

No. 10-1018

In The
Supreme Court of the United States

—◆—
STEVE A. FILARSKY,

Petitioner,

v.

NICHOLAS B. DELIA,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

—◆—
BRIEF FOR THE RESPONDENT

—◆—
DIETER C. DAMMEIER
MICHAEL A. MCGILL
Counsel of Record
MICHAEL A. MORGUESS
CHRISTOPHER L. GASPARD
CAROLINA VERONICA CUTLER
LACKIE, DAMMEIER & MCGILL APC
367 North Second Avenue
Upland, California 91786
(909) 985-4003
mcgill@policeattorney.com

QUESTION PRESENTED

The marketplace requires professionals to offer the best products and services at a competitive rate. Qualified immunity has as its driving purpose the prevention of unwarranted timidity in public officials who are required to undertake discretionary actions as part of their official duties. This Court has found that qualified immunity is not necessary for private actors in a sufficiently competitive market because competition prevents unwarranted timidity.

Private actors, including both attorneys and non-attorneys, compete to provide quality services, such as employee investigations, to public agencies. Even under the everyday threat of malpractice liability, there is no shortage of private actors offering these services, nor a shortage of public agencies in need of them. These are the hallmark ingredients that make up a competitive market. The question presented is thus:

With no firmly rooted tradition of qualified immunity for private actors investigating public employees for workplace violations, does this already competitive market now require correction by affording qualified immunity to its private actor participants?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT	8
ARGUMENT	14
I. <i>Richardson v. Mcknight</i> Sets Forth The Proper Test For Determining Whether Qualified Immunity Should Extend To Private Defendants.....	14
II. Filarsky Is Not Entitled To Qualified Immunity Under <i>Richardson</i> Because He Failed To Present Evidence Showing A Firmly Rooted Tradition Of Immunity Applicable To Private Actors Conducting Administrative Personnel Investigations, And None Of The Policies Are Advanced.....	15
A. The Public Policy Justifications Relied Upon By This Court In <i>Richardson</i> Do Not Support Application Of Qualified Immunity To Filarsky	18
III. Filarsky’s Proposed Test Is Arbitrary And Unworkable Because It Misconstrues History, Ignores Qualified Immunity’s Purposes, Denies The Market Realities Of Workplace Investigations, Ignores This Court’s Previous Admonishments Against “Functional” Tests, And Would Disrupt Working Precedent Without Good Reason.....	22

TABLE OF CONTENTS – Continued

	Page
A. There Is No Evidence Of A Historical Tradition Of Immunity For Private Parties Conducting Workplace Investigations.....	24
B. Filarsky’s Proposed Test Embellishes History, And Supplants The Policy Considerations For Extending Qualified Immunity To Private Persons With A Speculative Theory Not Supported By Market Realities	26
C. Because Policy Considerations For Absolute Immunity Differ From Those Underscoring Qualified Immunity, They Do Not Provide A Sufficient Corollary For Extending Qualified Immunity To Private Defendants.....	30
D. Filarsky’s Test Denies The Reality That Workplace Investigations Is A Competitive Market Comprised Of Non-Attorneys As Well As Attorneys.....	33
1. Private Attorneys Contracting With The Government Are Guided By Different Interests Than In-House Public Attorneys	36
E. A Functional Approach Analysis Is Not Workable Because Non-Attorneys Also Conduct Workplace Investigations	38
F. Circuit Courts Have Successfully Relied On The <i>Richardson</i> Framework And Policy Guidelines.....	39

TABLE OF CONTENTS – Continued

	Page
IV. Absent Qualified Immunity, Private Parties Like Filarsky May Still Be Able To Assert Good Faith As A Defense To Liability.....	42
V. Should The Court Be Inclined To Make Qualified Immunity Available To Private Attorneys, A Reasonable Attorney Standard Should Apply	45
VI. The Court Should Affirm The Ninth Circuit Decision On The Basis That Filarsky Violated Clearly Established Law.....	46
CONCLUSION.....	51

TABLE OF AUTHORITIES

Page

CASES

<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987).....	17, 26, 47
<i>Bender v. General Services Administration</i> , 539 F. Supp. 2d 712 (S.D.N.Y. 2008)	29, 39
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972).....	25
<i>Burns v. Reed</i> , 500 U.S. 478 (1991).....	17, 31, 32
<i>Butz v. Economou</i> , 438 U.S. 478 (1978)	11, 15, 23, 31
<i>Calloway v. Boro of Glassboro Department of Police</i> , 89 F. Supp. 2d 543 (D.N.J. 2000)	29
<i>Cook v. Martin</i> , 148 Fed.Appx. 327 (6th Cir. 2005)	41
<i>Gregoire v. Biddle</i> , 177 F.2d 579 (C.A. 2 1949), cert. denied, 339 U.S. 949 (1950).....	15, 31
<i>Halvorsen v. Baird</i> , 146 F.3d 680 (9th Cir. 1998).....	42
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	<i>passim</i>
<i>Harrison v. Ash, C.O.</i> , 539 F.3d 510 (6th Cir. 2008)	40, 41
<i>Hinson v. Edmond</i> , 192 F.3d 1342 (11th Cir. 1999)	16, 41
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976).....	31, 32
<i>In re Lee G.</i> , 1 Cal.App. 4th 17 (1991).....	37

TABLE OF AUTHORITIES – Continued

	Page
<i>Jensen v. Lane County</i> , 222 F.3d 570 (9th Cir. 2000)	42
<i>Katz v. U.S.</i> , 389 U.S. 347 (1967).....	48, 50
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001).....	49, 50
<i>Malinowski v. DeLuca</i> , 177 F.3d 623 (7th Cir. 1999)	41
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986).....	22, 45, 46, 47
<i>Mejia v. City of New York</i> , 119 F. Supp. 2d 232 (E.D.N.Y. 2000).....	29
<i>Northwest Airlines, Inc v. County of Kent, Michigan</i> , 510 U.S. 355 (1994)	46
<i>O'Connor v. Ortega</i> , 480 U.S. 709 (1987).....	49
<i>Pani v. Empire Blue Cross Blue Shield</i> , 152 F.3d 67 (2d Cir. 1998).....	29
<i>Payne v. Tennessee</i> , 501 U.S. 808 (1991).....	38
<i>Payton v. New York</i> , 445 U.S. 573 (1980).....	48
<i>Richardson v. McKnight</i> , 521 U.S. 399 (1997)....	<i>passim</i>
<i>Rosewood Services, Inc. v. Sunflower Diversified Services, Inc.</i> , 413 F.3d 1163 (10th Cir. 2005)	42
<i>Sherman v. Four County Counseling Center</i> , 987 F.2d 397 (7th Cir. 1993)	41
<i>Silverman v. United States</i> , 365 U.S. 505 (1961)	49
<i>Smith v. Maryland</i> , 442 U.S. 735 (1979)	48
<i>Tewksbury v. Dowling, M.D.</i> , 169 F. Supp. 2d 103 (E.D.N.Y. 2001).....	39, 40, 41

TABLE OF AUTHORITIES – Continued

	Page
<i>Thigpen v. Roberts</i> , 468 U.S. 27 (1984).....	46
<i>Tower v. Glover</i> , 467 U.S. 914 (1984)	9, 16, 17, 25
<i>United States v. Foust</i> , 61 F.2d 328 (7th Cir. 1972)	50
<i>United States v. Karo</i> , 468 U.S. 705 (1984)	50
<i>United States v. Leon</i> , 468 U.S. 897 (1984)	45, 47
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975)	33
<i>Wyatt v. Cole</i> , 504 U.S. 158 (1992)	<i>passim</i>

STATUTES

42 U.S.C. § 1983	<i>passim</i>
------------------------	---------------

OTHER AUTHORITIES

Akin, Gump, Strauss, Hauer & Feld, LLP, “ <i>How to Conduct An Effective Workplace Investigation</i> ” (April 2001, § II(H), pp. 5-6)	34
Bessler, John D., “ <i>The Public Interest and the Unconstitutionality of Private Prosecutors</i> ” 47 Ark. L. Rev. 511, 518 (1994)	30
<i>Developments in the Law—State Action and the Public/Private Distinction: Private Party Immunity from Section 1983 Suits</i> 123 Harv. L. Rev. 1266, 1271 (2010).....	28

TABLE OF AUTHORITIES – Continued

	Page
Los Angeles Times, “ <i>Bratton to Lead Investigation of UC Davis Pepper Spraying</i> ” November 23, 2011.....	35
“ <i>Overview–Kroll Provides Trusted Intelligence and Scalable Technology Solutions,</i> ” www.kroll.com/about/overview	35
Pierce, Linda, “ <i>Should I Go In-House?</i> ” Northwest Legal Search (2010).....	36, 37

STATEMENT OF THE CASE

Petitioner Steve A. Filarsky is a named partner in the law firm of Filarsky & Watt LLP. Pet. App. 88. Prior to becoming an attorney, he was responsible for labor relations at a small Southern California city, and prior to that was employed by another small city.¹ After becoming an attorney, he switched to the private sector and has been with Filarsky & Watt for 23 years. Pet. App. 88. His firm “specializes in representing public sector employers statewide in all matters pertaining to employment relations.”² One of his firm’s clients for the past 14 years has been the City of Rialto. Pet. App. 89. For the duration of this ongoing relationship the firm has provided diverse services, including conducting interviews for employee investigations, providing legal analysis concerning proposed disciplinary actions, and representing the City in legal proceedings. *Id.*

Respondent Nicholas B. Delia has been a firefighter for Filarsky’s client City of Rialto since 2000. Opp. Cert. App. 23. While on duty in early August 2006, he was cleaning up a toxic spill began to feel ill. He went to the emergency room and was told he would have to undergo tests to determine the cause of his illness. Opp. Cert. App. 23. He was bleeding from somewhere, and the emergency room doctor provided

¹ Filarsky & Watt LLP, www.filarskyandwatt.com/filarsky.html.

² *Id.*

Delia with an off-duty work order for three work shifts; however, there were no activity restrictions placed upon him. *Id.* at 23-24. Five days later, Delia returned to the hospital. He was issued an off-duty work order for eight shifts. Again, no activity restrictions were placed on him, and he was scheduled for a colonoscopy to locate the source of the bleeding. *Opp. Cert. App.* 24.

One week later Delia again returned to the hospital and was given an off-duty work order for another eight shifts, again without any restrictions. He then endured both a colonoscopy and an endoscopy. *Opp. Cert. App.* 24. He was diagnosed with esophagitis, and after being put off work for a fourth time, he was cleared to return to work after September 3, 2006. *Id.*

The City suspected Delia was in fact not undergoing continuous medical evaluation and hired an investigator to follow and videotape him. Eventually, Delia was videotaped purchasing wood and insulation at a store. *Pet. App.* 89. He was also videotaped picking up his son from school, and with his son in front of his home. *JA* 120-121.

Shortly thereafter, Filarsky was asked by his city client to conduct an interview of Delia. *Pet. App.* 89. Delia was ordered to appear and presented himself with his representative, the firefighter union's attorney. *JA* 86. This was not the first time Filarsky and Delia met. Filarsky believed that previously, Delia had lied to him about an unrelated matter. *JA* 167.

Filarsky also had a history with the union's attorney. To paraphrase, Filarsky seems to find him to be generally obstreperous, with a penchant for raising needless objections. JA 170. Two Battalion Chiefs observed the interview. Other than to commence the interview, neither Chief participated, nor were they there for any particular purpose. JA 77, 83, 156. The Fire Chief remained down the hall, working in his office. JA 156.

Filarsky commenced the interview with the usual admonitions, notifying Delia that he was obligated to "fully cooperate and answer questions [and 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." JA 87. Filarsky asked him detailed questions about the colonoscopy and endoscopy. JA 94. Filarsky asked Delia whether he had been placed on any restrictions. Delia answered that he was given no specific restrictions other than to "take it easy and to rest" and not perform firefighter/paramedic functions. JA 96. Delia told Filarsky that during his leave he would still experience dizziness from time to time, and some weakness, but had been given no driving or other restrictions to limit his daily functions around the house. JA 98.

Then Filarsky questioned him about home improvement projects. Delia described some purchases he had made, including the insulation. JA 108. Delia said it was sitting, still packaged, in his kitchen. *Id.* Filarsky asked "[s]o if we visited your house today we would find the insulation in your kitchen. . .?"

JA 115-116. Delia responded affirmatively. *Id.* Although Delia was under no medical restrictions, and after telling the Chief what he was going to do, JA 157, Filarsky told Delia:

“[Y]ou have indicated that those building materials that were observed in the video are presently at your home uninstalled. What I want to do is to verify that after you leave here today. So I would like Chief Peel to follow you home to your personal residence and to have you to allow him access to view those building materials.”

JA 128.

Delia’s attorney told Delia: “You don’t have to consent to the search of your house.” Filarsky agreed, telling Delia “You don’t have to.” JA 128-129.

When Delia withheld consent, Filarsky became determined:

“Okay. Then we will do it a different way. What we will do is we will send you home, and we will have Chief Peel follow you and I will direct you to bring out the piece of plywood and bring out the three bundles of insulation. Any problem with that?”

JA 129.

Delia’s attorney asked “Is that an order?” Filarsky responded, “Yes.” *Id.*

Delia's attorney counseled Filarsky:

"I don't think you are entitled to order somebody to go into their house and bring articles of their own personal belongings out of the house without a search warrant. That circumvents the whole process." JA 129.

Filarsky was not persuaded. Delia's attorney reiterated his position:

"By asking that he go in and bring items of his own personal property out, you are issuing an illegal order and violating his right to be free of unreasonable search and seizure. You are also subjecting the City to civil liability for violation of his 4th Amendment rights to be free from unlawful search and seizure. You don't have any right to ask him to bring items of personal property out of his home. . . . If these Chiefs don't speak up and say they don't want to do it, then we are going to name them, too."

JA 130.

Filarsky impatiently stated "Now, we are going to order you to remove those three bundles of insulation." JA 131.

Likely fully exasperated, Delia's attorney again articulated his concerns, and probably feeling the need to have them taken seriously, he reiterated his threat to sue the City and the idle Battalion Chiefs watching this duel unfold, and said "We might possibly find a way to figure if we can name you Mr. Filarsky. You are issuing an illegal order. You have no

right to ask him to bring items of personal property outside of his house. If you want to take that chance, you go right ahead.” JA 132.

Unflinchingly, the very next words from Filarsky were:

“Second item, we would like a note of some sort from [the medical facility] verifying the procedure that you had on the 29th. Any problem with that?” JA 132.

Delia’s attorney tried reasoning with Filarsky: “You are creating an illegal order and you might want to take a minute to think about it.” JA 135. Filarsky saw no need.

When pressed by Delia’s attorney as to whether Filarsky even had authority to compel compliance with the order, Filarsky responded “[w]hen we are done with the orders, they will ratify the order and then you can go off.” JA 136.

Filarsky then prepared a ratifying order for Fire Chief Wells, who was still in his office. He asked the Chief to sign it. The Chief did. JA 158.

Though Filarsky contends that he never issued an order to Delia to remove the property from his house, plainly he did. In their declarations, Battalion Chiefs Bekker and Peel, witnesses to the events, both stated “I did not order Delia to produce the building insulation from his house. The only person who did that orally as far as I was aware was Mr. Filarsky.” JA 78, 84.

Both Battalion Chiefs were concerned with Filarsky's tactics in light of the threatened lawsuit. Filarsky "assured" them there was "no problem. . . ." JA 83.

Delia's attorney made his final attempt, cautioning Filarsky against searching "a man's home. The highest level of protection." JA 145. Ultimately, Filarsky got his way. He handed the ratifying order to Delia's attorney. He questioned the language of the order. Filarsky noted it was imprecise "but close enough for government work so to speak, then that is adequate." JA 150.³

Thereafter the Battalion Chiefs immediately followed Delia to his home, and as ordered, Delia removed the insulation bundles for them to see, unused and still packaged. JA 78, 85.

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

On April 3, 2009, Delia filed an appeal of the district court's decision granting Defendants' motion for

³ The full transcript of the very intense exchange between Filarsky and Delia's attorney commences at JA 128.

summary judgment. The Ninth Circuit held that the warrantless, compelled search of Delia’s home violated his rights under the Fourth Amendment. Pet. App. 14-20. However, based on the Ninth Circuit’s finding that the rights violated by the unlawful search were not clearly established at the time of the defendants’ misconduct, Chief Wells, Peel, and Bekker were entitled to qualified immunity. Pet. App. 20-24.

The Ninth Circuit then turned its attention to whether Filarsky is entitled to qualified immunity, noting that “[u]nlike the other individual defendants in this case, Filarsky is not an employee of the City. Instead, he is a private attorney who was retained by the City to participate in internal affairs investigations.” Pet. App. 24. The Ninth Circuit concluded that Filarsky is not entitled to qualified immunity. Pet. App. 27. Accordingly, it reversed the district court’s grant of summary judgment in favor of Filarsky based on qualified immunity and remanded for further proceedings. *Id.*



SUMMARY OF ARGUMENT

The Court should affirm the Ninth Circuit’s decision on the ground that Filarsky, a private individual conducting an interview, is not entitled to qualified immunity. *Richardson v. McKnight*, 521 U.S. 399 (1997). First, there is no firmly rooted tradition of immunity applicable to private actors conducting workplace investigations. Neither Filarsky nor Delia

has uncovered such a tradition. This is not surprising: it is unlikely that government had a need to conduct workplace investigations to document and support workplace discipline prior to the enactment of civil service laws or recognition of the right to procedural due process before the deprivation of a property interest in public employment, neither of which was recognized at the time Section 1983 was enacted in 1871. And while this Court recognized at *English* common law lawyers may have been afforded some immunity for negligent conduct, it has already denied qualified immunity to attorneys sued under Section 1983 for intentional misconduct. *Tower v. Glover*, 467 U.S. 914, 922 (1984). And although Filarsky may happen to be an attorney, he was donning his investigator's hat when he conducted the interview. Private non-attorneys conduct workplace interviews and investigations every day without the expectation of qualified immunity.

Second, none of the policy considerations underlying qualified immunity would be advanced by extending qualified immunity to private persons, whether they are attorneys or not, conducting workplace investigations. Qualified immunity seeks chiefly to prevent unwarranted timidity in public officials required to execute their discretionary duties, but this Court has recognized that adequate marketplace pressures will incentivize private companies to perform effectively and efficiently because they have to compete to earn and retain clients. The City of Rialto is but one of many clients of Filarsky's firm, and

Filarsky is but one of many private persons engaged in the business of public workplace investigations. His firm has competition; the City of Rialto can hire another firm. Filarsky was not there at the “behest” of the city. The reality is that private attorneys today do not engage in public law as a result of *any* government behest. No such authoritative command is needed; there is no shortage of private attorneys knocking on government’s doors for business. One only need notice the stack of *amici* briefs filed by private attorney associations as proof of that. Indeed, it is this very competition that likely led to Filarsky’s timid-free resolve to one way or another get Delia to prove he did not unpack the insulation. Being an attorney only contributed to his bravado to do so and to convince those around him that he could do it.

Third, not extending qualified immunity to private parties conducting workplace investigations will expose one to no more of a risk than someone such as an attorney or doctor may have to a claim of malpractice. Any suggestion that the threat of distracting litigation would increase is purely speculative. Finally, because private competitors like Filarsky are not constrained by civil service restraints and other public policy considerations, they can offset any such increased risk with higher pay or extra benefits. And the market competition will keep the higher pay in check.

To avoid this ineluctable denial of qualified immunity under *Richardson*, Filarsky proposes a reformulation of the qualified immunity test tailored to his

needs. However, his test is arbitrary and unworkable. While it incorporates some traditional aspects of the inquiry, it focuses primarily on control exercised by and close coordination with government officials and the role an attorney's legal counsel plays in the execution of an essential governmental activity. These considerations are not rooted in any historical tradition or analogy based on the common law in 1871. And neither test satisfies the overriding policies supporting qualified immunity, most notably preventing unwarranted timidity.

Filarsky makes inanalogueous comparisons to absolute immunity as a basis to extend qualified immunity to private actors. However, absolute immunity is supported by policy considerations that address concerns not attendant to activities that are not intimate with the judicial process. Only "special functions," *Butz v. Economou*, 438 U.S. 478, 508 (1978) such as judges, prosecutors, grand jurors and witnesses are accorded absolute immunity. They have a particularly heightened risk of exposure to lawsuits by resentful defendants, and there is no marketplace pressure to offset the timidity that may be created by these risks.

By logical extension, Filarsky's mixed functional-close supervision test should apply to non-attorneys as well. Non-attorneys are just as likely to conduct independent workplace investigations; sometimes outside investigators are hired to create the appearance of independence. And more often than not those investigators are non-attorneys because conventional wisdom counsels against it. Rather, attorneys typically

serve in a purely advisory, behind the scenes, capacity. Filarsky, on the other hand, served as both investigator, and perhaps for a brief moment provided counsel to assuage any fears that his conduct crossed constitutional boundaries.

Filarsky further argues that because attorneys take an oath to uphold the law and put their clients' interests first, their goals are indistinguishable from those of publicly employed attorneys. However, as is apparent from Filarsky's conduct, private attorneys who contract with the government have different interests than in-house public attorneys. As this Court noted in *Richardson*, 521 U.S. at 410, public and private employees operate within different systems. Private parties, such as attorneys, have numerous clients to prioritize, each with differing interests. The private attorney seeks to attract and retain these clients. Public attorneys do not have a client, they have only their public-employer agency. Private attorneys do not act solely in the public interest; indeed, how can they when they have billable hour concerns and seek to make the most out of a monthly retainer typical of long-term clients. For the private attorney, time is his only stock in trade.

Furthermore, the functional prong of Filarsky's proposed test is not workable because non-attorneys are just as likely to conduct workplace investigations as attorneys. Moreover, conducting workplace investigations is not a "prototypical government function," *Richardson*, 521 U.S. at 416 (Scalia, J., dissenting). Nor does the absence of qualified immunity deprive

private parties of a defense to liability; this Court recognized that private persons may still be able to assert the defense of good faith.

Ultimately, if the Court determines that qualified immunity should be available to private attorneys, it should adopt a standard that recognizes the expertise for which they are sought, and employ a “reasonable attorney” standard to determine whether a well trained attorney should have known that his or her conduct or advice violated constitutional law.

Perhaps this Court should affirm the Ninth Circuit’s decision on the ground that Filarsky violated clearly established law.⁴ Filarsky attempted to jackhammer the sacred ground of the Fourth Amendment by ordering Delia to move into plain view the contents of his home. Most Americans would be shocked to wake up one day and find that a protection so basic to the safety and security upon which we, as a people, close our doors, turn off our lights, and rest peacefully in bed; a notion that sets our country apart from much of the world, the right to be free from unreasonable searches of the home and to be left alone, could so easily be circumvented by Filarsky’s scorched earth policy. How could anyone question the right to lock our doors from government intrusion? There is no legal distinction between physically searching the home and ordering that the home be emptied of its

⁴ Delia is mindful that since he did not file a cross-petition, such a finding would likely have no effect on the government defendants.

contents and displayed on the front lawn for inspection. Therefore, the Ninth Circuit decision could be affirmed on alternative grounds well-supported by the record.

◆

ARGUMENT

I. *Richardson v. McKnight* Sets Forth The Proper Test For Determining Whether Qualified Immunity Should Extend To Private Defendants

As this Court discussed in *Richardson v. McKnight*, 521 U.S. 399 (1997), when determining whether qualified immunity should apply to private persons, one “look[s] both to history and to the purposes that underlie government employee immunity in order to find the answer.” *Richardson*, 521 U.S. at 404. Thus, looking to both, the Court first found “no conclusive evidence of a historical tradition of immunity for private parties” serving as prison guards. *Id.* at 407.

Notwithstanding that, the Court then examined “[w]hether the immunity doctrine’s purposes warrant immunity” for private prison guards. (Emphasis in original) *Id.* (“[I]rrespective of the common law support, we will not recognize an immunity available at common law if § 1983’s history or purpose counsel against applying it in § 1983 actions.” *Wyatt v. Cole*, 504 U.S. 158, 164 (1992).) The purposes are to protect “‘government’s ability to perform its traditional functions’ by providing immunity where ‘necessary to preserve’ the ability of government officials ‘to serve

the public good, to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.’” *Richardson*, 521 U.S. at 408 (citing *Wyatt v. Cole*, 504 U.S. 158, 167). Immunity also meets “the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.” *Butz v. Economou*, 438 U.S. 478, 508 (1978). The social costs exacted by insubstantial suits against officials not only include the expense of litigation, but “the diversion of official energy from present public issues” (*Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) and the possibility that the “fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’” *Id.*, citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (C.A. 2 1949), cert. denied, 339 U.S. 949 (1950).

Filarsky’s ability to claim qualified immunity must be considered under this standard.

II. Filarsky Is Not Entitled To Qualified Immunity Under *Richardson* Because He Failed To Present Evidence Showing A Firmly Rooted Tradition Of Immunity Applicable To Private Actors Conducting Administrative Personnel Investigations, And None Of The Policies Are Advanced

The Ninth Circuit began its analysis of whether Filarsky is entitled to qualified immunity by pointing

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

Filarsky’s argument in this regard notes this Court’s passing reference to immunities previously granted to “certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.” *Richardson*, 521 U.S. at 407 (citing *Tower v. Glover*, 467 U.S. 914, 921 (1984)).

However, the lawyers referred to by the *Richardson* Court when it cited *Tower*, were *denied immunity under Section 1983 for intentional misconduct.* *Tower*, 467 U.S. at 922; *Hinson v. Edmond*, 192 F.3d 1342, 1345 (11th Cir. 1999).

There, the Court denied immunity for public defenders partly because history showed no established American practice of extending immunity under Section 1983 for intentional misconduct. Because the Court did “not have license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy,” together with the dearth of American practice or precedent in extending such immunity, it was “up to Congress to determine

whether § 1983 litigation has become too burdensome . . . ”. *Tower*, 467 U.S. at 922-923. Analogous British practice is inapposite, because “it is *American* common law that is determinative,” not *English* common law. *Burns v. Reed*, 500 U.S. 478, 493 (1991) (citing *Anderson v. Creighton*, 483 U.S. 635, 644 (1978) (Emphasis in original)).

The *Tower* decision where this Court denied qualified immunity to private attorneys acting as public defenders, together with an utter lack of evidence showing individuals in Filarsky’s position being extended immunity, demonstrates that the available history provides no support for qualified immunity being extended to private investigators. This despite the vague and isolated historical references regarding our Nation’s founding fathers having been engaged in public life, as presented by Petitioner in his brief.

In contrast to the public defenders in *Tower*, whom *were actually engaged and employed as attorneys*, Filarsky was simply retained to conduct a workplace investigation into whether Delia was sick. He was not working in a capacity that might otherwise be entitled to qualified immunity under *Richardson*.

Notwithstanding Filarsky’s efforts to recast his role in the investigation, there exists no case or any historical evidence that would support his claim that private actors who conduct workplace personnel investigations have enjoyed qualified immunity. As such, he is not entitled to qualified immunity under *Richardson*.

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

The second *Richardson* factor—whether public policy justifications support the application of qualified immunity—is virtually ignored by Filarsky. He instead frames his arguments based upon hypothetical and speculative annihilation of affordable legal services to public agencies, with the unsubstantiated conclusion that the denial of qualified immunity will be the death knell of this field of law. However, the question presented is simply whether private actors should be entitled to qualified immunity when they conduct workplace investigations; here there was a simple allegation of misuse of sick leave, which turned out to be unfounded.

In *Richardson*, this Court discussed policy concerns that might give rise to qualified immunity even in the absence of historical evidence of a firmly rooted tradition of immunity. 521 U.S. at 407-412. The first, and most important, concern giving rise to government immunities is unwarranted timidity. *Id.* at 409. However, explained the Court, the concern regarding unwarranted timidity “is less likely present, or at least is not special, when a private company subject to competitive market pressures” is involved. *Id.* at 409.

While the record does not contain the particulars of Filarsky’s contract with the City of Rialto, it appears that these marketplace pressures are present.

The City of Rialto can hire any private investigator it wishes to investigate complaints of employee misconduct. Indeed, Filarsky's brief, as well as that of *amici curiae*, is chock-full of references to the growing number of cities contracting out for services with private employers. And there is no shortage of private investigators.

As a private investigator hired by the City, Filarsky is a profit-seeking market participant. That is, he faces competition; thus, he must perform efficiently and effectively to retain business. Also, California Rule of Professional Responsibility 3-410 requires attorneys who do not carry professional liability insurance to provide notice of that fact to their clients. These marketplace pressures provide an incentive for the City to hire an effective attorney and/or an attorney who carries his own liability insurance.

Unlike Filarsky, "government employees typically act within a *different* system. They work within a system that . . . is often characterized by multi-department civil service rules that, while providing employee security, may limit the incentives or the ability of individual departments or supervisors flexibly to reward, or to punish, individual employees." 521 U.S. at 410-411. Accordingly, there exists no special immunity-related need for the City's privately-contracted personnel investigators, even if they happen to be attorneys, to prevent timidity or encourage vigorous performance.

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

The final policy consideration underlying governmental immunity is whether lawsuits might distract employers from their duties. *Id.* at 411-412. However, "the risk of 'distraction' alone cannot be sufficient grounds for an immunity." *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)). In considering this policy consideration, the *Richardson* Court stated:

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

Id. at 412.

Here, the threat that investigators hired by the City to investigate allegations of employee misconduct will be subjected to a barrage of distracting litigation for violating employees' civil rights is speculative, at best. For one thing, qualified immunity's application to someone in Filarsky's position is only an issue where the Constitutional right is not *clearly* defined. For another, any such litigation is certainly less likely than the distraction a malpractice action may cast.

In short, there is nothing about the job of conducting administrative investigations into personnel complaints that warrants providing Filarsky with governmental immunity. His job is one that private industry might, or might not, perform; and which does not have a firmly rooted tradition of immunity applicable for private actors. Because there are no special reasons significantly favoring an extension of governmental immunity, and indeed the express policy rationales of *Richardson* are not advanced by Filarsky's inclusion, the Court should hold that Filarsky, unlike those who work directly for the City of Rialto, does not enjoy immunity from suit under Section 1983.

III. Filarsky’s Proposed Test Is Arbitrary And Unworkable Because It Misconstrues History, Ignores Qualified Immunity’s Purposes, Denies The Market Realities Of Workplace Investigations, Ignores This Court’s Previous Admonishments Against “Functional” Tests, And Would Disrupt Working Precedent Without Good Reason

Attempting to escape the test provided in *Richardson*, Filarsky argues the proper test should instead be whether the attorney is the functional equivalent of a government employee based on the nature of the advisory or representative role the attorney performs; the control exercised by and close coordination with government employees or officials; the role that the attorney’s legal counsel plays in the execution of an essential governmental activity; and the immunity accorded to government employees performing the same role.⁵ (Pet. Brief 34) The United States offers a similar, though more narrowly constructed, test. (Brief for the United States as *Amicus Curiae* Supporting Petitioner, 15).

However, none of these tests are “rooted in historical analogy, based on the existence of common-law rules in 1871, rather [they are] ‘freewheeling policy choice[s].’” *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring) (citing *Malley v. Briggs*, 475 U.S. 335, 342

⁵ Filarsky’s functional test would ultimately lead to immunity to all private parties hired to conduct any function similar to that of a public employee; perhaps even park maintenance.

(1986). Moreover, neither test satisfies the policies supporting qualified immunity, most notably the most important: preventing unwarranted timidity in carrying out required official duties, *Butz v. Economou*, 438 U.S. 478, 506 (1978). Indeed, there is no evidence Filarsky displayed any timidity.

Rather, Filarsky's approach eliminates consideration of those policies. He offers no real elaboration, only that his approach might be easier and that there should be no distinction based upon whether the person performing the function is a public employee or private. *See also Richardson v. McKnight*, 521 U.S. 399, 415-417 (Scalia, J. dissenting).

Ironically, although he suggests a test highly tailored to his version facts of the facts of this case, in actuality, Filarsky meets none of those prongs: he was simply investigating whether Delia was really sick, neither representing nor advising the city. Nor was there "control exercised by and close coordination" with government officials; to the contrary, Battalion Chiefs Bekker and Peel simply observed the interview in silence "for no particular purpose," and Bekker was there because it was good training for him for internal affairs investigations; Fire Chief Wells was tending to his own responsibilities down the hallway and simply *ratified* Filarsky's order by signing, at Filarsky's request, a document prepared by Filarsky. Finally, Filarsky has not provided any evidence of a history of private persons conducting public workplace inquiries. Even under his own test, Filarsky is not entitled to qualified immunity.

Although Filarsky may argue that somewhere along the line he switched hats from investigator to attorney and was providing legal counsel by assuring the search was “no problem,” it is plain that he was self-interested in this advice; he was invested in a particular result—that the search would go forward—particularly after the showdown with Delia’s representative. This was hardly the dispassionate and reasoned advice and counsel of a disinterested third party.

A. There Is No Evidence Of A Historical Tradition Of Immunity For Private Parties Conducting Workplace Investigations

Like Delia, Filarsky is unable to find a “‘firmly rooted’ tradition,” *Richardson*, 521 U.S. at 404, of affording qualified immunity to private parties conducting workplace investigations. Indeed, it is unlikely that workplace investigations even occurred when Section 1983 was enacted in 1871; and even less likely that they were conducted by an attorney or a private person. Rather, workplace investigations of public employees would logically seem to be an outgrowth of laws protecting job security, assuring that termination or other discipline was memorialized upon a legitimate and permissible basis.

Filarsky conducted his investigation of Delia for these very reasons. However, “[civil-service laws] did not even exist when § 1983 was enacted....”

Richardson, 521 U.S. at 420 (Scalia, J., dissenting), and this Court did not recognize a right to procedural Due Process before the deprivation of a constitutionally cognizant property interest in public employment until its decision 100 years later in *Board of Regents v. Roth*, 408 U.S. 564, 569-570 (1972). So it is unlikely that prior to 1871, workplace investigations of public employees, if they even existed, justified the cost of hiring of a private party, let alone the cost of talented attorneys such as Abraham Lincoln.⁶

Even though this Court has admonished that “[w]e do not have a license to establish immunities from section 1983 actions in the interests of what we judge to be sound public policy,” *Tower v. Glover*, 467 U.S. 914, 922-923, because history does not support qualified immunity in this case, Filarsky proposes that this Court do just that, and reformulates the application of qualified immunity so that private attorneys can have immunity in nearly all instances.

⁶ Although one cannot be sure, it is doubtful that paid sick leave, or even abuse of sick leave, existed back then.

B. Filarsky's Proposed Test Embellishes History, And Supplants The Policy Considerations For Extending Qualified Immunity To Private Persons With A Speculative Theory Not Supported By Market Realities

The consideration of policies supporting qualified immunity is paramount and should underscore its present day application; it allows the Court to realistically evaluate current or changed circumstances (and they have changed) over the past 140 years rather than an approach, as apparently suggested by Filarsky, that is arbitrary for the very reason that it does not distinguish between public and private status, or has been rendered irrelevant, or which yields results against which policy considerations counsel. It is for these reasons that this Court has stated “we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law.” *Anderson v. Creighton*, 483 U.S. 635, 644-645 (1987). And it is for these reasons that this Court, when asked to further extend qualified immunity into the private sector—and here Filarsky essentially asks this Court to extend qualified immunity to all private attorneys who do business with the government, must consider whether the “rationales mandating qualified immunity for public officers are . . . applicable to private parties.” *Wyatt v. Cole*, 504 U.S. 158, 167 (1992).

As noble a profession as the law may be, it is also a business. For example, municipal law is usually but

one area of practice in a large firm; such a firm may also have a corporate governance, finance, antitrust, tax, construction, appellate, insurance law and other practice. It is beyond speculation to argue, as do Petitioner, the United States, and assorted *amici*, that associates and partners employed by such firms will abandon their municipal practices for the reason that they are not entitled to qualified immunity for workplace investigations, all the while still having to defend against claims of violations of “clearly established” law and even malpractice claims from any one of their clients in any of a number of areas of law.

Truth to tell, and in light of the above, the private bar cannot muster a credible, fact-based argument that denial of qualified immunity for workplace investigations will have a palpable impact on their practices, or will dampen their ardor or resolve to deliver for their clients, or how it would realistically hamper the “government’s ability to perform its traditional functions,” *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) by securing talented counsel. Talented attorneys and investigators already rise to the top of the profession, and through market pressures must offer competitive rates.

The doomsday scenario painted by Petitioner and *amici* League of California Cities and the California State Association of Counties, whereby droves of attorneys will flee the municipal law landscape and the few who remain will drive up the price of workplace investigations, is pure speculation. For it is difficult to imagine why, if private attorneys are already

susceptible to liability for violations of clearly established law, not to mention malpractice—a *potential distraction in every attorney-client relationship*—the lack of the defense of qualified immunity alone is going to tip the scale and make the “burdens of governmental representation become too high.” Brief for Petitioner 49. Indeed, these predictions have not materialized since the Ninth Circuit denied Filarsky qualified immunity.

Thus, it is not enough to examine whether the private law firm is “working alongside or under close supervision of government officials” as the United States and Filarsky suggest. First, that may at times require an intense factual inquiry that would circumvent the purpose that qualified immunity be not just a defense, but immunity from suit. *Developments in the Law—State Action and the Public/Private Distinction: Private Party Immunity from Section 1983 Suits* 123 Harv. L. Rev. 1266, 1271 (2010). Like the subjective intent inquiry abandoned by this Court in *Harlow v. Fitzgerald*, whether the private law firm was working “alongside or under close supervision” at a specific time is a question of fact “inherently requiring resolution by a jury.” *Harlow v. Fitzgerald*, 457 U.S. at 816.

And it would be difficult enough to uniformly agree on exactly what it means to work under close supervision. Indeed, it is doubtful there ever is close supervision; after all, private attorneys are purportedly retained by public agencies for their expertise and guidance, and not to be closely supervised on a factory assembly line. Filarsky certainly was under

no supervision whatsoever; he was in complete control of the interview and insisted to all three Chiefs, who were concerned with his approach, that his approach was “no problem.”

The private bar’s “close supervision” proposal is better suited for “private party acts that are isolated, taken at the specific direction of the government, or done without profit or other marketplace incentive. *See, e.g., Mejia v. City of New York*, 119 F. Supp. 2d 232, 266-268 (E.D.N.Y. 2000) (qualified immunity for ‘private actors enlisted by law enforcement officials to assist in making an arrest’ because marketplace pressures absent for those whose assistance is ‘brief and isolated’ and ‘not compensated’); *Calloway v. Boro of Glassboro Department of Police*, 89 F. Supp. 2d 543, 557 n. 21 (D.N.J. 2000) (qualified immunity for private citizen ‘asked to participate in a single criminal investigation . . . acting under supervision of the [government] investigators.’); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 73 (2d Cir. 1998) (qualified immunity for private administrators of federal Medicare claims in their efforts to detect Medicare fraud because such efforts are required by law and the administrators have ‘no personal financial interest’ in the pursuit of such fraud.)” *Bender v. General Services Administration*, 539 F. Supp. 2d 712, 714 (S.D.N.Y. 2008); *see also Richardson*, 521 U.S. at 413.

Such isolated, ephemeral instances stand in sharp contrast to the continuous 10 year profitable relationship Filarsky & Watt had (and continues to have) with the City of Rialto at the time of the interview (Petition 88-89), and whatever simultaneous

engagements the partnership has with other public and private agencies.

C. Because Policy Considerations For Absolute Immunity Differ From Those Underscoring Qualified Immunity, They Do Not Provide A Sufficient Corollary For Extending Qualified Immunity To Private Defendants

Filarsky argues that because absolute immunity in the judicial and quasi-judicial setting applied to private attorneys, qualified immunity should apply to attorneys whose law firms have public agency clients. Petitioner’s Brief on the Merits, 24-26. *Richardson* also noted private individuals serving as grand jurors and witnesses are entitled to absolute immunity, and posited that it would be unlikely the Court would deny prosecutorial immunity to private attorneys retained to conduct high profile criminal prosecutions. *Richardson*, 521 U.S. 417-418 (Scalia, J. dissenting). Indeed, *amicus curiae* in support of Petitioner has noted “‘American citizens continued to privately prosecute criminal cases in many locales during the nineteenth century. . . . Thus, “[p]arents of young women prosecuted men for seduction; husbands prosecuted their wives’ paramours for adultery; wives prosecuted their husbands for desertion.’” John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors* 47 Ark. L. Rev. 511, 518 (1994).” Brief of DRI 11. And Filarsky reminds us that the late President Abraham Lincoln, while in private practice, was

appointed prosecutor in a rape case. Brief for the Petitioner 19.

But absolute immunity has been reserved for “special functions,” *Butz v. Economou*, 438 U.S. 478, 508 (1978), where it is “better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.” *Imbler v. Pachtman*, 424 U.S. 409, 428 (1976) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (C.A. 2 1949), cert. denied, 339 U.S. 949 (1950)).

Therefore, at common law no prosecutors were immune for suits for malicious prosecution and defamation, including the knowing use of false testimony before the grand jury and at trial. *Burns v. Reed*, 500 U.S. 478, 485 (1991). And in *Imbler*, 424 U.S. at 431, this Court held that prosecutors are absolutely immune from liability under Section 1983 for conduct in “initiating a prosecution and in presenting the State’s case” insofar as that conduct is “intimately associated with the judicial phase of the criminal process.” *Id.* at 430. Immunity makes sense there because “suits against prosecutors for initiating and conducting prosecutions ‘could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State’s advocate’” which would divert prosecutors’ attention away from their duty of enforcing criminal law, and potential liability “‘would prevent the vigorous and fearless performance of the prosecutor’s duty that is essential to the proper functioning of the criminal justice

system.’” *Burns*, 500 U.S. at 485-486 (quoting *Imbler*, 424 U.S. at 425, 427-428).

These distinctions, particularly the expectation of frequency of exposure to lawsuits from a resentful criminal defendant upon whom the State’s advocate’s sights have been set, may justify application of absolute immunity to private persons engaged to perform “special functions” directly connected within the judicial process—a prototypical government function to which an entire article of the United States Constitution is devoted. However, it does not follow that therefore partners of law firms should be entitled to qualified immunity when they are paid to undertake the most mundane of tasks like determining whether an employee was really sick; workplace investigations hardly involve such a “special function” and are as commonplace in the private sector as they are the public sector; moreover, such investigations are more likely to be performed by non-attorney employees.

Today, and historically, there is “nothing special,” *Richardson*, 521 U.S. at 412, about workplace investigations. And they are certainly less special than something like being a private prison guard. Nor are workplace investigations a “prototypical governmental function . . .”. *Id.* at 416 (Scalia, J., dissenting). Perhaps as importantly, there are no “marketplace pressures,” *Id.* at 409, present in being a grand juror or witness to offset with strong incentives that would cause anyone to undertake these special roles in the judicial process; indeed, witnesses often have no choice but to testify.

Somewhat similarly, although Petitioner points out qualified immunity is extended to private persons serving as school board members, *Wood v. Strickland*, 420 U.S. 308 (1975), Brief for Petitioner 13, this Court noted there that “[m]ost of the school board members across the country receive little or no monetary compensation for their service.” *Id.* at 320. According to Petitioner, nearly two-thirds of school board members receive no salary and only 2% receive more than \$15,000 per year. Brief for Petitioner 13. Again, there simply is no marketplace pressure present in being an unpaid school board member, and for the handful of school board members who are paid, government is the only “purchaser.” *Richardson*, 521 U.S. at 419 (Scalia, J., dissenting). The same cannot be said for workplace investigations conducted by private companies.

D. Filarsky’s Test Denies The Reality That Workplace Investigations Is A Competitive Market Comprised Of Non-Attorneys As Well As Attorneys

Filarsky’s assertion of a mixed functional-close supervision test would require the Court to extend qualified immunity to non-attorney workplace investigators, and thus “sweeps too far.” *Harlow*, 457 U.S. at 810. Private companies, as well as public agencies, conduct their own investigations into allegations of employee misconduct. There is nothing uniquely governmental about it.

Nor is the task always undertaken by an attorney. Non-attorneys, whether they are former police officers or human resources persons, are just as likely to independently conduct and direct workplace investigations. Indeed, some workplace investigations are outsourced specifically for the purpose of creating an appearance of independence in the investigation—thus there is no “hand in glove” or “arm in arm” relationship, or any supervision whatsoever.

Indeed, attorneys, public or private, do not typically conduct employee investigations. Conventional wisdom counsels against it; even Petitioner’s counsel does: “There is certainly a legitimate and important role for legal counsel in workplace investigations, especially if the issues involve potential legal liability. The role of counsel, however, will typically be as a behind-the-scenes advisor and consultant, not as an investigator. . . . [D]irect participation in gathering evidence should be avoided in most instances.” (“*How to Conduct An Effective Workplace Investigation*” Akin, Gump, Strauss, Hauer & Feld, LLP (April 2001, § II(H), pp. 5-6)).

The use of outside investigators is advised generally only when the agency does not have the resources within its organization; and it is most common where the target of the investigation is a high ranking employee of the organization. (*Id.*, at § II(G), p. 4)

Outside investigators are also used to create the appearance of an independent investigation. For example, former Los Angeles Police Chief William J. Bratton will head an independent investigation into

the recent pepper-spraying of student protestors at University of California, Davis. Bratton is now chairman of the New York-based Kroll security consulting firm, which was hired by the university to conduct the investigation. (“*Bratton to Lead Investigation of UC Davis Pepper Spraying*” Los Angeles Times, November 23, 2011) At the time of the Los Angeles Times article, Kroll was still negotiating its fee for the investigation.⁷ *Id.*

Indeed, providing investigative and other human resource services to public and private agencies is big business. Kroll security has offices in more than 52 cities in 29 countries, and more than 2,800 employees.⁸ It is doubtful that absent the availability of qualified immunity, former Chief Bratton and Kroll will approach the investigation with timidity. The competitive market for employee investigations is thus made up of players of all types, from former non-attorney public officials chairing worldwide firms, to former police officers, to solo practitioners.

⁷ No doubt Bratton’s stature as former Police Chief was instrumental in securing the contract. Filarsky & Watts’ pitch is not very different: Filarsky advertises that before becoming an attorney, he handled labor relations for a local Southern California city for three and one-half years; and prior to that he was employed by another local city. (Filarsky & Watt LLP; www.filarskyandwatt.com/filarsky.html).

⁸ “*Overview—Kroll Provides Trusted Intelligence and Scalable Technology Solutions*,” www.kroll.com/about/overview.

1. Private Attorneys Contracting With The Government Are Guided By Different Interests Than In-House Public Attorneys

Filarsky attempts to bolster his argument by noting the special fiduciary role of attorneys, and the attorney-oath, asserting that attorneys therefore have the exact same focus of government's interest as does a public employee. Brief for Petitioner 26-28. Yet, there are palpable differences between "in-house" public attorneys and privately contracted attorneys because "government employees typically act within a *different* system." *Richardson*, 521 U.S. at 410 (emphasis in original).

First, their relative motivations are entirely dissimilar. Private attorneys typically develop a practice area. In larger firms, attorneys are expected to fine tune their expertise by developing a specialty or subspecialty, and then command a market share of clients, and raise their hourly rates. "*Should I Go In-House?*" Linda Pierce, Northwest Legal Search (2010). They are more self-interested. Without a doubt, there is more money to be made by leaving the public sector, going into private practice and then contracting with the government to provide those same services. Like Filarsky, such attorneys hope to become sought-after for their expertise and have many clients, clients who have variously distinct needs and interests. Hence, there are private attorneys who subspecialize in municipal finance, tax, water rights,

land-use, labor and employment and so on. It would be unusual if they had only one client.

By contrast, in-house public attorneys have only one client—their public employer—and are expected to have knowledge in diverse areas of law—a mile wide and an inch deep; they are often present throughout the decision making process, and are often pressed for immediate answers to pressing questions on a wider range of issues than a private attorney. *Id.*

Second, public attorneys are expected to act “solely and conscientiously in a public capacity. . . .” *In re Lee G.*, 1 Cal. App. 4th 17, 29 (1991). Although they are expected to act in a cost conscious manner for the good of the public, public attorneys are not slaves to the billable hour or concerned with becoming upside down in their monthly retainer. This alone makes a privately contracted attorney somewhat less of a team player.

Third, private attorneys are in competition with others to retain the public agency’s business. This tends to make them more “results oriented” for their public agency clients. Certainly, Filarsky was results-oriented: one way or another, he was going to get Delia to remove the personal items stored in his home.

Finally, the fiduciary relationship an attorney has with a client simply does not apply to private non-attorneys who conduct workplace investigations. Those “rationales are not transferable,” *Wyatt*, 504 U.S. at 168, to non-attorneys.

E. A Functional Approach Analysis Is Not Workable Because Non-Attorneys Also Conduct Workplace Investigations

Filarsky advocates in part the *Richardson* dissent's functional approach. However, "[A] purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery." *Richardson*, 521 U.S. at 409. This is one of those situations, and would require the Court to eventually extend qualified immunity to non-attorneys as well, creating a brand new and expansive category of qualified immunity. This Court should be reluctant to create such a broad immunity. Allowing Filarsky to avail himself to qualified immunity by applying a framework previously rejected by this Court is inconsistent with the doctrine of *stare decisis*. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 848 (1991) ("The overruling of one of this Court's precedents ought to be a matter of great moment and consequence.").

Notwithstanding this, Filarsky's theoretical entitlement to qualified immunity under such a rejected approach would not cast doubt on the Ninth Circuit's holding. Contrary to Filarsky's assertion, he would not be entitled to qualified immunity even if the Court chose to apply the functional approach discussed in the *Richardson* dissent because conducting workplace investigations is not a "prototypically government

function” giving rise to qualified immunity. *Richardson*, 521 U.S. at 416 (Scalia, J., dissenting).

Even the function of the private prison guards in *Richardson* stands in sharp contrast to that of Filarsky, who was employed by the City to conduct a workplace personnel investigation to determine whether Delia was really sick, as he and his doctor’s notes supported. Filarsky cannot escape the facts of this case. Unless the duties of private, workplace investigators are stretched so far as to label them integral to the judicial process, Filarsky cannot avail himself to the defense of qualified immunity under the functional approach.

F. Circuit Courts Have Successfully Relied On The *Richardson* Framework And Policy Guidelines

Following *Richardson*, circuit courts have generally, but not always, rejected qualified immunity for private parties. *Bender v. General Services Administration*, 539 F. Supp. 2d 702, 714 (S.D.N.Y. 2008).

In *Tewksbury v. Dowling, M.D.*, 169 F. Supp. 2d 103 (E.D.N.Y. 2001), the court held that private physicians employed by a hospital were not entitled to qualified immunity against a patient’s claim of involuntary confinement. Finding no immunity at common law for privately employed physicians who commit individuals suspected of mental illness, *Id.*, at 113, the court examined whether the immunity doctrine’s purposes warranted immunity. *Id.* Denying

qualified immunity, the Court found “it is clear that Defendants are subject to competitive market pressures and have an incentive to commit patients.” *Id.* at 114. Therefore, “‘marketplace pressures provide [Defendants] with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or “non-arduous” employee job performance.’ *Richardson*, 117 S. Ct. at 2107. Accordingly, like the privately employed prison guards in *Richardson*, the purposes behind the qualified immunity defense do not support its application here.” *Id.*

In *Harrison v. Ash, C.O.*, 539 F.3d 510 (6th Cir. 2008), an inmate died in custody after an asthma attack. The court granted qualified immunity to officers employed by a county jail, but denied qualified immunity to private nurses whose employer contracted with the jail. In fact, the court held that the officers were qualifiedly immune because they were entitled to rely upon the medical treatment of the private nurses once they obtained medical care for the decedent. *Id.* at 518. In contrast, the court found that the purposes of qualified immunity do not support extension to the nurses employed by the private medical provider. Under *Richardson*, the court determined that in deterring “unwarranted timidity, the most important rationale underlying qualified immunity,” *Harrison*, 539 F.2d at 524, “market forces” operate to ensure the employees effectively execute their duties because the medical provider [like *Filarsky & Watt*] “must compete with other firms to obtain contracts to provide medical services. . . .” *Id.*

And at the end of its contractual term “it will likely face ‘pressure from potentially competing firms who can try to take its place.’ [citation].” *Id.* The court also found that “any distraction caused by the threat of suit is certainly no greater than the threat of malpractice suits faced by other medical professionals.” *Id.* at 525. Like medical professionals, private attorneys face a similar threat of malpractice suits. Certainly more so than the threat of Section 1983 suits.

On the other hand, in *Sherman v. Four County Counseling Center*, 987 F.2d 397, 405-406 (7th Cir. 1993), a pre-*Richardson* case, the court found that a private psychiatric facility that was ordered by a state court to detain the plaintiff against his will and treat him as it deemed appropriate was entitled to qualified immunity. Its holding was based on the fact that the defendant “acted pursuant to court order on an emergency basis.” *Tewksbury*, 169 F. Supp. 2d at 114 (citing *Sherman*, 978 F.2d at 405-406).

Other courts have heeded *Richardson’s* underpinnings so as to not unnecessarily extend immunity where its purposes would not be served. In *Cook v. Martin*, 148 Fed. Appx. 327, 342 (6th Cir. 2005), the court denied qualified immunity for private providers of prison medical services. The court in *Hinson v. Edmond*, 192 F.3d 1342, 1345 (11th Cir. 1999), also denied qualified immunity for a private provider of prison medical services.

In *Malinowski v. DeLuca*, 177 F.3d 623, 624 (7th Cir. 1999), the court denied qualified immunity for

privately employed building inspectors. In *Jensen v. Lane County*, 222 F.3d 570, 578 (9th Cir. 2000), the court denied qualified immunity for a provider of psychiatric care services. In *Halvorsen v. Baird*, 146 F.3d 680, 685 (9th Cir. 1998), the court denied qualified immunity for the provider of involuntary commitment services for inebriates. In *Rosewood Services, Inc. v. Sunflower Diversified Services, Inc.*, 413 F.3d 1163, 1169 (10th Cir. 2005), the court denied qualified immunity to a provider of disability benefit services.

These cases, and many others like them, show the extent to which the lower Circuits have successfully implemented *Richardson*, along with the consistent development of the application of its test and sound results reflective of the policy considerations underlying qualified immunity.

IV. Absent Qualified Immunity, Private Parties Like Filarsky May Still Be Able To Assert Good Faith As A Defense To Liability

While qualified immunity provides immunity from suit, substantive defenses may still be available regardless of the existence of immunity. Although the Court should not extend qualified immunity to private parties conducting workplace investigations, the “good faith” defense to Section 1983 liability has been recognized as a substantive defense that this Court

has not swept away with its “reformulation” of the qualified immunity analysis.

As this Court noted in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the prior qualified immunity analysis had two distinct aspects: an objective inquiry (“presumptive knowledge of and respect for ‘basic, unquestioned constitutional rights’”), and a subjective inquiry (“permissible intentions,” or more commonly, “good faith”). *Id.* at 815. *Harlow*, however, eliminated this subjective “good faith” inquiry from the qualified immunity analysis because it was incompatible with prior admonitions that “insubstantial claims should not proceed to trial.” *Id.* at 815-816. Thus, in order to avoid “excessive disruption of government” and to “permit the resolution of many insubstantial claims on summary judgment” *Id.* at 818, qualified immunity was reformulated without the subjective inquiry. The Court’s approach was designed to create a “threshold immunity question” prior to the fact-intensive and subjective good-faith inquiry. *Id.* Importantly, however, the good-faith defense was still available after the “threshold immunity question.”

In *Wyatt v. Cole*, 504 U.S. 158 (1992), this Court noted the distinct nature of the two inquiries in determining whether qualified immunity applied to private persons. There, the Court recognized *Harlow*’s approach to qualified immunity as establishing an “immunity from suit rather than a mere defense to liability.” *Id.* at 166. Thus, in finding that the defendants in that case were not entitled to qualified immunity, *Wyatt* emphasized that its holding did

“not foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith.” *Id.* at 165. This Court reaffirmed this in *Richardson*, expressly leaving open the possibility that a good-faith defense may apply to defendants denied qualified immunity while expressing no view on it. 521 U.S. at 413-414.

The Court’s purpose in moving away from the subjective inquiry prong of qualified immunity was driven by recognition that “subjective faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.” *Harlow*, 457 U.S. at 816. This would result in subjecting “officials to the risk of trial–distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.” *Id.* However, these distractions do not attend lawsuits against private parties, and certainly no more so than a malpractice claim, because they are not government officials; they “hold no office requiring them to exercise discretion,” *Wyatt*, 504 U.S. at 168. And “unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes.” *Id.*

Therefore, this Court may determine that a good faith defense is more appropriate for someone in Filarsky’s position.

V. Should The Court Be Inclined To Make Qualified Immunity Available To Private Attorneys, A Reasonable Attorney Standard Should Apply

Although Filarsky and the private bar have shown no historical tradition of immunity for private attorneys conducting workplace investigations, should the Court determine that creating qualified immunity in this situation would further the immunity's policies, the proper objective standard to apply would be "whether an attorney, reasonably well-trained in public employee investigations, would have known that the search of Delia's personal property stored in his home was illegal." The Court's cases provide support for this view. In *United States v. Leon*, 468 U.S. 897, 922, n. 23 (1984), the Court held that in the context of a suppression hearing, a "good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." And in *Malley v. Briggs*, 475 U.S. 335, 344 (1986), this Court determined that the objective reasonableness standard applied in suppression hearings "defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." Thus, the Court determined that the "analogous question" there was "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345. Furthermore,

this Court found that even though a magistrate, given “docket pressures,” may fail to act properly and not approve the warrant, “ours is not an ideal system” and it is “reasonable to require applying for the warrant to minimize this danger by exercising reasonable professional judgment.” *Id.* at 345-346.

Therefore, even though Chief Wells, like the magistrate in *Malley*, ultimately signed the order presented to him by Filarsky for written ratification, Filarsky should be held to a “reasonably well-trained public employee investigation attorney,” as he holds himself out to be, in order to determine whether qualified immunity should apply to him when he applied to the Chief for an order ratifying the search.

If the Court does implement such a standard, this case should be remanded to the District Court for a determination on this issue, using this standard.

VI. The Court Should Affirm The Ninth Circuit Decision On The Basis That Filarsky Violated Clearly Established Law

“A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment.” *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355, 364 (1994) (citing *Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984)). Delia asserted below that Filarsky violated clearly established law.

For purposes of qualified immunity, a “clearly established” right exists where “[t]he contours of the right . . . [are] sufficiently clear [such that] a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). It is not necessary that “. . . the very action in question has previously been held unlawful . . .”. *Id.* Rather, a right will be considered “clearly established” where “. . . in the light of pre-existing law the unlawfulness” of the conduct is “apparent.” *Id.*

As argued below, prior decisions of this Court support that Filarsky, should be held to a “reasonably well-trained public labor and employment attorney.” *See, e.g., United States v. Leon*, 468 U.S. 897, 922, n. 23 (1984); *Malley v. Briggs*, 475 U.S. 335, 344 (1986). In light of substantial case law, in addition to even the general public’s basic understanding of the Fourth Amendment, it is hard to believe anyone would not know that if it is unlawful to search a person’s home without a warrant, absent justification, they cannot instead compel them to display the contents of their home on the front lawn.

The Fourth Amendment’s guarantee against unreasonable government intrusion is a foundational Constitutional right, with origins rooted in British Common Law and the American Colonies’ application of that common law. This basic guarantee is so firmly established that it is considered “. . . familiar history that indiscriminate searches . . . conducted under the authority of ‘general warrants’ were the immediate

evils that motivated the framing and adoption of the Fourth Amendment.” *Payton v. New York*, 445 U.S. 573, 583 (1980).

The Court’s recognition of this long history is well documented, for more than “a century ago the Court stated in resounding terms that the principles reflected in the Amendment ‘reached farther than the concrete form’ of the specific cases that gave it birth, and ‘apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life.” *Id.* at 585.

A Fourth Amendment “search” occurs when government action intrudes upon a person’s “actual (subjective) expectation of privacy,” where that expectation “is one that society is prepared to recognize as reasonable.” *Katz v. U.S.*, 389 U.S. 347, 361 (1967). This “*Katz* test”, first offered by Justice Harlan in his *Katz* concurring opinion, was adopted by the Court’s majority in *Smith v. Maryland*, 442 U.S. 735 (1979). The overwhelming amount of established precedent makes Filarsky’s unlawful conduct apparent: Delia, like all persons, is entitled to these basic rights; the unlawful intrusion was of his home, an area of strict application of the Fourth Amendment. As such, Delia undoubtedly had an actual subjective expectation of privacy in an objectively reasonable matter. And, because Filarsky’s actions amounted to a warrantless search of Delia’s home, without a valid exception to that requirement, Delia’s Fourth Amendment rights were clearly violated.

Delia's status as a firefighter employed by the City of Rialto does not strip him of Fourth Amendment protection. It is well established that "(s)earches . . . by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment." *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987).

It is no small matter that the unlawful conduct here invaded the sanctity of Delia's home, an area *unquestionably* holding the highest of Fourth Amendment protection. Noted unambiguously throughout the Fourth Amendment's history is the idea that "(a)t the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). The recognition of this basic principle by the Court is common knowledge, for "the search of a home's interior," is "the prototypical . . . area of protected privacy." *Kyllo v. United States*, 533 U.S. 27, 28 (2001). As an attorney, it would beg credulity to suggest that Filarsky had no inclination that his order violated the Fourth Amendment, or that he should not have known. This is especially true when considering the fact that numerous non-attorney persons questioned the legality of his plan.

What force would the Fourth Amendment's guarantees have if instead of invading the home and searching, the Constitution allowed government officials to compel homeowners to empty the personal contents of their home for public display. It seems

elementary that such an order is clearly an end-run around the Fourth Amendment. While Filarsky ordered Delia to only display the unpackaged insulation, under Filarsky's logic he could have ordered Delia to empty every space in his home where the insulation might be, including the spaces between the walls—all just to prove Delia was not sick and *did* install the insulation. To the average citizen, this potential power by the government is extremely invasive, and amounts Filarsky's tactics to *nothing more than a mere crafty manifestation around the very evils the Fourth Amendment was adopted to protect*.

The Court has routinely made it “. . . clear that the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.” *Katz v. United States*, 389 U.S. 347, 353 (1967). The Court has repeatedly and unambiguously reaffirmed this application. Thus, the Fourth Amendment will apply to the government's identification of a single object inside one's home, even where agents do not physically enter, *United States v. Karo*, 468 U.S. 705 (1984); and the Fourth Amendment applies to use of a “thermal imaging device” monitoring of home, again even where agents do not physically enter, *Kyllo*, 533 U.S. 27 (2001). Even ordering a person to “empty their pockets” falls within the Fourth Amendment's ambit. *United States v. Foust*, 461 F.2d 328 (7th Cir. 1972), among others. This is no different from ordering one to “empty” the contents of their home.

Filarsky, like Delia, his attorney, Battalion Chief Bekker, Battalion Chief Peel, and Fire Chief Wells, should have at least reflected upon this grave decision. Had he done so, he likely would have recognized the clear unlawfulness of his orders.

◆

CONCLUSION

The judgment of the court of appeals should be affirmed for the reasons that (a) under this Court's precedents, neither history nor policy considerations support applying qualified immunity to private parties conducting workplace investigations; and (b) Filarsky violated clearly established law. If, on the other hand, this Court determines Filarsky is at least eligible for qualified immunity this Court should remand the matter to the District Court for a determination on that issue.

Respectfully submitted,

DIETER C. DAMMEIER

MICHAEL A. MCGILL

Counsel of Record

MICHAEL A. MORGUESS

CHRISTOPHER L. GASPARD

CAROLINA VERONICA CUTLER

LACKIE, DAMMEIER & MCGILL APC

367 North Second Avenue

Upland, California 91786

(909) 985-4003

mcgill@policeattorney.com