SUPREME COURT OF THE UNITED STATES

Nos. 15–1358, 15–1359 and 15–1363

JAMES W. ZIGLAR, PETITIONER
15–1358 *v.*
AHMER IQBAL ABBASI, ET AL.

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, ET AL., PETITIONERS
15–1359 *v.*
AHMER IQBAL ABBASI, ET AL.

DENNIS HASTY, ET AL., PETITIONERS
15–1363 *v.*
AHMER IQBAL ABBASI, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 19, 2017]

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I join the Court's opinion except for Part IV–B. I write separately to express my view on the Court's decision to remand some of respondents' claims under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), and my concerns about our qualified immunity precedents.

I

With respect to respondents' *Bivens* claims, I join the opinion of the Court to the extent it reverses the Second Circuit's ruling. The Court correctly applies our precedents to hold that *Bivens* does not supply a cause of action against petitioners for most of the alleged Fourth and

Fifth Amendment violations. It also correctly recognizes that respondents' claims against petitioner Dennis Hasty seek to extend *Bivens* to a new context. See *ante,* at 24.

I concur in the judgment of the Court vacating the Court of Appeals' judgment with regard to claims against Hasty. *Ante,* at 29. I have previously noted that "'*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.'" *Wilkie* v. *Robbins*, 551 U. S. 537, 568 (2007) (concurring opinion) (quoting *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 75 (2001) (Scalia, J., concurring)). I have thus declined to "extend *Bivens* even [where] its reasoning logically applied," thereby limiting *"Bivens* and its progeny . . . to the precise circumstances that they involved." *Ibid.* (internal quotation marks omitted). This would, in most cases, mean a reversal of the judgment of the Court of Appeals is in order. However, in order for there to be a controlling judgment in this suit, I concur in the judgment vacating and remanding the claims against petitioner Hasty as that disposition is closest to my preferred approach.

II

As for respondents' claims under 42 U. S. C. §1985(3), I join Part V of the Court's opinion, which holds that respondents are entitled to qualified immunity. The Court correctly applies our precedents, which no party has asked us to reconsider. I write separately, however, to note my growing concern with our qualified immunity jurisprudence.

The Civil Rights Act of 1871, of which §1985(3) and the more frequently litigated §1983 were originally a part, established causes of action for plaintiffs to seek money damages from Government officers who violated federal law. See §§1, 2, 17 Stat. 13. Although the Act made no mention of defenses or immunities, "we have read it in harmony with general principles of tort immunities and

defenses rather than in derogation of them." *Malley* v. *Briggs*, 475 U. S. 335, 339 (1986) (internal quotation marks omitted). We have done so because "[c]ertain immunities were so well established in 1871 . . . that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley* v. *Fitzsimmons*, 509 U. S. 259, 268 (1993); accord, *Briscoe* v. *LaHue*, 460 U. S. 325, 330 (1983). Immunity is thus available under the statute if it was "historically accorded the relevant official" in an analogous situation "at common law," *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976), unless the statute provides some reason to think that Congress did not preserve the defense, see *Tower* v. *Glover*, 467 U. S. 914, 920 (1984).

In some contexts, we have conducted the common-law inquiry that the statute requires. See *Wyatt* v. *Cole*, 504 U. S. 158, 170 (1992) (KENNEDY, J., concurring). For example, we have concluded that legislators and judges are absolutely immune from liability under §1983 for their official acts because that immunity was well established at common law in 1871. See *Tenney* v. *Brandhove*, 341 U. S. 367, 372–376 (1951) (legislators); *Pierson* v. *Ray*, 386 U. S. 547, 553–555 (1967) (judges). We have similarly looked to the common law in holding that a prosecutor is immune from suits relating to the "judicial phase of the criminal process," *Imbler*, *supra*, at 430; *Burns* v. *Reed*, 500 U. S. 478, 489–492 (1991); but see *Kalina* v. *Fletcher*, 522 U. S. 118, 131–134 (1997) (Scalia, J., joined by THOMAS, J., concurring) (arguing that the Court in *Imbler* misunderstood 1871 common-law rules), although not from suits relating to the prosecutor's advice to police officers, *Burns*, *supra*, at 493.

In developing immunity doctrine for other executive officers, we also started off by applying common-law rules. In *Pierson*, we held that police officers are not absolutely immune from a §1983 claim arising from an arrest made

pursuant to an unconstitutional statute because the common law never granted arresting officers that sort of immunity. 386 U. S., at 555. Rather, we concluded that police officers could assert "the defense of good faith and probable cause" against the claim for an unconstitutional arrest because that defense was available against the analogous torts of "false arrest and imprisonment" at common law. *Id.*, at 557.

In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. See *Wyatt*, *supra*, at 170 (KENNEDY, J., concurring); accord, *Crawford-El* v. *Britton*, 523 U. S. 574, 611 (1998) (Scalia, J., joined by THOMAS, J., dissenting). In the decisions following *Pierson*, we have "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson* v. *Creighton*, 483 U. S. 635, 645 (1987) (discussing *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982)). Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under §1983, we instead grant immunity to any officer whose conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix* v. *Luna*, 577 U. S. ___, ___–___ (2015) (*per curiam*) (slip op., at 4–5) (internal quotation marks omitted); *Taylor* v. *Barkes*, 575 U. S. ___, ___ (2015) (slip op., at 4) (a Government official is liable under the 1871 Act only if "'existing precedent . . . placed the statutory or constitutional question beyond debate'" (quoting *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 741 (2011))). We apply this "clearly established" standard "across the board" and without regard to "the precise nature of the various officials' duties or the precise character of the particular rights alleged to

have been violated." *Anderson*, *supra*, at 641–643 (internal quotation marks omitted).* We have not attempted to locate that standard in the common law as it existed in 1871, however, and some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine. See generally Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. (forthcoming 2018) (manuscript, at 7–17), online at https://papers.ssrn.com/abstract=2896508 (as last visited June 15, 2017).

Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in "interpret[ing] the intent of Congress in enacting" the Act. *Malley*, *supra*, at 342; see *Burns*, *supra*, at 493. Our qualified immunity precedents instead represent precisely the sort of "free-wheeling policy choice[s]" that we have previously disclaimed the power to make. *Rehberg* v. *Paulk*, 566 U. S. 356, 363 (2012) (internal quotation marks omitted); see also *Tower*, *supra,* at 922–923 ("We do not have a license to establish immunities from" suits brought under the Act "in the interests of what we judge to be sound public policy"). We have acknowledged, in fact, that the "clearly established" standard is designed to "protec[t] the balance between vindication of constitutional rights and government officials' effective performance of their duties." *Reichle* v. *Howards*, 566 U. S. 658, 664 (2012) (internal quotation marks omitted); *Harlow*, *supra*, at 807 (explaining that "the recognition of a qualified immunity defense . . . reflected an attempt to balance competing values").

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*Although we first formulated the "clearly established" standard in *Bivens* cases like *Harlow* and *Anderson*, we have imported that standard directly into our 1871 Act cases. See, *e.g., Pearson* v. *Callahan*, 555 U. S. 223, 243–244 (2009) (applying the clearly established standard to a §1983 claim).

The Constitution assigns this kind of balancing to Congress, not the Courts.

In today's decision, we continue down the path our precedents have marked. We ask "whether it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted," *ante,* at 29 (internal quotation marks omitted), rather than whether officers in petitioners' positions would have been accorded immunity at common law in 1871 from claims analogous to respondents'. Even if we ultimately reach a conclusion consistent with the common-law rules prevailing in 1871, it is mere fortuity. Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence.