage.[106] Consequently, not only does this mean that "courts are permitted to grant qualified immunity without ever deciding whether a constitutional violation occurred in the first place,"[107] but with the current state of qualified immunity law, the analysis "more often prevent[s] cases from proceeding past summary judgement."[108]

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100 *Id.* ("A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

101 Pearson v. Callahan, 555 U.S. 223, 232 (2009). The Court in *Pearson* held that this two-pronged test need not be applied in any particular order. *Id.* at 236.

102 FED. R. CIV. P. 56(a).

103 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254–55 (1986).

104 FED. R. CIV. P. 56(c)(1)(A).

105 Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

106 *Pearson*, 555 U.S. at 236.

107 SCHWEIKERT, *supra* note 49, at 8 ("The practical result of this discretion is that qualified immunity not only denies justice to victims whose rights have been violated, but it also stagnates the development of the law going forward [because] if courts refuse to resolve legal claims because the law was not clearly established [without acknowledging the rights violations] then the law will never become clearly established.").

108 Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 48 (2017).

## II. THE CURRENT CIRCUIT SPLIT

The Supreme Court has repeatedly established that it is within the discretion of lower courts to decide where the burden lies and which step of the qualified immunity analysis to examine first in establishing whether a defendant is entitled to the protection of qualified immunity.[109] This has resulted in a split among the circuits, with the majority placing the burden on the plaintiff to establish why the official is not entitled to qualified immunity. A minority of circuits place this burden on the defendant. The Fourth Circuit, however, has created its own application: it places the burden of the first prong on the plaintiff and the second prong on the defendant.

### *A. The Supreme Court's Failure to Address the Burden Issue*

The Supreme Court's failure to rule on both the proper order in which to analyze the two qualified immunity prongs or the proper party that must bear the burden has resulted in a circuit split. Recently, the Court again refused to address the burden question when denying certiorari in *Anderson v. City of Minneapolis*.[110] The main question presented in that case asked the Court to explicitly decide "[w]hether the burden of persuasion in qualified immunity cases should be, in part or entirely, on the plaintiff as held by the Eighth Circuit . . . or whether it should be placed on the defendant."[111]

The qualified immunity doctrine effectively bars many Section 1983 plaintiffs from ever reaching the merits of their case because the majority of these cases are decided at the summary judgement stage. Therefore, Section 1983 plaintiffs rarely have the opportunity to present the full merits of their claims in front of a fact finder.[112] Although the Supreme Court has been clear that these cases should be dismissed "at the earliest possible stage,"[113] the

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109 *Pearson*, 555 U.S. at 236 ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

110 141 S. Ct. 110 (2020) (mem.).

111 Petition for Writ of Certiorari at *i–ii*, Anderson v. City of Minneapolis, 934 F.3d 876 (8th Cir. 2019), *cert. denied*, 141 S. Ct. 110 (2020) (mem.) (No. 19-656).

112 *See* Jamison v. McClendon, 476 F. Supp. 3d 386, 405 (S.D. Miss. 2020) (quoting Mark R. Brown, *The Fall and Rise of Qualified Immunity: From* Hope *to* Harris, 9 NEV. L.J. 185, 195 (2008)) ("The Supreme Court has also given qualified immunity sweeping procedural advantages. 'Because the defense of qualified immunity, is in part, a question of law, it naturally creates a super-summary judgement right on behalf of government officials. Even when an official is not entitled to summary judgement on the merits—because the plaintiff has stated a proper claim and genuine issues of fact exist—summary judgement can still be granted when the law is not reasonably clear.'").

113 *See* Schwartz, *supra* note 108, at 48 ("The Court's qualified immunity decisions paint a clear picture of the ways in which the Court believes the doctrine should operate: it should

Court's jurisprudence has been significantly less clear on whose burden it is at that earliest possible stage to prove whether the qualified immunity defense applies.[114] The Supreme Court addressed this question once in *Gomez v. Toledo*[115] and determined that qualified immunity is an affirmative defense where the defendant bears the burden.[116]

In *Gomez*, the petitioner brought a Section 1983 claim against the Superintendent of the Police of the Commonwealth of Puerto Rico, alleging the superintendent violated his constitutionally guaranteed right to procedural due process.[117] The district court dismissed the case pursuant to the defendant's motion to dismiss for failure to state a claim, finding that the plaintiff failed to allege that "the official acted in bad faith."[118] The First Circuit affirmed.[119] On appeal, the Supreme Court reversed the First Circuit, explicitly holding that plaintiffs have no pleading burden in qualified immunity cases other than to plead the two allegations required under the statute to state a cause of action: (1) that a person has deprived the plaintiff of a constitutional right and (2) that "the person who has deprived [the plaintiff] of that right acted under color of state or territorial law."[120] The Court went even further to deny the existence of a specific pleading burden on plaintiffs in qualified immunity cases by explaining that "this Court has never indicated that qualified immunity is relevant to the existence of a plaintiff's cause of action; instead we have described it as a defense available to the official in question."[121] In determining that "the nature of the qualified immunity defense" makes the only rational conclusion for the burden of addressing qualified immunity to fall on the defendant as "whether such

be raised and decided at the earliest possible stage of the litigation (at the motion to dismiss stage if possible), and it should, therefore, protect defendants from the time and distractions associated with discovery and trial in insubstantial cases.").

114 *See* Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 142 (2012) (quoting Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgement and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 91 (1997)) ("The Supreme Court may have smoothed out some of the edges of qualified immunity law over time, but it has left the law regarding burdens of persuasion and production quite nebulous. 'The Supreme Court has never clarified whether the plaintiff or the defendant bears the burden of persuasion on the defense of qualified immunity.'").

115 446 U.S. 635 (1980).

116 *Id.* at 640 (citations omitted) ("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. Since qualified immunity is a defense, the burden of pleading it rests with the defendant.").

117 *Id.* at 636.

118 *Id.* at 637–38.

119 *Id.* at 638.

120 *Id.* at 640.

121 *Id.*

immunity has been established depends on facts peculiarly within the knowledge and control of the defendant."[122] Although *Gomez* seems to explicitly clear up this burden question, the Court has denied that this case truly stands for that proposition.[123]

In *Harlow*, the Court clarified their decision in *Gomez*, and stated that *Gomez* only stood for the proposition that "qualified immunity is an affirmative defense that must be pleaded by a defendant official."[124] As previously mentioned, in 2019, the Supreme Court explicitly decided not to address this issue when denying certiorari in *Anderson v. City of Minneapolis*.[125] Without further guidance from the Supreme Court, the circuits have split on where the burden lies. This circuit split has resulted in a majority of circuits applying a qualified immunity doctrine that routinely puts the whole of establishing whether qualified immunity applies to a government official on the plaintiff.

Even with this consequential split among the circuits, the Supreme Court has begun a practice of either denying certiorari on qualified immunity cases or finding that lower courts had the discretion to find qualified immunity applicable.[126] Recently, the only cases where the Supreme Court has granted certiorari have been "especially egregious grants of immunity, which . . . suggest[s] the Justices want to curb the worst excesses of the doctrine."[127] At the same time, however, this implies that "the Supreme

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122 *Id.* at 640–41.

123 *See* Chen, *supra* note 114, at 91 ("The Court specifically reversed the burden of persuasion issue, however, and has never returned to answer this critical question.").

124 Harlow v. Fitzgerald, 457 U.S. 800, 815 & n.24 (1982) (citations omitted) ("Although *Gomez* presented the question in the context of an action under 42 U.S.C. § 1983, the Court's analysis indicates that 'immunity' must also be pleaded as a defense in actions under the Constitution and laws of the United States. *Gomez* did not decide which party bore burden of proof on the issue of good faith."); *see* Chen, *supra* note 114, at 91 n.570 (noting that Justice Rehnquist's concurrence in *Gomez* was based on the understanding that the *Gomez* majority opinion "did not decide the burden of persuasion issue").

125 141 S. Ct. 110 (2020) (mem.).

126 *See supra* note 33.

127 Jay Schweikert, *The Supreme Court Won't Save Us from Qualified Immunity*, CATO INST. (Mar. 3, 2021, 4:58 PM), https://www.cato.org/blog/supreme-court-wont-save-us-qualified-immunity [https://perma.cc/G4QP-R75R]; *see* Taylor v. Riojas, 592 U.S. 7, 7–9 (2020) (per curiam) (reversing a grant of qualified immunity to correctional officers because "any reasonable correctional officer should have realized" that plaintiff's "shockingly unsanitary" cell, which was covered "nearly floor to ceiling" in feces, violated the Eight Amendment); McCoy v. Alamu, 141 S. Ct. 1364 (2021) (mem.) (vacating, pursuant to the ruling in *Taylor*, the grant of qualified immunity to a correctional officer who, without provocation, allegedly sprayed a prisoner in the face with a chemical agent); Tanzin v. Tanvir, 592 U.S. 43, 45, 50 (2020) (holding that plaintiffs were entitled to money damages against officials in their individual capacity under the Religious Freedom Restoration Act and

Court is *not* going to take up the larger question of whether qualified immunity itself should be reconsidered."[128] Consequently, it seems that the Court is also not concerned about addressing where the burden should lie in these cases.

### *B. Qualified Immunity Among the Circuits*

As the circuit split stands today, eight circuits place the entirety of the burden on the plaintiff to overcome a qualified immunity defense: the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits.[129] This means that "[o]nce the defense of qualified immunity has been asserted, the plaintiff has the burden of demonstrating that '(1) the official violated a statutory or constitutional right and (2) the right was clearly established at the time.'"[130] Consequently, the plaintiff must prove both prongs of the qualified immunity analysis. At the summary judgement stage, where this

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emphasizing that "[t]here is no doubt that damages claims have always been available under § 1983 for clearly established violations of the First Amendment").

128 Schweikert, *supra* note 127.

129 *See* Matthew Ackerman, *Reflections on a Qualified (Immunity) Circuit Split*, ACKERMAN & ACKERMAN (Mar. 17, 2022), https://ackerman-ackerman.com/reflections-on-a-qualified-immunity-circuit-split/ [https://perma.cc/5BAS-9ZBC]; T.O. v. Fort Bend Indep. Sch. Dist., 2 F.4th 407, 413 (5th Cir. 2021); Williams v. Maurer, 9 F.4th 416, 430 (6th Cir. 2021) ("Once [qualified immunity is] raised, the plaintiff bears the burden of showing that a defendant is not entitled to qualified immunity." (quoting Bletz v. Gribble, 641 F.3d 743, 750 (6th Cir. 2011))); Estate of Davis v. Ortiz, 987 F.3d 635, 638–39 (7th Cir. 2021) ("Once a government official invokes qualified immunity in a section 1983 suit, the burden shifts to the plaintiff to defeat the defense by showing (1) that a trier of fact could conclude that the officer violated a federal right, and (2) that the unlawfulness of the conduct was clearly established at the time the officer acted."); Quraishi v. St. Charles Cnty., 986 F.3d 831, 835 (8th Cir. 2021) ("The [plaintiffs] have the burden to show that their right was clearly established at the time of the alleged violation."); Shooter v. Arizona, 4 F.4th 955, 961 (9th Cir. 2021) ("The plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct." (quoting Romero v. Kitsap Cnty., 931 F.2d 624, 627 (9th Cir. 1991))); Ullery v. Bradley, 949 F.3d 1282, 1289 (10th Cir. 2020) ("When a defendant raises the qualified-immunity defense, the plaintiff must therefore establish (1) the defendant violated a federal statutory or constitutional right and (2) the right was clearly established at the time of the defendant's conduct."); Washington v. Howard, 25 F.4th 891, 898 (11th Cir. 2022) ("The plaintiff then bears the burden of proving both that the defendant violated his constitutional right and that 'the right was clearly established at the time of the violation.'" (quoting Barnes v. Zaccari, 669 F.3d 1295, 1303 (11th Cir. 2012))); Palmieri v. United States, 896 F.3d 579, 586 (D.C. Cir. 2018) ("When an official asserts qualified immunity, the plaintiff must 'overcome' that assertion by demonstrating (*inter alia*) that the right 'was clearly established at the time of the alleged violation.'" (quoting Fox v. District of Columbia, 794 F.3d 25, 29 (D.C. Cir. 2015))).

130 *T.O.*, 2 F.4th at 413 (quoting Morgan v. Swanson, 659 F.3d 359, 370 (5th Cir. 2011) (en banc)); *see also* Bishop v. Karney, 408 Fed. App'x 846, 848 (5th Cir. 2011) ("In essence, a plaintiff must allege facts sufficient to demonstrate that no reasonable officer could have believed his actions were proper" (citing Babb v. Dorman, 33 F.3d 472, 477 (5th Cir. 1994))).

determination is primarily being made, this means that plaintiffs must show a genuine issue of material fact concerning these issues without the benefit of full discovery or any testimony. While the nonmoving party—the plaintiff—in theory does have the advantage of the court drawing all facts in their favor, as Ms. Codgill's case demonstrates, the advantage does not make much of a difference during litigation. In practice, the official attempting to claim qualified immunity as a defense will move for summary judgement, arguing that either (1) the plaintiff has not established a violation of a constitutional right or (2) that the right was not clearly established at the time. Even with all the inferences being drawn in favor of the plaintiff, more often than not, the official is able to succeed on their summary judgement motion.[131] As exemplified in the *Cope* case from the Fifth Circuit, this standard results in cases where the court can simultaneously acknowledge the egregiousness of an official's actions while still granting immunity.[132]

In contrast, only three circuits, the First, Second, and Third Circuits, place the burden on the defendant to establish that they are entitled to the qualified immunity defense.[133] In these circuits, courts treat qualified immunity as an affirmative defense that the defendant must prove, just as any defendant attempting to assert any other affirmative defense would have to do.[134] This more closely follows the justification behind treating qualified immunity as an affirmative defense in the earlier line of Supreme Court

131 *See* Chung et al., *supra* note 39 (collecting data across the country from excessive force cases against the police and finding that since 2005, courts have increasingly favored granting defendants qualified immunity regardless of whether their actions were deemed unlawful).

132 *See* Cope v. Cogdill, 3 F.4th 198, 209 (5th Cir. 2021) (acknowledging that a jailer "knew he should have taken" certain precautions that could have saved Cope's life, but still granting the jailer qualified immunity because his conduct was not previously identified in the law as "constitut[ing] unconstitutional conduct").

133 *See* Alston v. Town of Brookline, 997 F.3d 23, 50 (1st Cir. 2021) ("[B]ecause 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."); Triolo v. Nassau Cnty., 24 F.4th 98, 107–08 (2d Cir. 2022); Thomas v. Indep. Twp., 463 F.3d 285, 289 (3d Cir. 2006); Peroza-Benitez v. Smith, 994 F.3d 157, 165 (3d Cir. 2021).

134 *See Alston*, 997 F.3d at 50; *Triolo*, 24 F.4th at 107 ("A defendant has the burden of proving the affirmative defense of qualified immunity." (citing Gomez v. Toledo, 446 U.S. 635, 640–41 (1980))); *Thomas*, 463 F.3d at 289 ("We continue to stand by established precedent that recognizes that a plaintiff has no pleading burden to anticipate or overcome a qualified immunity defense, and a mere absence of detailed factual allegations supporting a plaintiff's claim for relief under § 1983 does not warrant dismissal of the complaint or establish defendant's immunity."); *Peroza-Benitez*, 994 F.3d at 165 ("At summary judgement, the burden is on the officer to establish an entitlement to qualified immunity." (citing Halsey v. Pfeiffer, 750 F.3d 273, 287 (3d Cir. 2014))).

cases.[135] Using this precedent, the Second Circuit found that "[a] defendant has the burden of proving the affirmative defense of qualified immunity."[136] The Third Circuit continues to apply *Gomez* to hold that "the burden of pleading a qualified immunity defense rests with the defendant, not the plaintiff."[137] Acknowledging that the Supreme Court stated in *Mitchell* and *Behrens* that "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery,"[138] the Third Circuit still found that neither of these holdings impose a specific "burden of pleading allegations in anticipation of a qualified immunity defense on the plaintiff."[139]

The Fourth Circuit applies a different approach that splits where the burden falls.[140] In practice, this means that plaintiffs have the burden to sufficiently plead a constitutional violation and the defendant then has the burden to prove that the violation was not clearly established at the time. The Fourth Circuit's approach fulfills the Supreme Court's goal of balancing competing interests in the administration of the qualified immunity defense[141] better than the approaches taken by the other circuits. By first requiring the plaintiff to demonstrate a constitutional violation, frivolous lawsuits will continue to be filtered out, while still addressing whether an official's actions were unconstitutional. Placing the burden on the defendant to demonstrate that their conduct was clearly established accomplishes the

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135 *Compare Gomez*, 446 U.S. at 640 (acknowledging that the nature of qualified immunity logically calls for the defendant to have to establish why they are entitled to the qualified immunity defense), *with* Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("Because qualified immunity is 'an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.'" (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985))).

136 *Triolo*, 24 F.4th at 107.

137 *Thomas*, 463 F.3d at 293.

138 *Mitchell*, 472 U.S. at 526; Behrens v. Pelletier, 516 U.S. 299, 306–07 (1996); *Thomas*, 463 F.3d at 293.

139 *Thomas*, 463 F.3d at 293; *see also Peroza-Benitez*, 994 F.3d at 165. The Third Circuit instead relied on a reading of the holding in *Crawford-El v. Britton*, 523 U.S. 574 (1998) "as a reaffirmation of the rule announced in *Gomez* that" defendants bear the burden of pleading a qualified immunity defense. *Thomas*, 463 F.3d at 293.

140 *See* Stanton v. Elliot, 25 F.4th 227, 233 (4th Cir. 2022) ("In the Fourth Circuit, we have a split burden of proof for the qualified-immunity defense. The plaintiff bears the burden on the first prong and the officer bears the burden on the second prong" (citing Henry v. Purnell, 501 F.3d 374, 377–78 & n.4 (4th Cir. 2007))); Mays v. Sprinkle, 992 F.3d 295, 302 n.5 (4th Cir. 2021) ("Plaintiffs bear the burden of proof to show that a constitutional violation occurred. But at least in our Circuit, defendants bear the burden of showing that the violation was not clearly established, and they are therefore entitled to qualified immunity." (citing *Henry*, 501 F.3d at 378)).

141 *See supra* Sections I.C–D.

Court's other goal of providing justice to plaintiffs whose constitutional rights were violated.

## III. PLACEMENT OF THE BURDEN AFFECTS THE ABILITY OF PLAINTIFFS TO RESOLVE § 1983 CLAIMS

Historically, qualified immunity was created to protect government officials from frivolous lawsuits, but today, "it has become a highly effective shield in thousands of lawsuits seeking to hold law enforcement accountable when they are accused of using excessive force."[142] This evolution produced criticism about the qualified immunity doctrine that spans the jurisprudential spectrum[143]—from Justice Sotomayor[144] to Justice Thomas.[145] Legal scholars have decried how courts in recent years have expanded the qualified immunity doctrine, from a good faith and probable cause standard to the broad "clearly established" standard used today.[146]

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142 Chung et al., *supra* note 39.

143 SCHWEIKERT, *supra* note 49, at 13 & n.84 (compiling the "large and diverse array" of federal court judges who "have begun to criticize [qualified immunity] . . . , with many explicitly calling for the Supreme Court to reconsider qualified immunity entirely").

144 *See* Kisela v. Hughes, 584 U.S. 100, 108 (2018) (Sotomayor, J., dissenting) ("Viewing the facts in the light most favorable to [the plaintiff], as the Court must at summary judgment, a jury could find that Kisela violated [the plaintiff's] clearly established Fourth Amendment rights . . . . In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield.").

145 *See* Baxter v. Bracey, 140 S. Ct. 1862, 1862, 1864 (2020) (mem.) (Thomas, J., dissenting from the denial of certiorari) ("I have previously expressed my doubts about our qualified immunity jurisprudence. . . . In several different respects, it appears that 'our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act.'") (quoting Ziglar v. Abbasi, 582 U.S. 120, 159 (2017) (Thomas, J., concurring in part and concurring in the judgment)).

146 *See* SCHWEIKERT, *supra* note 49, at 1 (critiquing qualified immunity as a judicial invention that has vastly expanded beyond its supposed common-law roots and calling for either the "complete abolition" of the doctrine or a vastly narrower version of the doctrine that preserves "a modified kind of immunity in a few safe harbors"); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799–1800, 1814–20 (2018) (arguing that qualified immunity has strayed too far from "common-law foundations," fails to realize its supposed policy goals, and gravely hollows the protections afforded by the Fourth Amendment); *see also* Chung et al., *supra* note 39 (noting the "growing chorus of criticism" from legal scholars who "[s]pan[] the political spectrum"); Lawrence Hurley & Andrew Chung, *Before the Court: A United Front Takes Aim at Qualified Immunity*, REUTERS INVESTIGATES (May 8, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-police-immunity-opposition/ [https://perma.cc/Z2G9-P6SW] (noting that groups that often thought of as ideologically opposed, such as the ACLU, Cato Institute, Alliance Defending Freedom, and NAACP Legal Defense & Educational Fund, are unified in urging the Court to "narrow or abolish" its qualified immunity jurisprudence); *but see* Adam A. Davidson, *Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity*, 99 WASH. U. L. REV. 1459, 1463–64 (2022) (arguing that the abolition of qualified immunity might not lead to the increased vindication of civil rights plaintiffs because of, among other

Across the circuits, the lack of guidance from the Supreme Court on where the burden of proof lies in qualified immunity cases has resulted in different outcomes for plaintiffs in different jurisdictions. In a dataset created by Professor Joanna C. Schwartz, different Section 1983 plaintiffs experienced different outcomes across various districts and at various stages of litigation.[147] These analytics about the success of summary judgement motions raising qualified immunity in the Southern District of Texas, Middle District of Florida, Northern District of Ohio, Northern District of California, and Eastern District of Pennsylvania demonstrate the practical consequences of placing the burden of proof on the plaintiff versus the defendant.

Overall, out of 440 total motions in these five districts—including both summary judgement and motions to dismiss—qualified immunity motions for summary judgement were denied 31.6% of the time.[148] The Southern District of Texas, located in the Fifth Circuit, had the "lowest rate of qualified immunity denials (21.7%)" and the "highest rate of qualified immunity grants: courts in the Southern District of Texas granted 33.3% of defendants' qualified immunity motions in part or full on qualified immunity grounds."[149] Comparatively, the Eastern District of Pennsylvania, located in the Third Circuit where the burden lies on the defendant to establish the applicability of the qualified immunity defense, "granted only 6.1% of the qualified immunity motions in whole or part on qualified immunity grounds."[150] Professor Schwartz's findings strongly suggest that the Fifth Circuit's decision to place the burden completely on the plaintiff in qualified immunity cases results in significantly higher grants of qualified immunity, therefore keeping more plaintiffs from getting to their cases on the merits.[151] In contrast, by requiring the defendant to establish qualified immunity, the Third Circuit allows more cases to be heard on the merits. Although

factors, the rightward tilt of the judiciary); Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. Rev. 547, 551 (2020) (defending the legal foundation of qualified immunity as an example of congressional "delegation of authority to the federal courts to develop common law rules for the administration of liability under the Civil Rights Act of 1866" and offering "an alternative justification" of the doctrine that highlights "its incentive effects in light of the ubiquity of indemnification"—i.e., that it is possible that a government that is overexposed to damages liability will either "rais[e] taxes or, more likely, [cut] public services that are likely to fall disproportionately on relatively powerless populations").

147 Schwartz, *supra* note 108, at 25–27, 37.

148 *Id.* at 36–37.

149 *Id.* at 37.

150 *Id.*

151 Professor Schwartz did not explicitly choose the five district courts she studied because of the burden appropriation each circuit has embraced. Rather, she chose them because of their perceived ideological leanings, the volume of data she expected them to produce, and the variety of "small, medium, and large law enforcement agencies" under their umbrella. *Id.* at 19–20.

Professor Schwartz's dataset did not examine district courts within the Fourth Circuit, the difference between outcomes in the Third and Fifth Circuits demonstrates how burden placement can act as a barrier for plaintiffs attempting to overcome qualified immunity.

## IV. THE SUPREME COURT MUST RESOLVE THIS CIRCUIT SPLIT TO ALLOW QUALIFIED IMMUNITY CASES TO ACTUALLY REACH THE MERITS

If the doctrine of qualified immunity is going to be permanent in American jurisprudence, the Supreme Court must resolve the circuit split that has made the current qualified immunity doctrine a disaster.[152] For qualified immunity to function as the common law intended, the Supreme Court should mandate that qualified immunity is treated as the affirmative defense it was created to be.[153] When asserting their entitlement to qualified immunity, defendants should bear the burden to show why they deserve the protection of this doctrine. However, splitting this burden between plaintiffs and defendants would better address the objectives set out from the Supreme Court's creation of qualified immunity. Practically, following a defendant's assertion of the qualified immunity defense, the burden would first be on plaintiffs to plead their alleged constitutional violation. This burden would then shift, requiring defendants to establish that their conduct was not clearly established at the time, therefore entitling them to qualified immunity. While still resolving these types of cases at the earliest stages of litigation—i.e., motions to dismiss and summary judgement motions—this would allow more plaintiffs to reach the merits of their claims.

### *A. A Split Burden of Proof Better Ensures Qualified Immunity's Continuation as an Affirmative Defense*

By placing the entire burden of proof to dispute an official's claim of qualified immunity on the plaintiff, courts have undermined the functionality of qualified immunity as an affirmative defense. Under Federal Rule of Civil Procedure Rule 8(c), "in responding to a pleading, a party must affirmatively state any avoidance or affirmative defense."[154] The Supreme Court has further explained that the burden of proving an affirmative defense rests on the defendant, including "all [the] circumstances of justification, excuse, or alleviation."[155] By forcing plaintiffs to bear the full burden of disproving an

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152 *See* SCHWEIKERT, *supra* note 49, at 2 ("In short, qualified immunity has failed utterly as a matter of law, doctrine, and public policy.").

153 *See supra* Sections I.B–C.

154 FED. R. CIV. P. 8(c).

155 Dixon v. United States, 548 U.S. 1, 8 (2006) (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

official's entitlement to qualified immunity, courts ignore the procedural requirements for a defendant to establish a claim of qualified immunity.

Placing the burden of proof on the defendant would keep qualified immunity consistent with other affirmative defenses within federal law. The Fair Labor Standards Act, Robinson-Patman Act, Internal Revenue Code, and statutes governing stockholder derivative suits all require the defendant to bear the burden of proof.[156] Although these statutes and bodies of law are explicit in requiring the defendant to bear the burden of proof where Section 1983 is not,[157] it is hard to imagine why qualified immunity should not mirror these affirmative defenses.

### *B. The Burden of Proof Should Lie with the Defendant to Establish Their Constitutional Violation Was Not Clearly Established*

At the summary judgement stage, placing the burden of proof on the plaintiff to demonstrate the law governing the constitutional violation is "clearly established" is effectively a bar on litigation. The Supreme Court's own language in *Gomez v. Toledo* demonstrates that the burden issue has been contemplated, yet ignored, for the last forty years.[158] By acknowledging that in qualified immunity litigation, the majority of relevant "facts [are] peculiarly within the knowledge and control of the defendant" and that "impos[ing] the pleading burden on the plaintiff would ignore this elementary fact and be contrary to the established practice in analogous areas of the law," the Supreme Court has already noted that the burden of establishing whether a defendant is entitled to qualified immunity belongs

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156 Gary S. Gildin, *The Standard of Culpability in Section 1983* Bivens *Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 Hofstra L. Rev. 557, 598 & nn. 224–27 (1983) (first citing Barcllona v. Tiffany English Pub, Inc., 597 F.2d 464, 468 (5th Cir. 1979) (Fair Labor Standards Act); then FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759 (1945) (Robinson-Patman Act); then United States v. Kroll, 547 F.2d 393, 395 (7th Cir. 1977) (Internal Revenue Code); and then Cohen v. Ayers, 596 F.2d 733, 739–40 (7th Cir. 1979) (stockholder derivative suits)); *see also* Duvall, *supra* note 114, at 162 (reiterating Gildin's argument that "qualified immunity is like other federal affirmative defenses that place the burdens of proof on defendants").

157 *Compare* 29 U.S.C. § 260 (placing the burden on employers to "show[] to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act"), *and* 15 U.S.C. 13(b) (placing the burden "upon the person charged with a violation of th[e]" Robinson-Patman Act), *and* I.R.C. § 6651(a) (placing the burden on the taxpayer to show that any failure to file a tax return or pay taxes "is due to reasonable cause and not due to willful neglect"), *and Cohen*, 596 F.2d at 740–41 (shifting the burden to directors to "demonstrate affirmatively that the transactions were engaged in with good faith and were fair" when a director's personal conflict excludes them from the benefit of the business judgment rule), *with* 42 U.S.C. § 1983 (failing to assign the burden of proof).

158 Gomez v. Toledo, 446 U.S. 635, 639–41 (1980).

with that defendant.[159] By placing this burden on the defendant to establish that their violation was not "clearly established," plaintiffs would no longer have to attempt to find a case that establishes the defendant's conduct as illegal without the benefit of discovery. This opens significantly more doors for plaintiffs who, for the most part, are currently forced to specifically establish how they can overcome a defense—a procedural process that varies from how federal affirmative defenses are treated in other instances.[160]

Furthermore, this takes away the barrier that affects plaintiffs even before going to litigation. By following the Fourth Circuit's interpretation of qualified immunity where "the plaintiff bears the burden of proof on the first question—i.e., whether a constitutional violation occurred,"[161] and "the defendant bears the burden of proof on the second question—i.e., entitlement to qualified immunity"[162]—more plaintiffs will have the opportunity to actually reach the merits of their civil rights claims. This would force defendants to prove why qualified immunity applies and treat it as the affirmative defense it was created to be. Additionally, first addressing whether a constitutional violation occurred would help build out the body of caselaw establishing which constitutional violations have been clearly established.[163]

### *C. Additional Suggestions*

The Supreme Court should also return the standard for qualified immunity cases to the one established when qualified immunity was first conceived: requiring an official to prove their actions were done reasonably and in good faith.[164] In addition to placing the burden to demonstrate that a constitutional violation was not "clearly established" on the defendant, the Supreme Court should also add an additional requirement to the second prong of the qualified immunity analysis. By requiring officials to demonstrate (1) that the violation was not "clearly established" *and* (2) that their conduct was done in good faith, the Court would return the qualified immunity analysis to its common law roots and avoid the absurd result where courts can acknowledge the unlawfulness and egregiousness of an official's actions, yet still find them deserving of immunity.

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159 *Id.* at 641. The "analogous areas of the law" the Court identifies are those discussed *supra* notes 154–155. *Gomez*, 446 U.S. at 641 & n.8.

160 *See supra* notes 154–155.

161 Henry v. Purnell, 501 F.3d 374, 377 (4th Cir. 2007).

162 *Id.* at 378.

163 *See* SCHWEIKERT, *supra* note 49.

164 *See supra* Sections I.B–C.

## CONCLUSION

Although the Supreme Court seems to be set on keeping qualified immunity a part of our constitutional law jurisprudence, it does not mean that its application must allow the evils of government officials to go unpunished. With a restructuring of the way qualified immunity cases are treated at the early stages of litigation, the Supreme Court can create a doctrine that both ensures justice for plaintiffs who have had their civil rights violated while still protecting officials acting in good faith in the line of duty. For these reasons, this Note suggests splitting the burden in qualified immunity cases to require plaintiffs to plead their constitutional violation and defendants to bear the burden of why they are entitled to the qualified immunity defense. Specifically, the burden should no longer lie on the plaintiff alleging a constitutional violation to prove an official's affirmative defense for them.