No. 10-1018

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

REPLY BRIEF FOR STEVE A. FILARSKY, ESQ.

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INTRODUCTION

This petition presents a compelling issue for certiorari: Whether petitioner Filarsky (Filarsky), a private 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 full time government employee. Recognizing the petition's strength, respondent (Delia) makes an eleventh hour attempt to re-characterize Filarsky's role as that of a "private investigator" instead of "private attorney." However, Delia's belated shift is totally foreclosed by the Ninth Circuit opinion and by the record.

Moreover, Delia cannot legitimately dispute that there is an express, direct circuit split on the very question presented. His attempt to argue that the Ninth Circuit decision does not contravene this Court's opinion in *Richardson v. McKnight,* 521 U.S. 339 (1997) also fails. Nor can Delia legitimately dispute that the question is a vitally important one given the prevalence of § 1983 actions and the importance of the issue to public entities – as evidenced by the filing of the brief of the *Amici Curiae* for the League of California Cities and the California State Association of Counties in support of the petition.

The petition should be granted because this case presents an ideal vehicle to determine that private

attorneys hired by cities and counties enjoy qualified immunity.

I. DELIA'S ATTEMPT TO DODGE THE ISSUE PRESENTED BY BELATEDLY RE-CHARACTERIZING FILARSKY AS A "PRIVATE INVESTIGATOR" RATHER THAN A "PRIVATE ATTORNEY" IS FORECLOSED BY THE RECORD

Delia's sudden attempt to shift the issue from qualified immunity for a "private attorney" to qualified immunity for a "private investigator" contradicts his own previous arguments, the Ninth Circuit's express holding, and the underlying record.

First, Delia has contended all along since the district court level that Filarsky was acting in his capacity as a private *attorney* retained by the City, as evidenced by the Ninth Circuit's opinion. As that opinion plainly states "*Delia contends* that Filarsky, *as a private attorney*, is not entitled to qualified immunity." Pet. App. 24-25 (emphasis added).

Second, the Ninth Circuit's opinion describes Filarsky as " . . . a private attorney, who was retained by the City to participate in internal affairs investigations." Pet. App. 24-25. The Ninth Circuit opinion also states that "[t]he interview was conducted by Filarsky, *a private attorney* retained by the City." Pet. App. 6-7 (emphasis added). Moreover, the term used by the Ninth Circuit at Pet. App. pages 6-7 ("representing") is a term used to describe the function of an

attorney, not an investigator; it is not being used for any other purpose than to describe the legal relationship between Filarsky and the City.[1] Even more important, the opinion specifically holds that "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." Pet. App. 27 (emphasis added). There is therefore no merit whatsoever to Delia's attempt to reconstruct the Ninth Circuit's holding by stating the "error in Filarsky's argument is that the Ninth Circuit did not hold that private attorneys are never entitled to qualified immunity; but instead, that Filarsky as a private investigator conducting an internal affairs investigation, was not entitled to qualified immunity." Opp. 9. The petition presents the precise issue raised by the proceedings below – whether qualified immunity should extend to private attorneys who are not government employees but are hired to perform government functions alongside of government employees.

Third, the underlying record indisputably confirms that Filarsky was retained by the City of Rialto (City) to assist in conducting the investigation as *an*

[1] *See also* Opp. 11, n.4, where Delia attempts to make the same argument regarding Filarsky's lack of representation as an attorney for the City; however, again Delia uses the word "represent," which denotes Filarsky's legal representation of the City in the setting of an internal affairs investigation.

attorney. It was only because of Filarsky's expertise *as an attorney* that he was employed by the City for more than a decade, "to participate in internal affairs investigations concerning personnel issues," to conduct interviews of City employees "in connection with the investigative process of the City's personnel/ internal affairs matters," and to provide legal advice to the City in connection with disciplinary proceedings. Pet. App. 88-89 ¶¶3-4; see also Pet. App. 44-45 ¶4 ("At the time of the interview, Filarsky had for a number of years been regularly representing the City and providing legal advice to it regarding labor and employment issues" and "had previously questioned Fire Department employees in internal affairs investigations."). In short, there is no confusion or debate as to the fact that Filarsky acted as an *attorney* on behalf of the City. Accordingly, Delia's surprise assertion that Filarsky is a "private investigator" and not a "private attorney" fails completely.

II. THERE IS AN EXPRESS AND DIRECT CIRCUIT SPLIT

Delia's attempts to dispute that there is a circuit conflict are absurd given that the Ninth Circuit *expressly* parts ways with the Sixth Circuit. Opp. 18, 19, 20, 21. The Ninth Circuit's opinion *acknowledges* (Pet. App. 25) its ruling conflicts with the Sixth Circuit's opinion in *Cullinan v. Abramson,* 123 F.3d 301, 310 (6th Cir. 1997), by stating it was unable to follow *Cullinan* because it was bound by the Ninth Circuit's own earlier, per curiam opinion in *Gonzalez*

v. Spencer, 336 F.3d 832 (9th Cir. 2003). Pet. App. 25-26, citing *Gonzalez,* 336 F.3d at 834-35. Accordingly, the law of the Ninth Circuit as reaffirmed in this case, is *Gonzalez v. Spencer,* 336 F.3d 832 (9th Cir. 2003), which held that a private attorney representing a county was not entitled to qualified immunity without any analysis beyond the mere fact that the defendant attorney was a private party and not a government employee. *Id*. at 834-835. Pet. App. 25-26.

There is no merit to Delia's suggestion that Filarsky "attempt[s] to marry this case to" *Gonzalez*. It was *not* Filarsky that linked *Gonzalez* with this case; it was the Ninth Circuit itself that did so. The Ninth Circuit's opinion in this case unequivocally states that "the court is bound by *Gonzalez* 'unless an *en banc* decision, Supreme Court decision or subsequent legislation undermines' " it. Pet. App. 26. Accordingly, the law of the circuit as affirmed in this case is the ruling of *Gonzalez* that qualified immunity is not available to private attorneys. While Delia criticized "Filarsky's perception that the holdings of *Gonzalez* and *Cullinan* are incompatible" (Opp. 21), Delia ignores that the Ninth Circuit in this case declined to factually distinguish *Gonzalez* and *Cullinan* and chose instead to categorically part company with the Sixth Circuit, without so much as mention of the analysis mandated by this Court.

Further, even beyond this direct circuit conflict, Delia completely ignores the petition's showing of confusion in the lower courts on the availability of

qualified immunity to private parties, which further warrants this Court's review. See Pet. at 34-35 (explaining that lower courts have varied widely in applying *Richardson* as a test and that this Court should grant certiorari 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*); see also *Developments in the Law: State Action and the Public Private Distinction: Private Party Immunity from § 1983 Suits*, 123 HARVARD LAW REVIEW 1266, 1271 (March 2010).

III. DELIA'S MERITS ARGUMENTS REGARDING ENTITLEMENT TO QUALIFIED IMMUNITY UNDER THE *RICHARDSON* MAJORITY AND DISSENT PROVIDE NO REASON TO DENY CERTIORARI

The important question for this Court is the same one decided by the Ninth Circuit: Whether Filarsky, retained as a private lawyer 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. In fact, this Court left open the opportunity of extending qualified immunity to private individuals, including by specific example lawyers, working "at the behest of the sovereign" when "special circumstances"

were present. *Richardson v. McKnight,* 521 U.S. at 407, citing *Tower v. Glover,* 467 U.S. 914, 914-21 (1994), and J. Bishop, *Commentaries on Non-Contract Law* §§ 704, 710 (1889). This Court should therefore grant certiorari to decide this important question over which the lower courts are irreconcilably divided.

Most of Delia's argument regarding *Richardson* is premised – falsely – on his newly minted "private investigator" characterization of Filarsky's role. In apparent recognition that there is tremendous historical precedent for the extension of qualified immunity to lawyers, Delia employs the tactic of "reinventing" Filarsky as an investigator to divert attention from such precedent and to suggest there is no historical precedent for affording immunity to investigators and, therefore, the Ninth Circuit's opinion does not contravene the *Richardson* principles but rather is in accord with them. Opp. 2. But, the Ninth Circuit's holding directly forecloses Delia's "private investigator" characterization of Filarsky. See Pet. App. 6-7, and 24-25. Consequently, this shell game engaged in by respondent is factually inaccurate and is a false legal conclusion. Delia's contentions, premised on this false notion that we are not dealing with a private attorney hired "at the behest of the sovereign," fail under the test of the *Richardson* majority decision.

In any event, even under Delia's blatant mischaracterization of Filarsky as a "private investigator," Filarsky would still meet the *Richardson* majority's criteria that he be "briefly associated with a government body" (the City), acting "adjunct to

government in an essential governmental activity" (conducting internal affairs investigations, which are prototypically government functions), and "acting under close official supervision." *Richardson*, at 413. As such, the Ninth Circuit's categorical rule contravenes the *Richardson* majority, which expressly did not preclude qualified immunity for an *individual* working with the government in an essential government activity, and under close supervision.

Moreover, Delia's attempt to rely on the *Richardson* majority rationale that competitive market forces would serve some of the same purposes that qualified immunity serves (Opp. 13) fails. As explained by the *Amici Curiae* brief, that rationale does not apply here:

> Unlike private prison companies, whose only potential clients are government units, private attorneys can take their business elsewhere – namely to private clients. Nor will mechanisms such as indemnity and insurance, *see id.* at 410-411, cure the problem. If private attorneys cannot avail themselves of qualified immunity, then the costs to indemnify and insure their services will increase and will ultimately be borne by the cities and government units that utilize their services. As Justice Scalia pointed out in *Richardson,* there is no "free lunch"; "as civil-rights claims increase, the cost of civil-rights insurance increases." *Id.* at 419 n.3 (Scalia, J., dissenting). *Amici Curiae* 16.

The Ninth Circuit's categorical rule as to private attorneys also contravenes the "functional approach"

analysis discussed in the petition. Delia's argument that Filarsky's representation of the City in internal investigations should not be considered a "prototypically governmental function" makes no sense. Opp. 17. Internal affairs investigations are at their core solely government activities. Indeed, as pointed out in the petition, the Ninth Circuit found that, for the same acts (conducting an internal affairs investigation), those who had the power to issue the Order (the City) were qualifiedly immune but Filarsky was not. Pet. App. 4-5, 12-24. It is clear that policy rationales previously noted in *Richardson,* 521 U.S. at 417-18 (Scalia, J., dissenting) dictate that qualified immunity apply to private attorneys in these circumstances. The Ninth Circuit's opinion categorically takes away this protection for private attorneys working for public entities throughout the Ninth Circuit.

Finally, Delia attempts to bolster his position with irrelevant *absolute* immunity principles. Opp. 17, citing *Briscoe v. LaHue,* 460 U.S. 325, 335 (1983). While this Court has been "quite sparing" in recognizing *absolute* immunity, such as in *Burns v. Reed,* 500 U.S. at 478, 486 (1991), Filarsky has never contended that he is entitled to *absolute* immunity. Accordingly, Delia's arguments relating to Filarsky not completing a "quasi-judicial function" (Opp. 18) are irrelevant to the application of *qualified* immunity. *Burns,* 500 U.S. at 486.

IV. THIS CASE IS AN IDEAL VEHICLE FOR NOT ONLY RESOLVING THE CLEAR CIRCUIT SPLIT, BUT ALSO FOR CLARIFYING AN ISSUE OF VITAL IMPORTANCE FOR MUNICIPALITIES IN SEEKING LEGAL COUNSEL

The use of private attorneys as exemplified by the City's employment of Filarsky is a common and vital component of municipal, county, and other forms of local governance and even the federal government. *Amici Curiae* 10. There is no merit to Delia's argument that the "*amici curiae* brief only addresses the general argument, framed around hypothetical facts, that municipalities should be able to contract for legal services and that some of those legal service providers should be entitled to qualified immunity." Opp. 12. On the contrary, the *Amici Curiae* brief details the myriad of ways that *private* attorneys are, in fact, being used by public entities. *Amici Curiae* 6, 9. To that end, most counties bring in outside counsel for the *specific purpose of conducting personnel investigations,* as in this case. *Amici Curiae* 9. Even apart from the Circuit conflict, this is another ground warranting certiorari. Supreme Court Rule 10.

The importance of issues involving private party liability for alleged constitutional violations is further underscored by the recent grant of certiorari in *Minneci v. Pollard* (Case No. 10-1104) on the issue of whether the Court should imply a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971),

against individual employees of private companies that contract with the federal government to provide prison services. In fact, the *Amici Curiae* brief in this case cites the underlying Ninth Circuit opinion in the *Minneci* case (*Pollard v. GEO Group, Inc.,* 629 F.3d 843 (9th Cir. 2010)) in making the point that the issue raised in this matter – whether qualified immunity extends to private attorneys who are not government employees but are hired to perform government functions alongside government employees – is important not only to local government entities but also potentially to federal government agencies, which also commonly utilize such private attorneys. See *Amici Curiae* 11, n.2.

A number of special reasons favor qualified immunity for attorneys, such as Filarsky, who are hired by city and county officials to work for and with them in *representing* cities and counties performing government functions, as demonstrated above. While Delia would have this Court believe that Filarsky's case is unique and does not present a compelling issue for review, the *Amici Curiae* brief demonstrates that this case presents an important issue that has a wide-impact on a variety of public entities across the United States.

V. CONCLUSION

This Court should grant certiorari, reverse the Ninth Circuit's judgment, and bring clarity once and for all to the application of qualified immunity to

private attorneys, such as Filarsky, who act as adjuncts to government agencies.

Respectfully submitted,

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