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

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") respectfully submits this brief as *amicus curiae* in support of the Respondent. Letters from the parties giving consent to the filing of this *amicus* brief accompany this filing.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits, including actions for damages under 42 U.S.C. § 1983 for violation of constitutional rights under color of state law.

AAJ believes that the lower court correctly applied this Court's precedents and held that a private attorney retained by a municipal government to conduct an investigation of a city fire fighter was not entitled to qualified immunity for alleged Fourth Amendment violations. To adopt Petitioner's expansion of qualified immunity to include private attorneys would undermine Congress' purpose in enacting this important legislation.

SUMMARY OF THE ARGUMENT

1. Petitioner asks this Court to drastically expand the rule of qualified immunity to include attorneys who are not government employees, but have been retained by a government for a particular

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amicus Curiae*, its members, or counsel make a monetary contribution to its preparation.

task. This is a special immunity from § 1983 that Congress has not authorized, that the common law did not recognize, that does not serve the policy aims of qualified immunity for government employees, and that would undermine Americans' constitutional rights as well as their right of access to the courts.

Qualified immunity was created by this Court to reflect historical practice and to further policy interests. Its scope should be drawn no wider than is required by those bases.

In 1871, Congress found it necessary to create the cause of action for damages in 42 U.S.C. § 1983 to enforce the constitutional rights guaranteed to all Americans. Congress made no provision for exemptions or immunities. Nevertheless, this Court has presumed that Congress was aware of the defenses and immunities that were well-established at common law and would have intended to recognize those immunities that serve important public policies. This Court has recognized, for example, the absolute immunity for judges. The Court has also held that officials performing discretionary functions are shielded from liability under § 1983 for conduct that does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. To extend that immunity to attorneys who are not governmental officials or employees would exceed the intent of Congress.

The scope of qualified immunity should also be narrowly construed because it limits the remedial cause of action Congress established to enforce federal constitutional rights. Congress was aware that an award of damages is often the only effective means of enforcing those rights and specifically

intended that this remedy be expansively construed and broadly available. This Court is not free to expand qualified immunity in violation of that intent, even if persuaded by sound policy reasons.

Finally, the scope of qualified immunity ought to be narrowly construed because it is not simply a limitation on the elements of the wrong. It is a complete defense to any accountability and entitles the holder to dismissal of a § 1983 action at the earliest stage. Access to the courts to petition an impartial tribunal for justice is a fundamental constitutional right of Americans. Any limitation on the right to one's day in court should be no broader than absolutely necessary.

2. The party seeking immunity from liability under § 1983 must establish both that the immunity was firmly rooted in the common law in 1871 and that the immunity is necessary to advance the public policies this Court has identified. With respect to the first requirement, there was no established common-law immunity for private attorneys retained by governments. Many 19th Century attorneys, including many whose names are well known to this Court, represented federal, state, and local governments. But there was not a single instance where a private attorney retained by a government body to perform work similar to Petitioner's was granted immunity from tort liability.

The fact that in 19th Century America private attorneys often served as public prosecutors who were given absolute immunity does not entitle Petitioner to qualified immunity for legal work that had nothing to do with the public prosecution of

criminal cases in the name of the state. A lawyer under those circumstances might be entitled to raise good faith as a defense at trial. But the attorney is not entitled to dismissal of the § 1983 case based on qualified immunity. Additionally, dicta in which this Court suggested that attorneys might be eligible for immunity for performing services "at the behest of the sovereign" is insufficient to support qualified immunity in this case.

The fact that there was no firmly rooted common law rule granting government-retained private attorneys tort immunity the inquiry and precludes the grant of qualified immunity in this case, regardless of the policy reasons that might support it.

3. The public policies that support the qualified immunity of government officials do not support extending that immunity to private attorneys. Generally, the Court looks to those policies to strike a balance between deterring misconduct and compensating its victims, on one hand, and protecting government's ability to perform its traditional functions. That balance loses its relevance when the actor is not a government official charged with serving the public good, but a private contractor more directly influenced by the profit motive and by competition.

Qualified immunity protects the public from officials whose fear of personal liability leads to unwarranted timidity in pursuing the public good. Immunity does not have the same impact on private contractors. Those contractors are seldom vested with broad discretion that may be chilled by fear of liability. Their duties are instead defined by the

terms of their contracts and their desire to be paid accordingly. There is no public interest to be served by encouraging contractors to boldly and imaginatively depart from the requirements of their contracts. Even if fear of liability were creating a problem for the government entity, the solution would be to provide indemnity for the contractor, not to deprive the victims of misconduct of the remedy provided by § 1983.

Similarly, there is no indication that requiring private contractors to be accountable under § 1983 deters talented individuals from entering government service. Again, to the extent that fear of liability does create such a problem, the appropriate course of action is to provide indemnification.

Finally, the danger that government officials may become distracted by having to respond to § 1983 lawsuits is much less in the case of private contractors. The important consideration is the harm to the public good, not the burden or cost to the worker or private contractor. Nor is this the most important factor in striking the appropriate balance. In any event, requiring private parties such as Petitioner to defend their actions in court does not appear contrary to the public interest.

ARGUMENT

I. THE SCOPE OF QUALIFIED IMMUNITY TO SECTION 1983 ACTIONS MUST BE NARROWLY CONSTRUED.

A. Qualified Immunity Is a Judicial Limitation on a Cause of Action Enacted By Congress to Protect Constitutional Rights and Ought to Be Narrowly Construed.

Petitioner asks this Court to dramatically expand the Court's narrowly-drawn immunity from suit under a cause of action that Congress created for the purpose of protecting and enforcing the constitutional rights of all Americans. Petitioner seeks a special immunity that Congress has not authorized, that the common law did not recognize, that does not serve the policy aims of qualified immunity for government employees, and that would undermine Americans' constitutional rights as well as the right of access to the courts. *Amicus* urges this Court to reject Petitioner's attempt to shield a growing area of private outsourced government activity from accountability for violations of fundamental rights.

In 1871, Congress created a civil remedy pursuant to Section 5 of the Fourteenth Amendment. Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, was enacted in response to violence against newly freed slaves and the inability or unwillingness of state officials to control the lawlessness that existed at that time. *See* Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 47 (1983).

In its current form, that Act of Congress provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42 U.S.C. § 1983.

By its terms, § 1983 "creates a species of tort liability that, on its face, admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). "Its language is absolute and unqualified, and no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Independence*, 445 U.S. 622, 635 (1980).

However, this Court has presumed that:

> [M]embers of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and they likely intended these common-law principles to obtain, absent specific provisions to the contrary."

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981).

This Court therefore has read § 1983 "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler*, 424 U.S. at 418. There was "no clear indication," Chief Justice Warren wrote for the Court in *Pierson v. Ray*, 386 U.S. 547 (1967), "that Congress meant to abolish wholesale all common-law immunities." *Id.* at 554. Consequently, in § 1983 actions this Court permits a defendant to assert an absolute or qualified immunity that "was so firmly rooted in the common law and was supported by such strong policy reasons" that if Congress in 1871 had wished to abolish the doctrine it would have done so explicitly. *Richardson v. McKnight*, 521 U.S. 399, 403 (1997).

This is the "legal source" of the qualified immunity which Petitioner here seeks to extend. *Id.* at 403; *Wyatt v. Cole*, 504 U.S. 158, 163 (1992). It is also clear from this Court's formulation that immunities in § 1983 actions are highly disfavored.

Pierson held that the common law's well-established absolute immunity for judges for actions taken on the bench may be raised as an affirmative defense to liability under § 1983. 386 U.S. at 554. Such an immunity was not available for police officers at common law, and so could not be invoked as a shield against a § 1983 action by arrested civil rights workers against the arresting officers. *Id.* at 555. In the absence of qualified immunity, the case could not be dismissed. *Id.* at 556. However, the officers were entitled to raise the defense at trial

that they acted in good faith and with probable cause. *Id*. at 557.

Significantly, this Court did not veer from its fidelity to the intent of Congress to incorporate only those common law immunities that were well recognized in 1871. No public policy consideration, including the difficult lot of police officers, moved the Court to substitute its own views on that score.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court recognized qualified immunity, as distinguished from the good faith defense:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow*, 457 U.S. at 819).

Thus, this Court has already answered, repeatedly and firmly, Petitioner's argument that important public policy concerns should sway this Court in favor of extending the scope of qualified immunity: It is for Congress to weigh those factors and strike the appropriate balance. "We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public

policy." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984). This Court's "role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Any extension of qualified immunity must hew closely to the intent of Congress to allow only those immunities that were widely recognized at common law in 1871.

B. Qualified Immunity Is a Limitation On a Remedial Cause of Action to Enforce Fundamental Constitutional Rights and Ought to Be Narrowly Construed.

By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity," including the protection of the Fourth Amendment, applicable to the states under the Fourteenth. *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961). Congress was aware that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen*, 445 U.S. at 651. In determining whether such a party should be shielded by immunity, this Court has stated that the injustice that "many victims of municipal malfeasance would be left remediless" due to qualified immunity "should not be tolerated." *Id.*

As this Court has emphasized, Congress made its intent explicitly clear that the remedy it was creating is to be broadly construed:

The congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, . . . confirm the expansive sweep of the statutory language. Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the Act was to receive:

> I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provision authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous, were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend

> and give remedies for their wrongs to all the people.
>
> Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (hereinafter Globe App) Similar views of the Act's broad remedy for violations of federally protected rights were voiced by its supporters in both Houses of Congress. *See Monell v. New York City Dept. of Social Services*, 436 U.S. at 683-687.

Owen, 445 U.S. at 635-36.

This Court has noted that "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814; *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971) ("For people in Bivens' shoes, it is damages or nothing"). As the Fifth Circuit has summarized, "courts are naturally loathe to clothe any person with an immunity which would frustrate the statute's design of providing vindication to those wronged by the misuse of state power." *Marrero v. City of Hialeah*, 625 F.2d 499, 503 (5th Cir. 1980).

Accordingly, this Court has cautioned the lower courts that "it would defeat the promise of the statute to recognize any preexisting immunity without determining both the policies that it serves and its compatibility with the purposes of § 1983. *Only after careful inquiry into considerations of both history and policy* has the Court construed § 1983 to incorporate a particular immunity defense." *City of Newport News*, 453 U.S. at 259 (emphasis added).

Justice Kennedy addressing an issue very similar to the question presented in this case, warned against extending qualified immunity to private actors who were not accorded immunity at common law. He emphasized, "we are devising limitations to a remedial statute, enacted by the Congress," and thus "we may not transform what existed at common law based on our notions of policy or efficiency." *Wyatt*, 504 U.S at 171-72 (Kennedy, J., concurring).

C. Qualified Immunity Infringes Upon the Fundamental Right of Access to the Courts For Redress of Wrongful Injury and Ought to Be Narrowly Construed.

In deciding whether to expand the scope of qualified immunity, it is important to bear in mind that it serves as a complete defense to liability and "frees one who enjoys it from a lawsuit whether or not he acted wrongly." *Richardson,* 521 U.S. at 403. The defendant who establishes qualified immunity is entitled to dismissal of the action against him at its earliest stage, regardless of the merits of the plaintiff's claim and the extent of damage the defendant has caused. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation."); *see also* Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 Cardozo L. Rev. 81, 81 n.4 (2004) (stating that qualified immunity has been transformed "into the functional equivalent of absolute immunity, which protects against even the need to defend."); Jonathan M. Freiman, *The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts*

the Constitution, 34 Idaho L. Rev. 61, 68 (1997) ("[Q]ualified immunity has pulled the door to the courthouse nearly shut, leaving a crack so thin that only the most battered plaintiffs can still squeeze through.").

This Court has often declared that access to the courts to seek redress for injury is a fundamental right protected by the Constitution. *See Borough of Duryea v. Guarnieri*, --- U.S. ----, 131 S. Ct. 2488, 2494 (2011) ("This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.") (collecting cases); *Haywood v. Drown*, 556 U.S. 729, 129 S. Ct. 2108, 2117 (2009) (where state sought to shield corrections officers from accountability in its trial courts, "New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy.").

Indeed, this Court has noted that its decisions have grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (citations omitted). It may be stated that "[t]he citizen's right to access an impartial tribunal to seek redress for official grievances is so fundamental and so well established that it is sometimes taken for granted." *Woodford v. Ngo*, 548 U.S. 81, 104 (2006) (Stevens, J., dissenting).

Accordingly, this Court does not "lightly impute to Congress an intent to invade freedoms"

protected by the Bill of Rights, including "the right of access to the courts," *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 525 (2002), citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972), and "has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court." *Forrester v. White*, 484 U.S. 219, 223-24 (1988).

In sum, this Court has made clear that qualified immunity to § 1983 liability contravenes the expressed intent of Congress, undermines the enforcement of federal constitutional rights, and limits Americans' access to the courts to seek legal redress for injury. Therefore, Petitioner's request that qualified immunity be expanded to include government-retained private attorneys must be denied unless Petitioner has made a clear and compelling case for it. *Amicus* submits that Petitioner has failed to make that case.

II. THE COMMON LAW DID NOT RECOGNIZE TORT IMMUNITY FOR PRIVATE ATTORNEYS HIRED BY GOVERNMENT FOR INVESTIGATIVE PURPOSES.

This Court has consistently held that a party seeking to assert immunity from liability under § 1983 must persuade the court both that the immunity "was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Richardson*, 521 U.S. at 403 (quoting *Wyatt*, 504 U.S. at 164) (quoting *Owen*, 445 U.S. at 637). *See also Wyatt*, 504 U.S. at 169-71 (Kennedy, J., concurring) (immunity

depends upon "historical origins" and "public policy"). *Amicus* submits that Petitioner has fallen short on both requirements.

With respect to the first requirement, this Court has stated:

> Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.

Malley, 475 U.S. at 339-40 (citations and internal quotation marks omitted). Only "[i]f parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871" does the Court consider whether considerations of public policy justify limiting the remedy Congress enacted. *Wyatt*, 504 U.S. at 164.

For example, this Court in *Harlow* observed that the common law recognized absolute immunity for officials "whose special functions or constitutional status requires complete protection from suit." *Harlow*, 457 U.S. at 806. These include legislators, in their legislative functions, judges, in their judicial functions, prosecutors and similar officials acting in their prosecutorial function, executive officers engaged in adjudicative functions, and the President of the United States. *Id.* at 807. *See also Doe v.*

Boland, 630 F.3d 491 (6th Cir. 2011) (The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law; accordingly § 1983 does not permit recovery of damages against a private party for false testimony, even if given under color of state law.).

It is apparent from the outset that Petitioner is unable to demonstrate a firmly rooted common-law immunity from tort liability for private attorneys retained by governmental bodies in circumstances analogous to Petitioner's in this case. Instead, Petitioner invokes the names of great American lawyers of the 19th Century. Chief Justice John Marshall, Daniel Webster, and Abraham Lincoln all represented states and other government entities in various court cases—including cases before this Court—while in private practice. (Pet'r's Br. 18-20.) We also learn that three of the chief supporters of the Civil Rights Act of 1871 also represented state governments. (*Id.* at 20-21.) Petitioner declares that it was, in fact, quite common for state and local governments to retain private attorneys. (*Id.* at 15.) Even the federal government, did so prior to the advent of the Department of Justice in 1870. (*Id.* at 37.)[2]

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[2] Several *amici* have pointed out to this Court that state and local governments have increasingly privatized and outsourced their legal work for at least the past 25 years. (*Amici Curiae* League of California Cities Br. 4-9; *Amici Curiae* State of Kansas and Other States Br. 4-8; *Amicus Curiae* American Bar Ass'n Br. 6-12.) This trend has grown primarily because retaining private attorneys is cheaper. (*Amici Curiae* League of California Cities Br. 5 & 6.)

What Petitioner has failed to establish for this Court is the one historical element that is essential to his argument. Petitioner cannot point to a single instance in which any of these illustrious attorneys, or any other private attorney was granted immunity from liability for torts committed while retained by a government entity. Petitioner asks whether Abraham Lincoln should be "left holding the bag" after government employees have been granted immunity. (Pet'r's Br. 20.) The correct question is whether any court at about 1871 granted tort immunity to private attorneys retained by federal, state, or local governments to conduct investigations or perform similar tasks. Petitioner has not taken the first step toward meeting his burden of showing that such an immunity was firmly established at common law.

Petitioner and United States attach significance to the fact that private attorneys often acted as prosecutors in 19th Century America. (Pet'r's Br. 16; *Amicus Curiae* United States Br. 28-29.) It is true that government prosecutors and private attorneys who performed the functions of government prosecutors were accorded absolute immunity with respect to those activities. *Butz*, 438 U.S. at 508-12; *Imbler*, 424 U.S. at 418. That immunity is currently recognized where private attorneys prosecute cases for the state. *See, e.g., Day,*

That fact suggests that neither the private attorneys nor the governmental entities retaining them find the current practice under which such private attorneys are not entitled to qualified immunity unacceptably costly or burdensome. It surely does not make the case for subsidizing private attorneys by leaving victims of unconstitutional misconduct without remedy.

Durham, Eldridge v. Gibson, 332 F.3d 1019, 1021 (6th Cir. 2003) (absolute immunity available to private prosecutor).

Petitioner's legal work in this case, however, had nothing to do with the prosecution of criminal cases in the name of the state. He merely conducted an inquiry for an employer into possible misconduct by an employee. This Court has rejected the notion that recognition of absolute prosecutorial immunity at common law may serve as a basis for granting qualified immunity to private attorneys do not actually prosecute cases, but simply "set the wheels of government in motion by instigating a legal action." *Wyatt*, 504 U.S. at 164-65.

At most, the Court stated, private attorneys acting under state law in circumstances like Petitioner's might be entitled to raise the good faith defense at trial. However, "that would still not entitle them to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials under" *Harlow*. *Id*. at 165. *See also Duncan v. Peck*, 844 F.2d 1261, 1265 (6th Cir. 1988) (private attorney not entitled to qualified immunity where the court found "no evidence that the common law ever extended the immunity to include private citizens").

Petitioner also relies on Justice Breyer's statement for this Court in *Richardson* that the common law did recognize "a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign." *Id*. at 407. (*See* Pet'r's Br. 26.) It is not clear whether the Court had qualified immunity in mind, nor whether "at the behest of the sovereign"

might include a contractual retainer. It is, moreover, doubtful that a municipality qualifies as "the sovereign." *See Alden v. Maine*, 527 U.S. 706, 756 (1999) (sovereign immunity "bars suits against States but not lesser entities," such as "a municipal corporation or other governmental entity which is not an arm of the State"). In any event, this small bit of dicta is woefully inadequate to meet Petitioner's burden in this case.

In the absence of an established and recognized immunity at common law for government-retained private attorneys, the Court's inquiry is complete. The Court does "not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993). Consequently, where "there is no historical tradition of immunity on which we can draw, our inquiry is at an end." *Id.*

III. THE POLICY REASONS SUPPORTING QUALIFIED IMMUNITY FOR GOVERNMENT EMPLOYEES DO NOT SUPPORT IMMUNITY FOR PRIVATE ATTORNEYS RETAINED BY GOVERNMENT.

Even apart from the absence of any historical basis at common law, expanding qualified immunity to government-retained private attorneys would not serve "the special policy concerns involved in suing government officials" and should therefore be rejected. *Wyatt*, 504 U.S. at 167 (citing *Harlow,* 457 U.S. at 813).

The Court looks to those policies because qualified immunity is designed to "strike a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167. *Amicus* suggests that such a "balance" loses relevance where the conduct is not that of an official sworn to uphold the public good, but a private contractor guided by profit and market forces.

Nor does the "government's ability to perform its traditional functions" have any bearing on whether a private party may be accountable for carrying out its government contract in an illegal or unconstitutional manner. This Court specifically identified three policy considerations that justify qualified immunity for government employees. None of those policies supports extending that immunity to private attorneys retained by a municipal government in circumstances similar to this case.

In *Richardson*, the Supreme Court held that prison guards at a private, for-profit prison could not assert qualified immunity. This Court explicitly rejected the argument raised by Petitioner here (Pet'r's Br. 11), that private parties performing the same work as government employees are entitled to the same qualified immunity. 521 U.S. at 408-09. The Court instead restated that the source of law for immunity to § 1983 liability is historical proof that the claimed immunity was "firmly rooted" at common law *and* a showing that the immunity is justified by such strong reasons of public policy that Congress in 1871 would have taken note and intended to preserve the immunity. *Id.* at 403-04.

This Court has identified those policy considerations as, first, whether qualified immunity was needed to "protect[] the public from unwarranted timidity on the part of public officials"; second, whether qualified immunity would "ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service"; and third, whether allowing § 1983 lawsuits would "distrac[t] officials from their governmental duties." *Id*. at 408 (internal quotations and citiations omitted); *see also Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 816.

This Court in *Richardson* determined that these policies did not weigh in favor of permitting private prison guards to assert qualified immunity. 521 U.S. at 412. For similar reasons, Petitioner's bid for qualified immunity in this case also fails.

A. In the Case of Private Attorneys Retained By Government There Is Less Danger That Liability Will Cause Timidity On the Part of Officials In Their Conduct of Government Activities.

This Court has noted that when government officials are exposed to liability for damages, the threat of liability "can create perverse incentives that operate to inhibit officials in the proper performance of their duties [where] government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker." *Forrester*, 484 U.S. at 223. *See also Will v. Hallock*, 546 U.S. 345, 353 (2006) ("The nub of qualified immunity is the need to

induce officials to show reasonable initiative when the relevant law is not clearly established."); *Harlow*, 457 U.S. at 814 (Fear of being sued may "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.").

These considerations do not apply, or do not apply with the same force, in the case of private parties working as contractors for the government. Such contractors are "subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily present in government departments." *Richardson*, 521 U.S. at 412. The contractor is "not invested with the responsibility of executing the duties of a public official in the public interest," but rather by the desire to execute to provisions of the contract and to be paid accordingly. *Duncan*, 844 F.2d at 1264. Such private parties seldom exercise broad discretion; their duties are for the most part spelled out in the contract with the governmental entity. Thus, "unwarranted timidity is less likely present, or at least is not special, when a private company subject to competitive market pressures" is the actor. *Richardson*, 521 U.S. at 409. Nor is there any public interest to be served in encouraging bold or imaginative actions that depart from the governmental contract.

Indeed, if a contractor proves to be too timid in carrying out its responsibilities, the appropriate course is not to shield contractors from accountability, but to replace that contractor. Alternatively, if the public good would be served by shielding the contractor from liability for violating

the constitutional rights, the answer is not to leave individual victims without remedy. It is instead for the governmental body to indemnify its contractor, thereby spreading the costs of harm equitably.

B. There Is Less Danger That Liability May Deter Qualified Workers From Entering Public Service.

The notion that potential personal liability of government workers under § 1983 may deter talented persons from entering government employment is a presumed, though unproven rationale for qualified immunity for government workers. It is clear, however, that the potential liability of private contractors cannot be viewed as a deterrent to qualified applicants for government service. *Wyatt*, 504 U.S. at 168.

To the extent that the potential liability of private contractors may be deemed a barrier to accomplishing a public good, the appropriate course is for the governmental entity to agree to indemnify the contractor. Nearly all jurisdictions in the United States provide for indemnification of government employees for civil liability for harm done within the scope of employment. *See Bd. of Cnty. Comm'rs of Bryan Cnty., v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting) (stating that statutes in many states "authorize indemnification of employees found liable under § 1983 for actions within the scope of their employment."); *see also* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583, 586-88 (1998) (discussing and citing secondary authorities on the issue of indemnification under § 1983).

C. There Is Less Danger That Litigation Will Distract Government Officials From Their Duties.

Finally, this Court has indicated that, quite apart from personal liability, the public good suffers when public officials face distractions from "undue interference with their duties and from potentially disabling threats" due to litigation. *Harlow*, 457 U.S. at 806; *see also Anderson*, 483 U.S. at 646 n.6 ("One of the purposes of the . . . qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government'").

This is not a decisive factor. This Court has been careful to note that "the risk of 'distraction' alone cannot be sufficient grounds for an immunity." *Richardson*, 521 U.S. at 411. Moreover, the Court's qualified immunity cases "do not contemplate the complete elimination of lawsuit-based distractions." *Id*.

This Court has also noted that the proper measure here is the impairment of the public interest, not the potential hardship visited upon the private contractor. *Wyatt*, 504 U.S. at 168. Additionally, the Court stated, the responsibility for discretionary actions that affect the public interest tend to be reserved to governmental officials. *Id.* Therefore, "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*.

In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity." *Wyatt*, 504 U.S. at 168.

CONCLUSION

For the above reasons, the decision of the Ninth Circuit Court of Appeals below should be affirmed.

Respectfully submitted,

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