HOW *ZIGLAR V. ABBASI* SHEDS LIGHT ON QUALIFIED-IMMUNITY DOCTRINE

INTRODUCTION

In 2011, a man was involved in a road rage incident on a public highway in New Mexico. Two women called 911 to report the man as a drunk driver who was swerving while driving. The women then drove close behind the man, keeping on their bright lights, until the man, feeling threatened, pulled over on the off-ramp of the highway. The man spoke with the women and asked them why they were following him. There was no physical altercation or violence. The man then left the off-ramp and drove to his house where he lived with his brother.

Around 10:00 p.m., an officer responding to the women's 911 call arrived at the off-ramp and interviewed the two women. The women gave the officer the man's license plate number, and the women then left. Two other officers joined the interviewing officer on the off-ramp, and the three decided to investigate, though they decided that there was insufficient probable cause to arrest the man. One of the officers stayed on the off-ramp in case the man returned. The other two officers drove in separate police cars to the address registered with the license plate, and neither officer turned on his vehicle's police lights.

Arriving at the man's rural, secluded house, each officer parked his car at a distance not visible from the house and covertly approached the residence. The officers used their flashlights intermittently. The officers saw a light on inside the house and the man and his brother moving around inside. Around 11:00 p.m., noticing that there were people outside using flashlights, the man and his brother yelled out, "Who are you?" and "What do you want?" to which the officers responded, "Hey motherfuckers, we got you surrounded. Come out or we're coming in." The man and his brother did not hear the officers identify themselves as police at any point, and they did not see any police vehicles. They believed that they were being attacked, perhaps because of the earlier road rage incident. At that point, the man's brother yelled, "we have guns," opened a side door, and fired two shotgun shots into the air to try to scare off the potential attackers.

Meanwhile, the third officer arrived on the scene and covertly approached the house. He heard the "we have guns" statement, followed by the shots, and feared for his and his co-officers' safety. One of the officers shot at the brother and missed. The third officer then shot at the brother and killed him.

In *White v. Pauly*,[1] from which the above facts are based, the brother's estate sued the three officers for Fourth Amendment excessive force violations, and the officers moved for summary judgment asserting the defense of qualified immunity.[2]

A government official is entitled to qualified immunity when the official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[3] The Supreme Court in *White v. Pauly* suggested that the third officer's conduct did not violate clearly established law and remanded the case to the Tenth Circuit.[4] The Tenth Circuit found that the officer who shot the brother was entitled to qualified immunity.[5] The court granted the defendant's motion for summary judgment against the plaintiff's constitutional claim, holding that the officer did not violate clearly established law because the court could not identify any case "close enough on point to make the unlawfulness of [the officer's] action apparent."[6]

The purpose of qualified immunity is to allow law enforcement officers and government officials room to breathe in performing their duties so that they may make "reasonable but mistaken judgments about open legal questions" without fear of suit.[7] There is a fundamental tension in qualified-immunity cases between the societal need for officers to be able to exercise discretion without fear of suit on the one hand, and, on the other hand, the constitutional and statutory rights of citizens.[8] In the last three decades, however, qualified immunity has expanded incredibly, creating an almost insurmountable hurdle for civil rights plaintiffs.[9]

1. 137 S. Ct. 548 (2017) (per curiam).
2. *Id.* at 550.
3. *Id.* at 551 (quoting Mullenix v. Luna, 136 S. Ct. 305, 308 (2015)).
4. *Id.* at 552–53.
5. Pauly v. White, 874 F.3d 1197, 1223 (10th Cir. 2017).
6. *Id.* at 1223 (citation omitted) (quoting Pauly v. White, 814 F.3d 1060, 1091 (10th Cir. 2016)).
7. Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).
8. *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("Qualified immunity 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.").
9. *See, e.g.*, Erwin Chemerinsky, *Closing the Courthouse Doors*, 41 HUM. RTS. 5, 7 (2014) (summarizing cases that "show a Court that is very protective of government officials who are sued for money damages and that has made it very difficult for victims of constitutional violations to recover"); Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 78 (2016), http://www.minnesotalawreview.org/wp-content/uploads/2016/02/Kinports_PDF1.pdf [https://perma.cc/J3GR-FZWZ] ("In recent years, the Supreme Court opinions applying the qualified immunity defense have engaged in a pattern of describing the defense in increasingly generous terms and qualifying and deviating from past precedent—without offering any justification or even acknowledgement of the Court's departure from prior case law.").

While there are many historical reasons for the expansion of qualified immunity,[10] this Note examines the current state of the qualified-immunity doctrine, focusing specifically on the analytical procedure used by courts to decide qualified-immunity cases. In 2001, the Supreme Court held that lower courts ruling on qualified-immunity cases were required to decide both prongs of the qualified-immunity inquiry—i.e., courts were required to decide both (1) whether the official's conduct would amount to a constitutional or statutory violation, and (2) whether the relevant law at the time of the official's conduct was clearly established.[11] In 2009, in *Pearson v. Callahan*,[12] the Supreme Court overturned *Saucier*'s rule of mandatory sequencing after just eight years of its controversial application in qualified-immunity cases.[13] The *Pearson* Court held, instead, that in deciding qualified-immunity cases courts now need only to decide the clearly-established prong of the qualified-immunity two-part inquiry.[14] Under *Pearson*, if a court finds that the law was not clearly established at the time of the official's conduct, the court has discretion whether or not to decide the underlying merits of the plaintiff's claim.[15]

This Note proposes a new four-part balancing test which courts should use in choosing whether to decide both prongs of the qualified-immunity analysis, as in *Saucier*, or to decide only the clearly-established prong, as in *Pearson*. Part I traces the history and development of the Court's qualified-immunity jurisprudence in order to shed light on the order-of-battle dilemma. Part II explains the empirical effects of *Pearson* on plaintiffs' efforts to vindicate their civil rights. Part III focuses on the Supreme Court's recent employment of *Pearson* discretion in *Ziglar v. Abbasi*[16] to highlight four important concerns of qualified-immunity doctrine and to propose a new balancing test for the employment of *Pearson* discretion. The goal of this Note is to give courts a more nuanced standard for when to employ *Pearson* discretion, thus allowing vindication of plaintiffs' rights while respecting the importance of the qualified-immunity defense for government officials.

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10. S*ee, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 51–58 (summarizing the historical development and expansion of qualified immunity doctrine).

11. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001) ("A court required to rule upon the qualified immunity issue *must* consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? . . . [I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.") (emphasis added).

12. 555 U.S. 223 (2009).

13. *Id.* at 236.

14. *Id.*

15. *Id.*

16. 137 S. Ct. 1843 (2017).

I. THE SUPREME COURT'S QUALIFIED-IMMUNITY DOCTRINE AND THE ORDER-OF-BATTLE DILEMMA

The main purpose of qualified immunity is "to shield [public officials] from undue interference with their duties and from potentially disabling threats of liability."[17] A government officer is entitled to the defense of qualified immunity unless his or her conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[18] Put another way, in order for a plaintiff to defeat an officer's qualified-immunity defense, she must show both (1) that the officer violated her statutory or constitutional right, and (2) that this right was clearly established at the time of the officer's alleged violation.[19] Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law."[20]

In 2001, the Supreme Court in *Saucier v. Katz*[21] mandated that a court ruling on a qualified-immunity defense must first consider the merits of the alleged constitutional or statutory violation—that is, the court must initially decide, "do the facts alleged show the officer's conduct violated a constitutional right?"[22] Only after that threshold inquiry should a court decide whether the right was "clearly established" at the time of the officer's conduct.[23] The Court stated that "in the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case . . . ."[24] It reasoned that "[t]he law might be deprived of this explanation were a court simply to skip ahead to the question whether the law [was] clearly established," without deciding whether the officer's underlying conduct would amount to a statutory or constitutional violation.[25] The Court reasoned that requiring lower courts to decide the merits prong was essential in order to prevent the risk of constitutional stagnation that might result if courts decided only the clearly-established prong.[26] The *Saucier* Court worried that if a court granted

17. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).
18. *Id.* at 818.
19. *See id.*
20. Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).
21. 533 U.S. 194 (2001), *overruled by* Pearson v. Callahan, 555 U.S. 223 (2009).
22. *Id.* at 201 ("Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry.").
23. *Id.*
24. *Id.*
25. *Id.*
26. *See id.*

qualified immunity only because it could not identify a case "close enough on point to make the unlawfulness of [the officer's] action apparent"[27] without ruling on the underlying constitutional issue, constitutional questions of first impression may never be resolved.[28]

The Court's decision in *Saucier* received significant backlash amongst both judges and legal scholars because it did, in fact, have many problems.[29] Accordingly, in 2009 in *Pearson v. Callahan*[30] the Supreme Court overturned *Saucier*'s mandated "order of battle."[31] In *Pearson*, the Supreme Court fundamentally changed the procedure for granting government officials qualified immunity.[32] It held that courts, when performing a qualified-immunity analysis, were no longer required to decide the merits of a plaintiff's underlying constitutional or statutory claim.[33] Instead, a court may grant qualified immunity whenever it finds that the law at the time of the official's conduct was not clearly established—that the government official did not act unreasonably given the current open-ended status of the law—without deciding whether the officer's conduct in fact amounted to a statutory or constitutional violation.[34] Once a court finds that the law was not clearly established at the time of the official's conduct, it has discretion whether or not to decide the underlying merits of the plaintiff's claim.[35] Thus, in *Pearson*, the Court relaxed *Saucier*'s mandated sequencing, encouraging lower courts instead to exercise discretion in choosing which determinations to make in a qualified-immunity case—either to adhere to *Saucier*'s two-pronged analysis and decide both the merits and clearly-established prongs or to decide the clearly-established prong only.[36]

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27. Pauly v. White, 874 F.3d 1197, 1223 (10th Cir. 2017).

28. *See Saucier*, 533 U.S. at 201.

29. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 432 (2007) (Breyer J., concurring in judgment in part and dissenting in part) ("I would end the failed *Saucier* experiment now."); Karen M. Blum, *Section 1983 Litigation: Post*-Pearson *and Post*-Iqbal, 26 TOURO L. REV. 433, 433–34 nn.6–7 (2010) (collecting criticisms of *Saucier*'s mandated sequencing by Supreme Court Justices and lower courts); *see also* John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 116 ("Not only did *Saucier* have its critics, but the critics had a point. They successfully identified circumstances . . . where the merits-first, immunity-second order of battle proved genuinely awkward.") (internal quotation marks omitted); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 670 (2009) (arguing against the underlying rationale of *Saucier*'s mandated sequencing and concluding that sequencing does not lead to "the expansion of constitutional rights").

30. 555 U.S. 223 (2009).

31. *Id.* at 236 ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory.").

32. *Id.*

33. *Id.*

34. *See id.*

35. *Id.* ("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 . . . .").

36. *Id.*

The *Pearson* Court acknowledged that the *Saucier* two-prong analysis is beneficial because it "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified-immunity defense is unavailable,"[37] such as excessive force claims. The Court, however, encouraged lower courts to balance such beneficial development of precedent against the risk of "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case,"[38] especially in "cases in which the constitutional question is so factbound that the decision provides little guidance for future cases."[39] The *Pearson* Court went on to enumerate approximately ten overlapping factors that courts should take into account when determining whether to first decide the merits prong or the clearly-established prong in a qualified-immunity case.[40] According to *Pearson*, a court should depart from *Saucier*'s two-pronged procedure and decide only the clearly-established prong in a qualified-immunity case when the following ten factors are satisfied:

1. If resolving the constitutional or statutory question would result in a "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case";[41]

2. If it is "plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right";[42]

3. If litigation of the constitutional or statutory question would "waste[] the parties' resources";[43]

4. If the constitutional or statutory question is "so factbound that the decision [would provide] little guidance for future cases";[44]

5. If the constitutional or statutory question will "soon be decided by a higher court";[45]

6. If the constitutional or statutory question is "resting on an uncertain interpretation of state law";[46]

7. If resolving the constitutional or statutory question "depends on a

37. *Id.*
38. *Id.* at 236–37.
39. *Id.* at 237.
40. *See id.* at 236–42.
41. *Id.* at 236–37.
42. *Id.* at 237.
43. *Id.*
44. *Id.*
45. *Id.* at 238.
46. *Id.*

kaleidoscope of facts not yet fully developed";[47]

8. If the briefing on the constitutional or statutory question is "woefully inadequate";[48]

9. If resolving the constitutional or statutory question would "make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations";[49] and

10. If resolving the constitutional or statutory question would "depart[] from the general rule of constitutional avoidance."[50]

Since *Pearson*, the ten-part balancing test has overwhelmed courts, leading many courts to employ *Pearson* discretion without explaining their rationale for doing so.[51] *Pearson*, like *Saucier*, has received a substantial amount of criticism from legal scholars who argue that "the repeated invocation of qualified immunity" without resolving the underlying constitutional and statutory issues at play "will reduce the meaning of the Constitution to the lowest plausible conception of its content."[52] *Saucier*'s mandatory sequencing is unworkable in practice, but *Pearson* discretion leaves many plaintiffs without vindication of their constitutional or statutory rights and prevents the law from moving forward. Thus, there seems to be no correct "order of battle."[53]

II. THE EMPIRICAL EFFECTS OF *PEARSON V. CALLAHAN* ON PLAINTIFFS' CIVIL RIGHTS ACTIONS

While the *Saucier* Court found that the risk of constitutional stagnation caused by deciding only one prong of the two-pronged qualified-immunity

47. *Id.* at 239 (quoting Dirrane v. Brookline Police Dept., 315 F.3d 65, 69–70 (1st Cir. 2002)).
48. *Id.*
49. *Id.* at 240.
50. *Id.* at 241.
51. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 53–60 (2015) (recognizing "the post-*Pearson* empirical realities of the new qualified immunity" and drawing on administrative law principles to argue that courts should be required to give reasons when exercising *Pearson* discretion).
52. Jeffries, *supra* note 29, at 120–21; *see also* Nielson & Walker, *supra* note 51, at 52 ("Whereas the core constitutional stagnation fear expressed about *Pearson* discretion is probably exaggerated, the facts on the ground nevertheless show that *Pearson* is not perfect. There appears to be some stagnation with respect to rights-making; variation across the circuits; and the potential of substantive asymmetries."); Alan K. Chen, *Qualified Immunity Limiting Access to Justice and Impeding Development of the Law*, 41 HUM. RTS. 8, 9 (2014) ("[I]n cases involving cutting-edge issues of constitutional law, qualified immunity may itself prevent the law from ever becoming clearly established.").
53. *See* Brosseau v. Haugen, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring).

inquiry was unacceptable,[54] the *Pearson* Court found such a risk was tolerable.[55]

The risk of constitutional stagnation is more significant than the *Pearson* Court anticipated.[56] As scholars Greg Sobolski and Matt Steinberg explain, "[t]he stakes are high because the difference between mandatory or discretionary sequencing may bear on the frequency with which courts address substantive constitutional rights questions, which in turn impacts the 'rate' at which constitutional rights are 'clearly established' through precedents."[57] According to another scholar, a move from *Saucier*'s two-pronged analysis means that, "[f]unctionally, the Constitution will be defined not by what judges, in their wisdom, think it does or should mean, but by the most grudging conception that an executive officer could reasonably entertain."[58]

One unforeseen effect of *Pearson v. Callahan* is that the Supreme Court itself has employed *Pearson* discretion in a number of cases, declining to resolve the merits of plaintiffs' claims and instead finding only that the law at the time of the officer's conduct was not clearly established. As of the 2017 term, in the last eight years since *Pearson* was decided the Supreme Court has granted qualified immunity in approximately fourteen decisions.[59] Of these fourteen cases, the majority have been either issues of Fourth Amendment unreasonable search and seizure, or Eighth and Fourteenth Amendment excessive force claims.[60] Of these fourteen cases, the Supreme Court has itself employed *Pearson* discretion in eleven

54. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

55. *See* Pearson v. Callahan, 555 U.S. 223, 232 (2009).

56. *See supra* note 52 and accompanying text.

57. Greg Sobolski & Matt Steinberg, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 525, 556 (2010) (analyzing 741 qualified immunity decisions from federal courts of appeals following *Pearson*, and finding that "plaintiffs found by the court to have successfully alleged a constitutional violation in the pre-*Saucier* period were eleven percent more likely to ultimately recover damages than their counterparts post-*Saucier*").

58. Jeffries, *supra* note 28, at 120–121 ("What may not be quite so obvious, but is in fact far more important, is the degradation of constitutional rights that may result when *Saucier* is not followed and constitutional tort claims are resolved solely on grounds of qualified immunity. For rights that depend on vindication through damage actions, the repeated invocation of qualified immunity will reduce the meaning of the Constitution to the lowest plausible conception of its content.").

59. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1869 (2017); White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam); Mullenix v. Luna, 136 S. Ct. 305, 308 (2015); Taylor v. Barkes, 135 S. Ct. 2042, 2045 (2015); City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1778 (2015); Carroll v. Carman, 135 S. Ct. 348, 352 (2014); Lane v. Franks, 134 S. Ct. 2369, 2383 (2014); Wood v. Moss, 134 S. Ct. 2056, 2061 (2014); Plumhoff v. Rickard, 134 S. Ct. 2012, 2022–23 (2014); Stanton v. Sims, 571 U.S. 3, 7 (2013); Reichle v. Howards, 566 U.S. 658, 664 (2012); Messerschmidt v. Millender, 565 U.S. 535, 556 (2012); Ryburn v. Huff, 565 U.S. 469, 477 (2012); Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

60. *See, e.g.*, *White*, 137 S. Ct. at 551 (excessive force); *Carroll*, 135 S. Ct. at 352 (unreasonable search and seizure); *Plumhoff*, 134 S. Ct. 2022–23 (excessive force); *Ashcroft v. al-Kidd*, 563 U.S. at 743 (unreasonable search and seizure).

decisions.[61] That is, in eleven of the fourteen Supreme Court decisions granting qualified immunity since *Pearson*, the Supreme Court held only that the law was not clearly established because no reasonable officer could have known the law at the time of the officer's conduct.[62] It did not decide whether plaintiff's claim would amount to a Fourth Amendment, Eighth Amendment, or Fourteenth Amendment violation respectively.[63] In so doing, the Court declined to clearly establish the law in a way that would allow a civil rights plaintiff to succeed against a qualified-immunity defense in the future. When the Supreme Court declines to establish the law by opting not to make a determination on the merits, any officer in the future that performs the same constitutional violation under similar facts will be entitled to qualified immunity under a not-clearly-established standard.[64]

It seems that nowhere in the *Pearson* decision did the Court contemplate that the Supreme Court itself would be employing *Pearson* discretion so frequently. In fact, on a plain reading of the *Pearson* opinion, the Court appears to relax *Saucier*'s mandatory sequencing for "[d]istrict courts and courts of appeals with heavy caseloads" only.[65] Throughout the opinion, the Court makes numerous references to the lower courts,[66] and even bases its conclusion on its "respect for the lower federal courts that bear the brunt of adjudicating these cases."[67] The *Pearson* Court reasoned that "the *judges of the district courts and the courts of appeals* are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case."[68] Nowhere in its opinion does the *Pearson* Court seem to contemplate the constitutional stagnation that may result if the Supreme Court itself becomes free to employ *Pearson* discretion at will. Nowhere in the opinion does the Court contemplate what would happen if the country's court of highest resort declined to define

61. *See, e.g.*, *Ziglar*, 137 S. Ct. at 1869; *White*, 137 S. Ct. at 551; *Mullenix*, 136 S. Ct. at 308; *Taylor*, 135 S. Ct. at 2045; *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. at 1778; *Carroll*, 135 S. Ct. at 352; *Wood*, 134 S. Ct. at 2061; *Stanton*, 571 U.S. at 7; *Reichle*, 566 U.S. at 664; *Messerschmidt*, 565 U.S. at 556; *Ryburn*, 565 U.S. at 477. In three of the fourteen cases, the Supreme Court carried out *Saucier*'s two-pronged analysis and first decided whether the officer violated the alleged right, in addition to deciding if the right was clearly established at the time of his or her conduct. *See, e.g.*, *Lane*, 134 S. Ct. at 2383; *Plumhoff*, 134 S. Ct. at 2022–23; *Ashcroft v. al-Kidd*, 563 U.S. at 743.

62. *See supra* note 61 and accompanying text.

63. *See supra* note 61.

64. *See supra* note 52 and accompanying text.

65. *See* Pearson v. Callahan, 555 U.S. 223, 237 (2009).

66. *See, e.g.*, *id.* 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.") (emphasis added); *id.* at 242 ("Our decision does not prevent the *lower courts* from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases.") (emphasis added).

67. *Id.* at 242.

68. *Id.* (emphasis added).

statutory or constitutional rights, instead holding only that the law in question was not clearly established at the time of the alleged violation.

The over-employment of *Pearson* discretion by the Supreme Court is alarming because it curtails the rate at which law becomes clearly established,[69] especially where the Supreme Court hears qualified-immunity cases with unusual frequency.[70]

III. THE ROLE OF *PEARSON* DISCRETION IN *ZIGLAR V. ABBASI*

The next part of this Note analyzes the Supreme Court's recent decision in *Ziglar v. Abbasi*[71] to propose a way in which a court, and especially the Supreme Court, may limit its use of *Pearson* discretion, and thereby curtail the expansion of qualified immunity.

In *Ziglar*, six alien detainees of Arab or South Asian descent who were detained after the September 11, 2001 terrorist attacks sued federal officials and detention facility wardens, challenging the constitutionality of their detention.[72] The detainees brought *Bivens* actions alleging that the officials violated their constitutional rights under the Fourth and Fifth Amendments.[73] The detainees also brought a claim under 42 U.S.C. § 1985(3), arguing that the officers engaged in a civil conspiracy to deny them equal protection of the laws based on racial animus.[74]

Section 1985(3), originally Section 2 of the Ku Klux Klan Act, provides a remedy for individuals who are injured when two or more persons "conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws."[75] The law was initially passed as "an attempt to stop the assaults, murders, and property destruction" perpetuated by the Klan by creating a right of action against two or more persons who

69. *See* Sobolski & Steinberg, *supra* note 57, at 525.

70. *See* Baude, *supra* note 10, at 82–88 (analyzing "the Supreme Court's special treatment of qualified immunity issues on its certiorari docket").

71. 137 S. Ct. 1843 (2017).

72. *Ziglar*, 137 S. Ct. at 1848–53.

73. *See id.* at 1848 ("[T]his Court recognized in *Bivens* an implied damages action to compensate persons injured by federal officers who violated the Fourth Amendment's prohibition against unreasonable searches and seizures.") (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971)).

74. *Id.* at 1851–52.

75. 42 U.S.C. § 1985 (2017). Section 1985(3) provides in relevant part:

> "If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured . . . the party so injured or deprived may have an action for the recovery of damages . . . against any one or more of the conspirators."

§ 1985(3).

conspire to injure another because of race.[76] Currently, § 1985(3) is the "only federal civil statute enacted specifically to address race-based conspiracies."[77]

Prior to *Ziglar*, there was a long-standing circuit split regarding the applicability of § 1985(3) protections when the alleged co-conspirators are agents of a single entity, for example, two officers acting together as agents of the federal government.[78] In the corporate context, generally an agreement between two agents of a single corporation does not qualify as a conspiracy because the two agents' actions are attributable to the principle entity.[79] This doctrine—known as the intracorporate-conspiracy exception—is most often invoked in antitrust disputes.[80] Before *Ziglar*, courts were divided on whether such an intracorporate-conspiracy exception could bar plaintiffs' § 1985(3) claims against two or more government officials acting on behalf of the government.[81] The Supreme Court itself had declined to resolve the circuit split on multiple occasions ranging back to 1979.[82] *Ziglar* thus presented the first opportunity for the Supreme Court to decide the applicability of the intracorporate-conspiracy exception to § 1985(3) claims in almost twenty years.[83]

The officials in *Ziglar* argued that they were entitled to qualified immunity against the plaintiffs' § 1985(3) civil-conspiracy claim because the law at the time of their conduct was not clearly established.[84] The Supreme Court granted the officials qualified immunity, finding that a reasonable officer in the position of the officials would not have known that his or her conduct was an unlawful conspiracy because of the long-standing circuit split relating to the application of the intracorporate-conspiracy

76. Catherine E. Smith, *(Un)masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act*, 11 VA. J. SOC. POL'Y & L. 129, 130 (2004).

77. *Id.* at 131.

78. *Compare* Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984) (allowing plaintiffs to proceed on § 1985(3) claims even when alleged co-conspirators were agents acting on behalf of a single entity), *with* Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ., 926 F.2d 505 (6th Cir. 1991) (barring plaintiff's § 1985(3) claim where alleged co-conspirators were acting as agents of a single entity).

79. *See* J.S. Nelson, *The Corporate Conspiracy Vacuum*, 37 CARDOZO L. REV. 249, 255 (2015) ("The intracorporate conspiracy doctrine holds that because an association and its agents, such as its employees, are one legal entity, there are no two distinct minds that can meet to conspire.").

80. *Id.*

81. *See supra* note 78.

82. *See* Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 n.11 (1979) ("For the purposes of this question, we assume but certainly do not decide that the directors of a single corporation can form a conspiracy within the meaning of § 1985(3)."); *see also* Hull v. Shuck, 501 U.S. 1261 (1991) (denying petition for certiorari from the 6th Circuit to decide the issue, against J. White and J. Marshall's dissent).

83. Ziglar v. Abassi, 137 S. Ct. 1843, 1868 (2017); *see also supra* note 82 and accompanying text.

84. *Ziglar*, 137 S. Ct. at 1866.

exception to § 1985(3) claims.[85] The *Ziglar* Court found that "[w]hen the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability."[86] The Court, however, did not decide the merits issue—whether the intracorporate-conspiracy exception does in fact bar a plaintiff's § 1985(3) civil-conspiracy claim—stating specifically that "[n]othing in this opinion should be interpreted as either approving or disapproving the intracorporate-conspiracy doctrine's application in the context of an alleged § 1985(3) violation."[87] It found only that a reasonable officer could not have known if the exception applies because the law at the time of the officials' conduct was not clearly established.[88]

In short, the Court exercised *Pearson* discretion. It found that the officials were entitled to qualified immunity only because the law at the time of their conduct was not clearly established, and it reserved judgment on the merits of the legal issue.[89]

Had the Court in *Ziglar* followed *Saucier*'s two-pronged sequencing for qualified immunity, the Court would have had to resolve whether the intracorporate-conspiracy exception applies to § 1985(3) claims and could still have granted the officers qualified immunity based on the unsettled law at the time of the officers' conduct.[90] Instead, even after *Ziglar*, the applicability of the intracorporate-conspiracy exception to civil-conspiracy claims remains "not clearly established," and future plaintiffs will be unable to overcome a qualified-immunity defense to civil conspiracy.[91] Going forward, any future plaintiffs that bring suit against officials who conspire to unconstitutionally detain citizens due to race-based animosity will receive no benefit from *Ziglar*'s holding. The officers in such a situation will still be entitled to qualified immunity because the Court declined to

85. *Id.* at 1868–69.
86. *Id.* at 1868.
87. *Id.*
88. *Id.*
89. *Id.* Note also that prior to *Ziglar*, and not expressly mentioned by the Court in its opinion, there was a circuit split even relating to the availability of a qualified-immunity defense for government officers against § 1985(3) claims because § 1985(3) claims require such a strict showing of race-based animus. *Compare* Bisbee v. Bey, 39 F.3d 1096, 1101–02 (10th Cir. 1994) (holding that qualified immunity applies in § 1985(3) lawsuits), *with* Johnson v. City of Fort Lauderdale, 126 F.3d 1372, 1378–80 (11th Cir. 1997) (holding that, while qualified immunity was available under § 1981 and § 1983 claims, it is not available to federal officers against a § 1985(3) claim). The Eleventh Circuit had previously found that "[d]enying public officials qualified immunity under section 1985(3) does not threaten the breathing space they need for making discretionary decisions" because "'racial, or perhaps otherwise class-based, invidiously discriminatory animus' has no place in public policy and any actions by public officials based on such animus deserve to be chilled with the full force of federal law." Burrell v. Bd. of Trs. of Ga. Military Coll., 970 F.2d 785, 794 (11th Cir. 1992) (quoting United Bhd. of Carpenters & Joinders of Am., Local 610 v. Scott, 463 U.S. 825, 829 (1983)).
90. *Ziglar*, 137 S. Ct. at 1868.
91. *Id.*

settle the unresolved law.[92] Plaintiffs who bring § 1985(3) claims in the future will perpetually lose to qualified immunity. If a § 1985(3) claim makes it to the Supreme Court again, under the current ten-part balancing test, the Court will be able to again exercise *Pearson* discretion and find only that the law is not clearly established, thus leaving the law in perpetual flux. In this way, *Ziglar* is a good example of the dangers of unchecked *Pearson* discretion. When courts, including the Supreme Court, consistently decline to recognize underlying constitutional or statutory rights through *Saucier* sequencing, those rights remain indefinitely unclear and officers who violate them are thereby insulated from liability. Through unchecked *Pearson* discretion, qualified immunity becomes a functionally insurmountable hurdle for future civil rights plaintiffs.

There are ways of respecting the *Pearson* Court's concerns for qualified immunity, while limiting the expansion of qualified immunity so that cases like *Ziglar* would not have such a devastating effect for future civil rights plaintiffs. Looking at the ten interlacing factors articulated by the *Pearson* Court,[93] four main concerns emerge: (1) judicial economy; (2) preservation for appellate review; (3) issues of law versus fact; and (4) constitutional avoidance. Balancing those four factors in *Ziglar* would have led the Court to a different, and better, result.

A. Judicial Economy and the Parties' Resources

The *Pearson* Court recognized that *Saucier*'s two-step sequencing is beneficial particularly in cases "in which there would be little if any conservation of judicial resources to be had by beginning and ending with . . . the clearly established prong."[94] Two-pronged sequencing is less beneficial when it "results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case."[95] In cases in which deciding both the merits prong and clearly-established prong would result in a substantial expenditure of scarce judicial resources, courts are better advised to employ *Pearson* discretion and only decide if the law was clearly established.[96]

Resolving the statutory question at issue in *Ziglar* would not have resulted in a substantial expenditure of scarce judicial resources. Instead,

92. *See id.*
93. *See supra* notes 41–50 and accompanying text.
94. Pearson v. Callahan, 555 U.S. 223, 236 (2009).
95. *Id.* at 236–37.
96. *Id.*; *see also* 13D CHARLES ALAN WRIGHT ET AL, FEDERAL PRACTICE AND PROCEDURE § 3573.3 (West 3d ed. Sept. 2018 Supp.) (arguing that the *Pearson* holding is "salutary" because "the court and parties do not have to waste time and resources determining whether the plaintiff showed a deprivation of th[e] right.").

the case concerned a legal issue that had been adequately briefed and decided upon by the lower courts: whether the intracorporate-conspiracy exception applies to § 1985(3) claims.[97] In order to decide this question, the Court would not have had to request further briefing; the lower courts would not have had to request more factual development in the pleadings, or spend substantially more time or costs in trial.[98]

One of the main reasons for the Justices' concerns over judicial economy is "that courts often confront qualified-immunity issues early on in the course of litigation," particularly in motions to dismiss or motions for summary judgment.[99] So, requiring the lower courts to fully consider the merits of an underlying alleged constitutional violation at such an early stage runs the risk of "bad decisionmaking,"[100] especially given the limited resources of the lower courts early on in litigation. While the unnecessary expenditure of limited resources is an important concern for trial courts first hearing the qualified-immunity issue on a motion to dismiss or motion for summary judgment,[101] it should not be a primary concern of the Supreme Court when hearing a qualified-immunity issue that has already traveled through multiple levels of litigation and appeal, as in *Ziglar*.[102] Rather, precisely "because a judge who has chosen to reach the merits has decided, for one reason or another, to accept the costs, burdens, and responsibilities of adjudicating a constitutional issue,"[103] as in *Ziglar*, the Supreme Court should rule on the lower court's merits determination instead of punting the issue based solely on a not-clearly-established finding.

For the Supreme Court to decide the legal issue in *Ziglar*, "there would be little if any conservation of judicial resources to be had by beginning and ending with . . . the clearly established prong."[104] The Justices' careful

97. *See* Turkmen v. Hasty, 789 F.3d 218, 263 (2d Cir. 2015), *cert. granted sub nom.* Ziglar v. Turkmen, 137 S. Ct. 292, 196 L. Ed. 2d 211 (2016), *and cert. granted sub nom.* Ashcroft v. Turkmen, 137 S. Ct. 293, 196 L. Ed. 2d 211 (2016), *and cert. granted*, 137 S. Ct. 293, 196 L. Ed. 2d 211 (2016), *and judgment rev'd in part, vacated in part sub nom.* Ziglar v. Abbasi, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017).

98. For an explanation of concerns over judicial economy and the types of inefficiencies that courts may confront if required to follow *Saucier*'s two-step sequencing, see Leong, *supra* note 29, at 680–82.

99. *Id.* at 680 ("[I]n 2006 and 2007, 24.6% of cases in which a court addressed a qualified immunity issue took place on a motion to dismiss.").

100. Pearson v. Callahan, 555 U.S. 223, 239 (2009).

101. *See* Nielson & Walker, *supra* note 51, at 14 ("Justice Breyer's dismissal of the enterprise as wasting judicial resources may be too strong, but there is surely something to the critique, especially when issues are poorly briefed or buried under a pile of intricate (and unproven) facts.") (internal quotation marks omitted).

102. *See supra* note 97.

103. Michael T. Kirkpatrick & Joshua Matz, *Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from* Saucier *to* Camreta *(and Beyond)*, 80 FORDHAM L. REV. 643, 653 (2011).

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

analysis was the only resource saved by the *Ziglar* Court's decision to begin and end with the clearly established prong.

The *Pearson* Court was also concerned with the parties' expenditure of resources needed to litigate both the merits and clearly-established prongs.[105] According to *Pearson*, a court should not perform *Saucier*'s two-step sequencing when resolving the underlying constitutional or statutory question would "force[] the parties to endure additional burdens of suit . . . when the suit otherwise could be disposed of more readily."[106]

In *Ziglar*, however, like the judicial resources discussed above, the "costs of litigating constitutional questions and [the] delays attributable to resolving them"[107] had already been borne by the parties.[108] In fact, one of the main benefits of deciding the underlying statutory question in *Ziglar* would have been protecting parties to future § 1985(3) suits from having to re-litigate the legal issue. Now, given the *Ziglar* Court's reluctance to decide whether the intracorporate-conspiracy exception applies to § 1985(3) claims by undertaking *Saucier*'s two-step sequencing,[109] parties in future suits will have to expend their resources in order to litigate the issue.[110]

While concerns for judicial economy and the parties' resources may be warranted in some cases, *Ziglar* gives us an example of a time when such concerns should not be overly-heeded by the Supreme Court. The *Ziglar* Court would have served judicial economy more by resolving the merits determination.[111]

B. Preservation for Appellate Review

Another concern of the *Pearson* Court was that mandating *Saucier*'s two-step sequencing would be a waste of time where the constitutional or statutory question would "soon be decided by a higher court."[112] Further, the Court worried that lower courts resolving the constitutional or statutory question would "make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on

105. *Id.* at 237.

106. *Id.* (quoting Brief for National Ass'n of Criminal Defense Lawyers as *Amicus Curiae* at 30, *Pearson*, 555 U.S. 223 (2008) (No. 07-751)).

107. *Id.*

108. *See supra* note 97 and accompanying text.

109. *See supra* notes 87–89 and accompanying text.

110. Parties are, in fact, already expending resources in order to re-litigate this issue. *See, e.g.*, Mehari v. District of Columbia, 268 F. Supp. 3d 73, 80–81 (D.D.C. 2017); Williams v. City of Austin, No. 1:16-CV-1338-RP, 2017 WL 2963513, at *6 (W.D. Tex. July 11, 2017); Dickerson v. Mock, No. 4:16cv113-RH/CAS, 2017 WL 4159380, at *6–7 (N.D. Fla. Aug. 23, 2017), *report and recommendation adopted*, 2017 WL 4156191 (N.D. Fla. Sept. 19, 2017); Clark v. Noe, No. 2:16-cv-00920-MHH-TMP, 2017 WL 4707897, at *3 (N.D. Ala. Oct. 20, 2017).

111. *See supra* notes 107–110 and accompanying text.

112. *Pearson*, 555 U.S. at 238.

their operations."[113] This concern—that making the merits determination while granting qualified immunity based on a not-clearly-established finding would preclude public officials from appealing the merits determination—is a legitimate and serious concern for the lower courts.[114]

In 2011, the Supreme Court in *Camreta v. Greene*[115] helped mitigate the severity of this issue. In *Camreta*, a child protective services caseworker and a county sheriff removed a child from her school classroom in order to investigate allegations of abuse.[116] The constitutional determination before the Ninth Circuit was whether the removal of the child from the classroom and the subsequent interview without a warrant was a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures.[117] The Ninth Circuit held that the seizure violated the Fourth Amendment and that officials in the future must obtain a warrant before removing a child from his or her classroom in order to investigate allegations of abuse.[118] The Ninth Circuit granted the officials qualified immunity, however, finding that at the time of their conduct the law was not clearly established.[119] In *Camreta*, the Supreme Court held that unfavorable merits determinations when officials were granted qualified immunity on a not-clearly-established finding would be reviewable by the Court.[120] That is, officials who win on qualified immunity but lose on the merits determination like in *Camreta* are able to appeal the merits determination.[121] The Court limited its holding, however, stating that that the appealability of the merits determination was available only at the level of the Supreme Court. It withheld judgement on whether "an appellate court, too, can entertain an appeal from a party who has prevailed on immunity grounds."[122] While *Camreta*'s holding is "no silver bullet" for the appealability problem of *Saucier*'s two-part

113. *Id.* at 240.

114. *See* Brosseau v. Haugen, 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring) ("[A] rigid 'order of battle' . . . can sometimes lead to a constitutional decision that is effectively insulated from review."); *see also* Jeffries, *supra* note 29, at 127 ("[T]he most serious problem [with two-step sequencing] concerns appealability. The defendant who loses on the merits but prevails on qualified immunity may face difficulty securing appellate review.").

115. 563 U.S. 692 (2011).

116. *Id.* at 697.

117. *Id.* at 697–98 (discussing the Ninth Circuit's opinion).

118. *Id.*

119. *Id.*

120. *Id.* at 708 (finding that the Court's "role in clarifying rights . . . may support this Court in reviewing the correctness of the lower court's [merits] decision"). The Court found the issue in *Camreta* moot, however, because the child had already become an adult and moved across the country. *Id.* at 713–14.

121. *Id.*

122. *Id.* at 708.

sequencing, it is a major help.[123] It allows the Court to review merits rulings on important constitutional issues even when defendants are granted qualified immunity.[124]

Even independent of the Court's assistance in *Camreta*, the appealability issue was not a legitimate concern for the *Ziglar* Court. In *Ziglar*, the Second Circuit had found *both* that there was a rights violation *and* that the law at the time of the officials' conduct was, in fact, clearly established.[125] The Second Circuit had thus *denied* the officials qualified immunity on the plaintiffs' § 1985(3) civil-conspiracy claims.[126] Therefore, the *Ziglar* petitioners were able to appeal both prongs of the Second Circuit's decision, i.e., the officials could appeal both the merits and clearly-established determinations.[127] In cases in which the lower court decides that the officials are *not* entitled to qualified immunity, as in *Ziglar*, the officials will be able to appeal both prongs of the lower court's *Saucier* analysis. Accordingly, in such cases the appealability concern of the *Pearson* Court does not justify a court in declining to make the merits determination.

C. Issues of Law Versus Fact

The *Pearson* Court worried that *Saucier*'s two-step sequencing was not necessary when the constitutional or statutory question is "so factbound that the decision [would provide] little guidance to future cases."[128] In many excessive force cases the underlying question is highly fact-bound.[129] For example, a court must decide a fact-bound issue when deciding whether police officers used excessive force by shooting a victim through the window of his house while investigating an earlier road rage incident.[130]

123. *See* Kirkpatrick & Matz, *supra* note 103, at 645 (2011) (arguing that *Camreta* "effectively resolves the problem of reviewability" and suggesting that *Camreta* be extended to appellate courts' en banc review).

124. For further discussion of the consequences of *Camreta* on the reviewability problem, see Kirkpatrick & Matz, *supra* note 103, at 660–65. *See also* Karen Blum et. al, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 650–51 (2013) (describing *Camreta*'s effect on courts' ability to resolve the merits questions in qualified immunity cases).

125. Turkmen v. Hasty, 789 F.3d 218, 263–65 (2d Cir. 2015), *cert. granted sub nom.* Ziglar v. Turkmen, 137 S. Ct. 292 (2016), *and cert. granted sub nom.* Ashcroft v. Turkmen, 137 S. Ct. 293 (2016), *and cert. granted*, 137 S. Ct. 293 (2016), *and judgment rev'd in part, vacated in part sub nom.* Ziglar v. Abbasi, 137 S. Ct. 1843 (2017).

126. *Id.*

127. *See* Petition for Writ of Certiorari at 16–19, Ziglar v. Turkmen, 137 S. Ct. 293 (2016) (No. 15-1358), 2016 WL 2642061 at *16 (appealing both of the Second Circuit's findings); Petition for Writ of Certiorari at 27–31, Hasty v. Turkmen, 137 S. Ct. 293 (2016) (No. 15-1363) 2016 WL 2732817 at *27 (appealing both of the Second Circuit's findings); Petition for Writ of Certiorari at 21–27, Ashcroft v. Turkmen, 137 S. Ct. 293 (2016) (No. 15-1359), 2016 WL 2732091 at *21 (appealing both of the Second Circuit's findings).

128. Pearson v. Callahan, 555 U.S. 223, 237 (2009).

129. *See infra* notes 130–131 and accompanying text.

130. *See supra* note 1 and accompanying text.

Similarly, many Fourth Amendment search and seizure cases may be highly fact-bound, as when a court has to decide whether law enforcement officers violated plaintiff's Fourth Amendment rights when they entered onto a ground-level deck in plaintiff's backyard without a warrant.[131]

The merits question at issue in *Ziglar*, however, was not so fact-bound, but was an entirely legal question of statutory interpretation as to whether the intracorporate-conspiracy exception applies to § 1985(3) claims.[132] Lower courts that have confronted this question have done so without relying on factual analysis. Usually courts look to the conflicting policy reasons behind the statute and the exception. For example, in *Stathos v. Bowden*,[133] the First Circuit held that the intracorporate-conspiracy exception does not apply to § 1985(3) claims because of the exception's origins in antitrust.[134] Because of the intent of the statute to secure equal protection for citizens, without reference to the facts of the case, the First Circuit held that "the boundaries of an intracorporate exception to the § 1985(3) conspiracy provision should be narrower than in antitrust."[135] The Sixth Circuit in *Hull v. Cuyahoga Valley Joint Vocational School District Board of Education*[136] similarly performed a legal rather than a factual analysis in deciding if the intracorporate-conspiracy exception applies to § 1985(3) claims.[137]

The *Pearson* Court also suggested that if resolving the merits question "depend[s] on a kaleidoscope of facts not yet fully developed," then courts should not perform the two-step sequencing and resolve only the clearly established prong.[138] Once again this justification for employing *Pearson* discretion was not satisfied in *Ziglar*. As discussed above, the underlying statutory question at issue in *Ziglar* was an entirely legal question of statutory interpretation and did not depend on the particular facts of the case.[139] In fact, even under *Saucier*'s two-step sequencing, the Court would have found that the officials were entitled to qualified immunity because the law at the time of the officials' conduct was not clearly established—this was the only potentially fact-bound issue in the case.[140] Whether or not the intracorporate-conspiracy exception applies to § 1985(3) civil-conspiracy claims, however, did not depend on a "kaleidoscope of facts" not yet

131. *See* Carroll v. Carman, 135 S. Ct. 348, 349 (per curiam) (2014).
132. *See supra* notes 75–89 and accompanying text.
133. 728 F.2d 15 (1st Cir. 1984).
134. *Id.* at 21.
135. *Id.* (internal quotation marks omitted).
136. 926 F.2d 505 (6th Cir. 1991).
137. *See id.* at 509–10 (concluding that the intracorporate exception does in fact bar § 1985(3) claims based on the general, legal nature of conspiracy).
138. Pearson v. Callahan, 555 U.S. 223, 239 (2009).
139. *See supra* notes 132–137 and accompanying text.
140. *See supra* note 78 and accompanying text.

developed. Instead, the solution to that question depended only on careful legal analysis by the *Ziglar* Court.

D. Constitutional Avoidance

The final major concern of the *Pearson* Court was that resolving the constitutional or statutory question may "depart[] from the general rule of constitutional avoidance."[141] The principle of constitutional avoidance is rooted in Justice Brandeis's statement in his concurrence in *Ashwander v. Tennessee Valley Authority*[142] that the Court should "not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."[143] Alexander M. Bickel famously praised the principle as a significant "passive virtue" of the Court.[144]

Outside of the realm of qualified-immunity adjudications, the "passive virtues" of the Court have been both criticized and defended by a number of scholars. For example, Cass Sunstein, a proponent of judicial minimalism, argues that passive virtues such as constitutional avoidance are preferable to judicial activism "from the standpoint of deliberative democracy" in order to uphold what Sunstein calls the "democracy-permitting outcomes" of the other two branches of government.[145] Critics of judicial minimalism argue that the passive virtues are a farce for what is, in fact, judicial activism because the Court exercises avoidance and the other passive virtues strategically.[146]

Regarding the order-of-battle dilemma within the qualified-immunity doctrine, scholars are similarly split. It is difficult to balance the prudential and counter-majoritarian reasons for preferring a restrained Court from the practical benefits of a Court that articulates the law and prevents

141. *Pearson*, 55 U.S. at 241.

142. 297 U.S. 288 (1936).

143. *Id.* at 347 (Brandeis, J., concurring).

144. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111, 188–200 (2d ed. 1986).

145. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 37–38 (1996).

146. *See, e.g.*, Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1454 (2000) (highlighting "the inherent democratic legitimacy of the adjudicative process and the unique competence of that process to produce decisions about individual rights"). *See generally* Chemerinsky, *supra* note 9.

constitutional stagnation.[147] The Court's holdings in *Saucier* and *Pearson* reflect this difficulty.[148]

This Note joins the list of scholars who have concluded that avoidance as a justification for the expansion of qualified immunity is an unacceptable "impediment to the development of new constitutional law in civil rights damages actions."[149] First, constitutional tort law is not an ideal context for constitutional avoidance because its main goal is deterrence.[150] Where courts consistently avoid merits determinations and grant qualified immunity on a not-clearly-established finding, deterrence of public officials' illegal conduct fails.[151] Second, avoidance in the qualified-immunity context "poses the distinct danger of redefining substantive constitutional law" because it denies injunctive relief even against allegedly unconstitutional conduct.[152] Avoidance that perpetuates the expansion of qualified immunity defines "the meaning of constitutional protections from whatever the legitimate authorities believe the Constitution requires to some lesser standard of reasonable misperception."[153] Lastly, and most importantly, the articulation of law in the qualified-immunity context is especially valuable because of the individual hardship endured by citizens when unconstitutional conduct is permitted to continue because the court

147. *Compare* Nancy Leong, *Rethinking the Order of Battle in Constitutional Torts: A Reply to John Jeffries*, 105 NW. U. L. REV. 969, 971 (2011) ("While I do not, of course, advocate confusion in constitutional interpretation, I remain unconvinced that any law is *always* better than no law."), *with* Sarah L. Lochner, Note and Comment, *Qualified Immunity, Constitutional Stagnation, and the Global War on Terror*, 105 NW. U. L. REV. 829, 864 (2011) (providing several reasons why "[j]udicial passivity is not always a virtue").

148. *See* Pearson v. Callahan, 555 U.S. 223, 234–35 (2009) (discussing criticisms of *Saucier*'s holding as running counter to the general rule of constitutional avoidance).

149. John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 411 (1999); *see also* Case Comment, *Qualified Immunity, Order of Analysis:* Pearson v. Callahan, 123 HARV. L. REV. 272, 282 (2009) ("Though the Court's concern with constitutional avoidance is admirable, it comes at the expense of the clarification of constitutional doctrine and the creation of legal certainty.").

150. *See* Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 SMU L. REV. 1539, 1543 (2007) ("The aims of constitutional tort law include vindicating constitutional rights and deterring constitutional violations. Allowing lower courts discretion to decide on a case-by-case basis whether to apply the avoidance policy—as Justice Breyer proposes—would systematically undermine those goals."); *see also* Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 177 (2009).

151. *See* Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1521 (2016) ("[A]voidance compounds the extent to which the law is unsettled. And, the greater the uncertainty about the law, the greater the doctrinal space for a police officer to argue that particular rights were not 'clearly established' at the time the officer acted.").

152. David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 27, 55 (1989) ("This is not prudence in avoiding unnecessary constitutional rulings. It is avoidance with a vengeance and with a substantial cost to our constitutional system.").

153. Jeffries, *supra* note 29, at 131 (2009).

holds only that the law surrounding the conduct is not clearly established without engaging on the constitutionality of the conduct.[154]

Ziglar presents a good vehicle to reconsider the doctrine of *Pearson* discretion, and specifically to analyze the *Pearson* Court's constitutional avoidance concern, for several reasons. First, the merits question in *Ziglar* was not addressing a constitutional tort such as excessive force or unreasonable search and seizure like the Court's many other qualified-immunity cases.[155] Rather, the merits determination in *Ziglar* was primarily one of statutory interpretation.[156] Constitutional avoidance is premised on the idea that the Court should pass on *constitutional* questions when possible, not necessarily that the Court should pass on statutory questions.[157] The *Ziglar* Court was asked to decide if § 1985(3) allowed for an intracorporate-conspiracy exception, based primarily on Congress's intention in passing the statute.[158] Usually constitutional avoidance is preferred based on a respect for the political, majoritarian branches of government.[159] Yet this justification for avoidance should have been less of a concern for the *Ziglar* Court given the unique history of the Ku Klux Klan Act, part of which is now codified as § 1985(3).[160] Section 1985(3) is the exact kind of democratic effort that the *Ziglar* Court should have been dedicated to upholding, not avoiding.

In addition, the peculiar nature of a § 1985(3) claim requires that the officials' conduct be motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."[161] Because of the "narrow intent requirement [that] erects a significant hurdle for § 1985(3) plaintiffs,"[162] prior to *Ziglar*, there was a circuit split even relating to the availability of qualified immunity for federal officers against § 1985(3) claims.[163] Thus, it seems especially odd that the Court in 2017 would decline to resolve the legal issue on the merits, and instead, choose to keep the law on § 1985(3) actions in flux. The principle of constitutional avoidance did not adequately justify the *Ziglar* Court's choice to withhold judgment on the contours of a citizen's statutory right to be free from civil conspiracy under § 1985(3).

154. *See id.* ("The[] costs [of merits avoidance] are not measured solely, or even chiefly, in the persistence of uncertainty in the law. The greater problem is the underenforcement of constitutional rights while such uncertainty continues.").

155. *See supra* note 60 and accompanying text.

156. Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017).

157. *See supra* note 143 and accompanying text.

158. *See Ziglar*, 137 S. Ct. at 1867.

159. *See* Sunstein, *supra* note 145, at 37–38.

160. *See supra* notes 75–77 and accompanying text.

161. Burrell v. Bd. of Trs. of Ga. Military Coll., 970 F.2d 785, 794 (11th Cir. 1992) (quoting United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott, 463 U.S. 825, 829 (1983)).

162. *Id.*

163. *See supra* note 89 and accompanying text.

CONCLUSION

This Note has proposed a way of limiting the Supreme Court's "quiet expansion of qualified immunity"[164] by re-casting the Court's principle concerns and holding in *Pearson v. Callahan*. It has suggested a four-part balancing test for courts to use in exercising *Pearson* discretion in a qualified-immunity case. It has argued that the Court should adhere to *Saucier*'s two-step sequencing and decide both the merits and clearly-established determination of a qualified-immunity analysis when (1) doing so would serve judicial economy by preventing re-litigation of an entirely legal issue; (2) officials are able to appeal both prongs of a *Saucier* analysis because the lower court has decided that the officials are *not* entitled to qualified immunity; (3) analysis of the issue will be primarily legal and not fact-bound; and (4) the articulation of the law, especially a statute passed with great democratic support, outweighs the prudential benefits of constitutional avoidance. This Note analyzed the Court's recent decision in *Ziglar* to show how such a balancing test would operate in practice. While the defense of qualified immunity serves an important societal goal, a more nuanced test for exercising *Pearson* discretion is needed to curtail its unchecked expansion.

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164. Kinports, *supra* note 9, at 78.

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