No. _____

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.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS TO GRANT THE PETITION 11

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" 15

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" 16

TABLE OF CONTENTS – Continued

Page

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 20

C. Even Under The *Richardson* Dissent's Functional Approach, Petitioner Filarsky Is Entitled To Qualified Immunity 26

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..... 30

CONCLUSION 35

APPENDIX

Ninth Circuit Order denying rehearing *en banc* and Amended Opinion – reported at 621 F.3d 1069 (9th Cir. 2010) .....App. 1

Opinion of the United States District Court for the Central District of California, including the Judgment and Statement of Uncontroverted Facts.....App. 39

United States District Court for the Central District of California grant of Summary Judgment.....App. 50

TABLE OF CONTENTS – Continued

Page

Petitioner Steve A. Filarsky, Esq.'s Motion for Summary Judgment, or in the alternative summary adjudication ..... App. 52

Petitioner Steve A. Filarsky, Esq.'s Declaration in support of his Motion for Summary Judgment, or in the alternative summary adjudication ..... App. 87

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bartell v. Lohiser, 215 F.3d 550 (6th Cir. 2000) 12

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) 12

Cullinan v. Abramson, 128 F.3d 301 (6th Cir. 1997) .....*passim*

Delia v. City of Rialto, 621 F.3d 1069 (9th Cir. 2010) 1

Eagon ex rel. Eagon v. City of Elk City, 72 F.3d 1480 (10th Cir. 1996) 13

Gonzalez v. Spencer, 336 F.3d 832 (9th Cir. 2003) .....*passim*

Lee v. Wyatt, 2009 U.S. Dist. LEXIS 47357 (U.S. Dist. Ct. for the Western Dist. of Oklahoma 2009) 13

Richardson v. McKnight, 521 U.S. 399 (1997)....*passim*

Tower v. Glover, 467 U.S. 914 (1984).....15, 18

Wyatt v. Cole, 504 U.S. 158 (1992) 17

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES

U.S. Const. amend. IV 2, 7, 33

U.S. Const. amend. XIV section one 2, 7

28 U.S.C. section 1254(1) 1

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. section 1983.....*passim*

Federal Rules of Civil Procedure, Rule 12.....30

MISCELLANEOUS

J. Bishop, Commentaries on Non-Contract Law §§ 704, 710 (1889) 15

123 Harvard Law Review 1266, *Developments in the Law: State Action and the Public Private Distinction: Private Party Immunity from Section 1983 Suits* (March 2010).....34

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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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NICHOLAS B. DELIA,
Plaintiff-Appellant,

v.

CITY OF RIALTO, a Public Entity; CITY OF RIALTO FIRE DEPARTMENT, a Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as Battalion Chief for the City of Rialto; FRANK BEKKER, Individually and as Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as an Internal Affairs Investigator for the City of Rialto,
Defendants-Appellees.

No. 09-55514

D.C. No.
2:08-cv-03359-R-PLA

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
June 11, 2010 – Pasadena, California

Filed September 9, 2010
Amended November 8, 2010

Before: Alfred T. Goodwin, Johnnie B. Rawlinson, Circuit Judges, and Mark W. Bennett, District Judge.*

Opinion by Judge Bennett

COUNSEL

Michael A. McGill and Carolina V. Diaz of Lackie, Dammeier & McGill, Upland, California, for appellant Nicholas B. Delia.

Howard B. Golds and Cynthia M. Germano of Best Best & Kreiger, L.L.P., Riverside, California, for appellees City of Rialto, City of Rialto Fire Department, Stephen C. Wells, Mike Peel and Frank Bekker.

Jon H. Tisdale and Jennifer Calderon of Gilbert, Kelly, Crowley & Jennett, Los Angeles, California, for appellee Steve A. Filarsky.

ORDER

The opinion filed September 9, 2010, is amended as follows:

Slip Opinion page 13785, first full paragraph, lines 7-8 replace "knew they could not directly do without clearly violating the Fourth Amendment" with "declined to do directly."

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* The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa, sitting by designation.

With that amendment, Judge Rawlinson voted, and Judges Goodwin and Bennett recommended, to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Appellee Steve A. Filarsky's Petition for Rehearing En Banc filed on October 8, 2010, is **DENIED**.

Future petitions for rehearing and rehearing en banc will not be entertained.

OPINION

BENNETT, District Judge:

Appellant Nicholas B. Delia ("Delia"), a firefighter, brought this 42 U.S.C. § 1983 action against the City of Rialto, the Rialto Fire Department, Rialto Fire Chief Stephen C. Wells, two Rialto Fire Department Battalion Chiefs, Mike Peel and Frank Bekker, and a private attorney, Steve Filarsky. Delia alleges violations of his constitutional rights arising during a departmental internal affairs investigation. While being represented by counsel and interrogated at headquarters, he was ordered to go directly to his home while being followed by Battalion Chiefs Peel and Bekker in a City vehicle. He was ordered that when he arrived at his home he was to enter his home while in full view of the Battalion Chiefs, retrieve several rolls of recently purchased insulation, and bring them out of the house and place them in

his front yard for inspection by the Battalion Chiefs. Delia was told earlier in the interview that if he failed to do this he could be found to be "insubordinate" and subject to disciplinary action including termination. This order was given a few minutes after Delia and his counsel refused to consent to a warrantless search of his home by Battalion Chief Peel.[1]

The district court granted summary judgment in favor of all defendants. In a written order, the district court held that all of the individual defendants were entitled to qualified immunity. The district court also found that the City of Rialto ("the City") could not be held liable under *Monell v. Department of Social Services,* 436 U.S. 658 (1978). This was because Delia failed to show that a municipal policy caused his injury. This timely appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

For the reasons discussed below, we conclude that Delia's constitutional right under the Fourth Amendment of the United States Constitution to be protected from a warrantless unreasonable compelled search of his home was violated. However, because we

[1] Delia asserts in his complaint that defendants' actions violated his right to be free from unreasonable search and seizures under the Fourth and Fourteenth Amendments. He also asserts that defendants violated his right to be free from invasions of privacy under the First, Fifth and Fourteenth Amendments. In this appeal, however, he claims only violations of his Fourth and Fourteenth Amendment rights.

also conclude that this right, under these or similar facts, was not clearly established at the time of this constitutional violation, we affirm the district court's order granting qualified immunity to Stephen Wells ("Chief Wells"), Mike Peel ("Peel"), and Frank Bekker ("Bekker"). We also affirm the district court's grant of summary judgment to the City on Delia's *Monell* claim, but reverse the district court's grant of qualified immunity to Steve Filarsky ("Filarsky") and remand for further proceedings.

I. BACKGROUND

A. Work Incident And Its Aftermath

In July 2000, Delia was hired by the City's Fire Department as a firefighter. He was later promoted to the rank of engineer. As a result of a disciplinary decision against him, he was demoted back to firefighter in June 2006. On August 10, 2006, Delia began to feel ill while working to control a toxic spill. He was then transported to a hospital emergency room for evaluation. There, a doctor gave him an off-duty work order for three work shifts. The doctor, however, did not place any activity restrictions on Delia.

On August 15, 2006, Delia returned to the hospital. The doctor again issued him an off-duty work order. This time it was for eight shifts. The doctor also scheduled a medical test for him. Again, the doctor did not place any activity restrictions on Delia. On August 22, 2006, Delia returned to the hospital

and the doctor gave him an off-duty work order for eight shifts. Once again, no activity restrictions were placed on Delia. Shortly after this examination, Delia underwent a colonoscopy and endoscopy. He was diagnosed with esophagitis, an ulceration of the esophagus. On August 29, 2006, Delia's doctor issued an off-duty work order for the period of August 29, 2006, through September 3, 2006. The doctor cleared him to return to work after September 3, 2006.

The City was suspicious of Delia's off-work status due to his disciplinary history. The record reveals that Delia was previously disciplined for sending improper e-mails. Why this would make the City suspicious of Delia's off-work activities is not readily apparent. In any event, the City hired a private investigation firm to conduct surveillance on Delia. During this surveillance, Delia was filmed buying building supplies, including several rolls of fiberglass building insulation, at a home improvement store. Based on these observations, the City began a formal internal affairs investigation of Delia to determine whether he was off-work on false pretenses. The City began its internal affairs investigation of Delia despite the fact that Delia had no activity restrictions placed on him by his treating physician and the City possessed no contrary evidence.

As part of the internal affairs investigation, Delia was ordered to appear, on September 18, 2006, for an administrative investigation interview. The interview was conducted by Filarsky, a private attorney retained by the City. Filarsky had previously

represented the City in conducting interviews during internal affairs investigations.

B. The Internal Affairs Interview

Filarsky's interview of Delia was conducted on September 18, 2006. In addition to Filarsky and Delia, Delia's attorney, Stuart Adams, Peel and Bekker were also present at the interview. At the onset of the interview, Filarsky warned Delia that he was obligated to fully cooperate. Delia was further cautioned 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."

After some preliminary questions, Filarsky asked Delia about any home construction projects he was currently undertaking in his home. Delia answered that he had some duct work done in his home and had purchased some rolls of insulation. He told Filarsky that the rolls were currently sitting in his house. Filarsky showed Delia a videotape of him purchasing home construction materials, including the rolls of insulation, at a store. Filarsky asked Delia whether this insulation had been installed. Delia told Filarsky that it was still bagged at his house. Shortly after this line of questioning, Filarsky requested Delia and Adams step out of the interview room so he could confer with "the Chiefs." During this break, Filarsky consulted with Chief Wells concerning his desire to order Delia to produce the rolls of insulation

for inspection. Chief Wells, who was never present during the interview with Delia, agreed to permit Filarsky to order Delia to produce the rolls of insulation.

Following the break, Filarsky asked Delia to allow Peel to follow him to his house and, once there, permit Peel to enter his home to conduct a warrantless search of the insulation there. On the advice of counsel, Delia refused Filarsky's request. Unable to get Delia to consent to a warrantless search of his house by Peel, Filarsky then asked if Delia would volunteer to have Peel follow him to his 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.

Unable to get Delia to volunteer, Filarsky orally ordered Delia to produce the rolls of insulation from his house. Adams, Delia's attorney, questioned Filarsky's legal authority for issuing such an order and requested that the order be in writing. Following a lengthy break, Delia was presented with a written order to produce the insulation for inspection signed by Chief Wells. The interview then concluded.

C. The Search And Resulting Lawsuit

Immediately after the interview, Peel and Bekker followed Delia, in a city vehicle, to Delia's house. Once there, Peel and Bekker parked alongside the curb in front of Delia's house, and waited a few minutes for Adams to arrive. Peel and Bekker never

left their vehicle. After Adams arrived, he, Delia, and a union representative went into Delia's house and brought out three or four rolls of insulation and placed them on his lawn. After Delia brought out the last roll of insulation, Peel thanked him for showing them the insulation and the two drove off. On May 21, 2008, Delia filed this lawsuit. Defendants subsequently moved for summary judgment. At the hearing on defendants' motions for summary judgment, the district court orally granted defendants' motions. The court found that Delia had not established municipal liability against the City. The court concluded that Delia had failed to show that he was injured by an express policy, a longstanding custom, or an official with final policymaking authority. The district court also found that the individual defendants, Chief Wells, Peel, and Bekker were entitled to qualified immunity. However, with respect to Filarsky, the court stated:

> As to Defendant Filarsky, the evidence establishes that Filarsky's conduct did not result in the deprivation of any constitutional right required – as a required element for a 1983 claim. Filarsky's conduct consisted of conducting the interview, arguing with Delia's attorney, and consulting with Fire Chief Wells, who then issued the written order. Filarsky was not present at Delia's house, and at no point was Delia threatened with subordination [sic] or termination if he refused to comply with the order.

The district court's written order granting defendants' motions for summary judgment does not contain this holding.

The district court directed defense counsel to prepare findings of fact and conclusions of law. It appears from the record that the district court mechanically adopted the findings of fact and conclusions of law as prepared by defense counsel.[2] In its

[2] This court has previously noted its disapproval of this practice. *Federal Trade Comm'n v. Enforma Natural Prods., Inc.,* 362 F.3d 1204, 1215 (9th Cir. 2004); *Unt v. Aerospace Corp.,* 765 F.2d 1440, 1444 (9th Cir. 1985); *Lumbermen's Underwriting Alliance v. Can-Car, Inc.,* 645 F.2d 17, 18-19 (9th Cir. 1980); *Industrial Bldg. Materials, Inc. v. Interchemical Corp.,* 437 F.2d 1336, 1339 (9th Cir. 1970). As this court recognized forty years ago in *Interchemical Corp.*: "This practice has been condemned because of the possibility that such findings and conclusions, prepared by the non-objective advocate, may not fully and accurately reflect the thoughts entertained by the impartial judge at the time of his initial decision." *Interchemical Corp.,* 437 F.2d at 1339; *see also United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 657, n.4 (1964) (quoting Judge J. Skelly Wright's admonition, in his Seminars for Newly Appointed United States District Judges 166 (1963), that: "'lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.'"); *Nissho-Iwai Co. v. Star Bulk Shipping Co.,* 503 F.2d 596, 598 (9th Cir. 1974) ("We are aware that busy judges sometimes request attorneys to prepare the first draft of proposed findings and conclusions. The vice is when the district judge fails to study them and make such changes as are necessary to be sure they reflect his opinion.").

written order, the district court concluded that Filarsky, as well as Peel, Bekker and Chief Wells, was entitled to qualified immunity. No explanation for this change in the district court's reasoning appears in its written order.[3] The district court also held that the City was entitled to summary judgment on Delia's Monell claim. The district court, again, found that Delia had not established that he was injured by an

[3] The dangers of mechanically adopting counsel prepared summary judgment orders appear to be exemplified in this case. The district court's oral reasons for granting summary judgment do not match its written order. Yet, no explanation for this change appears in the record. Because the district court's written order postdates its oral statement, we will proceed on the presumption that the district court abandoned its prior oral reasoning for granting summary judgment. We will, instead, rely exclusively on the district court's written order. *See White v. Washington Public Power Supply Sys.,* 692 F.2d 1286, 1289 n.1 (9th Cir. 1982) (noting that "the rule in this circuit is that the formal findings of fact and conclusions of law supersede the oral decision."); *see also O'Neill v. AGWI Lines,* 74 F.3d 93, 95 (5th Cir. 1996) (noting that "to the extent that the district court's statements from the bench conflict with its formal findings and conclusions of law, we need not consider them."); *Snow Machines, Inc. v. Hedco, Inc.,* 838 F.2d 718, 727 (3d Cir. 1988) (noting that "a formal order controls over a prior oral statement."); *E.E.O.C. v. Exxon Shipping Co.,* 745 F.2d 967, 974 (5th Cir. 1984) (observing that "to the extent the [trial] court's statements from the bench conflict with its formal findings and conclusions, we do not consider them."); *Harbor Tug & Barge v. Belcher Towing,* 733 F.2d 823, 827 n.3 (11th Cir. 1984) ("The trial judge was not bound by his off-hand remarks. In its search for error, the reviewing court looks to the formal findings and conclusions . . . ").

express policy, a longstanding custom, or an official with final policymaking authority..

II. STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment. *Long Beach Area Chamber of Commerce v. City of Long Beach,* 603 F.3d 684, 689 (9th Cir. 2010). We must determine whether, viewing the evidence in the light most favorable to Delia, as the nonmoving party, "there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *California Alliance of Child and Family Servs. v. Allenby,* 589 F.3d 1017, 1020 (9th Cir. 2009).

III. DISCUSSION

A. Qualified Immunity – The City's Employees

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan,* 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). In *Pearson,* the United States Supreme Court offered this explanation of the reasoning behind the concept of qualified immunity: "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment,

distraction, and liability when they perform their duties reasonably." *Id.* In fact, "[t]he protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson,* 129 S. Ct. at 815 (quoting *Groh v. Ramirez,* 540 U.S. 551, 567 (2004)) (Kennedy, J., dissenting).

In considering a claim for qualified immunity, the court engages in a two-part inquiry: whether the facts shown "make out a violation of a constitutional right," and "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson,* 129 S. Ct. at 815-16. In *Pearson,* the Court overruled its prior holding, in *Saucier v. Katz,* 533 U.S. 194 (2001), that courts had to proceed through the two-step inquiry sequentially. *Pearson,* 129 S. Ct. at 818; *see James v. Rowlands,* 606 F.3d 646, 651 (9th Cir. 2010) (recognizing that *Pearson* overruled *Saucier* in part). As the Court explained, "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson,* 129 S. Ct. at 818. Thus, following *Pearson,* it is within our discretion to decide which step to address first. *Brooks v. Seattle,* 599 F.3d 1018, 1022 n.7 (9th Cir. 2010); *Bull v. City & County of San*

Francisco, 595 F.3d 964, 971 (9th Cir. 2010) (en banc). Thus, the threshold question we will decide is whether Delia being ordered to bring the rolls of insulation out of his home for inspection "make[s] out a violation of a constitutional right." *Pearson,* 129 S. Ct. at 816; *see Saucier,* 533 U.S. at 201.

1. Fourth Amendment violation

Delia contends that Chief Wells, Peel, and Bekker violated his Fourth Amendment right to be free from unreasonable searches and seizures when he was ordered to retrieve the rolls of home insulation and show them to fire department personnel. We agree. The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, *Mapp v. Ohio,* 367 U.S. 643, 655 (1961), guarantees, "[t]he 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 place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The Supreme Court has held that the Fourth Amendment applies to "[s]earches and seizures by government employers or supervisors of the private property of their employees." *O'Connor v. Ortega,* 480 U.S. 709, 715 (1987).

In *Payton v. New York,* 445 U.S. 573 (1980), the Supreme Court explained that no zone of privacy is

more clearly defined than one's home: "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590; *see Kyllo v. United States,* 533 U.S. 27, 28 (2001) (observing that "search of a home's interior" is "the prototypical . . . area of protected activity . . . "); *Silverman v. United States,* 365 U.S. 505, 511 (1961) (observing that "[a]t the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); *see also United States v. Struckman,* 603 F.3d 731, 738 (9th Cir. 2010) (recognizing the core of the Fourth Amendment is protection against unreasonable searches of one's home); *United States v. Brock,* 667 F.2d 1311, 1326 (9th Cir. 1982) (noting that "[o]ne of the foundations of the fourth amendment is the right of the people 'to be secure in their . . . houses.'"); *cf. New York v. Harris,* 495 U.S. 14, 17 (1990) ("[T]he rule in *Payton* was designed to protect the physical integrity of the home[.]"). Therefore, the warrantless search of a home is presumptively unreasonable unless the government can prove consent or that the search falls within one of the carefully defined sets of exceptions. *See Arizona v. Hicks,* 480 U.S. 321, 327 (1987); *Coolidge v. New Hampshire,* 403 U.S. 443, 474-75 (1971). The circumstances which excuse the failure to obtain a warrant are " 'few in number and

carefully delineated,'" where one's home is concerned.[4] *See Welsh v. Wisconsin,* 466 U.S. 740, 749

[4] We note that the Supreme Court recently reemphasized that the "'special needs' of the workplace" constitute an exception to the general rule that warrantless searches "'are per se unreasonable under the Fourth Amendment' . . . " *Ontario v. Quon,* 130 S. Ct. 2619, 2630 (2010) (citation and internal quotations omitted). In *Quon,* the Court reviewed a disagreement in *O'Connor v. Ortega,* 480 U.S. 709 (1987), on the proper analytical framework for Fourth Amendment claims against government employers. *Quon,* 130 S. Ct. at 2628. Under one approach, representing the plurality opinion in *O'Connor,* the Court explained the plurality analysis has two steps:

> First, because "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable," *id.,* at 718, a court must consider "[t]he operational realities of the workplace" in order to determine whether an employee's Fourth Amendment rights are implicated, *id.,* at 717 . . . Next, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances."

Id. (quoting *O'Connor,* 480 U.S. at 717, 718, and 725-726). The competing approach, championed by Justice Scalia in his concurrence in *O'Connor,* "dispensed with an inquiry into 'operational realities' and would conclude 'that the offices of government employees . . . are covered by Fourth Amendment protections as a general matter.'" *Id.* (quoting *O'Connor,* 480 U.S. at 731). Thus, under Justice Scalia's approach, the core inquiry is whether the search would be "regarded as reasonable and normal in the private-employer context." *O'Connor,* 480 U.S. at 732. If so, the search does not violate the Fourth Amendment. *Id.* The Court did not resolve this schism in *Quon. Quon,* 130 S. Ct. at 2628. The *Quon-O'Connor* workplace

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(1984) (quoting *United States v. United States District Court,* 407 U.S. 297, 318 (1972)).

In this case, defendants initially attempted to conduct a warrantless search of Delia's house for the insulation by asking for Delia's consent. Presumably, this is because a search conducted with the home owner's voluntary consent is an exception to the Fourth Amendment's proscription on warrantless searches. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973); *United States v. Rubio,* 727 F.2d 786, 796

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warrant exception, however, has no application here. Although the search at issue in this case arose as a result of a workplace investigation, defendants were not seeking to search Delia's workplace environment, but his home. *See Quon,* 130 S. Ct. at 2633 (concerning search of messages made by police officer on government owned alphanumeric pager); *O'Connor,* 480 U.S. at 712-13 (concerning search of physician's state office and seizure of personal items from his desk and filing cabinet). Moreover, even if the *Quon-O'Connor* workplace warrant exception was applicable to the search here, the search was unreasonable under either the *O'Connor* plurality or Justice Scalia's approach. Under the *O'Connor* plurality approach, the search here was unjustified from the start because there were no reasonable grounds for believing that a search for the insulation was necessary for the investigation. Delia was being investigated for abuse of sick leave. However, no activity restrictions were ever placed on Delia by his treating physician as a result of his workplace exposure to the hazardous substances. Consequently, whether or not he installed insulation in his home was irrelevant to the investigation, since he could install insulation in his home and still be in full compliance with his physician's orders. For these same reasons, we also conclude that the search would fail to satisfy Justice Scalia's approach because it would not be "regarded as reasonable and normal in the private-employer context." *O'Connor,* 480 U.S. at 732.

(9th Cir. 1983). Filarsky asked Delia to consent to allowing Peel to search for the insulation. Delia, however, refused to consent. Unable to obtain Delia's consent to a warrantless search of his house by Peel, Filarsky tried a different tactic. He sought to obtain Delia's consent to Delia bringing the rolls of insulation out of his home to show Peel that they had not yet been installed. No doubt this was done because an individual does not have an expectation of privacy in items exposed to the public, thereby eliminating the need for a search warrant. *See Katz v. United States,* 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *see also United States v. Broadhurst,* 805 F.2d 849, 856 (9th Cir. 1986) ("What a person knowingly exposes to public view is not protected by the Fourth Amendment"). Delia, however, again rejected Filarsky's request.

Unable to obtain Delia's consent to search his home, and alternatively, failing to persuade Delia to voluntarily retrieve the insulation from his home and place it in public view on his front lawn, Filarsky was stymied. It was only at this juncture that Filarsky's final move was to hatch a plan to compel Delia to do indirectly what Filarsky and the City of Rialto officials declined to do directly. Delia was *ordered* to go into his house and bring out the rolls of insulation for inspection. He was cautioned at the beginning of his interview that his failure to cooperate with the

investigation could result in charges of insubordination and possible termination of his employment. As a result, Chief Wells's order "convey[ed] a message that compliance with [his] request[ ][was] required." *Florida v. Bostick,* 501 U.S. 429, 435 (1991). As this court has recognized in the situation where police demand entrance to a dwelling, "compliance with a [governmental] demand is not consent." *United States v. Winsor,* 846 F.2d 1569, 1573 n.3 (9th Cir. 1988) (en banc) (internal quotations omitted). In *Winsor,* police officers decided to enter a hotel and go from room to room looking for a robbery suspect. *Id.* at 1571. "When the police knocked on the door [of the defendants' room] and demanded that it be opened," one of the defendants obeyed, at which point, the police officers recognized the suspect as the robber and found evidence of the robbery in plain view. *Id.* This court found that the defendant had opened the door in response to a claim of lawful authority, not voluntarily. *Id.* at 1573. Consequently, this court held that "the police did effect a 'search' when they gained visual entry into the room through the door that was opened at their command." *Id.* Similarly, under the facts in this case, Delia was compelled to enter his own home and retrieve the insulation for public view by *order* of Chief Wells. Delia's actions were involuntary and coerced by the direct threat of sanctions including loss of his firefighter position.[5] Therefore,

[5] It is well established that public employers generally cannot condition employment on an employee's waiver of

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we hold that the warrantless compelled search of Delia's own home, requiring him to retrieve and display the insulation in public view on his front yard, violated Delia's right under the Fourth Amendment to be free from an unreasonable search of his home by his employer.

2. Clearly established right

Having found that Delia's Fourth Amendment rights were violated, we turn to the second prong of the qualified immunity inquiry, whether the right was clearly established at the time of the defendants' misconduct. Accordingly, we must focus on what the defendants' knew, or should have known, concerning Delia's Fourth Amendment constitutional rights as of September 18, 2006, the date of Chief Wells's order. Whether a right is clearly established "turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Pearson,* 129 S. Ct. at 822 (quoting *Wilson v. Layne,* 526 U.S. 603, 614 (1999)); *see Clouthier v. County of Contra Costa,* 591 F.3d 1232, 1241 (9th Cir. 2010); *Greene v. Camreta,*

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constitutional rights. *See O'Hare Truck Serv., Inc. v. City of Northlake,* 518 U.S. 712, 717 (1996); *Pickering v. Board of Educ.,* 391 U.S. 563, 568 (1968); *Vance v. Barrett,* 345 F.3d 1083, 1092 (9th Cir. 2003); *see also McDonell v. Hunter,* 809 F.2d 1302, 1310 (8th Cir. 1987) (holding that the state may not require, as a condition of employment, waiver of the Fourth Amendment right to be free from unreasonable searches).

588 F.3d 1011, 1031 (9th Cir. 2009). Delia bears the burden of demonstrating that the right allegedly violated was clearly established at the time of the incident. *See Greene,* 588 F.3d at 1031; *Robinson v. York,* 566 F.3d 817, 825 (9th Cir. 2009), *cert. denied,* 130 S. Ct. 1047 (2010); *Galen v. County of Los Angeles,* 477 F.3d 652, 665 (9th Cir. 2007). The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987); *see James,* 606 F.3d at 652.

This case does not fit neatly into any previous category of Fourth Amendment law. This is best demonstrated by the fact that no party provided any prior case law analogous to this situation. Moreover, until today, this court had not extended *Winsor* beyond situations where police demand entrance. In attempting to demonstrate that the right allegedly violated was clearly established at the time of Chief Wells's order, Delia cites several cases. These cases include this court's prior decision in *Los Angeles Police Protective League v. Gates,* 907 F.2d 879 (9th Cir. 1990), as well as the Supreme Court's decisions in *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation,* 392 U.S. 280 (1968) and *Gardner v. Broderick,* 392 U.S. 273 (1968). A review of these decisions, however, does not demonstrate that Chief Wells's order violated a clearly established right.

Both Supreme Court decisions concern municipal employees who were questioned about corruption in their agencies. In *Gardner*, the plaintiff, a police

officer, was subpoenaed to appear before a New York County grand jury that was investigating bribery and corruption of police officers in connection with gambling operations. *Gardner,* 392 U.S. at 274. Although he was informed of his privilege against self-incrimination, the police officer was told that he would be fired if he did not sign a waiver of immunity. *Id.* After he refused to sign the waiver, he was fired. *Id.* at 274-753. The Court held that the plaintiff was discharged "not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. . . . He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege." *Id.* at 2789.

The Court reached an identical conclusion in *Uniformed Sanitation Men,* decided the same day as *Gardner.* In *Uniformed Sanitation Men,* fifteen sanitation workers were summoned to appear at a hearing conducted by a commissioner of investigations. The commissioner was investigating charges that sanitation department employees were not charging certain fees and were keeping other fees for themselves. *Uniformed Sanitation Men Ass'n, Inc.,* 392 U.S. at 281. Each sanitation employee was told that if he refused to testify "his employment and eligibility for other city employment would terminate." *Uniformed Sanitation Men Ass'n, Inc.* 392 U.S. at 282. Twelve workers refused to answer, invoking their privilege against self-incrimination, and were discharged. *Id.* The remaining three workers answered

questions at the hearing. They were subsequently suspended as a result of "information received from the Commissioner of Investigation concerning irregularities arising out of (their) employment in the Department of Sanitation." *Id.* The three workers were later summoned before a grand jury and asked to sign waivers of immunity. *Id.* They refused and were fired solely for refusing to sign waivers of immunity. *Id.* at 282-83. The Supreme Court held all the discharges unconstitutional, noting that, "[the sanitation workers] were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination." *Id.* at 283. Thus, in both *Gardner* and *Uniformed Sanitation Men,* the Court held that public agencies may not impair an individual's privilege against self-incrimination by compelling incriminating answers, or by requiring a waiver of immunity. *See id.*; *Gardner,* 392 U.S. at 278. Neither case involved the legality of a search under the Fourth Amendment. Accordingly, neither *Gardner* nor *Uniformed Sanitation Men* would have put defendants on notice that Chief Wells's order to Delia, with no attendant threat to his employment, constituted a violation of the Fourth Amendment.

Delia also cites this court's decision in *Gates.* In *Gates,* a police officer was served with an administrative warrant to search his garage. *Gates,* 907 F.2d at 883. When the plaintiff refused to permit the search, he was fired for insubordination. *Id.* Relying on the

Supreme Court's decisions in *Gardner* and *Uniformed Sanitation Men,* this court held that the plaintiff "could not be disciplined when he refused to allow the appellants to violate his constitutional rights. As the Supreme Court has pointed out, it is not proper to discharge an officer from duty in order to punish that officer for exercising rights guaranteed to him under the constitution." *Id.* at 886. Thus, the *Gates* decision did not concern the legality of an actual search, let alone a "search" under circumstances similar to this case. As a result, the *Gates* decision, like the Supreme Court's decisions in *Gardner* and *Uniformed Sanitation Men,* would hardly have put defendants on notice that their conduct here violated the Fourth Amendment. Thus, Delia has not demonstrated that a constitutional right was clearly established as of the date of Chief Wells's order, such that defendants would have known that their actions were unlawful. Accordingly, we affirm the district court's grant of summary judgment in favor of Chief Wells, Peel, and Bekker on the ground of qualified immunity.

B. Qualified Immunity – Filarsky

We next take up the issue of whether Filarsky, too, is entitled to qualified immunity. Unlike 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 investigations. Delia contends that Filarsky, as a private attorney, is not entitled to qualified immunity. Filarsky, on the other hand,

argues that this is a distinction without a difference. He urges this court to follow the Sixth Circuit Court of Appeals's decision in *Cullinan v. Abramson,* 128 F.3d 301, 310 (6th Cir. 1997), and hold that he is entitled to qualified immunity. In *Cullinan,* the Sixth Circuit held that a law firm that had been hired by the City of Louisville to serve as outside counsel was entitled to qualified immunity against plaintiffs' § 1983 claims. *Id.* The court succinctly concluded: "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.* In arriving at this conclusion, the court of appeals relied exclusively on dictum in *Richardson v. McKnight,* 521 U.S. 399, 407 (1997), 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.'" *Cullinan,* 128 F.3d at 310.

The hitch in Delia's argument is that we are not free to follow the *Cullinan* decision. We are "bound by prior panel opinions 'unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.'" *In re Findley,* 593 F.3d 1048, 1050 (9th Cir. 2010) (quoting *Nghiem v. NEC Elec., Inc.,* 25 F.3d 1437, 1441 (9th Cir. 1994); *Robbins v. Carey,* 481 F.3d 1143, 1149 n.3 (9th Cir. 2007)) ("Ordinarily, panels cannot overrule a circuit precedent; that power is reserved to the circuit court sitting en banc."). In *Gonzalez v. Spencer,* 336 F.3d 832 (9th Cir. 2003), another panel of this court held that a private attorney representing a county was not

entitled to qualified immunity. *Id.* at 834-35. In *Gonzalez,* the defendant, a private attorney, was retained to defend Los Angeles County in an underlying civil rights suit brought by the plaintiff. *Id.* at 834. The attorney accessed the plaintiff's juvenile court file without notifying him and without obtaining authorization from the juvenile court. *Id.* The attorney employed information from the file in deposing the plaintiff. *Id.* The plaintiff brought suit against the attorney, her law firm, and the county "for accessing and using his juvenile court file without authorization." *Id.* The plaintiff alleged that this conduct constituted a violation of his Fourth and Fourteenth Amendment rights. *Id.* In rejecting the attorney's claim of qualified immunity, this court reasoned, "[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); *see Wyatt v. Cole,* 504 U.S. 158, 168-69 (1992) (holding that private defendants in § 1983 suit for "invoking a state replevin, garnishment, or attachment statute" later declared unconstitutional were not entitled to qualified immunity from suit); *cf. Pollard v. The Geo Group, Inc.,* 607 F.3d 583, 602 (9th Cir. 2010) (observing that "[u]nlike officers employed by public prisons," employees of a private corporation operating a federal prison would not be entitled to qualified immunity in *Bivens* cause of action); *Kimes v. Stone,* 84 F.3d 1121, 1128 (9th Cir. 1996) (holding that "the common law

did not provide immunity to private attorneys conspiring with a judge to deprive someone of their constitutional rights"). Filarsky does not allege any intervening en banc decision, Supreme Court decision, or intervening legislation which would permit us to overrule the holding in *Gonzalez.* Therefore, we are bound by the *Gonzalez* decision. Accordingly, Filarsky is not entitled to qualified immunity as a private attorney and we reverse the district court's grant of summary judgment in his favor and remand for trial, or further proceedings as determined by the district court.[6]

C. Municipal Liability

Finally, we consider whether the City may be held liable under § 1983 for the individual defendants' actions. The City may be held liable under § 1983 for its employees' actions where one of its customs or policies caused a violation of Delia's

[6] We are skeptical of the district court's oral holding that Filarsky has no responsibility for the deprivation of Delia's Fourth Amendment rights which occurred in this case. We leave to the district court on remand to determine Filarsky's liability consistent with this opinion. We do note that searches by private parties are subject to the Fourth Amendment if private parties act as agents of the government. *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 614 (1989); *United States v. Young,* 153 F.3d 1079, 1080 (9th Cir. 1998). Under § 1983, private parties acting under color of state law can be held liable for violations of federal constitutional rights. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 152 (1970); *Franklin v. Fox,* 312 F.3d 423, 444 (9th Cir. 2002).

constitutional rights. *Monell,* 436 U.S. at 690-91. In *Monell,* the United States Supreme Court held that municipalities are "persons" subject to damages liability under § 1983 where it has caused a constitutional tort through "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. The Court further observed that § 1983 also authorizes suit "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 690-691. The Court, however, specifically rejected the use of the doctrine of *respondeat superior* to hold a municipality liable for the unconstitutional acts of its employees. The Court instructed that municipalities could be held liable only when an injury was inflicted by a city's "law-makers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694. "[T]he touchstone of 'official policy' is designed 'to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.'" *City of St. Louis v. Praprotnik,* 485 U.S. 112, 138 (1988) (Brennan, J., concurring) (quoting *Pembaur v. City of Cincinnati,* 475 U.S. 469, 479-80 (1986)) (emphasis in *Pembaur*).

Even in the absence of an official policy or a custom, the Supreme Court has held that "an unconstitutional government policy could be inferred from a

single decision taken by the highest officials responsible for setting policy in that area of the government's business." *Praprotnik,* 485 U.S. at 123. Under this paradigm, however, "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur,* 475 U.S. at 481.

Thus, in order to establish an official policy or custom sufficient for *Monell* liability, a plaintiff must show a constitutional right violation resulting from (1) an employee acting pursuant to an expressly adopted official policy; (2) an employee acting pursuant to a longstanding practice or custom; or (3) an employee acting as a "final policymaker." *Webb v. Sloan,* 330 F.3d 1158, 1164 (9th Cir. 2003); *see Ulrich v. City & County of San Francisco,* 308 F.3d 968, 984-85 (9th Cir. 2002); *Gillette v. Delmore,* 979 F.2d 1342, 1346-47 (9th Cir. 1992). Delia has not directed us to any policy, officially adopted and promulgated by the City. Nor has he established a practice, so permanent and well-settled so as to constitute a custom, that existed and through which Chief Wells acted in ordering Delia to produce the rolls of insulation. *See Praprotnik,* 485 U.S. at 121. Indeed, Delia does not suggest that defendants were acting pursuant to an express official policy or a longstanding practice or custom.

This leaves only the third means of establishing municipal liability available to Delia, that he was

injured by an employee of the City with "final policymaking authority." *Id.* at 123. Delia asserts that the individual defendants, and Chief Wells in particular, were acting as final policymakers when ordering him to produce the rolls of insulation. In response, the City argues that none of the individual defendants had final policymaking authority. "[W]hether a particular official has 'final policymaking authority' is a question of state law." *Praprotnik,* 485 U.S. at 124; *see Pembaur,* 475 U.S. at 483 (noting that "[a]uthority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority"); *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 737 (1989) ("'whether a particular official has 'final policymaking authority' is a question of *state law.*'") (quoting *Praprotnik,* 485 U.S. at 123); *Lytle v. Carl,* 382 F.3d 978, 982 (9th Cir. 2004) ("To determine whether a school district employee is a final policymaker, we look first to state law.").

Review of the City's Code of Ordinances reveals that the Fire Chief has not been delegated final policymaking authority regarding any practices for the City's Fire Department. Instead, the City Council is vested with exclusive final policymaking authority for the Fire Department. Rialto Ordinance Chapter 2.34 governs the City's Fire Department. Section 2.34.020 provides:

> The fire department is a department within the framework of the city's administrative organization and is governed by state

> and federal laws pertaining thereto and the ordinances, *policies and procedures established by the city council.*

RIALTO, CAL., ORDINANCES § 2.34.020 (emphasis added). Section 2.34.030, which concerns the establishment of a Fire Chief, provides:

> There is a chief of the fire department who is subject to the general supervision of the city administrator and *with the approval of the city council,* solely responsible for the management and conduct of the department.

RIALTO, CAL., ORDINANCES § 2.34.030 (emphasis added). Finally, § 2.34.040 specifies the duties of the City's Fire Chief, providing in pertinent part as follows:

> The duties of the fire chief include, but are not limited to, the following:
>
> A. To *formulate and recommend policies and procedures* pertaining to the enforcement of rules and regulations for the government and operation of the fire department and pertaining to the prevention and control of fires; to administer such policies and procedures *when approved* and to conduct such activities for the city;
>
> . . . .
>
> H. To carry out such other affairs and assignments *as he/she is assigned by the city council by resolution,* or to carry out

> other functions as described of the fire chief in other provisions of this code;
>
> I. To be responsible for the general supervision and administration of the fire safety division.

RIALTO, CAL., ORDINANCES § 2.34.020 (emphasis added).

Thus, under these ordinances, even though Chief Wells had final authority over the fire department's day-to-day supervision and administration, he was not authorized to establish city policy. In *Pembaur,* the Supreme Court distinguished final policymaking authority from final decisionmaking authority, observing that:

> The fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Pembaur, 475 U.S. at 481-83 (citations and footnote omitted). To drive home this point, the Court offered the following illustration:

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment

> policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

Pembaur, 475 U.S. at 483 n.12.

The facts here mirror the *Pembaur* illustration. Chief Wells clearly had supervisory and final decisionmaking authority over the City's Fire Department. In that capacity, he signed the order requiring Delia to produce the rolls of insulation. The record, however, is devoid of any evidence that Chief Wells's authority included responsibility for establishing final departmental policy. To the contrary, the City's Code of Ordinances places policymaking authority for the fire department in the exclusive hands of the city council. *See* RIALTO, CAL., ORDINANCES §§ 2.34.020, 2.34.030. Thus, only the city council's

decisions would provide a basis for city liability. No such decisions appear in the record. As the Supreme Court cautioned in *Praprotnik,* "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Praprotnik,* 485 U.S. at 128.

Delia directs our attention to the fact that Chief Wells did not provide the city administrator with a copy of his order to Delia as evidence that he wielded final policymaking authority. This argument confuses final decisionmaking authority with final policymaking authority. While Chief Wells wielded the former, only the latter is sufficient to hold the City liable under § 1983 for his actions. *See Pembaur,* 475 U.S. at 483 & n.12. Indeed, if we were to accept the evidence in this case as establishing *Monell* liability, "the result would be indistinguishable from respondeat superior liability." *Praprotnik,* 485 U.S. at 126 (cautioning that "[i]f the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability."); *see Clouthier,* 591 F.3d at 1253 (noting that "'[t]o hold cities liable under section 1983 whenever policymakers fail to overrule the unconstitutional discretionary acts of subordinates would simply smuggle *respondeat superior* liability into section 1983 law [creating an] end run around *Monell*.'") (quoting *Gillette,* 979 F.2d at 1348). Accordingly, we conclude that the evidence here fails

to establish that Chief Wells had final policymaking authority.

Our conclusion is buttressed by cases from this court as well as our sister circuits. In *Gillette,* 979 F.2d 1342, this court held a fire chief's actions in firing the plaintiff could not constitute the basis for municipal liability because the fire chief was not a final policymaker. *Id.* at 1350. In arriving at this conclusion, this court observed that the fire chief's discretionary authority to hire and fire employees, standing alone, was "not sufficient to establish a basis for municipal liability." *Id.* This court also noted the fact that the "City Charter and ordinances grant authority to make City employment policy *only* to the City Manager and the City Council." *Id.* (emphasis added). In the absence of any evidence that the fire chief actually made policy, this court found that he was not a final policymaker. *Id.*; *see Collins v. City of San Diego,* 841 F.2d 337, 341-42 (9th Cir. 1988) (holding city was not liable for employment actions of police sergeant, even though police sergeant had "discretion to recommend hiring, firing, and discipline of employees", where he was not the city official responsible for establishing final departmental employment policy). The Eighth Circuit Court of Appeals reached the same conclusion in *Davison v. City of Minneapolis,* 490 F.3d 648, 661 (8th Cir. 2007). In *Davison,* the court held that there was insufficient evidence to subject the city to *Monell* liability for the actions of its fire chief. *Id.* In reaching this conclusion, the court noted that although the fire chief

had final decisionmaking authority regarding employment promotions, there was no evidence that he was also delegated with authority to make final municipal policy regarding employment practices. *Id.*; *see Bechtel v. City of Belton,* 250 F.3d 1157, 1161 (8th Cir. 2001) (holding that city fire chief whose authority over the operations of the fire department was subject to review by the city administrator "had no authority as the 'highest official responsible for setting policy.'").

Likewise, in *Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro,* 64 F.3d 962 (4th Cir. 1995), the Fourth Circuit Court of Appeals arrived at the identical determination. In that case, a firefighter sued the City of Greensboro under § 1983, alleging retaliation by the fire chief because of the firefighter's union participation. *Id.* at 963-64. The fire chief had failed to promote him despite the fact that he had the highest score on the promotions list. *Id.* Examining relevant state and city laws, the Fourth Circuit found that "'final policymaking authority' over employer-employee relations in the City of Greensboro rests only with the City Council and the City Manager." *Id.* at 965-66. Accordingly, the court held that even though the fire chief may have had final authority to determine whom to promote, he was not authorized to adopt a "municipal policy embodying anti-union animus." *Id.*; *see Crowley v. Prince George's County,* 890 F.2d 683, 685-86 (4th Cir. 1989) (holding that although a county police chief was responsible for personnel decisions within the police

department, he did not have "final policymaking authority" that would impute liability to the county under 42 U.S.C. § 1981). Similarly, in this case, there is a total absence of any policymaking authority delegated to Chief Wells by the City's Code of Ordinances. Chief Wells's final decisionmaking authority regarding whether to order Delia to produce the rolls of insulation, standing alone, is insufficient to subject the City to liability for his action. Accordingly, we affirm the district court's grant of summary judgment in the City's favor.

IV. CONCLUSION

Upon *de novo* review, we hold that Delia's Fourth Amendment rights were violated when Chief Wells, Peel, and Bekker affected a warrantless "search" of Delia's home by ordering Delia to go into his home and bring out the rolls of insulation for inspection. Because Delia's actions were involuntary and occurred as a result of the direct threat of sanctions, we hold that the warrantless compelled search of Delia's home violated his rights under the Fourth Amendment. Nevertheless, we conclude that these defendants are entitled to qualified immunity because Delia has not established that this constitutional right was clearly established at the time of Chief Wells's order to Delia. We therefore affirm the district court's grant of summary judgment on their behalf. We further conclude that Filarsky is not entitled to qualified immunity as a private attorney. Thus, we reverse the district court's grant of summary judgment in his

favor and remand for trial or further proceedings consistent with this opinion. Finally, we conclude that neither Chief Wells, nor any of the other individual defendants, had final policymaking authority for the City. Therefore, we affirm the district court's grant of summary judgment in favor of the City.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Each party is to bear its own costs on appeal.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA,

Plaintiff,

v.

CITY OF RIALTO, a Public Entity; CITY OF RIALTO FIRE DEPARTMENT, a Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL Individually and as a Battalion Chief for the City of Rialto; FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10 INCLUSIVE,

Defendants.

Case No.
CV 08-03359
R (PLAx)

JUDGMENT

(Filed Mar. 9, 2009)

JUDGMENT

This matter came on regularly for hearing on February 2, 2009, at 10:00 a.m. in Courtroom 8 of the above-entitled Court, the Honorable Judge Manuel L. Real presiding. Defendants and moving parties the City of Rialto, Stephen Wells, Mike Peel and Frank Bekker appeared by their attorneys of record Best Best & Krieger LLP by Howard B. Golds. Defendant Steve Filarsky appeared by his attorneys of record Gilbert, Kelly, Crowley & Jennett, LLP by Jon H. Tisdale. Plaintiff Nicholas B. Delia appeared by his attorneys of record Lackie, Dammeier & McGill by Sanjay Bansal.

The Court, having considered the Motion for Summary Judgment or Alternatively, Partial Summary Judgment brought by Defendants City of Rialto, Stephen Wells, Mike Peel and Frank Bekker and the Motion for Summary Judgment or Alternatively, Partial Summary Judgment brought by defendant Steve Filarsky, rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment in the above-captioned matter be, and hereby is, entered in favor of Defendants City of Rialto, Stephen Wells, Mike Peel, Frank Bekker and Steve Filarsky ("Defendants") and that plaintiff Nicholas Delia shall take nothing by way of his Complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants shall recover their costs of suit herein.

Dated: March 9, 2009

/s/ Real
UNITED STATES
DISTRICT COURT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA,

Plaintiff,

v.

CITY OF RIALTO, a Public Entity; CITY OF RIALTO FIRE DEPARTMENT, a Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL Individually and as a Battalion Chief for the City of Rialto; FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10 INCLUSIVE,

Defendants.

Case No.
CV 08-03359
R (PLAx)

STATEMENT OF UNCONTROVERTED FACTS

(Filed Mar. 9, 2009)

The Motions for Summary Judgment or in the alternative Partial Summary Judgment ("Motions") of Defendants City of Rialto ("City"), Stephen C. Wells ("Wells"), Mike Peel ("Peel"), Frank Bekker ("Bekker") and Steve Filarsky ("Filarsky") came on regularly for hearing on February 2, 2009, in Courtroom 8 of the above-entitled Court, the Honorable Judge Manuel L. Real presiding. Defendants and moving parties the City of Rialto, Stephen Wells, Mike Peel and Frank Bekker appeared by their attorneys of record Best Best & Krieger LLP by Howard B. Golds. Defendant Steve Filarsky appeared by his attorneys of record Gilbert, Kelly, Crowley & Jennett, LLP by Jon H. Tisdale. Plaintiff Nicholas B. Delia ("Delia") appeared by his attorneys of record Lackie, Dammeier & McGill by Sanjay Bansal.

After consideration of the papers in support of and in opposition to the Motions for Summary Judgment or in the Alternative, Partial Summary Judgment and the argument of counsel, the Court determines that the following facts and conclusions of law have been established:

UNCONTROVERTED FACTS

1. Delia began his employment with the City's Fire Department in July 2000 as a "Fire Fighter," and was subsequently promoted to the rank of "Engineer." However, in February 2006, the City determined that grounds existed to discipline Delia and it proposed that he be demoted back to the rank of "Fire Fighter."

After a *Skelly* Hearing was held in May 2006, a final decision was made to demote Delia in June 2006. (Transcript of Deposition of Nicolas Delia taken on December 17, 2008 ("Delia Depo."), pp. 6:20-22; 72:4-9.)

2. In August 2006 while on duty, Delia was assisting in the control of a toxic spill when he began to feel ill. He was transported to the hospital and ultimately given an off-work order by a doctor for a period of three shifts. (Delia Depo,. pp. 12:8-13:5; 14:3-7.)

3. The City became suspicious of Delia's off-work status because of the circumstances involving his previous discipline, in that he was at the time appealing his demotion. The City thereupon hired a private investigation company to conduct surveillance of Delia while he was off work and during that investigation, Delia was filmed buying building supplies, including rolls of fiberglass building insulation, at a local Lowe's home improvement store. Based upon that evidence, the City decided to undertake a formal internal affairs investigation of Delia to determine whether he was off-work based upon false pretenses. In furtherance of the investigation, it was decided that Delia would be interviewed by Filarsky. (Declaration of Stephen C. Wells in Support of Motion for Summary Judgment ("Wells Decl."), ¶¶ 3, 4.)

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. As part of that work, Filarsky had previously questioned Fire Department employees in internal affairs investigations. (Wells Decl., ¶ 4.)

5. Filarsky's interview of Delia took place starting on September 18, 2006. In attendance were Filarsky, Peel, Bekker, Delia and Delia's legal counsel, Stuart Adams ("Adams"). The interview was tape recorded and subsequently transcribed ("Transcript"). (See Declaration of Michael Peel in Support of Motion for Summary Judgment ("Peel Decl."), Exhibit "A;" Peel Decl., ¶ 5; Delia Depo, pp. 41:17-42:8.)

6. Both Peel and Bekker were asked to attend the interview, although neither had any specific role in the interview other than to witness the events. (Peel Decl., ¶ 2; Declaration of Frank Bekker in Support of Motion for Summary Judgment ("Bekker Decl."), ¶ 2; Wells Decl., ¶ 5.)

7. Peel spoke once during the interview when he was asked at the very beginning by Filarsky to go through the formality of ordering Delia to answer the questions truthfully. Peel never spoke again and Bekker never spoke at all. (Transcript, p. 1:33-34; ; Peel Decl., ¶ 5; Bekker Decl., ¶ 5.)

8. The interview began at 10:02 a.m. and after some preliminary questioning, Filarsky began to question Delia about what had been purchased at Lowe's. Delia described some lumber and the building insulation and specifically stated that the insulation had not been installed and was sitting in his kitchen.

Filarsky subsequently showed Delia video tape taken of him making purchases at Lowe's, including his purchase of the fiberglass insulation. (Transcript, pp. 30:38-31:30; 23:17-24:38.)

9. At some point during the interview, Filarsky asked Delia to produce the insulation for inspection and informed Delia that if he was able to do so, he would be exonerated from the charges that were the basis for the internal affairs investigation. Adams advised Delia that he didn't need to produce the materials, Filarsky and Adams then got into a fairly heated dispute over whether an inspection would be allowed, and then at some point Adams threatened to sue both Peel and Bekker. (Peel Decl., ¶¶ 3, 4; Bekker Decl., ¶¶ 3, 4; Transcript, pp. 35:27-44:39.) During a break in the interview Filarsky consulted with Wells. Filarsky explained the situation involving the insulation and his desire to order Delia to produce the insulation. Wells did not understand or believe that having Delia show the insulation outside his house was a violation of Delia's rights and, in fact, Wells did not witness the arguments about this issue that occurred between Filarsky and Adams and which are reflected in the Transcript. Based on Filarsky's comments and advice, Wells issued the order and Filarsky to conveyed the order to Delia. (Wells Decl., ¶¶ 5, 6.)

11. Neither Peel nor Bekker participated in any discussions with Filarsky or Wells or anyone else about whether Delia should be ordered to show the building insulation, made the decision to issue the

order, or communicated the order to Delia. However, at the time Filarsky gave the order, both Peel and Bekker believed that the order was legal, both because Filarsky was a lawyer and because Delia was not being ordered to allow anybody to enter his house. (Peel Decl., ¶¶ 6, 7; Bekker Decl., ¶¶ 6, 7.)

12. After the break, the interview then recommenced and after more discussion with Adams and Delia's refusal to voluntarily produce the insulation, Filarsky ordered Delia to show the building insulation to the City. (Peel Decl., ¶ 4; Bekker Decl., ¶ 4; Transcript, pp. 34:24-35:25.)

13. After a lengthy break in the interview, the parties reconvened at which time Delia was presented with a written order to produce the insulation signed by Wells. Wells recalls being told by Filarsky that Delia's attorney had demanded that the order to show the insulation be put in writing, and believes that Filarsky drafted it and then asked Wells to sign it. (Wells Decl., ¶ 8 and Ex. "B;" Transcript, p. 54:14-15.)

14. After the interview was finished, Peel and Bekker followed Delia in a City vehicle to Delia's house where they waited a few minutes for Adams who had gotten lost on the way. When Adams arrived, Delia, Adams and a union representative went into Delia's house and brought out three or four rolls of fiberglass building insulation which he placed on his front lawn. Once finished, Peel thanked Delia and Peel and Bekker drove away. Filarsky was never

present at Delia's home. The entire process of putting the insulation on the lawn and having it observed by Peel and Bekker lasted about a minute. At no time did Peel and Bekker ever leave their City vehicle while they were parked at the curb in front of Delia's house and at no time did they enter Delia's house. Furthermore, the only thing removed by Delia from his house and shown to Peel and Bekker were the three or four rolls of fiberglass building insulation. (Peel Decl., ¶ 8; Bekker Decl., ¶ 8.)

CONCLUSIONS OF LAW

1. Peel, Bekker, Wells and Filarsky are protected from liability by the doctrine of qualified immunity as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known because Delia has not demonstrated 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 plaintiffs house. *Pearson v. Callahan,* 555 U.S. ___, (January 21, 2009, No. 07-751), 172 L. Ed. 2d 565 (2009); *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *Mitchell v. Forsyth,* 472 U.S. 511, 525-27 (1985); *Saucier v. Katz,* 533 U.S. 194, 202 (2001); *Los Angeles Police Protective League v. Gates,* 907 F.2d 879, 887-888 (9th Cir. 1990).

2. 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 Filarksy had final policymaking authority, none was the policymaker for the City for the purposes of the act about which Delia complains and Delia has provided no evidence of any longstanding practice or custom of the City or that any official with final policy-making authority ratified the conduct of which Delia complains. *Cortez v. County of Los Angeles,* 294 F.3d 1186, 1189 (9th Cir. 2002); *Lytle v. Carl,* 382 F.3d 978, 982 (9th Cir. 2004); *Ulrich v. City and County of San Francisco,* 308 F.3d 968, 985; *Zografos v. City of San Francisco,* (Dec. 13, 2006, No. C 05-3881) N.D. Cal. [2006 Lexis 90101]; *Collins v. City of San Diego,* 841 F.2d 337 (9th Cir. 1988); *St. Louis v. Praprotinik,* 485 U.S. 112, 126 (1988); *Gillette v. Delmore,* 979 F.2d 1342 (9th Cir. 1992); Rialto Municipal Code sections 2.34.020, 2.34.030 and 2.34.040.

Dated: March 9, 2009

/s/ Real
UNITED STATES
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

CASE NO.: CV 08-3359-R **Date: FEB. 2, 2009**

TITLE: NICHOLAS B. DELIA V. CITY OF RIALTO, et al.

PRESENT:

HON. MANUEL L. REAL, JUDGE

Ricardo Juarez	**Bridget Montero**
Deputy Clerk	**Court Reporter**

ATTORNEY PRESENT FOR PLAINTIFF:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
Sanjay Banal	**Howard Golds** **Jon Tisdale**

PROCEEDINGS: 1) Defendants City of Rialto et al's Motion for Summary Judgment; or, for partial summary judgment [33]

2) Defendant Filarsky's Motion for Summary Judgment [34]

Court GRANTS both motions for summary judgment [33, 34].

Counsel for defendants shall prepare the Statement of Uncontroverted Facts and the Judgments.

Plaintiff's Motion for Partial Summary Judgment [38] is hereby taken OFF calendar as MOOT.

5 min

Initials of Deputy Clerk RJ

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA, Plaintiff v. CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT, A Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the City of Rialto; FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as an	Case No. CV 08-3359 R-PLAx Assigned to Hon. Manuel L. Real **DEFENDANT STEVE A. FILARSKY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; DECLARATION OF STEVE A. FILARSKY IN SUPPORT; DECLARATION OF JON H. TISDALE**

Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10, INCLUSIVE, Defendants.	**IN SUPPORT; [PROPOSED] ORDER** **[Statement of Uncontroverted Facts and Conclusions of Law Filed Concurrently Herewith.]** **Date: February 2, 2009** **Time: 10:00 a.m.** **Courtroom: 217/8**

Please take notice that on February 2, 2009, at 10:00 a.m., or as soon thereafter as may be heard in Courtroom "217/8" of the above entitled court, located at 312 North Spring Street, Los Angeles, California 90012; Defendant STEVE A. FILARSKY (hereinafter referred to as "Defendant FILARSKY") will move this court for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56, as to Plaintiff's Complaint against Defendant FILARSKY.

This Motion will be made on the following grounds:

- In the instant action, Defendant FILARSKY, an attorney licensed in California, was retained by the City of Rialto to participate in an internal affairs investigation and provide legal advice in connection with personnel issues. As retained special counsel representing the City of Rialto in connection with internal personnel matters, Defendant FILARSKY may assert and is protected by

the doctrine of qualified immunity to the same extent as any city official or other direct employee of the city.

- At the time Defendant FILARSKY was acting in his retained capacity of independent counsel for the City of Rialto, there was no obligation and/or duty imposed on Defendant FILARSKY to countermand the City's decision to order Plaintiff to produce specified building materials which plaintiff explained would exonerate him. Moreover, any reasonable attorney in Defendant FILARSKY's position would not have known that the request for Plaintiff to produce the specified building materials would conceivably constitute an unconstitutional "search" as alleged by plaintiff in view of the fact that the law was not clearly established that this action would constitute a violation of Plaintiff's constitutional rights under the 4th or 14th Amendments of the United States Constitution.
- Defendant FILARSKY is therefore entitled to summary judgment based upon the fact that he is entitled, as a matter of law, to assert the doctrine of qualified immunity, and that he is entitled, as a matter of law, to its full protection from any personal liability (and in fact from suit itself) for his alleged participation in what Plaintiff characterizes as an alleged unconstitutional "search".
- The threshold determination of whether the law governing the conduct at issue was clearly

established is purely a question of law for the court. A determination, of reasonableness, although it may require consideration of factual issues, is appropriate for summary judgment if the facts are undisputed. Here, Defendant FILARSKY was sued in an individual capacity and as an Internal Affairs Investigator for the City of Rialto, along with co-defendants City of Rialto and its employees. Both the City of Rialto and its employees are entitled to assert the doctrine of qualified immunity for any personal liability for their actions taken "under color of state law". In addition, an attorney for the City is entitled to assert the doctrine of qualified immunity for any personal liability for actions taken "under color of state law". Clearly, Defendant FILARSKY was retained by the City of Rialto as a lawyer experienced in personnel and internal affairs matters, notwithstanding the rather odd differentiation offered by Plaintiff to suggest that FILARSKY played an individual role as opposed to his role as outside legal counsel on behalf of the City of Rialto. Accordingly, there is no genuine issue of material fact as to the capacity in which FILARSKY was acting and he is therefore entitled to summary judgment as a matter of law.

This Motion is based upon this Notice, the Memorandum of Points and Authorities in support thereof, the concurrently filed Declarations of Steve A. Filarsky and Jon H. Tisdale, the Exhibits attached thereto, the records and pleadings on file herein, and

upon all such other oral and documentary evidence as may be presented at the time of the hearing.

Dated: January 12th, 2009

GILBERT, KELLY, CROWLEY & JENNETT, LLP

By: /s/ Jennifer West
JOHN H. TISDALE
JENNIFER WEST
Attorneys for Defendant
STEVE A. FILARSKY

TABLE OF CONTENTS

		Page
I.	STATEMENT OF FACTS/SUMMARY OF THE ARGUMENT	4
II.	SUMMARY OF THE ARGUMENT	8
III.	SUMMARY JUDGMENT IS PROCEDURALLY PROPER	9
IV.	QUALIFIED IMMUNITY IS CATEGORICALLY AVAILABLE TO DEFENDANT	12
V.	PLAINTIFF HAS NOT FOR PURPOSES OF SUMMARY JUDGMENT DEMONSTRATED THAT HE WAS DEPRIVED OF A CONSTITUTIONAL RIGHT UNDER THE FOURTH OR FOURTEENTH AMENDMENTS BY DEFENDANT FILARSKY	15
	a. Fourth Amendment	15
	b. Fourteenth Amendment	16

VI. IT WOULD NOT HAVE BEEN CLEAR TO ANY REASONABLE ATTORNEY THAT DEFENDANT FILARSKY'S CONDUCT WAS UNLAWFUL IN THE SITUATION HE CONFRONTED 17

VIII. DEFENDANT FILARSKY IS ENTITLED TO QUALIFIED IMMUNITY IN THIS CASE AS THE ALLEGED SEARCH WAS VOLUNTARILY CONSENTED TO BY THE PLAINTIFF 19

VI. CONCLUSION 20

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS/SUMMARY OF THE ARGUMENT.

This is an action by plaintiff NICHOLAS B. DELIA (hereinafter "Plaintiff") for the alleged violation of his civil rights. The Complaint alleges that in or about September 2006, Plaintiff was compelled under threat of insubordination and termination, to go to his home and produce certain private property for examination to "Defendants."[1] The Complaint further alleges that Defendants FILARSKY, Peel, Bekker, and Wells gave the unlawful order for said search and, as such, violated Plaintiff's constitutional rights.[2]

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[1] See, Complaint, ¶9, attached hereto as Exhibit "A".

[2] See, Complaint, ¶9, attached hereto as Exhibit "A".

The crux of Plaintiff's contention is that Defendant Steve A. Filarsky ("FILARSKY") performed services at the behest of the City of Rialto, a public municipality organized under the laws of the State of California[3] (hereinafter referred to as "City"). City retained FILARSKY solely to participate in internal affairs investigations with respect to City employees. It is alleged that in doing the acts alleged herein, Defendant FILARSKY acted under color of state law, within the course and scope of employment, and as an official policy-maker of the City."[4] The Complaint further prays for general, special, and exemplary damages for civil rights violations along with attorney's fees and costs.[5]

On September 18, 2006, an interview of Plaintiff was conducted in connection with an internal investigation; the subject matter of the investigation was the suspected inappropriate use of "sick time" by DELIA to work on a home remodeling project.[6] Battalion Chiefs Mike Peel and Frank Bekker, Plaintiff's attorney Stuart Adams, and Defendant FILARSKY were present (hereinafter collectively referred to as

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[3] See, Complaint, ¶4, attached hereto as Exhibit "A".

[4] See, Complaint ¶5, attached hereto as Exhibit "A".

[5] See, Complaint¶¶15, 16 attached hereto as Exhibit "A".

[6] See, Declaration of Defendant FILARSKY, ¶6; see also Deposition of Plaintiff p.24, lns. 2-6, attached to the Declaration of Jon H. Tisdale as Exhibit "B".

"Battalion Chiefs").[7] Fire Chief Stephen Wells was nearby in the same building and available, although not present in the room for the interview.[8] On behalf of City, Defendant FILARSKY was investigating Plaintiff based upon a *sub rosa* videotape which showed him purchasing building materials and unloading them at his home on a "sick" day.[9] Defendant FILARSKY was retained as outside legal counsel by the City because he was a lawyer and because he was experienced in personnel and internal affairs matters.[10] Defendant FILARSKY has conducted numerous investigations on behalf of the City, and has always been expected to conduct not only the investigations and interviews, but provide legal analysis, propose alternative disciplinary actions, draft correspondence regarding disciplinary actions directed by City employees, and conduct or participate in legal proceedings/hearings.[11] As such, Mr. Filarsky would not have been retained by the City to perform legal services had he not been a licensed attorney.

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[7] See, Declaration of Defendant FILARSKY, ¶7; see also Deposition of Plaintiff p.27. lns. 7-18, attached to the Declaration of Jon H. Tisdale as Exhibit "B".

[8] See, Declaration of Defendant FILARSKY ¶7.

[9] See, Declaration of Defendant FILARSKY, ¶6; see also Deposition of Plaintiff, p. 29, lns. 11-22, attached to declaration of Jon H. Tisdale as Exhibit "B".

[10] See, Declaration of Defendant FILARSKY, ¶5.

[11] See, Declaration of Defendant FILARSKY, ¶4.

The City had videotaped Plaintiff purchasing and loading plywood, lumber and rolls of fiberglass insulation at Lowe's Home Improvement Center (hereinafter referred to as the "Subject Building Materials").[12] At the interview of September 18, 2006, Plaintiff indicated *in his defense* that he did not incorporate the Subject Building Materials into his home remodeling project and that the Subject Building Materials remained unused at his residence.[13]

At the commencement of the interview, FILARSKY had no way of knowing in advance what explanation DELIA might offer in his defense of what was depicted in the videotape. Certainly, going into the interview, no one could reasonably have foreseen that DELIA would ***offer in his own defense*** an explanation that could so easily be corroborated by nothing more than simply showing the Subject Building Materials to his superiors.[14] During the investigation it became apparent from Plaintiff's responses that the Subject Building Materials were still in Plaintiff's kitchen and had not been incorporated into the walls.[15] At that point, there was a break in the

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[12] See, Declaration of Defendant FILARSKY, ¶6.

[13] See, Declaration of Defendant FILARSKY, ¶9; see also, written transcript of recording of Plaintiff's interview, attached thereto as Exhibit "A" to FILARSKY Declaration, pgs. 23-24, lns. 24-47; 1-5.

[14] See, Declaration of Defendant FILARSKY, ¶8.

[15] See, Declaration of Defendant FILARSKY, ¶9; see also, written transcript of recording of Plaintiff's interview, attached

(Continued on following page)

interview.[16] It was then suggested that if Plaintiff would simply show the Battalion Chiefs the Subject Building Materials, the investigation would be over and it would be resolved in DELIA's favor with no disciplinary action.[17]

The interview was then resumed and, at the direction of Chief Wells, it was requested that Plaintiff go home and produce the Subject Building Materials for his superiors in order to dispel questions relating to the allegation of misused sick leave.[18] Prior to issuing any order to produce the Subject Building Materials, Defendant FILARSKY communicated separately with Defendants Wells, Bekker, and Peel.[19] At that point in time, it was decided by Chief Wells to ask Plaintiff DELIA's permission for his superiors to simply view the Subject Building Materials to verify that they were still at Plaintiff's residence, not yet incorporated into the walls.[20] Plaintiff was represented by attorney Stuart Adams; when DELIA was requested to show the building materials to his superiors, Adams advised DELIA to refuse to produce the build-

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thereto as Exhibit "A" to FILARSKY Declaration, pgs. 23-24, lns. 24-47; 1-5.

[16] See, Declaration of Defendant FILARSKY, ¶10.

[17] See, Declaration of Defendant FILARSKY, ¶11; see also, Deposition of Plaintiff, p. 52, lns. 3-9, attached hereto as Exhibit "B".

[18] See, Declaration of Defendant FILARSKY ¶11.

[19] See, Declaration of Defendant FILARSKY ¶10.

[20] See, Declaration of Defendant FILARSKY ¶11.

ing materials.[21] Based on advice of counsel by Mr. Adams, Plaintiff denied the request.[22] The request was then clarified in the interview by FILARSKY, who indicated that the City had no intention of going *inside* Plaintiff's home at all but rather wanted Plaintiff to simply bring out the Subject Building Materials to the front yard for visual verification.[23] Again, Adams advised DELIA not to do so, even though it was expressly represented that the production of the Subject Building Materials would completely exonerate DELIA and end the investigation.[24]

After another discussion off the record, Defendant Wells, as the current Fire Chief, converted the request to produce the Subject Building Materials into a written order.[25] Defendant Wells had the final authority to unilaterally order the production of Subject Building Materials.[26] Defendant FILARSKY had no authority to make such an order, unilaterally

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[21] See, Declaration of Defendant FILARSKY, ¶12; see also, copy of written transcript of recording of Plaintiff's Interview attached thereto as Exhibit "A", pg. 34. lns. 10-19.

[22] See, Declaration of Defendant FILARSKY, ¶13.

[23] See, Declaration of Defendant FILARSKY, ¶14.

[24] See, Declaration of Defendant FILARSKY, ¶14.

[25] See, Declaration of Defendant FILARSKY, ¶15; see also, Plaintiff's Deposition pgs. 45-46, lns. 21-25; 1-3, attached as Exhibit "B" to Declaration of Jon H. Tisdale.

[26] See, Declaration of Defendant FILARSKY, ¶16.

or otherwise.[27] At no point in time before and/or after the order was issued was Plaintiff ever threatened to produce the Subject Building Materials under threat of insubordination and/or termination.[28] Defendant Wells signed the final written order, which required the production of the Subject Building Materials.[29] Notwithstanding Mr. Adams advice to Plaintiff, he voluntarily produced the Subject Building Materials to the Battalion Chiefs after the order was issued.[30] No one from the City or on behalf of the City ever entered Plaintiff's residence (or even set foot on his property).[31] In fact, the only city employees present at DELIA's home during the so called "search" were Peel and Bekker and *neither man ever got out of the car*.[32]

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[27] See, Declaration of Defendant FILARSKY, ¶17; see also, copy of written transcript of Plaintiff's Subject Investigation attached thereto as Exhibit "A", pg. 39, lns. 36-48.

[28] See, Declaration of Defendant FILARSKY, ¶18; see also, copy of written transcript of Plaintiff's Subject Investigation attached thereto as Exhibit "A", and Deposition of Plaintiff, p. 51, lns. 2-24, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[29] See, Declaration of Defendant FILARSKY, ¶15; see also, Exhibit "D" attached to Declaration of Jon H. Tisdale, Written Order dated September 18, 2006, sent to Plaintiff by Defendant Wells; and Plaintiff's Deposition, pgs. 45-46; lns. 21-25; 1-3, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[30] See, Declaration of Defendant FILARSKY, ¶21.

[31] See, Declaration of Defendant FILARSKY, ¶21.

[32] See, Plaintiff's Deposition p. 58, lns. 4-17, attached to Declaration of Jon H. Tisdale as Exhibit "B".

Prior to issuing the order to produce the Subject Building Materials, *no less than four* union representatives were called and summoned by Plaintiff's counsel, Stuart Adams, to the interview to sit in and listen while Plaintiff was ordered to drive to his home, remove the Subject Building Materials from inside, and show them to the Battalion Chiefs without objection.[33] Moreover, Defendant FILARSKY spoke to then City Attorney, Bob Owen, on the telephone prior to issuing the order.[34] Defendant FILARSKY advised Mr. Owen of the circumstances surrounding the investigation and the proposed order.[35] Further, Mr. Adams called and spoke to Mr. Owen prior to the order being issued.[36] Mr. Owen posed no objection and Defendant FILARSKY was advised to go forward with the order.[37] Lastly, Defendant FILARSKY ***did not even personally attend the alleged search***.[38]

Specifically at issue is the applicability of the doctrine of qualified immunity protecting Defendant

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[33] See, Declaration of Defendant FILARSKY, ¶19; Plaintiff's Deposition pgs. 27 and 48, lns. 7-18 and 10-19, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[34] See, Declaration of Defendant FILARSKY, ¶20.

[35] See, Declaration of Defendant FILARSKY, ¶20.

[36] See, Plaintiff's Deposition pgs. 43-44, lns. 21-25; 1-2, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[37] See, Declaration of Defendant FILARSKY, ¶20.

[38] See, Declaration of Defendant FILARSKY, ¶21; see also Plaintiff's Deposition p. 47, lns. 13-14, attached to Declaration of Jon H. Tisdale as Exhibit "B".

FILARSKY for his advisory role in providing legal advice to the City relating to the alleged search of the Subject Building Materials belonging to Plaintiff.

By this Motion, Defendant FILARSKY moves for Summary Judgment on Plaintiffs Complaint and submits that while he was not a regular employee of the City, Defendant FILARSKY was retained by the City as an attorney and asked to assist in providing legal advice in connection with personnel issues. As retained outside counsel, Defendant FILARSKY may therefore assert the doctrine of qualified immunity to the same extent as any city official. Moreover, Plaintiff specifically contends that Defendant FILARSKY "acted under color of state law", within the course and scope of his position with the City as "outside counsel", and as an official of the City. By this Motion, Defendant FILARSKY further submits that because he is entitled to the application and full protection of the doctrine of qualified immunity, the remaining individual capacity claims made against him must be dismissed. Accordingly, there is no genuine issue of material fact for such alleged actions, and Defendant FILARSKY is entitled to summary judgment as a matter of law.

II. SUMMARY OF THE ARGUMENT

The individual capacity claims against Defendant FILARSKY must be resolved by summary judgment because Defendant FILARSKY is entitled to qualified

immunity. Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory rights of which a reasonable person would have known." (*Harlow v. Fitzgerald* (1992) 457 U.S. 800, 818. Qualified immunity is not merely immunity to liability, but immunity from suit itself. (See, *Babb v. Dorman*, (5th Cir. 1994), 33 F.3d 472, 477.)

In the instant action, Defendant FILARSKY is not an employee of the City per se; however, he was clearly retained by the City in his capacity as an attorney and specifically requested to assist it in providing legal advice for personnel issues. Defendant FILARSKY has conducted numerous investigations on behalf of the City for the past fourteen years, and has always been expected to conduct and direct not only the investigative portion, but also provide legal analysis, propose alternative disciplinary actions, draft correspondence regarding the proposed disciplinary actions, and conduct or participate in legal proceedings/hearings.[39] As retained counsel, Defendant FILARSKY is therefore entitled to the blanket of protection under the doctrine of qualified immunity to the same extent any city official would be. (*Cullinan v. Abramson* (6th Cir. 1997) 128 F.3d 301, 310, cert. denied, 140 L.Ed. 2d. 792, 523 U.S. 1094 (1998), holding that the rationales, for qualified immunity

[39] See, Declaration of Defendant FILARSKY, ¶¶3 and 4.

unity apply to [private] lawyers and their firms in about the same way they apply to [the government attorney].")

By the language of the standing case law and the uncontroverted facts of this case, there is no question that Defendant FILARSKY is entitled to protection under the doctrine of qualified immunity thereby properly resolving the individual capacity claims against him by summary judgment.

III. SUMMARY JUDGMENT IS PROCEDURALLY PROPER.

This Motion is brought pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there are no genuine issues as to any material facts, and that as a matter of law there is no potential for liability as to individual capacity claims pursuant to the applicable doctrine of qualified immunity. Accordingly, Defendant FILARSKY is entitled to summary judgment.

Summary Judgment is appropriate when a party is unable to show a genuine, triable issue of material fact on which the party will bear the burden of proof at trial, so long as judgment against that party is appropriate as a matter of law. (*Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 322; *Department of Commerce v. U.S. House of Representatives* (1999) 525 U.S. 316, 327. Material facts are those necessary to the proof or defense of a claim, and are determined by reference to the substantive law. (See *Anderson v.*

Liberty Lobby (1986) 477 U.S. 242, 248. Summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." (*Celotex*, 477 U.S. at 322-23.) Moreover, "[a] summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." (*Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

There is question of law for the court to determine as to whether the "outside counsel" status of Defendant FILARSKY makes him eligible for the application of the doctrine of qualified immunity. In *Saucier v. Katz* (2001) 533 U.S. 194, 201, the Supreme Court set out a two step inquiry in determining whether an official has qualified immunity. First, taken in the light most favorable to the party asserting the injury, do the facts show the officers conduct violated a Constitutional right? (*Id*.) Second, the court must ask whether the right was clearly established. (*Id*.) The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [actor] his conduct was unlawful in the situation he confronted. (*Id*.; see also *Phillips v. Hust* (9th Cir. 2007) 477 F.3d 1070, 1079. In the Ninth Circuit, this two-part test

determines the scope of qualified immunity for governmental officials. (*Phillips v. Hust* (9th Cir. 2007) 477 F.3d 1070, 1079.) First, the court must determine whether the law governing the officials' conduct was clearly established at the time the officials acted. If the law was clearly established, the official is entitled to immunity from suit. (See, *Somers v. Thurman* (9th Cir. 1997) 109 F.3d 614, 616-17, cert. denied, 510 U.S. 893 (1997); *Act UP!/Portland v. Bailey* (9th Cir. 1993) 988 F.2d 868, 871.) If the law was *not* clearly established, the court must determine whether reasonable officials would have believed that their actions were lawful. If the court so finds, the officials are entitled to qualified immunity. (See, *Somers v. Thurman*, (9th Cir. 1997) 109 F.3d 614, 616-17, cert. denied, 510 U.S. 893 (1997); *Act UP!/Portland v. Bailey* (9th Cir. 1993) 988 F.2d 868, 871.)

For a federal right to be clearly established at the time of the defendant's alleged conduct, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. (See, *Somers v. Thurman*, (9th Cir. 1997) 109 F.3d 614, 616-17, cert. denied, 510 U.S. 893 (1997); *Act UP!/Portland v. Bailey* (9th Cir. 1993) 988 F.2d 868, 871.) This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law that unlawfulness must be apparent. (*Anderson v. Creighton* (1987) 483 U.S. 635, 640 (citations omitted). The threshold determination of

whether the law governing the conduct at issue is clearly established is a question of law for the court. (See, *Harlow v. Fitzgerald* (1992) 457 U.S. 800, 818.) Plaintiff bears the burden of showing that the constitutional right at issue was clearly established at the time of defendants' conduct (See, *Baker v. Racansky* (9th Cir. 1989) 887 F.2d 183, 186.) A determination of reasonableness, although it may require consideration of factual issues, is appropriate for summary judgment if the facts are undisputed. (See, *Act UP!/ Portland v. Bagley* (9th Cir. 1993) 988 F.2d 868, 872.)

In determining whether to grant summary judgment, once a party has established that summary judgment is appropriate, i.e., by illustrating for the court an absence of evidence in support of alleged claims or defenses, the burden then shifts to the opposing party to demonstrate that a genuine issue of material fact remains. (*Federal Rules of Civil Procedure*, Rule 56(e), and *Celotex Corp. v. Catrett*, *supra*, at 317.) Here, Plaintiff filed a Complaint for violation of his civil rights based on 42 U.S.C. §1983, which states:

> 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.

(Emphasis Added.)

To state a claim or cause of action for violation of civil liberties under 42 U.S.C. §1983 a plaintiff must prove two elements: (1) that the defendant deprived him of a right secured by the "Constitution and laws" of the United States, and (2) that the defendant deprived him of his constitutional right "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory"; this second element requires the plaintiff to show that the defendant acted "under color of law." (*Doe v. Detroit Board of Education* (2004, E.D. Mich.) 310 F.Supp.2d. 871; *Vives v. Rey* (2004, DC Puerto Rico) 310 F.Supp.2d. 404; *American Mfrs. Mutual Ins. v. Sullivan* (1999) 526 U.S. 40; see also, *Adickes v. S.H. Kress & Co*. (1970) 398 U.S. 144.) Defendant FILARSKY conducted Plaintiffs internal investigation and interview in the capacity as outside counsel for the City at its behest. Defendant FILARSKY conducted this interview in compliance with state law, in which the Fire Chief Battalion Chiefs, the City Attorney, and union representatives, along with the consent of Plaintiff

resulted in an order to bring out the Subject Building Materials from Plaintiff's home. As such, a reasonable attorney in Defendant FILARSKY'S situation would not have known that this action: (1) constituted a search at all, and (2) clearly violated Plaintiff's constitutional rights under the 4th and 14th Amendments. Thus, the application of the doctrine of qualified immunity is applicable to Defendant FILARSKY for which resolution by this motion for summary judgment is not only proper but necessary.

IV. QUALIFIED IMMUNITY IS CATAGORICALLY AVAILABLE TO DEFENDANT FILARSKY.

The doctrine of "qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." (*Wyatt v. Cole* (1992) 504 U.S. 158, 167, (citing *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.) Among the important rationales advanced for qualified immunity are the preservation of the government's ability to serve the public good by zealous enforcement of the law and the avoidance of deterring talented candidates from entering government employment for fear of liability. (*Id*.)

As a preliminary matter, while it is undisputed that there was "state action" on the part of Defendant FILARSKY, this fact alone does not require this court to find that he is entitled to qualified immunity. (See, *Richardson v. McKnight* (1997) 521 U.S. 399, 138

L. Ed. 2d 540; *Wyatt* 504 U.S. at 168.) There are two questions that must be answered with respect to Defendant FILARSKY'S claim of qualified immunity. First, the court must determine whether qualified immunity is categorically available. This requires an evaluation of the appropriateness of qualified immunity given its historical availability and the policy considerations underpinning the doctrine. (See, *Richardson*, *supra*, 521 U.S. at 399.)

We first address the categorical availability of qualified immunity. The Supreme Court in *Richardson* analyzed the availability of qualified immunity by looking to history and policy. Although § 1983 "'creates a species of tort liability that on its face admits of no immunities,'" (*Wyatt*, *supra*, 504 U.S. at 163 (quoting *Imbler v. Pachtman*, 424 (1976) U.S. 409, 417), the Court nonetheless accords qualified immunity where a "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" (504 U.S. at 164 (quoting *Owen v. City of Independence*, 445 U.S. 622, 637, (1980) (quoting *Pierson v. Ray*, 386 U.S. 547, 555, (1967).)

In *Richardson*, the Court held that qualified immunity was not available to privately employed prison guards because the Court was unable to identify a "firmly rooted" tradition of such immunity. (521 U.S. at 404.) Although government-employed prison guards had enjoyed qualified immunity growing out of their employment status, the Court cited extensive

history of private institutions involved in providing prison services and cases allowing the imposition of liability on private jailors. The Court therefore concluded that no firmly rooted tradition of immunity existed. (See, *Id*. at 404-07.) *However, the Court left open the question whether some private actors closely related to governmental function might have some kind of qualified immunity in contexts unrelated to prisons*.

Limited information has been presented on the historical availability of immunity for private lawyers asked by the government to make decisions on their behalf involving 42 U.S.C. §1983 claims. However, the Supreme Court in *Richardson* stated that "apparently the 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." (*Id*. at 407 (citing *Tower v. Glover*, (1984) 467 U.S. 914, 921, and J. Bishop, Commentaries on Non-Contract Law §§ 704, 710 (1889)). (Emphasis Added.) While the extent or "kind" of immunity was not discussed in *Richardson*, the United States Court of Appeals in the 6th Circuit has been confronted with the same legal question as to whether the "outside counsel" status of private lawyers and their firms makes these defendants eligible for qualified immunity. (See, *Cullinan v. Abramson* (6th Cir. 1997) 128 F.3d 301, 310, cert. denied, 140 L.Ed. 2d. 792, 523 U.S. 1094, (1998).

In *Cullinan*, *supra*, 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. §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. (*Id*.) 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. (*Id*.)

The district court largely denied the motions to dismiss, and each of the defendants except the city and their outside counsel perfected an interlocutory appeal from the denial of immunity. The appellate court, however, concluded that as attorneys for the city, the city's outside counsel, were clearly acting as the city's agents. (*Cullinan*, *supra* at pg. 310.) Citing *Richardson*, the court 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 was the case in *Cullinan*, here we are dealing with a defendant who was retained to represent the City in its investigation of Plaintiff. Defendant FILARSKY would not have been involved in Plaintiff's investigation on an individual basis had it not been at the specific request of the City. Defendant

FILARSKY has conducted numerous investigations on behalf of the City for the past fourteen years, and has always been expected to conduct not only the investigation portion, but also provide legal analysis, propose alternative disciplinary actions, draft correspondence regarding the proposed disciplinary actions, and conduct or participate in legal proceedings/ hearings.[40] Moreover, Defendant FILARSKY would not have been retained by the City as its outside counsel but for the fact that he was a licensed attorney with vast experience in dealing with employment/ personnel issues. According, Defendant FILARSKY is therefore eligible for the application of the doctrine of qualified immunity pursuant to his status as retained outside counsel for the City.

V. PLAINTIFF HAS NOT FOR PURPOSES OF SUMMARY JUDGMENT DEMONSTRATED THAT HE WAS DEPRIVED OF A CONSTITUTIONAL RIGHT UNDER THE FOURTH OR FOURTEENTH AMENDMENTS BY DEFENDANT FILARSKY.

a. Fourth Amendment:

Plaintiff contends that on September 18, 2006, he was compelled under threat of insubordination and termination, to go to his home and produce certain private property for examination to "Defendants", which in and of itself resulted in a violation of his

[40] See, Declaration of Defendant FILARSKY ¶4.

Fourth and Fourteenth Amendment protections against unreasonable search and seizures.[41] However, Plaintiff has not described and/or produced any evidence or case law, which would explain how either the Fourth or Fourteenth Amendment to United States Constitution protects him from being asked to show his superiors a few rolls of insulation under circumstances where *he himself offered up the status of the Subject Building Materials in defense of the internal affairs charges against him*.

We start with the principle that the Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures, just as it prohibits the issuance of a warrant without probable cause. Nowhere is the protective force of the fourth amendment more powerful than it is when the sanctity of the home is involved. (*United States v. Shaibu* (9th Cir. 1990) 895 F.2d 1291, No. 88-5367, slip op. 1659, 1664-65; *United States v. Winso*r (9th Cir. 1988) 846 F.2d 1569, (en banc). However, Plaintiff has never put forth any evidence or case law in support of his contention that Defendant FILARSKY'S conduct in conducting the internal investigation and concurring with the order constituted a "search" which was in violation of his Fourth Amendment rights.

The order indicated that the City did not issue any order to go inside Plaintiff's home at all but rather that Plaintiff simply bring certain building

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[41] See, Complaint ¶12, attached hereto as Exhibit "A".

materials offered up as his explanation in support of his defense outside the home to the front yard for visual confirmation.[42] It should be noted that Plaintiff voluntarily produced the Subject Building Materials in his front yard.[43] At no point in time prior to and/or after the order was given was Plaintiff ever compelled under threat of insubordination and termination to produce the Subject Building Materials.[44] Lastly, Defendant FILARSKY consulted with City Attorney, Bob Owen, the Fire Chief, as well as the Battalion Chiefs and left it up to their discretion to make the order to produce the Subject Building Materials. *None of these individuals objected*.[45] Defendant FILARSKY did not have the authority to issue such an order and certainly did not have the authority to carry it out. In fact, Defendant FILARSKY was not even present at the alleged search, which took place after the recorded investigation was over.[46] As such, on the evidence provided, viewed in the light most favorable to the Plaintiff, it is impossible to conclude that an intrusion upon plaintiff's constitutional rights even occurred. Plaintiff's allegations are conclusory at

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[42] See, Declaration of Defendant FILARSKY, ¶14.

[43] See, Declaration of Defendant FILARSKY, ¶21.

[44] See, Declaration of Defendant FILARSKY ¶18; see also, Deposition of Plaintiff p.51, lns. 2-24, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[45] See, Declaration of FILARSKY ¶10, 16, 19, and 20; see also, Deposition of Plaintiff, p.48, lns 10-19, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[46] See, Declaration of Defendant FILARSKY, ¶21.

best. Accordingly, Plaintiff has failed to prove that his allegations are sufficient to support the contention that a "search" occurred or that it constituted a deprivation of his constitutional rights under the 4th Amendment.

b. <u>Fourteenth Amendment:</u>

While Plaintiff has alleged that his Fourteenth Amendment protections against unreasonable searches and seizures have been violated – specifically, denial of equal protection – Plaintiff has wholly failed to provide any evidence or case law in support of his contention that the alleged "search" constituted a denial of equal protection.

As argued above, the order indicated that the City did not ask or order to go inside Plaintiff's home at all but rather that Plaintiff go home and bring the Subject Building Materials outside to the front yard for visual confirmation.[47] Moreover, Plaintiff voluntarily consented to the Chief Battalions following him home and in fact, produced the Subject Building Materials in his front yard.[48] At no point in time prior to and/or after the order was given was Plaintiff ever compelled under threat of insubordination and termination to produce the Subject Building

[47] See, Declaration of Defendant FILARSKY, ¶14

[48] See, Declaration of Defendant FILARSKY, ¶21.

Materials.[49] Lastly, Defendant FILARSKY consulted with City Attorney, Bob Owen, the Fire Chief, as well as the Battalion Chiefs and left it up to their discretion to make the order to order the production of the Subject Building Materials. *None of these individuals objected*.[50] As such, it is impossible to conclude that a constitutional violation of Plaintiff's 14th Amendment Equal Protection rights occurred. Accordingly, Plaintiff has failed to prove that his allegations are sufficient to establish a "search", which would constitute a deprivation of his constitutional rights under the 4th Amendment or a denial of equal protection under the Fourteenth Amendment.

VI. IT WOULD NOT HAVE BEEN CLEAR TO ANY REASONABLE ATTORNEY THAT DEFENDANT FILARSKY'S CONDUCT. WAS UNLAWFUL IN THE SITUATION HE CONFRONTED.

The second inquiry is whether the constitutional right was clearly established. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [actor] his conduct was unlawful in the situation

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[49] See, Declaration of Defendant FILARSKY, ¶18; see also, Deposition of Plaintiff, p.51, lns. 2-24, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[50] See, Declaration of FILARSKY ¶10, 16, 19, and 20; see also, Deposition of Plaintiff p.48, lns 10-19, attached to Declaration of Jon H. Tisdale as Exhibit "B".

he confronted." (*Phillips v. Hust* (9th Cir. 2007) 477 F.3d 1070, 1079 (emphasis added). In the case of *Milan v. Sailer* (9th Cir. 2007) 2007 U.S. Dist LEXIS 41111[51], the court concluded that because Plaintiff failed to provide any evidence or authority for her claim that a reasonable actor would know that it was a violation to preside over a hearing held in compliance with state law, in which the Committee members voted to uphold an earlier actor's suspension, Plaintiff's claims were dismissed. Plaintiff argued that the Chair of the Disciplinary Committee, Defendant Pearson, was obligated to dissent, or to inform the Committee that it was violating plaintiff's constitutional rights. However, Plaintiff's lack of citation to supporting case law supporting her position that a reasonable actor in Defendant Pearson's situation would have known that failing to do so violated a clearly established constitutional right

[51] Plaintiff was a former student at Bates Technical College. In March 2006, Defendant Sailer, the school's Vice President of Student Services suspended Plaintiff after she filed a student grievance against a nursing instructor. Plaintiff appealed, and the suspension was upheld by the Bates Technical College Student/Facility Disciplinary Committee. She appealed again and the suspension was ultimately upheld by the school's President. In her Complaint, Plaintiff alleged she was denied her First Amendment and Due Process rights, and asserted a claim under 42 U.S.C. 1983. The defendants, were Seiler, Bates President David Borofsky, and the Chair of the Student/Faculty Disciplinary Committee, John Pearson. Defendant Pearson moved to dismiss all claims against him, on the basis of Absolute and Qualified Immunity, and on the ground that Plaintiff could not establish that he deprived her of any constitutional right.

allowed (actually mandated) the Court to conclude that Defendant Pearson was entitled to be Qualifiedly Immune from plaintiff's §1983 claims against him. (*Milan*, 2007 U.S. Dist. LEXIS 41111, 18.) Accordingly, Defendant Pearson's Motion for Summary Judgment was granted.

Here, we have a virtually identical factual case where Defendant FILARSKY was presiding over the investigative hearing and did not otherwise have any authority to order Plaintiff to produce the Subject Building Materials and/or enforce such an order. Moreover, it was the City that ultimately collectively decided that if Plaintiff would show them the Subject Building Materials, the investigation would be over. The City asked for permission but was denied; City then decided to order the production of the Subject Building Materials with no credible reason whatsoever to believe that they were doing anything wrong. No less than four union representatives were called to the interview to sit in and listen while Plaintiff was ordered to drive to his house, remove the Subject Building Materials from inside and show them to the Battalion Chiefs, all of which occurred without objection after the interview was concluded. Further, Defendant FILARSKY spoke to the City Attorney, Bob Owen, before going back into the interview and discussed the proposed order with him; the ***actual*** City Attorney had no objection.

As such, Plaintiff has thus far provided no evidence and no authority in support of his claim that a reasonable actor in Defendant FILARSKY'S position

would have or should have known that it was a violation to preside over a hearing held in compliance with state law and to advise that he knew of no legal reason why the City could not issue an order to DELIA to bring out the Subject Building Materials from Plaintiff's home. Accordingly, no reasonable attorney would have any reason to know that this conduct would violate Plaintiff's constitutional rights under the 4th and/or 14th Amendments to the Constitution.

Moreover, there is a *complete omission* of reference to any case law, much less Supreme Court case law, which would satisfy plaintiff's burden of proof that a reasonable actor in Defendant FILARSKY'S situation would have known that failing to specifically object to the alleged search violated a clearly established constitutional right. Notwithstanding this complete lack of legal support, there is no obligation and/or duty, which was created that would obligate Defendant FILARSKY to countermand the proposed order. For these reasons, the Court must conclude, as it did in *Milan*, that Defendant FILARSKY is entitled to be Qualifiedly Immune from Plaintiff's §1983 claims against him.

VII. DEFENDANT FILARSKY IS ENTITLED TO QUALIFIED IMMUNITY IN THIS CASE AS THE ALLEGED SERACH WAS VOLUNTARILY CONSENTED TO BY THE PLAINTIFF.

It is clearly established that defendants are not entitled to enforce unconstitutional statutes so as to deprive plaintiffs of their rights. It is not at all clear, however, that a reasonable attorney would have known that advising the City to request the voluntarily inspection of Plaintiff's Subject Building Materials was unconstitutional and a violation of his privacy. Moreover, it is even more unclear that a reasonable attorney would have known that failing to specifically object to the alleged search on behalf of Plaintiff violated a clearly established constitutional right.

It is said that "consent" is a "waiver" of a person's rights under the Fourth and Fourteenth Amendments. The argument is that by allowing the police to conduct a search, a person "waives" whatever right he had to prevent the police from searching. In order to establish such a "waiver" the State must demonstrate "an intentional relinquishment or abandonment of a known right or privilege." (*Johnson v. Zerbst*, 304 U.S. 458, 464.) However, these standards were enunciated in *Johnson* in the context of the safeguards of a fair criminal trial, not pertaining specifically to "searches". Notwithstanding, and while not required, the actions of Plaintiff in the instant case do in fact demonstrate a knowing and intelligent waiver on his

own behalf, even after advice of counsel alerting Plaintiff of his right *NOT* to consent.

Accordingly, it can be determined from the facts of this case that (1) Plaintiff was not in 'custody' at the time of the search, (2) the Plaintiff was represented by counsel at the time of alleged "search", (3) was advised by counsel that he had a right to refuse the search and in fact did advise him to not consent to the search, (4) notwithstanding counsel's advice Plaintiff knowingly and intelligently voluntarily consented to the search, and (5) Plaintiff was never threatened with insubordination and/or termination if he did not consent to the production of the Subject Building Materials. As such, the resulting production of the Subject Building Materials was not the product of duress and/or coercion. Plaintiff did in fact have knowledge of his right to refusal and was represented by counsel at the time but chose not to head counsel's advice. All of these material facts support the proposition that a reasonable attorney would not have recognized the alleged unconstitutionality of the order at the time it occurred. Consequently, Defendant FILARSKY is entitled to the protection afforded by the doctrine of qualified immunity.

VI. CONCLUSION

For all of the reasons stated above the undisputed facts establish that Defendant FILARSKY'S legal advisory role to the City as independent outside counsel was performed solely at the City's behest,

thereby entitling him to the protection of the doctrine of qualified immunity just as another other city official would be. In addition, Defendant FILARSKY could not, under these circumstances, have known that the request for Plaintiff to voluntarily produce the Subject Building Materials would be an unconstitutional "search" in violation of his Fourth and Fourteenth Amendment rights. Moreover, Plaintiff voluntarily consented to the production of the Subject Building Materials without being under the threat of insubordination and/or termination. Accordingly, there is no genuine issue of material fact for such alleged actions, and Defendant FILARSKY is entitled to summary judgment as a matter of law.

Dated: January 12th, 2009

GILBERT, KELLY, CROWLEY & JENNETT, LLP

By: /s/ Jennifer West
JON H. TISDALE
JENNIFER WEST
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STEVE A. FILARSKY

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA, Plaintiff, v. CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT, A Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the City of Rialto, FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as an Internal Affairs Investigator for the	Case No. **DECLARATION OF STEVE A. FILARSKY IN SUPPORT OF DEFENDANT STEVE A. FILARSKY'S MOTION FOR SUMMARY JUDGMENT**

City of Rialto; and)
DOES 1 THROUGH 10)
INCLUSIVE,)
)
Defendants.)

I, Steve A. Filarsky, declare as follows:

1. I am a partner at the Law Offices of Filarsky & Watt LLP and am licensed to practice law before all of the courts of the State of California. At all times relevant to this action, I have been employed at the Law Offices of Filarsky & Watt LLP. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. This Declaration is submitted in support of Defendant STEVE A. FILARSKY'S Motion for Summary Judgment on the Complaint of Plaintiff NICHOLAS B. DELIA (hereinafter referred to as "DELIA").

3. I have been employed by the Law Offices of Filarsky & Watt LLP for twenty-three years. Concurrent with my employment at the Law Offices of Filarsky & Watt LLP I also served as independent outside counsel for the City of Rialto (hereinafter "City") beginning in 1986 through 1987. I then resumed working for the City in September of 1996. I am presently still acting as independent outside counsel for the City.

4. In my capacity as independent outside counsel for the City, I am retained to participate in

internal affairs investigations concerning personnel issues. I have conducted numerous interviews of City employees in connection with such personnel/internal affairs investigations. Throughout my tenure of fourteen years as independent outside counsel for the City I have not only been responsible for conducting interviews in connection with the investigative process of the City's personnel/internal affairs matters, but have also been charged with the responsibility for providing legal analysis, proposing alternative disciplinary actions, drafting correspondence at the direction of City management regarding proposed disciplinary actions, and conducting or participating in legal proceedings/hearings.

5. All of the legal functions I have performed for the City have been at their behest and have solely been based on my experience as a licensed attorney in employment/personnel matters for the past twenty nine years.

6. On September 18, 2006, I conducted an internal affairs interview of DELIA (hereinafter referred to as the "Subject Investigation") regarding a claim of misused sick leave by Plaintiff for an alleged incident occurring on August 18, 2006. The City had videotaped Plaintiff purchasing and loading plywood, lumber and insulation (hereinafter referred to as "Subject Building Materials") at Lowe's Home Improvement Center. The internal affairs interview was recorded and the recording ultimately transcribed into a written transcript. I have reviewed the transcript and it comports with my memory of the Subject

Investigation. (Attached hereto as **Exhibit "A"** is a true and correct copy of the written transcript of recording of the Subject Investigation.)

7. At the time of the September 18, 2006, interview of DELIA, Battalion Chiefs Mike Peel and Frank Bekker, Plaintiff's attorney Stuart Adams, and I were present. Fire Chief Stephen Wells was nearby in the same building and available, although not present in the room for the interview.

8. At the beginning of the interview, I was aware that DELIA had been videotaped purchasing building materials on a "sick day" but I had no idea what he had done with the materials or what his explanation might be. Certainly, I had not anticipated in advance what DELIA's explanation in his defense might be or that at the conclusion of the interview, DELIA would be asked to produce the Subject Building Materials depicted in the video.

9. During the course of the Subject Investigation, when confronted with the video and the suspicion that DELIA was using sick time to work on his remodel project, DELIA volunteered in his own defense that he had in fact not yet incorporated the Subject Building Materials into the project and that the materials remained unused at his residence.

10. After hearing DELIA's explanation, a break was taken in the interview process to discuss this development. It was discussed that if indeed DELIA had not incorporated the insulation into his project, than the investigation would be concluded and

resolved favorably to DELIA with no disciplinary action in connection with that portion of the investigation. This proposal was approved by Chief Wells.

11. Upon reconvening the interview, I specifically informed DELIA *on the record* that if he would simply show Battalion Chiefs Peel and Bekker the Subject Building Materials, the investigation would be concluded favorably to him. As the City's retained independent outside counsel, I requested that DELIA go to his home and produce the Subject Building Materials for his superiors in order to dispel questions relating to the allegation of his misused sick leave. (Attached hereto is a true and correct copy of the written transcript of recording of the Subject Investigation, attached hereto as **Exhibit "A"**, see page 34, lines 1-9).

12. Plaintiff was represented by attorney Stuart Adams in the interview; when DELIA was asked to produce the building materials, Adams opined that the request was inappropriate and that DELIA. should refuse to comply. Adams stated that in his opinion the request to see building materials to corroborate DELIA's offered defense was an illegal search; I did not agree and Adams offered no case law or statutory law in support of his opinion. (See, written transcript of recording of the Subject Investigation, attached hereto as **Exhibit "A"**, pg. 34, ln. 10-19).

13. Based on advice of counsel by Mr. Adams, Plaintiff refused to comply with the request to visually

verify the Subject Building Materials to corroborate his own offered defense. (See, written transcript of recording of the Subject Investigation, attached hereto as **Exhibit "A"**, pg. 34, lns. 10-19).

14. The request was then clarified by indicating that the City was not asking to go inside Plaintiff's residence at all but rather wanted Plaintiff to simply go to his house and bring out the Subject Building Materials to the front yard for visual verification while Peel and Bekker waited outside. Again, Adams objected and again DELIA refused to comply.

15. Another discussion took place off the record, after which Defendant Chief Wells converted the *request* to produce the Subject Building Materials into an *order*. (A copy of the written order dated September 18, 2006 and signed by Chief Wells is attached to the Declaration of Jon H. Tisdale as **Exhibit "D"** thereto and is incorporated herein by reference.)

16. Ultimately, Chief Wells had the final authority to order the production of the Subject Building Materials. At the request of Adams, the order was reduced to writing and I handed it to DELIA and Adams at Chief Wells' request.

17. I did not have the authority to unilaterally make an order for DELIA to produce the Subject Building Materials.

18. At no point in time that I was aware of either before or after the order was issued, was Plaintiff ever threatened with insubordination and/or

termination if he did not produce the building materials in support of his story and his defense; the only admonition given was at the commencement of the interview when DELIA acknowledged his obligation to tell the truth.

19. Prior to issuing the order to produce the Subject Building Materials, no less than four union representatives were called by Stuart Adams to the interview. Although I do not believe that they were present for the recorded portion of the interview of DELIA, they were present when DELIA was requested and then subsequently ordered to produce the Subject Building Materials in front of his house. I have no independent recollection of any objection made by any of the four union representatives to either the request or the order.

20. Prior to the issuance of the order and prior to the visit to DELIA'S house, I spoke to then City Attorney Bob Owen on the telephone and advised Mr. Owen of the circumstances surrounding the Subject Investigation, DELIA's explanation offered in his own defense during the interview and the proposed order to produce the insulation to exonerate himself and end the investigation. Mr. Owen posed no objection to the proposed order.

21. I did not personally attend the visit to DELIA's house and have never been to DELIA's home for any reason. I am informed and believe that Battalion Chiefs Peel and Bekker remained in their car, never set foot on DELIA's property and departed after

insulation was brought outside by DELIA, in apparent support of his explanation that the material was not yet incorporated into the project. I am informed and believe that although attorney Adams was present with DELIA at his residence, he did NOT further advise DELIA to refuse to comply with the order and that DELIA in fact voluntarily complied with the written order.

I declare under penalty of perjury, pursuant to the laws of the State of California that the foregoing is true and correct.

Executed this 12th day of January 2009, at Manhattan Beach California.

/s/ Steve A. Filarsky
STEVE A FILARSKY