In The

Supreme Court of the United States

STEVE A. FILARSKY, ESQ.,

Petitioner,

v.

NICHOLAS B. DELIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In *Richardson v. McKnight,* 521 U.S. 399, 408 (1997), a bare majority of this Court declined to extend qualified immunity to private prison guards, but expressly noted a historical basis of immunity for private lawyers working "at the behest of the sovereign." *Id.* at 407. The *Richardson* majority also expressly did not preclude qualified immunity for private parties working as "adjunct[s] to government." *Id.* at 413. Based on *Richardson*, the Sixth Circuit has accorded immunity to such "private" lawyers. *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997). Contravening *Richardson* and expressly disagreeing with *Cullinan*, the Ninth Circuit in this case denied qualified immunity to a "private" lawyer retained by the government solely because of his "private" status, even though it accorded qualified immunity to all of the individual government actors involved, thereby completely exonerating them for the very same conduct, which did not violate any clearly established rights. App., *infra,* 4-5, 12-24. The question thus presented is:

Whether a lawyer retained to work with government employees in conducting an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a "private" lawyer rather than a government employee.

PARTIES TO THE PROCEEDING

Petitioner (defendant and appellee below):
STEVE A. FILARSKY, ESQ.

Respondent (plaintiff and appellant below):
NICHOLAS B. DELIA

Additional defendants and appellees below:
CITY OF RIALTO, a Public Entity; CITY OF RIALTO FIRE DEPARTMENT, a Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief of the City of Rialto; MIKE PEEL, Individually and as the Battalion Chief for the City of Rialto; FRANK BEKKER, Individually and as the Battalion Chief for the City of Rialto. These defendants were parties to the underlying Ninth Circuit decision; however, they no longer have an interest in the case as the Ninth Circuit upheld their grant of summary judgment based upon an extension of qualified immunity.

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Petitioner, Steve A. Filarsky, Esq. (hereinafter referred to as "Petitioner Filarsky") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's Order denying rehearing *en banc* and amended opinion are reported at 621 F.3d 1069 (9th Cir. 2010). App., *infra*, 1-38. The Opinion of the United States District Court for the Central District of California, including the Judgment and Statement of Uncontroverted Facts, is not reported and is included in the Appendix at pages 39-51.

JURISDICTION

The Ninth Circuit issued its decision on September 9, 2010. Petitioner Filarsky timely filed a petition for rehearing *en banc*, which was denied on November 8, 2010. App., *infra*, 1-38. This Court has jurisdiction under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the placed to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

Section One of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

> Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. section 1983.

STATEMENT OF THE CASE

1. Petitioner Filarsky is a private attorney who performed services at the behest of the City of Rialto, a public municipality organized under the laws of the State of California (hereinafter referred to as the "City"). App., *infra,* 6-7, 54, 59, 88-89. The City retained Petitioner Filarsky to provide labor and employment law guidance, including participation in internal affairs investigations involving City employees. App., *infra,* 6-7, 54, 59, 88-89. In participating in such internal investigations on behalf of the City, Petitioner Filarsky acted under color of state law and within the course and scope of his

employment with the City. App., *infra*, 6-7, 54, 58-59, 88-89.

On September 18, 2006, an interview of Respondent Nicholas B. Delia, a firefighter for the City (hereinafter referred to as "Respondent Delia"), was conducted in connection with an internal investigation; the subject matter of the investigation was the suspected inappropriate use of "sick time" by Respondent Delia to work on a home remodeling project. App., *infra*, 6-8, 60, 89-90. Battalion Chiefs Mike Peel and Frank Bekker, Respondent Delia's attorney Stuart Adams, and Petitioner Filarsky were present (hereinafter collectively referred to as "Battalion Chiefs"). App., *infra*, 7, 58, 90. On behalf of the City, Petitioner Filarsky was investigating Respondent Delia after the City obtained a *sub rosa* videotape which depicted him purchasing building materials (hereinafter "Subject Building Materials") and unloading them at his home on a "sick" day. App., *infra*, 6, 60, 89. Petitioner Filarsky was retained by the City as legal counsel because of his experience in personnel and internal affairs matters. App., *infra*, 6, 59, 88-89.

Petitioner Filarsky has conducted numerous investigations on behalf of the City over the past fourteen years, and was routinely expected to conduct not only the investigation and interviews, but to provide legal analysis, propose alternative disciplinary actions, draft correspondence regarding disciplinary actions directed by City employees, and to

participate in legal proceedings and hearings. App., *infra*, 6-7, 58-59, 88-90.

During the interview on September 18, 2006, Respondent Delia offered in his defense that he had not incorporated the Subject Building Materials into his home remodeling project and that the Subject Building Materials remained unused at his residence. App., *infra*, 7, 60, 90.

After a short meeting, the City authorized Petitioner Filarsky to inform Respondent Delia that if he would simply show the Battalion Chiefs the Subject Building Materials to validate his explanation, the investigation would be over and it would be resolved in Respondent Delia's favor with no disciplinary action whatsoever. App., *infra,* 7-8, 60-61, 90-91. Thereafter, Petitioner Filarsky so advised Respondent Delia. App., *infra,* 7-8, 60-61, 90-91.

During the interview, Respondent Delia was represented by attorney Stuart Adams; when Respondent Delia was asked to show the Subject Building Materials to his superiors, Adams advised Respondent Delia to refuse to produce the Subject Building Materials. App., *infra,* 8, 61-62, 91. Based on advice of counsel, Respondent Delia then declined to comply. App., *infra,* 8, 61-62, 91. The request was then clarified in the interview by Petitioner Filarsky, who indicated that the City had no desire or intention of going inside Respondent Delia's home at all but rather wanted him to simply bring out a sample of the unused Subject Building Materials to the front

yard for visual verification to validate his story. App., *infra,* 8, 61-62, 91. Again, attorney Adams advised Respondent Delia to refuse to comply, even though it was expressly represented that the production of the Subject Building Materials would completely and immediately exonerate Respondent Delia. App., *infra*, 61-63, 91-92. Accordingly, Respondent Delia refused to comply. App., *infra,* 8, 61-63, 91-92.

Ultimately, Fire Chief Stephen C. Wells converted the request to produce the Subject Building Materials into a written order (hereinafter referred to as the "Order") and signed it, as Petitioner Filarsky had no authority to make such an order, unilaterally or otherwise. Petitioner Filarsky conveyed the Order to Respondent Delia and to Respondent Delia's counsel. App., *infra,* 8, 61-63, 91-92. At no point in time before or after the Order was issued was Respondent Delia ever threatened with insubordination and/or termination. App., *infra,* 63, 92-93.

Prior to conveying the Order to Respondent Delia, Petitioner Filarsky spoke directly to then-City of Rialto City Attorney Bob Owen on the telephone regarding the proposed Order. App., *infra,* 64, 93. Petitioner Filarsky advised Mr. Owen of the circumstances surrounding the investigation and the scope of the proposed Order. Additionally, Respondent Delia's counsel Mr. Adams also spoke to Mr. Owen prior to the Order being issued. App., *infra,* 64, 93. The City Attorney offered no objection to the proposed Order and could see no reason why the Order should not issue. App., *infra,* 64, 93.

Thereafter, no less than *four* (4) union representatives were called and summoned by Delia's counsel to the ongoing interview of Delia so that they could sit in and listen while Respondent Delia was directed to drive to his home, remove a sample of the unused Subject Building Materials from inside, and show them to the Battalion Chiefs. App., *infra,* 64, 93. The four union representatives listened to the Order and offered no objection whatsoever. App., *infra,* 64, 93.

Petitioner Filarsky did not attend the visit to Respondent Delia's home. App., *infra,* 64, 93-94. The only people who attended the visit to Respondent Delia's home were Respondent Delia, Respondent Delia's counsel, and Battalion Chiefs Peel and Bekker (Peel and Bekker remained in their car parked curbside the entire time and departed after a sample of the unused Subject Building Materials was brought outside by Respondent Delia). App., *infra,* 8, 9, 63, 93-94.

2. Respondent Delia filed a Complaint against Defendants City of Rialto Fire Department, Fire Chief Stephen C. Wells, Battalion Chief Mike Peel, Battalion Chief Frank Bekker, and Petitioner Filarsky, on May 21, 2008, in the United States District Court, Central District, based on the alleged violation of Respondent Delia's civil rights under the Fourth and Fourteenth Amendments of the U.S.

Constitution under 42 U.S.C. section 1983.[1] *See* App., *infra*, 3, 57. On January 12, 2009, Petitioner Filarsky moved for summary judgment, or in the alternative, summary adjudication of issues. Petitioner Filarsky asserted that: (1) he was entitled to the protection of the doctrine of qualified immunity as a private defendant who performed services at the behest of the sovereign, i.e., City of Rialto, (2) his conduct did not constitute a violation of Respondent Delia's constitutional rights for which a claim under 42 U.S.C. section 1983 could be sustained, (3) he had no obligation to countermand the City's decision to Order Respondent Delia to produce the Subject Building Materials, and (4) *even if* his conduct was ultimately determined to constitute a violation, it was not the violation of a "clearly established" constitutional right, thereby entitling him to the protection of the doctrine of qualified immunity.[2] App., *infra*, 53-55.

On February 2, 2009, the United States District Court, Central District, heard Petitioner Filarsky's motion for summary judgment (along with the other Defendants' motions for summary judgment); on that same day, the court granted Defendants' motions for

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[1] Respondent Delia made other claims including a separate *Monell* claim against the City of Rialto, however, for brevity's sake, we do not discuss those claims within this petition.

[2] Also on January 12, 2009, Defendants City of Rialto, Bekker, Peel, and Wells filed their motion for summary judgment, or in the alternative summary adjudication, however, again for the sake of brevity the basis for their assertions will not be discussed in this Petition.

summary judgment based upon the extension of qualified immunity which operated as a bar to suit. In addition, the District Court also found that Respondent Delia's Subject Building Materials display did not constitute a warrantless search and therefore was not a violation of Respondent Delia's constitutional rights. Specifically, the District Court held that:

- Petitioner Filarsky was "protected from liability by the doctrine of qualified immunity as [his] conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known because Delia [had] not demonstrat[ed] a violation of a clearly established constitutional right in that Delia was not threatened with insubordination or termination if he did not comply with any order given and none of these defendants entered [Delia's] house." App., *infra*, 48.
- "Delia's claim against the City based on 42 U.S.C. section 1983 fails as a matter of law because neither Wells, Peel, Bekker nor Filarsky had final policymaking authority, none was the policymaker for the City for the purposes of the act about which Delia complain[ed] and Delia [had] provided no evidence of any longstanding practice or custom of the City or that any official with final policymaking authority ratified the conduct of which Delia complain[ed]." App., *infra*, 49.

3. On April 3, 2009, Respondent Delia filed a timely Notice of Appeal, appealing the District Court's decision in granting Defendants' motions for summary judgment. App., *infra*, 3-5. The Ninth Circuit reversed as to Petitioner Filarsky *only*. App., *infra,* 4-5. The opinion was authored by District Judge for the Northern District of Iowa, sitting by designation, Judge Mark W. Bennett; the opinion was joined by Judges Alfred T. Goodwin and Johnnie B. Rawlinson. App., *infra,* 2-3. The panel found that there was a violation of Respondent Delia's rights, but also unequivocally found that it was not a violation of a "clearly established right." App., *infra*, 4-5, 24. The panel therefore upheld the grant of summary judgment for the City employees based upon an extension of qualified immunity but *reversed* the District Court's decision as to Petitioner Filarsky by refusing to extend qualified immunity to him for the very same acts. App., *infra*, 4-5, 24-27.

In declining to extend the protection of qualified immunity to Petitioner Filarsky in this case, the Ninth Circuit panel relied solely on *Gonzalez v. Spencer,* 336 F.3d 832 (9th Cir. 2003). In *Gonzalez,* the Ninth Circuit rejected the attorney's claim of qualified immunity without ever considering the *Richardson* factors or taking into account the long tradition of extending the protection of qualified immunity to lawyers under such circumstances. *Id.* at 835 (quoting *Richardson*, 521 U.S. at 412).

Curiously, the Ninth Circuit panel opinion expressly acknowledged a conflict with the Sixth Circuit

in the matter of *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 2005). App., *infra*, 25. However, the Ninth Circuit still declined to consider *Cullinan*, contending erroneously that they were inextricably bound by the decision in *Gonzalez*.

4. Petitioner Filarsky petitioned for panel rehearing *en banc* on the grounds that: (1) rehearing was warranted given the fact that the Ninth Circuit's panel opinion directly conflicted with an existing opinion of another circuit court (Sixth Circuit) and substantially affected the nationwide application/ extension of the doctrine of qualified immunity to "private" lawyers working at the behest of the sovereign, by serving as an adjunct to government in an essential governmental activity, and acting under close official supervision, and (2) rehearing was necessary to secure and maintain the uniformity of the district court's decisions thereby creating an overriding need for national uniformity. App., *infra,* 3.

The League of California Cities filed an *amicus curiae* brief in support of Petitioner Filarsky's petition for rehearing *en banc*. Rehearing was denied. App., *infra*, 3.

REASONS TO GRANT THE PETITION

The Ninth Circuit panel opinion skirts the thrust of the *only* Supreme Court opinion that addresses this issue directly: *Richardson v. McKnight*, 521 U.S. 399 (1997). While *Richardson* had a narrow holding,

the standards it adopted – closely examining the history of and policy rationales for qualified immunity – remain uncontroverted and are clearly applicable to this matter. As such, the Ninth Circuit's opinion and its basis are in conflict with the rationale in *Richardson*. Further, the Ninth Circuit's opinion is also in direct conflict with decisions from other Circuit courts. In fact, the Ninth Circuit panel expressly acknowledged a conflict with the Sixth Circuit in the matter of *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997). App., *infra*, 25. However, the Ninth Circuit declined to consider *Cullinan* at all, solely because they felt "bound" by their *Gonzalez* decision, notwithstanding that the doctrine of qualified immunity was not even at issue and was not briefed in *Gonzalez*.

In addition to *Cullinan v. Abramson*, the Ninth Circuit panel opinion conflicts with numerous decisions from other federal courts. *See, e.g., Cottingham v. Policy Studios Inc.,* 2008 U.S. Dist. LEXIS 23145-7 (U.S. Dist. Ct. for the Middle Dist. of Tennessee, Nashville Dist. 2008) (the court granted absolute prosecutorial immunity to a private attorney collecting alimony for the state because she acted at the "behest of the sovereign." The Court considered the history and policy arguments, creating a presumption of immunity for government contract lawyers); *Bartell v. Lohiser,* 215 F.3d 550, 556 (6th Cir. 2000) (in which private social workers were granted qualified immunity who provided a public service task under close government supervision and holding the purpose of the Supreme Court's articulation of qualified

immunity standards is to allow public officials to perform important government functions free from debilitating effects of excessive litigation); *Eagon ex rel. Eagon v. City of Elk City,* 72 F.3d 1480, 1489 (10th Cir. 1996) (holding a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity); *Lee v. Wyatt,* 2009 U.S. Dist. LEXIS 47357 (U.S. Dist. Ct. for the Western Dist. of Oklahoma 2009) (relying on *Richardson's* recognition of common law immunity, a district court granted a private prison physician qualified immunity with a discussion of history and policy).

Clearly, the Ninth Circuit's opinion is in direct conflict with this Court's majority decision in *Richardson v. McKnight*, but it is also in direct conflict with the Sixth Circuit and other federal courts. In this petition, we therefore urge that certiorari should be granted to: (1) finally clarify the qualified immunity standard by addressing and applying the *Richardson* factors, explaining how they relate, how they are to be applied, and which are dispositive in order to reform the standard into a clear and coherent test; and (2) settle once and for all the split among the Circuits on the applicability of qualified immunity to "private" lawyers who are retained specifically to work with government employees in conducting essential governmental activities, and "acting under close official supervision."

Contradictory immunity standards impose heavy costs upon municipalities and, therefore, upon the public at large. The Ninth Circuit's opinion creates an inconsistent standard across the nation's jurisdictions. As such, lawyers must adapt to each jurisdiction's rules, requiring differences in benefits and personnel practices, depending on the jurisdiction. In essence, this Ninth Circuit opinion overtly dictates to municipalities how they can and cannot go about their legal business by creating a powerful economic deterrent to seeking the assistance and advice of outside counsel. Under the law thus created by the Ninth Circuit, a W-2 paid City attorney and Petitioner Filarsky could engage in precisely the same conduct, and yet the City attorney would be qualifiedly immune from suit itself, while Petitioner Filarsky would not, simply and solely because of his "private" status. This not only makes no logical sense, but is contrary to the rationale in this Court's majority decision in *Richardson*, as well as the rationale in its dissenting opinion. Certiorari should therefore be granted.

I. THE NINTH CIRCUIT OPINION CONTRAVENES THIS COURT'S DECISION ON QUALIFIED IMMUNITY, UNDER THE *RICHARDSON* FACTORS, AS TO GOVERNMENT-RETAINED "PRIVATE" LAWYERS WHO ARE "ACTING AT THE BEHEST OF THE SOVEREIGN" BY SERVING AS AN "ADJUNCT TO GOVERNMENT IN AN ESSENTIAL GOVERNMENTAL ACTIVITY" AND "ACTING UNDER CLOSE OFFICIAL SUPERVISION."

Until the Ninth Circuit's panel opinion in this case, no Circuit Court had ever categorically declined to extend the protection of qualified immunity to government-retained private lawyers while weighing the *Richardson* factors and examining the tradition of immunity. In fact, this Court carefully and specifically left open the opportunity of extending qualified immunity to private individuals, including by example lawyers, working "at the behest of a sovereign" when "special circumstances" were present. In *Richardson*, 521 U.S. at 407, citing *Tower v. Glover*, 467 U.S. 914, 921 (1984), and J. Bishop, Commentaries on Non-Contract Law §§ 704, 710 (1889) this Court stated that the common law 'did provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.'" While the extent or "kind" of immunity was not discussed in *Richardson*, the United States Court of Appeals in the Sixth Circuit was confronted with the same legal question as to whether the "outside counsel" status of private lawyers and their firms made those defendants eligible

for qualified immunity. *See Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997). Ultimately, the Sixth Circuit determined that the rationales for qualified immunity applied to these lawyers and their firm in the same way they applied to the city's sometime law director, who was also a named defendant. *Id.* As such, the Ninth Circuit's opinion directly conflicts with this Court's holding in *Richardson* and creates a split in the Circuits by categorically denying the extension of qualified immunity to "private" lawyers working with government employees in "an essential government activity," and "acting under close official supervision."

A. Under The *Richardson* Majority Opinion, Petitioner Filarsky Is Entitled To Qualified Immunity In Light Of This Court's Reference To Historical Immunity For Lawyers Working "At The Behest Of The Sovereign."

In *Richardson v. McKnight*, this Court reviewed qualified immunity to the limited facts of its case where private actors were serving a largely public function – an inmate had sued a guard at a privately managed correctional center under 42 U.S.C. section 1983 for placing restraints tightly enough to cause physical injuries. *Richardson*, 521 U.S. at 401-402. The private guards asserted a qualified immunity defense from 42 U.S.C. section 1983 lawsuits. *Id.* After the District Court and the Sixth Circuit denied the

guards' assertion of qualified immunity, this Court granted certiorari.

In this Court's 5-4 decision, the majority opinion in *Richardson* examined the history and policy rationales of immunity and determined that under the narrow facts and circumstances of that case involving a private company managing a prison, the private prison guards were not entitled to assert qualified immunity from 42 U.S.C. section 1983 lawsuits. *Richardson,* 521 U.S. at 401. In reaching this conclusion, the *Richardson* majority analyzed this Court's decision in *Wyatt v. Cole,* 504 U.S. 158 (1992), which held that a private individual accused of conspiring with government employees was not entitled to assert qualified immunity on the "narrow" circumstance where the private individual was "invoking state replevin, garnishment, or attachment statute." *Wyatt*, 504 U.S. at 168-169; *Richardson,* 521 U.S. at 404. The *Richardson* majority concluded that there were two (2) factors which *must* be analyzed in order to determine whether qualified immunity applied to the private prison guards in the 42 U.S.C. section 1983 action: (1) any history providing immunity to prison guards, and (2) the policy concerns or purposes underlying immunity which would warrant applying it to the prison guards in the 42 U.S.C. section 1983 action before it.

The *Richardson* majority found no "firmly rooted" tradition of immunity for private prison guards; on the contrary, previous cases held private prison guards liable for mistreating inmates. *Richardson,*

521 U.S. at 404. The majority determined that private contractors were heavily involved in prison management activities as far back as the 19th century and there was no conclusive evidence of a historical tradition of immunity for private parties carrying out these functions. *Richardson,* 521 U.S. at 405-407. History, therefore, did not provide any significant support for the immunity claim of the private prison guards. *Richardson,* 521 U.S. at 407. Specifically to highlight the direct contrast, the opinion noted that doctors and lawyers acting "at the behest of the sovereign" historically had immunity; thus, even though not applicable to facts in that case, this Court took great care to illustrate the circumstances in which qualified immunity *would* be extended, in particular to lawyers and doctors. *Richardson,* 521 U.S. at 407 (majority opinion) (citing *Tower v. Glover*, 467 U.S. 914, 921 (1984)).

The majority in *Richardson* determined that it was a closer question as to whether the purposes underlying qualified immunity warranted its application to private prison guards. *Richardson,* 521 U.S. at 407-408. This Court recognized that one of the primary purposes of the immunity doctrine is to protect public officials, as well as society, from unwarranted timidity by public officials who may be deterred from exercising their authority by the threat of lawsuits exposing them to personal liability for inadvertent violations. *Richardson,* 521 U.S. at 407-408. The *Richardson* majority opinion rejected the prison guard's argument that since they performed

the same work as state prison guards, qualified immunity must be applied to a similar degree. The *Richardson* majority held that the mere performance of a government function should not make the difference between unlimited 42 U.S.C. section 1983 liability and qualified immunity especially for a private person who performs a job *without* government supervision or direction. *Richardson,* 521 U.S. at 409. (Italics added). The *Richardson* majority also noted that marketplace pressures were different for a private company versus a government employer and thus there was less concern with unwarranted timidity. *Richardson,* 521 U.S. at 409-410. The *Richardson* majority further indicated that private employees may be not be deterred by the threat of damages due in part to the availability of comprehensive insurance requirements for private companies as well as the ability to offer higher pay or extra benefits unavailable to civil service employees. *Richardson,* 521 U.S. at 412-413. Finally, the *Richardson* majority noted that the risk of distraction from lawsuits alone was not a sufficient ground for immunity. *Richardson,* 521 U.S. at 412.

The *Richardson* majority therefore concluded that private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a 42 U.S.C. section 1983 case. *Richardson,* 521 U.S. at 412. Accordingly, while this Court concluded that none of the factors evident in that limited situation warranted the extension of qualified immunity to private prison guards *under those*

specific facts, it clearly indicated that there was an established history of the extension of such immunity to lawyers acting in the same capacity as Petitioner Filarsky. *Id.* at 412. Finally, we think that it is not a coincidence that this Court in *Richardson* employed the example of *lawyers* having a lengthy history of immunity in illustrating how and under what circumstances qualified immunity should properly be extended.

B. The *Richardson* Majority Expressly Did Not Preclude Qualified Immunity For An Individual Working With The Government In An Essential Government Activity, And Under Close Supervision, Such As Petitioner Filarsky.

The Ninth Circuit's blanket prohibition against *any* private actor asserting qualified immunity in its jurisdiction simply because they are a "private" actor contravenes this Court's majority opinion in *Richardson* wherein it was specifically indicated that qualified immunity may be appropriately asserted by private individuals. *Richardson,* 521 U.S. at 413. App., *infra*, 26-27. As such, the Ninth Circuit completely ignored this Court's majority decision in their opinion by creating this blanket prohibition without ever considering the *Richardson* factors. Accordingly, Petitioner Filarsky's case involves facts that place it squarely under the parameters of this Court's majority opinion in *Richardson*, which left open the application of qualified immunity to be extended to

private individuals, such as lawyers. It is therefore imperative that this Court now clarify the application and scope of the doctrine of qualified immunity to government-retained "private" lawyers working at the "behest of the sovereign" by working with government employees in "essential government activities" and "under close official supervision."

The majority opinion in *Richardson,* while holding that qualified immunity did not apply to the private prison guards under the particular circumstances of that case, expressly limited its holding as follows:

> [W]e have answered the immunity question narrowly, in the context in which it arose. That context is 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. The case does not involve a private individual briefly associated with a governmental body, serving as an adjunct to government in an essential government activity, or acting under close supervision. *Richardson,* 521 U.S. at 413.

By carefully carving out these exceptions, the majority in *Richardson* specifically allowed for the doctrine of qualified immunity to be extended to private individuals so long as the *purposes* of immunity were being properly served. *Richardson,* 521 U.S. at

413. As such, "a private individual . . . " "associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close supervision" should be entitled to assert qualified immunity. *Richardson,* 521 U.S. at 431.

The Ninth Circuit did not address this caveat; yet, the record in this case unequivocally establishes Petitioner Filarsky's continued involvement in the City's internal investigations under close supervision, which is a perfect fit under the criteria set forth in *Richardson.* Petitioner Filarsky has provided legal advice to the City on a multitude of labor and employment law matters over the past fourteen years, including internal affairs investigations. App., *infra,* 6-7, 59, 88-89. Moreover, Petitioner Filarsky performed such legal services for a variety of other municipalities and entities in the public sector. App., *infra,* 6-7, 59, 88-89. Further, it was and is undisputed that there was "state action" on the part of Petitioner Filarsky in that he was acting at the behest of the City at the time the alleged constitutional violation occurred. App., *infra,* 6-7, 54, 58-59, 88-89. Therefore, Petitioner Filarsky was unequivocally acting under 'color of state law' and within the course and scope of his employment with the City as a "private" attorney when he conducted the interview of Respondent Delia. As such, Petitioner Filarsky falls directly within the *Richardson* caveat of being a "private individual" "associated with a government body."

In addition, the record in this case clearly establishes Petitioner Filarsky was "serving as an adjunct to government in an essential governmental activity." *Richardson*, 521 U.S. at 413. Petitioner Filarsky served as a lawyer who specialized in labor and employment law, including personnel and internal affairs matters for the City of Rialto and, at its behest, conducted the interview of Respondent Delia in conjunction with the City's investigation of Respondent Delia's suspected inappropriate use of "sick time." App., *infra,* 6-7, 59, 88-89. The oral examination of City employees and rendering of legal advice in connection with employment and personnel issues is undoubtedly an essential governmental activity.

Further, the record in this case indicates that Petitioner Filarsky's participation in Respondent Delia's interview with *two* Battalion Chiefs in the room and the Fire Chief nearby more than satisfied the "acting under close official supervision" criteria in the *Richardson* caveat. App., *infra,* 6-7. Petitioner Filarsky's advice to the City was *completely consistent* with the Ninth Circuit's finding that this was not the violation of a "clearly established right." App., *infra,* 4-5, 20-24.

The District Court determined and the Ninth Circuit agreed Petitioner Filarsky's conduct was limited to directing the internal investigation and concurring with the Order. App., *infra,* 7-8. Petitioner Filarsky had neither the authority nor obligation to countermand the City's decision to order Respondent Delia to produce the Subject Building Materials. App.,

infra, 8, 62-63, 92. Moreover, Petitioner Filarsky did not have control over the Battalion Chiefs to make unilateral decisions regarding the outcome of this internal investigation. App., *infra*, 8, 62-63, 92. As such, Petitioner Filarsky's conduct clearly meets the "under close official supervision" factor of *Richardson*.

The Ninth Circuit wholly failed to address the *Richardson* Court's caveat by which this Court indicated qualified immunity may appropriately be asserted by a private individual. In fact, the Ninth Circuit completely ignored the majority decision in *Richardson* other than to quote the fact that the Sixth Circuit's decision in *Cullinan v. Abramson,* 128 F.3d 301 (1997) "relied exclusively on dictum in *Richardson v. McKnight*, 521 U.S. 399, 407, that 'the common law *did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.'" App., *infra*, 25. The Ninth Circuit's opinion offers no further analysis of *Richardson* or its express limitations and guidelines.

Subsequently, the Ninth Circuit then completely contradicted itself by concluding that "they are not free to follow the *Cullinan* decision because they are "bound by prior panel opinions 'unless an en banc decision, *Supreme Court* decision or subsequent legislation undermines those decisions.'" App., *infra*, 25. (Italics added). The contradiction is ironic inasmuch as *Richardson* is a Supreme Court decision, which *Cullinan* directly cites and relies on, and which *should* in fact require the Ninth Circuit to follow.

Instead, the Ninth Circuit elected to claim that their hands were tied and they had no choice but to follow *Gonzalez v. Spencer,* 336 F.3d 832 (9th Cir. 2003), where the Ninth Circuit stated in *two sentences*, "[the attorney] is not entitled to qualified immunity. . . ." *Id.* at 835 (quoting *Richardson*, 521 U.S. at 412). It is abundantly clear that the Ninth Circuit never examined the *Richardson* factors, nor did it take into account the long tradition of extending immunity under these circumstances because the panel erroneously opined that it had no choice but to follow *Gonzalez*. The gravamen of this choice was that the Ninth Circuit held Petitioner Filarsky, the messenger conveying the Order, responsible for violating Respondent Delia's rights, while declining to extend to him the protection of qualified immunity but affording immunity to those who *actually had the power to issue the Order.*

Qualified immunity should therefore be extended to Petitioner Filarsky, and this Court should clarify that a "private" lawyer working at the "behest of the sovereign" by serving as an adjunct to government in an essential government activity and under "close official supervision" is entitled to an extension of qualified immunity under the *Richardson* majority opinion.

C. Even Under The *Richardson* Dissent's Functional Approach, Petitioner Filarsky Is Entitled To Qualified Immunity.

Four Justices dissented from the majority opinion in *Richardson*. The dissent authored by Justice Scalia and joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas, argued that a functional approach should be applied to determine whether qualified immunity should be extended to private individuals. *Richardson,* 521 U.S. at 414-416. The dissent contended that the historical underpinnings and underlying immunity established that private parties who were performing governmental functions which give rise to qualified immunity should also be entitled to assert qualified immunity. *Richardson,* 521 U.S. at 414-416.

The dissent questioned the holding that qualified immunity should be "unavailable to employees of private prison management firms, who perform the same duties as state employed correctional officials, who exercise the most palpable form of state power, and who may be sued for acting 'under color of state law.'" *Richardson,* 521 U.S. at 414. Instead, the dissent relied upon prior Supreme Court precedent which held that immunity analysis rests on functional categories, not on the status of the defendant. *Richardson,* 521 U.S. at 416-417. The dissent recognized that private individuals have regularly been accorded immunity when they perform a governmental function that qualifies. *Richardson,* 521 U.S. at 417-418.

It was suggested in the dissent that the history of the functional approach should govern whether qualified immunity is extended to a private individual and that it should be not be dependent upon policy reasons. *Richardson,* 521 U.S. at 418. Nonetheless, the dissent analyzed the majority's policy reasons and concluded that the market pressures and insurance analysis employed by the majority was correct. *Richardson,* 521 U.S. at 419-420:

> [S]ince there is no apparent reason, neither in history nor in policy, for making immunity hinge upon the court's distinction between public and private guards, the precise nature of that discretion must also remain obscure. . . .
>
> Today's decision says that two sets of prison guards who are indistinguishable in the ultimate source of their authority over prisoners, indistinguishable in the powers that they possess over prisoners, and indistinguishable in the duties that they owed toward prisoners, are to be treated quite differently in the matter of their financial liability. . . . Neither our precedent, nor the historical foundations of section 1983, not the policies underlying section 1983, support this result. *Richardson,* 521 U.S. at 422-423.

It is clear from the record before this Court that Petitioner Filarsky finds himself in the exact situation that the dissent in the *Richardson* court alluded to: a private attorney, retained by the City to conduct internal affairs investigations (an essential

government activity) acting as the City's attorney in matters relating to labor and employment. There is no distinction between the role and function of Petitioner Filarsky in serving the City's legal needs and that of its own in-house counsel/City Attorney. Ironically, the Ninth Circuit found that, for the same acts, those who had the power to issue the Order (City) were qualifiedly immune but Petitioner Filarsky was not. What Petitioner Filarsky was entitled to, according to the Ninth Circuit, was to become open to personal financial liability, while City employees engaging in the exact same conduct were qualifiedly immune and completely exonerated for their actions because suit is barred. App., *infra,* 4-5, 12-24.

A more far-reaching impact of the Ninth Circuit's opinion, and one which this Court touched on in the *Richardson* dissent is the question of the extent to which courts will refuse to extend qualified immunity to private actors under *any* circumstance, but especially where "private" lawyers are retained by municipalities to perform specialized legal services under circumstances where a state employee engaging in the identical conduct would clearly be entitled to immunity. In view of the Ninth Circuit's opinion, no sensible "private" attorney offering services to municipalities would continue to do so without an agreement by the municipality to indemnify them and hold them harmless. Hundreds of such lawyers statewide, and possibly thousands nationwide, perform private legal services in the public sector on a regular basis; *all* of them are now directly and adversely impacted

by this Ninth Circuit opinion. This Ninth Circuit opinion will cause municipalities to be unable to afford to seek specialized legal guidance (such as employment law advice) without exposing themselves potentially to further financial expense by having to indemnify the attorneys they have retained, while *their regular employees* are otherwise immune.

In other words, the cities and their employees might be qualifiedly immune for the same conduct, but they may be obligated to later provide indemnity to private actors in the public sector or be deprived of the opportunity to obtain such services. As a practical matter, this opinion *takes away* the protection of qualified immunity from any "private" attorney working for a municipality throughout the Ninth Circuit. This policy rationale has been previously noted, with concern, by this very Court in examining immunity's purposes where performing a governmental function confers immunity. *See Richardson,* 521 U.S. at 417-418. It would be unfortunate to allow the Ninth Circuit's categorical denial, without explanation, of the application of qualified immunity to so-called "private" attorneys, to stand as precedent without a studied review of its potential effect on municipalities all over the country.

Finally, it should be noted that the extension of qualified immunity to private actors in the public sector does not constitute a "get out of trouble free card"; qualified immunity applies *only* where the infringement is inadvertent, accidental and not of a "clearly established right" and is therefore not a

license to violate constitutional rights, regardless of whether the actor is public or private.

II. THE NINTH CIRCUIT OPINION CREATES A CIRCUIT SPLIT ON THE DOCTRINE OF QUALIFIED IMMUNITY BY CATEGORICALLY DENYING QUALIFIED IMMUNITY TO ALL GOVERNMENT-RETAINED "PRIVATE" LAWYERS.

Since *Richardson* was decided by this Court, the lower courts have varied widely in applying its factors; however, no Circuit Court had ever categorically denied the extension of qualified immunity to government-retained "private" lawyers when weighing the *Richardson* factors and examining the tradition of immunity until this Ninth Circuit opinion.

The Sixth Circuit in *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997), granted a city's outside counsel qualified immunity based on the phrase "behest of the sovereign." In *Cullinan*, 128 F.3d at 310, Plaintiffs were independent investment managers who handled a portion of the assets of a Louisville, Kentucky police fund that brought a federal civil rights/RICO lawsuit, now codified under 42 U.S.C. section 1983, against the city, its outside lawyers, the mayor, and other city officials, all of whom were said to have been involved in the efforts to have the plaintiffs fired as investment managers for the pension fund. All defendants moved for dismissal of the complaint under Federal Rules of Civil Procedure, Rule 12, asserting among other defenses, absolute

and qualified immunity from suit on both the federal claims and numerous pendent state law claims by which the federal claims were accompanied. *Cullinan*, 128 F.3d at 310.

The District Court largely denied the motions to dismiss; however, the appellate court concluded that as attorneys for the city, the city's outside counsel, were clearly *acting as the city's agents*. *Cullinan,* 128 F.3d at 310. (Emphasis added). Citing *Richardson*, the *Cullinan* court determined that the rationales for the application of qualified immunity to the lawyers and their firm applied to the city's sometime law director (also a named defendant) in the same fashion. *Cullinan*, 128 F.3d at 310.

As was the case in *Cullinan,* Petitioner Filarsky was retained *to act as the City's agent* in its investigation of Respondent Delia. Petitioner Filarsky would not have been involved in Respondent Delia's investigation on an individual basis, had it not been at the specific request of the City. Accordingly, Petitioner Filarsky was entitled to the protection of qualified immunity to the same extent any city official would be. *See Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997) holding that "the rationales for qualified immunity apply to [private] lawyers and their firms in about the same way they apply to [the government attorney]."

The *Cullinan* decision is therefore correct under *Richardson* 521 U.S. at 412-413, holding it had answered the question of *not* extending qualified

immunity narrowly to the facts of its case: "[s]econd, we have answered the immunity question narrowly, in the context in which it arose. That context is 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. The case does 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." *Richardson* therefore emphasized how narrow a question this Court was answering in dealing *only* with private defendants invoking a state replevin, garnishment, or attachment statute and wisely leaving open the door for the opportunity to extend qualified immunity to private individuals working "at the behest of a sovereign" when "special circumstances" were present. *Richardson,* 521 U.S. at 407.

The Ninth Circuit's opinion serves as a blanket denial of qualified immunity to private individuals merely on their *status* as a private party as opposed to whether their function serves the *purposes* of the doctrine of qualified immunity. *Richardson,* 521 U.S. at 431. As such, this Ninth Circuit opinion serves as an automatic disqualification of a private party's right to assert the defense of qualified immunity in 42 U.S.C. section 1983 lawsuits in this jurisdiction, which is at odds with the application of qualified

immunity to private parties in 42 U.S.C. section 1983 in the Sixth Circuit.

Moreover, the Ninth Circuit's reliance on *Gonzalez v. Spencer,* 336 F.3d 832 (9th Cir. 2003) is wholly misplaced given that it provides absolutely no reasoning for its decision. In *Gonzalez,* the plaintiff brought suit against the attorney, her law firm, and the county "for accessing and using his juvenile court file without authorization" and alleged this conduct constituted a violation of his *Fourth Amendment* rights. *Id.* In rejecting the attorney's claim of qualified immunity, the Ninth Circuit stated in *two sentences*, "[the attorney] 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." *Id.* at 835 (quoting *Richardson*, 521 U.S. at 412). The clear implication in this terse two sentence edict is that the issue of qualified immunity would have been decided differently if the attorney *had* pointed to such special reasons; however, appellant's counsel in *Gonzalez* neglected to cite to this Court's acknowledgment in *Richardson* of the long history of immunity provided to attorneys in her position. Consequently, the Ninth Circuit panel simply never considered the *Richardson* factors or "special reasons," and did not take into account the long tradition of extending the protection of qualified immunity to lawyers under such circumstances. In fact, the Ninth Circuit panel in *Gonzalez* had no reason to even address the issue of qualified

immunity at all, inasmuch as the court expressly found appellant's conduct to constitute a violation of a "clearly established" right, thereby rendering the doctrine of qualified immunity inapplicable on its face.

Nevertheless, relying only upon *Gonzalez v. Spencer,* 336 F.3d 832 (9th Cir. 2003) the Ninth Circuit panel concluded that because Petitioner Filarsky did not allege "any intervening legislation, *en banc* decision or Supreme Court decision that would allow the court to overrule the decision in *Gonzalez* and therefore Filarsky is not entitled to qualified immunity." App., *infra*, 25-26.

Other lower courts have varied widely in applying *Richardson* as stated in the Harvard Law Review article published in the scholarly treatise, *Developments in the Law: State Action and the Public Private Distinction: Private Party Immunity from Section 1983 Suits,* 123 Harvard Law Review 1266 (March 2010). This treatise notes:

> Seven Circuits have used *Richardson* as a test, refusing to grant private actors qualified immunity in any circumstances. While only one Circuit has explicitly granted private actors qualified immunity under *Richardson*, others have arguably done so implicitly, so immunity is not always categorically precluded. One Circuit has held that qualified immunity applied in every case it has considered, even though it has not relied on *Wyatt* or *Richardson.* The remaining four

> Circuits have no holding applying *Richardson*. Much litigation continues at the district court level without circuit-wide resolution. 123 Harvard Law Review at p. 1271.

The Sixth Circuit holding in *Cullinan v. Abramson,* 128 F.3d 301 (6th Cir. 1997) and the recent treatise cited above state persuasive reasons why this Court should grant this petition for writ of certiorari in order to re-examine and clarify the *Richardson* factors and finally explain how they relate, how they are to be applied, and which are dispositive for extending the protection of qualified immunity to government retained "private" lawyers as expressly left open in *Richardson.*

CONCLUSION

The issue before this Court is the applicability of the doctrine of qualified immunity to "private" government retained lawyers such as Petitioner Filarsky. Petitioner Filarsky has been found to be a state actor for purposes of 42 U.S.C. section 1983 liability, and at the same time is now being denied the right to assert qualified immunity even though City employees engaging in precisely the same conduct were entitled to do so. App., *infra*, 6-7, 54, 58-59, 88-89. As such, a grave injustice has been created by this Ninth Circuit opinion, which, if permitted to stand, will adversely affect the practice of law by private lawyers in the public sector across the nation.

Accordingly, for the foregoing reasons, Petitioner Filarsky urges that this petition for a writ of certiorari be granted.

Respectfully submitted,

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