No. 10-1018

In The
Supreme Court of the United States

STEVE A. FILARSKY,

Petitioner,

v.

NICHOLAS B. DELIA,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER STEVE A. FILARSKY

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*[1]

The League of California Cities and the California State Association of Counties, as representatives of local government entities throughout California, have a vital interest in ensuring that cities and counties continue to have the ability to make effective and cost-efficient use of private attorneys in providing legal services and representation to the public. As explained in greater detail below, use of private attorneys on an ad hoc basis similar to the circumstances in this case is commonplace, desirable, and sometimes necessary—for smaller cities and counties in particular, but even for larger ones. The availability of qualified immunity for these attorneys is thus vitally important to these local government units.

The League of California Cities (League) is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those

[1] The parties have consented to the filing of this brief, and their consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

The California State Association of Counties (CSAC) is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

SUMMARY OF ARGUMENT

In this section 1983 action, the Ninth Circuit Court of Appeals' published opinion (Opinion) concludes that a city firefighter's Fourth Amendment rights were violated during an internal affairs investigation. Recognizing, however, that there was no clearly established authority that the investigating conduct would constitute a Fourth Amendment violation, the Opinion holds that all the individuals involved in conducting the investigation are entitled to qualified immunity—that is, all except one.

The one participant the Opinion concludes is not entitled to qualified immunity is a private attorney—petitioner Steve A. Filarsky—whom the City of Rialto

employed to assist it in conducting the investigation. While noting an express conflict with the Sixth Circuit's opinion in *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997), the Ninth Circuit panel reasoned it was bound by an earlier Ninth Circuit precedent holding—with virtually no reasoning—that private attorneys hired by government agencies are not entitled to qualified immunity. (Appendix to Petition for a Writ of Certiorari of Steve A. Filarsky (Pet.App.) 25-26 (citing *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003) (per curiam)).)

The Court should reverse and hold that Mr. Filarsky is entitled to qualified immunity for the following reasons:

- Local government units, like the City of Rialto in this case, and even federal government agencies commonly engage private attorneys in various capacities in an effort to obtain the most effective legal services and representation possible for the public. The availability of qualified immunity for these private attorneys hired to perform public functions is critical to government agencies' abilities to provide such representation to the public in a fiscally responsible manner.

- This Court's two opinions addressing the availability of qualified immunity to private parties—*Richardson v. McKnight*, 521 U.S. 399 (1997) and *Wyatt v. Cole*, 504 U.S. 158 (1992)—*support* the availability of qualified immunity for private

attorneys hired by cities and counties to perform public functions alongside public officials and employees.

- Flatly denying qualified immunity to private attorneys is not just legally wrong but will harm cities and counties by making use of private attorneys less effective and more expensive. This, in turn, will force many cities and counties to forego the considerable advantages of employing private attorneys or to pay considerably more to do so.

ARGUMENT

THE COURT SHOULD CLARIFY THAT QUALIFIED IMMUNITY EXTENDS TO PRIVATE ATTORNEYS WHO ARE NOT GOVERNMENT EMPLOYEES BUT ARE HIRED TO PERFORM GOVERNMENT FUNCTIONS ALONGSIDE GOVERNMENT EMPLOYEES—AN ISSUE OF VITAL IMPORTANCE TO CITIES AND COUNTIES.

A. Cities, Counties, And Other Government Units Rely Heavily On Private Attorneys Such As Petitioner Filarsky For Representation And Advice In Performing Government Functions.

"In an era of ever-increasing fiscal consciousness brought on by financial constraints, local government

agencies are constantly exploring methods of continuing to provide public services at their traditional level yet, at the same time, reducing if not stabilizing service costs." Philip D. Kahn, *Privatizing Municipal Legal Services*, 10 Local Government Studies, no. 3 (1984) at 1, *available at* http://www.informaworld.com/smpp/content~db=all~content=a789131048. Although this observation was made more than 25 years ago, it is even more apt in the dire financial circumstances most local government agencies face today. Today, as then, one common means for cities and counties to meet their needs for legal services in a cost-effective and fiscally responsible manner is to hire private attorneys either to provide specific services on an ad hoc basis or to serve as city attorney or county counsel.

As in this case, cities frequently utilize private attorneys on an ad hoc basis for a variety of purposes, including "litigation matters, criminal prosecution, special appearances before other government agencies, extensive research projects, preparation of contracts and agreements other than those routinely used by the city in the ordinary course of business, and other projects of an unusual or time consuming nature." *Id*. at 3. And hundreds of cities in California contract out the position of city attorney to a private attorney or law firm. *See id*. at 2 (in 1984, "[i]nformation maintained by the League of California Cities indicate[d] that out of 435 member cities surveyed, 340 of them—approximately 78 per cent—ha[d] contract city attorneys").

Cities are not the only government units that frequently utilize private attorneys. The vast majority of California counties use private outside counsel in situations like the one in this case. In most counties, outside counsel are brought in for the investigation of high level personnel issues, where the facts are particularly complicated, or where there are conflicts of interest. Some counties bring in outside counsel routinely.

Private attorneys are similarly hired by "other local government agencies such as water districts, school districts, [and] redevelopment agencies[.]" *Id*. at 2 & n.8. Federal government agencies too use private counsel on an ad hoc basis for litigation and various other purposes. *See* William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 Notre Dame L. Rev. 399, 463 (1988) (surveying various federal departments and agencies and concluding that "legal work of all types, from the purely advisory to litigation, is contracted out").

"The first and most obvious potential advantage of outsourcing legal services is cost savings." Patrick McFadden, Note, *The First Thing We Do, Let's Outsource All the Lawyers: An Essay*, 33 Pub. Cont. L.J. 443, 444 (2004). "Although substantially similar from a functional stand-point, in-house and contract city attorneys differ primarily with regard to financial considerations." Kahn, *supra*, at 2. Using private attorneys rather than in-house staff provides substantial savings to government entities on a myriad of expenses,

from employee benefits to law libraries to various administrative overhead costs. *Id*. "The economies associated with a contract city attorney are particularly evident in the case of cities whose legal needs are insufficient to warrant the full-time permanent employment of one or more attorneys; however, even cities with substantial legal needs nonetheless still benefit from contracting out some or all city attorney services (and the attendant administrative overhead) to the private sector." *Id*.

Saving costs is not the only reason cities, counties, and other government units hire private attorneys. *See* McFadden, *supra*, at 453 (summarizing "the possible benefits of outsourcing legal work in terms of cost savings, improved service, and more pragmatic decision making"). "Value includes not only the absolute cost, but also the quality of service. At its most basic level, the decision to outsource government attorneys is not so different from the 'make-or-buy' decision that corporations face with respect to the size of their in-house legal departments." *Id*. at 444-45; *see also id*. at 445 & n.8 (noting, in context of private firm outsourcing of legal services, advantage of outside firms' exposure to new legal issues and developments).

Specifically, other pragmatic and beneficial reasons for cities and counties to employ private outside counsel include:

- limitations on in-house staff resources and time to do the necessary work—many smaller cities and counties simply

lack the legal staff to complete even relatively small tasks, and even larger ones may lack sufficient legal staff for especially large tasks, *see* Kahn, *supra*, at 2 (noting that some cities are so small that their legal needs do not warrant full-time employment of even one attorney); *see also* Luneburg, *supra*, at 405, 463 (noting these limitations in corporate context and that same considerations apply to federal agencies), 459 (noting that "[t]he FDIC explains its use of private attorneys largely as a matter of lack of staff resources to handle the volume of work");

- to avoid actual or potential conflict-of-interest issues, *see*, *e.g.*, *Morongo Band of Mission Indians v. State Water Resources Control Bd.*, 45 Cal. 4th 731, 737-42, 88 Cal. Rptr. 3d 610, 199 P.3d 1142 (2009) (discussing conflict-of-interest issues arising where agency attorney acts as both advocate before and advisor to an agency); and, relatedly,

- "a particular need for 'independence' in the rendering of the opinion or as a check on an opinion rendered internally in an area where the inside lawyer may have less experience than outside counsel and some 'comfort' might be obtained by confirmation of the inside view," Luneburg, *supra*, at 405; *see also id*. at 463 (noting that this consideration, arising in

corporate context, also applies to federal agencies).

Public entities frequently employ private counsel when there is a need for specialized expertise that in-house attorneys for a city or other government unit—small or large—may lack. "Private attorneys with significant, specialized expertise in various sectors can provide improved service to government agencies." McFadden, *supra*, at 445; *see also* Luneburg, *supra*, at 405 (noting "lack of in-house expertise" as reason to outsource legal work), 463 (noting that this consideration, arising in corporate context, also applies to federal agencies), 459 (noting that the FSLIC's contracting is required for both lack of staff resources and need for expertise in areas of local law).

This case well illustrates these concepts. The City of Rialto is a relatively small city that does not employ an in-house city attorney but hires outside counsel for legal services. Additionally, like other cities small and large, the City of Rialto sometimes needs to hire private counsel on an ad hoc basis and to hire counsel with specialized knowledge in areas such as labor law. Mr. Filarsky, a private attorney, had served as an independent outside counsel for the City over a period of more than a decade, "to participate in internal affairs investigations concerning personnel issues," to conduct interviews of City employees "in connection with the investigative process of the City's personnel/internal affairs matters," and to provide legal advice to the City in connection with disciplinary proceedings. (Pet.App. 88-89, ¶¶ 3-4; *see also* Pet.App. 6-7 ("Filarsky had previously represented the City in

conducting interviews during internal affairs investigations."); Pet.App. 44-45, ¶ 4 ("At the time of the interview, Filarsky had for a number of years been regularly representing the City and providing legal advice to it regarding labor and employment issues" and "had previously questioned Fire Department employees in internal affairs investigations.").)

In short, use of private attorneys—as exemplified by the City of Rialto's employment of Mr. Filarsky—is a common and vital component of municipal, county, and other forms of local governance, including the federal government. Given the prevalence of section 1983 actions, the issue of whether private attorneys hired by cities and counties enjoy qualified immunity has the potential to significantly impact each of the League's 469 members and CSAC's 58 members—not to mention cities, counties and other local government units nationwide—and perhaps even federal government agencies in the context of *Bivens* actions.[2]

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[2] *See Anderson v. Creighton*, 483 U.S. 635, 637 (1987) (discussing qualified immunity of federal agents in context of Fourth Amendment action for money damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 65 (2001) (leaving open the question "whether a *Bivens* action might lie against a private individual"); *Pollard v. GEO Group, Inc.*, 629 F.3d 843, 846 (9th Cir. 2010) (explaining that panel majority "grants a *Bivens* claim to a prisoner against private company prison guards who are unprotected by notions of qualified immunity, available only to government employees") (Bea, J., dissenting from denial of rehearing en banc) (footnote omitted), *cert.*

(Continued on following page)

B. Private Attorneys Such As Mr. Filarsky—Who Are Hired By And Work With Government Officials And Employees To Perform Government Functions—Are Entitled To Qualified Immunity Even Though They Are Not Public Employees.

In this case, the Ninth Circuit panel determined that it was bound by the circuit's earlier, per curiam opinion in *Gonzalez*, which held that a private attorney representing the County of Los Angeles was not entitled to qualified immunity. (Pet.App. 25-26, citing *Gonzalez*, 336 F.3d at 834-35.) The entire reasoning of *Gonzalez* for rejecting the private attorney's claim of qualified immunity was that (1) she was "a private party, not a government employee," and (2) she pointed to "'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." 336 F.3d at 835 (quoting *Richardson*, 521 U.S. at 412). However, the result in *Gonzalez*, and now in this case, actually contravenes this Court's two opinions that address qualified immunity of private parties—*Wyatt* and *Richardson*.

Consistent with those opinions, the Sixth Circuit in *Cullinan* "s[aw] no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel." (Pet.App. 25, quoting *Cullinan*, 128 F.3d at 310.) *Cullinan*'s observation applies with even greater force here. Mr. Filarsky

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granted sub nom. Minneci v. Pollard, 131 S. Ct. 2449 (May 16, 2011) (No. 10-1104).

was hired by the city to assist in an internal affairs investigation—an inherently public function. *See Richardson*, 521 U.S. at 417 (Scalia, J., dissenting) (explaining that the function at issue there—"'[t]he duty of punishing criminals'"—was "'inherent in the Sovereign power'") (citation omitted). Attorneys performing such a public function at the request of public officials, "'while engaged in that duty, stand so far in the place of the State and exercise its political authority, and do not act in any private capacity.'" *Id.* (citation omitted).

1. *Wyatt* and *Richardson* allow for qualified immunity here.

Though *Wyatt* declined to afford qualified immunity to private party defendants, its holding was "precise[ly]" limited to parties "invoking a state replevin, garnishment, or attachment statute" for private purposes, 504 U.S. at 168-69, thus leaving open whether qualified immunity might be available to private parties who performed government functions. Far from invoking state statutes for private purposes like the defendant in *Wyatt*, private attorneys like Mr. Filarsky provide public services at the request of local governments.

Similarly, while *Richardson* declined to provide qualified immunity to prison guards in a private prison setting, it expressly "answered the immunity question narrowly, in the context in which it arose." 521 U.S. at 413. Far removed from a private attorney

providing legal services on an ad hoc basis at the request of a government entity, the specific context in *Richardson* was "one in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms." *Id.*

Richardson, in fact, points directly to application of qualified immunity here. It distinguished "lawyers who performed services at the behest of the sovereign," *id*. at 407, and emphasized that the case did "not involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id*. at 413. That description fits Mr. Filarsky's role in this case to a tee. As the Opinion acknowledged, he "is a private attorney, who was retained by the City to participate in internal affairs investigations." (Pet.App. 24.) The Opinion also describes Mr. Filarsky conducting the internal affairs interview in the presence of two fire battalion chiefs, and conferring with the fire chief during a break in the interview. (Pet.App. 6-8.) Thus, Mr. Filarsky, like many private attorneys retained on an ad hoc basis by cities and counties, was not performing anything like the kind of long-term and largely autonomous administrative function addressed in *Richardson*.

2. History favors recognition of qualified immunity here.

As *Richardson* explained, this Court "look[s] both to history and to the 'special policy concerns involved in suing government officials' " in determining whether private defendants enjoy immunity. 521 U.S. at 404 (quoting *Wyatt*, 504 U.S. at 167). In terms of history, *Richardson* points out that "[a]pparently the law *did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed at the behest of the sovereign." *Id.* at 407. The Sixth Circuit relied in part on this point in *Richardson* to conclude that a private attorney hired by a municipality was entitled to qualified immunity. *Cullinan*, 128 F.3d at 310; *see also Cooper v. Parrish*, 203 F.3d 937, 952 (6th Cir. 2000) (declining to extend qualified immunity to private attorney prosecuting nuisance abatement actions and distinguishing *Cullinan* on grounds that attorney was not acting at behest of the state and not paid by the state for his services).[3]

[3] While the Ninth Circuit's opinion in this case dismissed this point as just a dictum in *Richardson* (Pet.App. 25), the point was not mere dictum but was actually part of the *Richardson* majority's express rationale for concluding that history did not support the immunity claim of private prison operators. *Richardson*, 521 U.S. at 407; *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996) (contrasting rationale and portions of opinion necessary to reach result with "mere *obiter dicta*").

3. Policy considerations favor qualified immunity here.

More importantly, this Court has "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson*, 483 U.S. at 645. What is most significant is that the key policy concerns identified by this Court favor allowing, not disallowing, qualified immunity here. As *Richardson* recaps, qualified immunity serves the purposes of:

- "protecting government's ability to perform its traditional functions by providing immunity where necessary to preserve the ability of government officials to serve the public good or to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service";
- "protecting the public from unwarranted timidity on the part of public officials by, for example, encouraging the vigorous exercise of official authority"; and
- "contributing to principled and fearless decision-making." 521 U.S. at 408 (internal quotation marks and citations omitted).

These purposes are all thwarted by disallowing qualified immunity to private attorneys who are hired by government entities to represent, advise, and work with them on matters of governance and who effectively perform government functions.

Disallowing qualified immunity undoubtedly would discourage some talented private attorneys from performing services for cities, counties, and other government units. The public benefits greatly from cities and counties utilizing talented attorneys with special expertise, but disallowing them qualified immunity solely because they are private will surely act as a disincentive to their doing so. *See Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 406 (7th Cir. 1993) (explaining that where private entity is "fulfilling a public duty," denying qualified immunity would discourage public service and that "[t]he *Wyatt* Court noted that one purpose of qualified immunity is to avoid discouraging public service") (citing *Wyatt*, 504 U.S. at 168).

And private lawyers who do continue to perform services for cities and other government units will likely exhibit "unwarranted timidity" in government decision making, one of the very pitfalls that qualified immunity is intended to prevent. *Richardson*, 521 U.S. at 408; *see also DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 723 (10th Cir. 1988) ("[D]enying immunity would make contractor defendants—whether individual or corporate—more timid in carrying out their duties and less likely to undertake government service."). The public's ability to procure "vigorous exercise of official authority" and "principled and fearless decision-making" should not turn on whether an attorney representing the public is on the public payroll or instead hired by the public on an ad hoc basis.

And, inevitably, the cost of hiring private lawyers will increase if they are categorically disqualified from receiving qualified immunity in section 1983 lawsuits. Mechanisms such as indemnity and insurance, *see Richardson*, 521 U.S. at 410-11, will not prevent increasing costs. If private attorneys cannot avail themselves of qualified immunity, then the costs to indemnify and insure their services will increase and will ultimately be borne by the government entities that use them. As Justice Scalia pointed out in *Richardson*, there is no "free lunch": "[A]s civil-rights claims increase, the cost of civil-rights insurance increases." *Id*. at 419 n.3 (Scalia, J., dissenting). Denying qualified immunity to private attorneys such as Mr. Filarsky thus directly implicates cities' and other government units' abilities to cost-effectively "serve the public good." *Richardson*, 521 U.S. at 408 (internal quotation marks and citations omitted).

While the majority opinion in *Richardson* opined that competitive market forces would serve some of the same purposes that qualified immunity serves, *id*. at 409, that rationale does not apply here. In *Richardson*, the private prison companies' only potential clients were government units. *See Richardson*, 521 U.S. at 418-19 (Scalia, J., dissenting) (stating that "it is fanciful to speak of the consequences of 'market' pressures in a regime where public officials are the only purchaser"). Here, on the other hand, private attorneys can take their business elsewhere—namely to private clients.

In sum, more than ample policy reasons favor qualified immunity for attorneys, such as Mr. Filarsky, who are hired by city and county officials to work for and with them in representing cities and counties and performing government functions, as demonstrated above. As we now explain, failure to clarify that qualified immunity is available to these private attorneys will harm cities, counties, and other government units that use them.

C. Disallowing Qualified Immunity To Private Attorneys Hired By Cities And Counties Will Hamper Their Abilities To Obtain High-Quality And Cost-Effective Legal Services For The Public.

As explained above, many smaller cities and counties do not have sufficient legal needs or ample enough budgets to employ in-house attorneys, and even larger ones may not be able to afford sufficient in-house legal staff to handle all their legal needs. Moreover, cities and counties of all sizes sometimes require attorneys with specialized skills. If private attorneys who presently work for cities and counties decide to opt out of such service altogether rather than face lawsuits without qualified immunity, this will hamper the ability of small cities and counties, and even larger ones, to obtain the services of talented lawyers with needed expertise in areas of municipal and county governance.

And as the fees charged by experienced private attorneys who do continue to provide vigorous services to cities and counties go up—due to the increased costs that will inevitably follow from the lack of qualified immunity—all cities and counties will be adversely affected. Smaller cities and counties with little or no in-house legal staff will have to pay more for private attorneys or bear the financial burden of hiring in-house counsel. Larger cities and counties that have significant in-house counsel staff will pay more when the need arises for attorneys with specialized expertise or else bear the financial burden of obtaining and maintaining in-house counsel with such expertise.

To keep costs—and thus prices—from increasing, some private attorneys may perform less fearlessly than they would if qualified immunity were available or than attorneys on the public payroll to whom qualified immunity is available. *See Richardson*, 521 U.S. at 419 (Scalia, J., dissenting) (explaining that price will be the "predominating factor" in public entity's choice of contractors and that "fearless" performance entails lawsuits, which increase contractors' costs and thus price). Perhaps less qualified, less experienced, and less talented private attorneys will step forward to offer their services at cheaper rates. Either way, cities and counties will then be getting less value for the money spent on private attorneys.

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CONCLUSION

For the foregoing reasons, the court of appeals' judgment should be reversed with directions to grant qualified immunity to petitioner Filarsky. Disallowing qualified immunity will cost cities and counties substantially in terms of both the value and price of legal services. These negative consequences are not even remotely required by this Court's precedent; on the contrary, *Richardson* paves the way for this Court to clarify that qualified immunity is available to private attorneys, such as Mr. Filarsky, who act as adjuncts to government agencies.

Respectfully submitted,

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