No. 10-1018

In The
Supreme Court of the United States

STEVE A. FILARSKY,

Petitioner,

v.

NICHOLAS B. DELIA,

Respondent.

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

BRIEF IN OPPOSITION OF RESPONDENT NICHOLAS DELIA

MICHAEL A. MCGILL
Counsel of Record
LACKIE, DAMMEIER & MCGILL APC
367 North Second Avenue
Upland, California 91786
(909) 985-4003
mcgill@policeattorney.com

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In *Richardson v. McKnight*, 521 U.S. 399 (1997), this Court held that employees of private prison management firms that contract with state and local governments are not entitled to qualified immunity from constitutional claims brought under 42 U.S.C. section 1983. Although the opinion was not unanimous, all nine Justices agreed that the question of whether private prison guards were entitled to qualified immunity turned on whether such immunity was traditionally available at common law. 521 U.S. at 404-05, 414.

Consistent with that opinion, the Ninth Circuit recently held that Petitioner Filarsky – a for-profit private investigator (who happens to also be an attorney), contracted by a city to participate in an administrative personnel investigation of one of its employees – was not entitled to assert the defense of qualified immunity. The Ninth Circuit's opinion is in complete harmony with this Court's opinion in *Richardson* – requiring that Filarsky show a "firmly rooted" tradition of immunity for private investigators in order to avail himself of the defense of qualified immunity from claims under 42 U.S.C. section 1983.

The question thus presented is:

Whether a for-profit private investigator, contracted by the government to participate in an administrative personnel investigation, is entitled to avail himself of a qualified immunity defense.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

INTRODUCTION

The Ninth Circuit appellate decision ("the appellate decision") below arose out of litigation brought by a firefighter, Nicholas B. Delia ("Delia") against the City of Rialto, City of Rialto Fire Department, Stephen C. Wells ("Chief Wells"), Mike Peel ("Peel"), Frank Bekker ("Bekker"), and Steve A. Filarsky ("Filarsky") (collectively "Defendants").

The appellate decision includes a finding that Delia's Fourth Amendment rights were violated when Delia was ordered, without legitimate cause, to enter his home and produce materials from the inside of his home and display them in public view to his employers on his front yard. The appellate decision further analyzed the various Defendants' qualified immunity arguments and held that because Delia could not demonstrate a constitutional right was clearly established on the date of the order, City employees would not have known that their actions were unlawful. Thus, the City employees were entitled to qualified immunity. However, the appellate decision specifically carved Filarsky, a private investigator who was hired by the City to conduct the personnel investigation, out of that immunity. The appellate decision held that Filarsky was not entitled to qualified immunity.

Filarsky filed this Petition for a Writ of Certiorari. However, the Petition fails to present any "compelling reasons" that might support a grant of certiorari. *See* Sup. Ct. R. 10. Filarsky attempts to overstate his case

by arguing that the appellate decision contravenes this Court's opinion in *Richardson v. McKnight*, 521 U.S. 399 (1997), and further arguing that the appellate decision creates a split in circuits on the doctrine of qualified immunity. However, these claims lack merit.

Filarsky's assertion that the appellate decision contravenes *Richardson* fails after even a cursory review of *Richardson*. Both the Majority and Dissenting Opinions in *Richardson* recognize that private individuals performing certain government functions have been afforded immunity when there is a "firmly rooted" tradition of immunity for those specific functions. In his Petition, Filarsky cannot point this Court to any historical reference suggesting investigators should be afforded immunity. Thus, the appellate decision does not contravene *Richardson*, but rather, is in accord with its principles.

Further, Filarsky's claim that there exists a split among the Circuit Courts on this issue is similarly lacking support. Filarsky's claim of a split relies exclusively on the Sixth Circuit's opinion in *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir.), *cert. denied*, 523 U.S. 1094 (1998), in which the Sixth Circuit granted qualified immunity to outside counsel who, acting as attorneys and representatives, were actively engaged in litigation on behalf of the government. Filarksy's attempts to conflate his role as a private investigator with that of an attorney representing the City of Rialto in litigation, all in the name of creating a conflict among the circuits, is unavailing. Instead, the appellate decision acknowledged *Cullinan* and

correctly decided that Filarsky was not entitled to qualified immunity.

The appellate decision does not contravene *Richardson* and there is no conflict with the Sixth Circuit's opinion in *Cullinan*. Simply put, Filarsky has completely failed to carry his burden of demonstrating that there are *any* compelling reasons for this Court to grant his Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE[1]

In July 2000, Delia was hired by the City of Rialto's Fire Department as a firefighter. Pet. App. 5.[2] On August 10, 2006, Delia began to feel ill while working to control a toxic spill. *Id.* He was then transported to a hospital emergency room for evaluation. *Id.* There, a doctor provided Delia with an off-duty work order for three work shifts, but placed no activity restrictions on him. *Id.*

On August 15, 2006, Delia returned to the hospital, at which time the doctor again issued him an off-duty work order. This time it was for eight shifts. *Id.*

---

[1] This recitation of background facts is substantially identical to that contained in the Ninth Circuit's Order Amending Opinion and Denying Petition for Rehearing En Banc and Amended Petition. *See* App. to Pet. 1.

[2] All references to "App." shall refer to the Appendix in Filarsky's Petition for Writ of Certiorari.

The doctor also scheduled a medical test for him. *Id.* Again, the doctor did not place any activity restrictions on Delia. *Id.* On August 22, 2006, Delia returned to the hospital and the doctor gave him another off-duty work order for eight shifts. Pet. App. 5-6. Once again, no activity restrictions were placed on Delia. Pet. App. 6. Shortly after this examination, Delia underwent a colonoscopy and endoscopy. *Id.* He was diagnosed with esophagitis, an ulceration of the esophagus, caused by his employment. *Id.* On August 29, 2006, Delia's doctor issued an off-duty order for the period from August 26, 2006, through September 3, 2006. *Id.*

The City became suspicious of Delia's off-work status due to a prior disciplinary matter. *Id.* Delia was previously disciplined for sending improper e-mails, but it is unclear why this would make the City suspicious of Delia's off-work activities. *Id.* In any event, the City hired a private investigator to conduct surveillance on Delia due to the City's suspicions. *Id.* During the surveillance, Delia was filmed buying building supplies at a home improvement store. *Id.* Based on these observations, the City began a formal internal affairs investigation of Delia to determine whether he was off work on false pretenses. *Id.* The City began its internal affairs investigation despite the fact that Delia had no activity restrictions placed on him by his treating physician and the City possessed no evidence to the contrary. *Id.*

As part of the internal affairs investigation, Delia was ordered to appear, on September 18, 2006, at an

administrative investigation interview. *Id.* The interview was conducted by Filarsky, a private investigator retained by the City. *Id.* In addition to Filarsky and Delia, Delia's attorney, Stuart Adams, Peel, and Bekker were also present at the interview. Pet. App. 6-7.

Filarsky indicated to Delia that he was obligated to fully cooperate and cautioned Delia that "[i]f at any time it is deemed you are not cooperating then you can be held to be insubordinate and subject to disciplinary action, up to and including termination." *Id.* Filarsky then asked Delia about his home construction projects. *Id.* Delia answered that he had some duct work done on his home and had purchased some rolls of insulation. *Id.* Delia told Filarsky that the rolls were currently sitting in his house. *Id.* Filarsky showed Delia a videotape of Delia purchasing home construction materials, and asked him whether the insulation had been installed. *Id.* Delia told Filarsky that the rolls were still bagged at his house.

Shortly after discussing the insulation rolls with Delia, Filarsky had a private meeting with the "Chiefs," in which Filarsky expressed his desire to order Delia to produce the rolls of insulation for inspection. Pet. App. 7-8. Following this, Filarsky asked Delia to allow Peel to follow him to his house and permit Peel to enter Delia's home to conduct a warrantless search for the insulation there. Pet. App. 8. On the advice of counsel, Delia refused Filarsky's request. *Id.* Unable to obtain Delia's consent to a warrantless search of his home, Filarsky then asked if Delia would volunteer

to have Peel follow him to Delia's house, where Delia would bring out the rolls of insulation to show Peel that they had not been installed. Again, on the advice of his counsel, Delia refused Filarsky's request. *Id.*

Unable to get Delia to volunteer, Filarsky orally ordered Delia to produce the rolls of the insulation from his house. *Id.* Delia's attorney questioned Filarsky's authority for issuing such an order (since Filarsky was only a private investigator) and requested that it be in writing. *Id.* Following a break, Delia was presented with a written order to produce the insulation for inspection, which was signed by Chief Wells. *Id.*

Immediately after the interview, Peel and Bekker, in a city vehicle, followed Delia to his house. *Id.* Once there, Peel and Bekker parked along the curb in front of Delia's home. Pet. App. 8-9. Delia went into his home and brought out three to four rolls of insulation and placed them on his lawn. Pet. App. 9. Having confirmed that Delia had been truthful in the investigation, Peel and Bekker then drove away. *Id.*

On May 21, 2008, Delia filed this lawsuit in the United States District Court, Central District of California. *Id.* Defendants subsequently moved for summary judgment, which was granted by the district court. *Id.* The court held that Delia had not established municipal liability against the City. Pet. App. 9-11. It further held that the individual

defendants, including Filarsky, were all entitled to summary judgment based on qualified immunity.[3] *Id.*

On April 3, 2009, Delia filed an appeal of the district court's decision granting Defendants' motion for summary judgment. The Ninth Circuit held that the warrantless, compelled search of Delia's home violated his rights under the Fourth Amendment. Pet. App. 14-20. However, based on the Ninth Circuit's finding that the right violated by the unlawful search was not clearly established at the time of the defendants' misconduct, Chief Wells, Peel, and Bekker were entitled to qualified immunity. Pet. App. 20-24.

The Ninth Circuit then turned its attention to whether Filarsky is entitled to qualified immunity, noting that "[u]nlike the other individual defendants in this case, Filarsky is not an employee of the City. Instead, he is a private attorney who was retained by the City to participate in internal affairs

---

[3] The district court's order states that Filarsky, Peel, Bekker and Chief Wells, are all entitled to qualified immunity. However, during the hearing on Filarsky's motion for summary judgment, which predated the order, the district court stated that Wells, Peel, and Bekker were entitled to qualified immunity, but that Filarsky's "conduct did not result in the deprivation of any constitutional right – as a required element for a 1983 claim." The Ninth Circuit attributes this inconsistency to the apparent, mechanical adoption by the district court of the findings of fact and conclusions of law, which were prepared by defense counsel. At any rate, the Ninth Circuit opted to rely exclusively on the district court's written order – that Filarksy is entitled to qualified immunity.

investigations." Pet. App. 24. The Ninth Circuit's analysis resulted in its conclusion that Filarsky is not entitled to qualified immunity. Pet. App. 27. Accordingly, it reversed the district court's grant of summary judgment in favor of Filarsky based on qualified immunity and remanded for further proceedings. *Id.*

REASONS FOR DENYING FILARSKY'S PETITION

The stated basis for Filarsky's petition is twofold: (1) The Ninth Circuit's holding in this case conflicts with the precedent set by this Court in *Richardson*; and (2) this case highlights a split between the circuits regarding qualified immunity.

However, this case does not conflict with *Richardson* because it does not involve the requisite "special circumstances" necessary to confer qualified immunity on a private individual, as discussed in *Richardson*. Furthermore, there is no "split" between the circuits regarding whether a private individual employed as a contract private investigator is entitled to qualified immunity. Finally, even if Filarsky were correct that the Ninth Circuit incorrectly applied Richardson, that alone would not necessitate review by this Court. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

I. The Ninth Circuit's Holding Does Not Contravene Supreme Court Authority.

The first of Filarsky's two arguments is that the appellate decision contravenes Supreme Court authority, namely *Richardson*. However, this argument is premised on a mischaracterization of the appellate decision as a *categorical* denial of qualified immunity to government-retained private lawyers. *See* Pet. 15. The error in Filarsky's argument is that the Ninth Circuit did not hold that private attorneys are never entitled to qualified immunity; but instead, that Filarsky, as a private investigator conducting an internal affairs investigation, was not entitled to qualified immunity. Filarsky assumes that because the Ninth Circuit declared that it is not bound to Sixth Circuit precedent, and because it did not offer an overly extensive qualified immunity analysis under *Richardson*, its holding therefore *contravenes* this Court's decision in *Richardson*.

In *Richardson*, the Court discussed two primary factors for determining when a private person sued under 42 U.S.C. section 1983 may avail himself of the qualified immunity normally accorded to public officials: (1) Whether history reveals a firmly rooted tradition of immunity applicable to the type of private actor involved in the case; and (2) whether public policy justifications support the application of qualified immunity. *Id.* at 404. As discussed below, neither of these factors are present in Filarsky's case, which renders the Ninth Circuit's holding is consistent with *Richardson*.

A. Filarsky Is Not Entitled To Qualified Immunity Under *Richardson* Because He Failed To Present Evidence Showing A Firmly Rooted Tradition Of Immunity Applicable To Private Actors Conducting Administrative Personnel Investigations.

The Ninth Circuit began its analysis of whether Filarsky is entitled to qualified immunity by pointing out that "Filarsky is not an employee of the City. Instead, he is a private attorney, *who was retained by the City to participate in internal affairs investigations*." Pet. App. 24 (emphasis added). Filarsky has failed to cite to any cases or historical evidence that would support his claim that private actors conducting administrative personnel investigations enjoyed qualified immunity. Without such evidence, he has failed to establish that he is entitled to raise the defense of qualified immunity.

Petitioner Filarsky's argument in this regard is essentially comprised of nothing more than a summary of *Richardson*, *see* Pet. 16-20, and its passing reference to immunities previously granted to "certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign." *Richardson*, 521 U.S. at 407 (citing *Tower v. Glover*, 467 U.S. 914, 921 (1984)). The lawyers referred to by the *Richardson* Court when it cited *Tower*, are public defenders. *See Tower*, 467 U.S. at 921.

In contrast to the public defenders in *Tower*, Filarsky "was retained *to act as the City's agent* in its investigation of Respondent Delia." Pet. 31. He was not working in a capacity that might otherwise be entitled to qualified immunity under *Richardson*, such as that of a contract city attorney or a contract public defender. Instead, Filarsky concedes that he was hired to participate in an administrative personnel investigation.

Notwithstanding Filarsky's clever attempts to frame his prior acts as those similar to that of a contract city attorney, rather than an administrative private investigator, there exists no case or any historical evidence that would support his claim that private actors who conduct administrative personnel investigations have enjoyed qualified immunity.[4] As such, he is not entitled to qualified immunity.

---

[4] For the first time on appeal before this Court, Filarksy modified the caption on his Petition, by unilaterally adding "ESQ." after his name. This was done despite the fact that the initial complaint listed Filarsky "as an Internal Affairs Investigator for the City of Rialto." However, adding ESQ. to Petitioner's caption hardly changes the character of his actions from that of a private investigator hired to participate in an administrative personnel investigation. As Filarsky concedes in his motion for summary judgment, "[W]e are dealing with a defendant who was retained to represent the City in its investigation of Plaintiff." (App.'s Index of Record, Vol. II, 14:22-23.)

B. The Public Policy Justifications Relied Upon By This Court In *Richardson* Do Not Support Application Of Qualified Immunity.

The second *Richardson* factor – whether public policy justifications support the application of qualified immunity – is virtually ignored in Filarsky's Petition. The *amici curiae* brief filed in support of Petitioner is similarly unhelpful as it ignores the facts of this case. Instead *amici curiae* address only the general argument, framed around hypothetical facts, that municipalities should be able to contract for legal services and that some of those legal service providers should be entitled to qualified immunity. The question of whether private attorneys contracted to perform essential governmental services, such as that of a city attorney or a city manager, should be entitled to qualified immunity is not the issue presented in this appeal. Rather, the real question is whether private actors should be entitled to qualified immunity when they are employed to participate in administrative investigations regarding simple allegations of employee misconduct.

In *Richardson*, this Court discussed policy concerns that might give rise to qualified immunity even in the absence of historical evidence of a firmly rooted tradition of immunity. 521 U.S. at 407-12. The first, and most important, concern giving rise to government immunities is unwarranted timidity. *Id.* at 409. However, explained the Court, the concern regarding unwarranted timidity "is less likely present, or at

least is not special, when a private company subject to competitive market pressures" is involved. *Id.* at 409. In the context of private prison contracts, the Court clarified:

> In other words, marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or "nonarduous" employee job performance. And the contract's provisions – including those that might permit employee indemnification and avoid many civil-service restrictions – grant this private firm freedom to respond to those market pressures through rewards and penalties that operate directly upon its employees. [] To this extent, the employees before us resemble those of other private firms and differ from government employees.

Id. at 410 (citation omitted).

While the record does not contain the particulars of Filarsky's contract with the City of Rialto, it appears that these marketplace pressures are present. The City of Rialto can hire any private investigator it wishes to investigate complaints of employee misconduct. Indeed, Filarsky's brief, as well as that of *amici curiae*, is chock-full of references to the growing number of cities contracting out for services with private employers.

As a private investigator hired by the City, Filarsky is a profit-seeking market participant. That is, he faces competition; thus, he must perform

efficiently and effectively to retain business. Also, California Rule of Professional Conduct 3-410 requires attorneys who do not carry professional liability insurance to provide notice of that fact to their clients. These marketplace pressures provide an incentive for the City to hire an effective attorney and/or an attorney who carries his own liability insurance.

Unlike Filarsky, "government employees typically act within a *different* system. They work within a system that . . . is often characterized by multidepartment civil service rules that, while providing employee security, may limit the incentives or the ability of individual departments or supervisors flexibly to reward, or to punish, individual employees." 521 U.S. at 410-11. Accordingly, there exists no special immunity-related need for the City's privately-contracted personnel investigators, even if they happen to be attorneys, to encourage vigorous performance.

Next, "privatization helps to meet the immunity-related needs to ensure that talented candidates are not deterred by the threat of damages suits from entering public service." *Id.* at 411 (internal quotation marks and citations omitted). As discussed above, the fact that Filarsky operates outside of civil service restraints, allows the City of Rialto to offset increased employee liability risk with higher pay or extra benefits. As a result, Filarsky, and his competitors, can operate as private firms instead of like typical government departments.

The final policy consideration underlying governmental immunity is whether lawsuits might distract employers from their duties. *Id.* at 411-12. However, "the risk of 'distraction' alone cannot be sufficient grounds for an immunity." *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)). In considering this policy consideration, the *Richardson* Court stated:

> Given a continual and conceded need for deterring constitutional violations and our sense that the firm's tasks are not enormously different in respect to their importance from various other publicly important tasks carried out by private firms, we are not persuaded that the threat of distracting workers from their duties is enough virtually by itself to justify providing an immunity.

Id. at 412.

Here, the threat that investigators hired by the City to investigate allegations of employee misconduct will be subjected to a barrage of distracting litigation for violating employees' civil rights is speculative, at best.

In short, there is nothing about the job of conducting administrative investigations into personnel complaints that warrants providing Filarsky with governmental immunity. His job is one that private industry might, or might not, perform; and which does not have a firmly rooted tradition of immunity applicable for private actors. Because there are no

special reasons significantly favoring an extension of governmental immunity, the Court should hold that Filarsky, unlike those who work directly for the City of Rialto, does not enjoy immunity from suit under Section 1983.

C. Filarsky Would Not Be Entitled To Qualified Immunity Under The "Functional Approach" Analysis Discussed In The *Richardson* Dissent.

Filarsky argues that he would be entitled to qualified immunity under the *Richardson* dissent's functional approach. Pet. 26-30. However, the *Richardson* majority rejected that approach: "[A] purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery." *Richardson*, 521 U.S. at 409. Allowing Filarsky to avail himself of qualified immunity by applying a framework previously rejected by this Court is inconsistent with the doctrine of *stare decisis*. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 848 (1991) ("The overruling of one of this Court's precedents ought to be a matter of great moment and consequence.").

Notwithstanding this, Filarsky's theoretical entitlement to qualified immunity under such a rejected approach would not cast doubt on the Ninth Circuit's holding. Contrary to Filarsky's assertion, he

would not be entitled to qualified immunity even if the Court chose to apply the functional approach discussed in the *Richardson* dissent. Justice Scalia, the author of that dissent, recognized that "[p]rivate individuals have regularly been accorded immunity when they perform a governmental function *that qualifies*." *Richardson*, 521 U.S. at 417 (emphasis added). Under the dissent's functional approach, "immunity is determined by function, not status." *Id.* at 416. Applying that approach, the dissent determined that the private prison guards performed the type of governmental function that should invoke qualified immunity.

However, the function of the private prison guards in *Richardson* stands in sharp contrast to that of Filarsky, who was employed by the City to conduct administrative personnel investigations regarding employee misconduct – not to "perform a prototypically governmental function (enforcement of state-imposed deprivation of liberty) . . . that gives rise to qualified immunity." *Id.*

More specific to attorneys, Justice Scalia also discussed the policies underlying immunity granted to private actors functioning as grand jurors, prosecutors, judges, and witnesses in court proceedings. Turning to private attorneys, the dissent explained: "I think it highly unlikely that we would deny prosecutorial immunity to those private attorneys increasingly employed by various jurisdictions in this country to conduct high-visibility criminal prosecutions." *Id.* at 418 (citations omitted). The common thread between

all of these private actors – a thread not shared by Filarsky – is the fact that they are all "integral parts of the judicial process." *Id.* (quoting *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)). Filarsky, by conducting an internal administrative investigation into employee misconduct, was not completing even a quasi-judicial function.

In short, Filarsky cannot escape the facts of this case. Unless the duties of private, administrative personnel investigators are stretched so far as to label them integral to the judicial process, Filarsky cannot avail himself of the defense of qualified immunity under the functional approach.

II. The Ninth Circuit's Opinion Does Not Create A Split In The Circuits.

Filarsky argues that the Ninth Circuit's opinion creates a circuit split on the doctrine of qualified immunity by mischaracterizing the opinion as a *categorical* denial of qualified immunity to all government-retained private lawyers. Pet. 30-35. The supposed circuit split that Petitioner attempts to create is based solely on the Sixth Circuit's decision in *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). However, the facts in *Cullinan* bear almost no resemblance to those of this case, and the Ninth Circuit's decision regarding Filarsky hardly creates a Circuit split vis-à-vis the Sixth Circuit's decision in *Cullinan*.

In *Cullinan*, the Sixth Circuit held that a city's outside legal counsel was entitled to qualified immunity. The court stated, "We see no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel." *Id.* However, the *Cullinan* Court failed to offer a reasoned analysis for its decision. The fact that neither the Sixth Circuit in *Cullinan*, nor the Ninth Circuit in this case, analyze their respective facts under the *Richardson* rubric makes it impossible to declare a split between the Circuits. Filarsky's assumption that the litigation attorneys in *Cullinan* are similarly situated to *Filarsky*, an administrative personnel investigator who happens to also be an attorney, does not constitute evidence of a Circuit "split."

Filarsky's attempt to marry this case to *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003) is equally unavailing.[5] While it is true that the *Gonzalez* court held that a private attorney was not entitled to qualified immunity, the holding in *Gonzalez* was not the product of a comprehensive analysis under *Richardson*; instead, the court's holding was based on the fact that the private attorney (defendant) failed to establish a record supporting the grant of qualified immunity. *Compare Gonzalez*, 336 F.3d at 835 ("Spencer . . . *has pointed to* 'no special

---

[5] While Filarsky's Petition concedes that "the doctrine of qualified immunity was not even at issue and was not briefed in *Gonzalez*," Pet. 12, it goes on to include a full analysis of the case, Pet. 33-34.

reasons significantly favoring an extension of governmental immunity' to private parties in her position." (quoting *Richardson*, 521 U.S. 399) (emphasis added)), *with Richardson*, 521 U.S. at 412 ("Our examination of history and purpose thus reveals nothing special enough about the job or about its organizational structure that would warrant providing these private prison guards with a governmental immunity.").

Further underscoring the fact that the *Gonzalez* holding is not the product of the *Richardson* framework applied to an adequate factual record is its two-sentence discussion of qualified immunity:

> Spencer is not entitled to qualified immunity. She is a private party, not a government employee, and she has pointed to "no special reasons significantly favoring an extension of governmental immunity" to private parties in her position. *See Richardson v. McKnight*, 521 U.S. 399, 412, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997).

Gonzalez, 336 F.3d at 835. In short, the appellate decision correctly cites *Gonzalez* for the general principle that private parties who cannot establish special reasons significantly favoring an extension of governmental immunities to them in their positions are not entitled to a grant of qualified immunity. Pet.

App. 26.[6] The mere fact that the Ninth Circuit opted not to author an extensive analysis under *Richardson* in this case does mean that its holding "is in direct conflict with" *Richardson*. Pet. 13.

Finally, Filarsky's perception that the holdings of *Gonzalez* and *Cullinan* are incompatible matters not. The appeal here is from the present matter, involving Filarsky, a for-profit private investigator. The unique facts presented in this appeal, with Filarksy hired, not as an attorney to represent the government in litigation, but rather as an investigator to conduct an employee investigation, take this case far outside the holdings of *Gonzalez* and *Cullinan*. The appellate decision is in line with this Court's holding in *Richardson*. Had the Ninth Circuit elected to extend qualified immunity to Filarsky, an attorney hired to conduct administrative personnel investigations of city employees, the exception would swallow the rule – government immunity would be extended so as to apply to *any* attorney hired by *any* public entity for *any* purpose. That would clearly be inconsistent with the stated goals and objectives of qualified immunity under *Richardson*.

---

[6] The Ninth Circuit had no reason to doubt the weight of *Gonzalez*, given this Court's denial of certiorari in that case. *See Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003).

III. The Petition Should Be Denied Because The Facts Of This Case Create A Poor Vehicle For Deciding The Questions Presented By Petitioner.

As discussed above, this case does not involve the type of "special circumstances" present as contemplated by *Richardson*. Instead, it involves a private investigator, who was retained by the City to participate in internal affairs investigations." Pet. App. 24. Filarsky has presented no evidence to the Ninth Circuit of a firmly rooted tradition of immunity applicable to his situation. As discussed above, the public policy justifications do not support the application of qualified immunity.

Contrary to Filarsky's suggestion, this is not the case to decide whether outside attorneys, hired to represent the government in litigation, should be entitled qualified immunity. Filarsky was not hired for that purpose.

Furthermore, Filarsky's petition is not about a "split" between the circuits. The unique facts presented by Filarsky's position as an outside private investigator, do not warrant review at this time. There are no other circuits that have addressed this issue and there is no compelling reason for this Court to do so at this time.

Instead, this Petition is simply about Filarsky's belief that the Ninth Circuit misapplied *Richardson* to the facts of this case. That mistaken belief, however, does not justify a grant of certiorari. *See* Supreme

Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL A. MCGILL
Counsel of Record

LACKIE, DAMMEIER & MCGILL APC
367 North Second Avenue
Upland, California 91786
(909) 985-4003

Counsel for Respondent

Blank Page