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 STATE OF KANSAS AND OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DEREK SCHMIDT
Attorney General of Kansas
STEPHEN R. MCALLISTER
Solicitor General of Kansas
Counsel of Record
KRISTAFER AILSLIEGER
Deputy Solicitor General
120 S.W. 10th Street, 2nd Floor
Topeka, KS 66612
(785) 296-2215
stevermac@fastmail.fm

November 21, 2011

Counsel for Amici Curiae

[Additional counsel listed inside front cover]

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Luther Strange
Attorney General of Alabama
500 Dexter Avenue
Montgomery, Alabama 36130

John J. Burns
Attorney General of Alaska
P.O. Box 110300
Juneau, Alaska 99811

Tom Horne
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007

John W. Suthers
Attorney General of Colorado
1525 Sherman Street
Seventh Floor
Denver, Colorado 80203

Joseph R. Biden, III
Attorney General of Delaware
820 North French Street
Wilmington, Delaware 19801

Irvin B. Nathan
Attorney General for the District of Columbia
One Judiciary Square
441 4th Street, N. W.
Suite 600 South
Washington, D.C. 20001

Samuel S. Olens
Attorney General of Georgia
132 Judicial Building
40 Capitol Square, SW
Atlanta, Georgia 30334

David M. Louie
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Lawrence G. Wasden
Attorney General of Idaho
P.O. Box 83720
Boise, Idaho 83720

Lisa Madigan
Attorney General of Illinois
100 W. Randolph St., 12th Floor
Chicago, Illinois 60601

Tom Miller
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, Iowa 50319

Jack Conway
Attorney General of Kentucky
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

James D. "Buddy" Caldwell
Attorney General of Louisiana
Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, Louisiana 70804

William J. Schneider
Attorney General of Maine
6 State House Station
Augusta, Maine 04333

Bill Schuette
Attorney General of Michigan
P. O. Box 30212
Lansing, Michigan 48909

Chris Koster
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, Missouri
65101

Gary K. King
Attorney General of
New Mexico
P. O. Drawer 1508
Santa Fe, New Mexico 87504

Wayne Stenehjem
Attorney General of
North Dakota
600 E. Boulevard Avenue
Bismark, North Dakota
58505

E. Scott Pruitt
Attorney General of
Oklahoma
313 N.E. 21st Street
Oklahoma City, Oklahoma
73105

John R. Kroger
Attorney General of Oregon
1162 Court Street, N.E.
Salem, Oregon 97301

Linda L. Kelly
Attorney General of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania
17120

Robert E. Cooper, Jr.
Attorney General of Tennessee
P. O. Box 20207
Nashville, Tennessee 37202

Mark L. Shurtleff
Attorney General of Utah
Utah State Capitol Suite #230
P.O. Box 142320
Salt Lake City, Utah 84114

Kenneth Cuccinelli, II
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219

Rob McKenna
Attorney General of
Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, Washington 98504

Darrell V. McGraw, Jr.
Attorney General of
West Virginia
State Capitol, Room 26-E
Charleston, West Virginia 25305

Gregory A. Phillips
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

QUESTION PRESENTED

Whether a "private" outside lawyer who performs government functions for a state or local government is entitled to the same immunity—absolute or qualified—that a government lawyer would have if sued under 42 U.S.C. § 1983 for performing the same functions?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER MATERIALS

INTEREST OF THE *AMICI* STATES

All States periodically retain outside legal counsel for a variety of reasons and in a variety of settings. Sometimes an Attorney General may retain outside counsel for fiscal reasons or because of staffing and resource limitations. Sometimes an Attorney General may retain outside counsel because of the specialized area of law involved in a particular matter. And sometimes an Attorney General may retain outside counsel because of conflict-of-interest concerns with regard to government lawyers in a particular matter.

Thus, the States have very direct interests in the important legal question whether private outside counsel who perform state government functions may claim the same immunity that would be available to a government lawyer in the same circumstances.

STATEMENT

1. The petitioner, attorney Steve A. Filarsky, was "retained by the City" to assist with "the internal affairs investigation" of a firefighter, Respondent Nicholas B. Delia. *Delia v. City of Rialto, et al.*, 621 F.3d 1069, 1072 (9th Cir. 2010) (reprinted in the Appendix to the Petition, hereinafter "Pet. App."). The sum total of Filarsky's involvement in this case was to conduct an interview with Delia (with other City officials and Delia's lawyer present), question Delia about the matter under investigation, orally direct that Delia go to his house and bring outside materials relevant to the dispute, and consult with the City fire chief who ultimately issued Delia a written order requesting that he go to his home and bring outside

certain materials for inspection by fire department officials. Pet. App. 6-8.

There is no indication in the record that any of these actions were not within the realm of legal advice and assistance, or that the same actions could not have been performed by a government lawyer who undoubtedly would have been able to claim qualified immunity with regard to such actions. The District Court initially indicated that Filarsky's actions did not violate any of Delia's rights, Pet. App. 9, and then in a written order concluded that Filarsky was entitled to qualified immunity. *Id*. at 10-11.

2. The Ninth Circuit reversed the qualified immunity holding. The court first observed 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. The court acknowledged that in *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997), the Sixth Circuit recognized qualified immunity for a private law firm that a city had retained. Pet. App. at 25. The Ninth Circuit characterized the Sixth Circuit as relying "exclusively on dictum in *Richardson v. McKnight*, 521 U.S. 399, 407 (1997), that 'the common law did provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.'" Pet. App. at 25 (internal quotations and emphasis omitted).

The Ninth Circuit, however, opined that it was "not free to follow the *Cullinan* decision" because "[i]n *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003), another panel of this court held that a private attorney representing a county was not entitled to qualified

immunity." Pet. App. at 25-26. *Gonzalez* reasoned that a private attorney was not entitled to qualified immunity because she was "a private party, not a government employee, and she ha[d] pointed to 'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." Pet. App. at 26 (citations omitted). The Ninth Circuit concluded that "we are bound by the *Gonzalez* decision. Accordingly, Filarsky is not entitled to qualified immunity as a private attorney . . . ." *Id*. at 27.

INTRODUCTION AND SUMMARY OF ARGUMENT

To the best of the States' knowledge, *all* States permit the retention of outside counsel by the Attorney General, the Governor, or other state officials or entities, in at least some circumstances. Many States expressly authorize the retention of outside counsel by statute.[1]

---

[1] *See, e.g.*, Ariz. Rev. Stat. § 41-191(C) ("The attorney general may also, within the limits of appropriations made therefor, employ attorneys for particular cases upon a fixed fee basis ...."); Ark. Code Ann. § 25-16-702(b)(2) ("If, in the opinion of the Attorney General, it shall at any time be necessary to employ special counsel to prosecute any suit brought on behalf of the state or to defend a suit brought against any official, board, commission, or agency of the State, the Attorney General, with the approval of the Governor, may employ special counsel"); 29 Del. Code § 2507 ("special counsel may be employed . . . with the approval of the Attorney General and the Governor"); Ga. Code Ann. §45-15-4 ("The Attorney General . . . is authorized to select and employ private counsel to perform legal services for" state agencies and officials); Haw. Rev. Stat. § 28-8 ("The attorney general may appoint and, by contract retain the services of special deputies to

perform such duties and exercise such powers as the attorney general may specify"); Idaho Code § 67-1406(3) ("Whenever the attorney general determines that it is necessary or appropriate in the public interest, the attorney general may authorize contracts for legal services"); Kan. Stat. Ann. §75-710 (Attorney General "shall appoint such assistants ... as shall be authorized by law"); Ky. Rev. Stat. § 12.210 ("The Governor, or any department with the approval of the Governor, may employ and fix the terms of employment and the compensation to be paid to an attorney or attorneys for legal services to be performed for the Governor or for such department"); Md. Code Ann. § 6-105(b)(1) ("the Attorney General, with the written approval of the Governor, may employ any assistant counsel that the Attorney General considers necessary to carry out any duty of the Office in an extraordinary or unforeseen case"); Miss. Code Ann. § 7-5-7 ("The attorney general is hereby authorized and empowered to appoint and employ special counsel, or a fee or salary basis, to assist the attorney general in the preparation for, prosecution, or defense of any litigation in the state or federal courts or before any federal commission or agency in which the state is a party or has an interest"); Neb. Rev. Stat. § 84-203 (Attorney General "may employ counsel" to prosecute or defend suits); N.M.S.A. § 8-5-4 ("special legal assistance, may be employed by the attorney general, under his direction and control, at a reasonable compensation, in any pending action or proceeding to protect the interest of the state"); N.D. Cent. Code § 54-12-08 (Attorney General "may appoint assistant or special assistant attorneys general to represent" the State); Nev. Rev. Stat. Ann. § 41.03435 ("The attorney general may employ special counsel . . . if the attorney general determines at any time prior to trial that it is impracticable, uneconomical or could constitute a conflict of interest for the legal service to be rendered by the attorney general or a deputy attorney general"); N.H. Rev. Stat. § 7:12.I. ("With the approval of the joint legislative fiscal committee and the governor and council, the attorney general may employ counsel, attorneys, detectives, experts, accountants and other assistants in cases of reasonable necessity"); N.C. Gen. Stat. § 147-17(b) ("Whenever the Attorney General shall advise the Governor that it is impracticable for him to render legal services to any State agency, officer, institution, commission, bureau or

other organized activity, or to defend a State employee or former employee . . ., the Governor may authorize the employment of such counsel, as in his judgment, should be employed to render such services"); Ohio Rev. Code Ann. § 109.07 ("the attorney general may appoint special counsel to represent the state in civil actions, criminal prosecutions, or other proceedings in which the state is a party or directly interested"); 74 Okla. Stat. § 20i.A.3. ("If the Attorney General is unable to represent the agency or official due to a conflict of interest, or the Office of the Attorney General is unable or lacks the personnel or expertise to provide the specific representation required by such agency or official, [the Attorney General may contract] with a private attorney or attorneys"); Ore. Rev. Stat. § 180.140(5) ("Special legal assistants or private counsel may be employed by the Attorney General, under the direction and control of the Attorney General, in particular cases or proceedings, whenever the Attorney General deems it appropriate to protect the interests of the state"); R.I. Gen. Laws § 42-9-I.(b) ("The attorney general shall appoint such special assistant attorneys general as may from time to time be necessary"); S.D. Cod. Laws § 1-11-5 ("The attorney general is also authorized to appoint assistant attorneys general as he may deem necessary on a part-time basis for special assignments"); Tenn. Code Ann. § 8-6-106 ("In all cases where the interest of the state requires . . . the governor shall employ such counsel"); Tex. Gen. Approp. Act, 82nd Leg., R.S., ch. 1355, art. IX, 16.01(a)(3), 2011 Tex. Gen. Laws 4025, 4878-80 ("If the Attorney General determines that outside legal counsel is in the best interest of the State, the Attorney General shall so certify to the Comptroller and to the requesting state governmental entity which may then utilize appropriated funds to retain outside legal counsel"); 3 Vt. Stat. Ann. § 153(c) ("The attorney general may appoint such . . . special assistant attorneys general as may be necessary for the proper and efficient performance of his department"). Va. Code Ann. §§ 2.2-507(C) and 2.2-510(2) ("In cases of legal services in civil matters to be performed for the Commonwealth, where it is impracticable or uneconomical for the Attorney General to render such service, he may employ special counsel whose compensation shall be paid out of the appropriation for the Attorney General's office").

In some states, the power to employ such counsel is implicit or assumed in statutes that provide procedures for or limitations on such appointments.[2]

In actual practice, it is common for Attorneys General to employ outside legal counsel, and to do so both on a regular basis and in a variety of settings, including because the Attorney General's office needs specialized legal assistance, lacks the attorney resources to handle particular matters, or a situation involves conflict-of-interest concerns. Furthermore, there are certainly numerous examples of the States receiving such legal assistance from outside counsel at discounted rates or even on a pro bono basis, with outside counsel recognizing that such work is at least in part a public service.

---

[2] *See, e.g.*, *Alaska v. Breeze*, 873 P.2d 627 (Alaska Ct. App. 1994) (Attorney General had authority to appoint special prosecutor to remedy a perceived conflict of interest); Alaska Stat. § 36.30.015(d) (the attorney general must "maintain appropriate supervision, direction, and control" over the outside counsel he appoints); Cal. Code Ann. Tit. 2 § 12520 ("Restriction on employment of special counsel"); Ind. Code Ann. § 4-6-5-3 (No agency "shall have any right to name, appoint, employ, or hire any attorney or special or general counsel . . . without the written consent of the attorney general"); 5 Maine Rev. Stat. § 191.3.B. ("In all instances where the Legislature has authorized an office or an agency of the State to employ private counsel, the Attorney General's written approval is required as a condition precedent to the employment"); Utah Code Ann. § 67-5-5 ("Unless he hires such legal counsel from outside his office, the attorney general shall remain the sole legal counsel for that agency"); Wash. Rev. Code § 43.10.067 (No state official "other than the attorney general, shall employ, appoint, or retain in employment any attorney for" state agencies or officials for the "performance of any of the duties specified by law to be performed by the attorney general").

A. The Court repeatedly has decided what immunity to accord a Section 1983 defendant by considering the function in which the defendant was engaged, not the person's status or title. In fact, except in the context of the private prison guards in *Richardson v. McKnight*, 521 U.S. 399 (1997), the functional analysis has always been a primary inquiry in the Court's immunity cases. *See id*. at 418 (Scalia, J., dissenting) (quoting and citing at least seven decisions of the Court employing such an analysis). A functional analysis has the advantage of drawing relatively clear lines based on conduct, rather than official title, or lack thereof. Furthermore, a functional approach avoids the ironic result that in a Section 1983 suit like this one the *only* defendant left holding the liability bag is the *private* lawyer because all of the government actors—the very people Section 1983 was enacted to reach—have immunity.

B. Private outside counsel function as government lawyers when they represent the States and their officials. They are distinguishable from the private prison guards in *Richardson v. McKnight* for at least four reasons. First, such lawyers are directed by, supervised by, report to, and answer to the Attorney General's office or other government clients. Outside lawyers generally work very closely with and are in constant contact with the Attorney General's office. Second, outside lawyers owe professional, ethical, and fiduciary obligations to their state clients, duties that prison guards simply never bear. Outside lawyers, as a matter of law and ethics, must serve their state clients' interests, and only those interests. Third, outside counsel do with some frequency work for the States at below-market rates, or even on a *pro bono* basis. And, finally, outside counsel who perform

government functions generally conduct themselves precisely as they would if they were in fact government lawyers. For all of these reasons, the outside counsel the States retained are in all respects but title "government lawyers."

C. According immunity to private outside counsel performing government functions serves the purposes of immunity in Section 1983 cases by ensuring that such lawyers can provide representation and give advice without fear of personal liability and harassing litigation. Failing to accord private outside counsel such immunity likely will result in decreasing both the quantity and quality of legal assistance currently provided to the States by such lawyers. Providing no immunity to outside counsel necessarily will increase costs to the States, either by virtue of the higher rates that outside counsel will charge, or through new liability imposed on the States if they have to indemnify outside counsel in the event those private lawyers are sued for their work with the States. Furthermore, some outside counsel may well decide that the increased risk, or increased cost of malpractice insurance, is not worth the rewards when it comes to representing the States and their officials. Thus, some private counsel may effectively remove themselves from the pool of attorneys available to the States for outside legal assistance.

ARGUMENT

Outside Counsel Retained By The States Should Be Accorded The Same Immunity That Would Be Available To A Government Lawyer In The Same Circumstances.

A. As A General Rule, The Court Has Determined A Person's Immunity In Section 1983 Suits On The Basis Of Function, Not Status.

Although "Section 1983 'creates a species of tort liability that on its face admits of no immunities,'" *Wyatt v. Cole*, 504 U.S. 158, 163 (1992) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)), the Court long has recognized either absolute or qualified immunity for a variety of governmental functions. In particular, the Court's cases consistently have held "that immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). Thus, for example, a judge who has absolute immunity for judicial functions, *Stump v. Sparkman*, 435 U.S. 349 (1978), only has qualified immunity for administrative functions. *Forrester v. White*, 484 U.S. 219, 224 (1988). Similarly, a prosecutor who has absolute immunity for prosecutorial functions, *Imbler*, only has qualified immunity for investigative functions. *Burns v. Reed*, 500 U.S. 478, 489-90 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). And a police officer who typically has qualified immunity for law enforcement functions, *Anderson v. Creighton*, 483 U.S. 635 (1986), receives absolute immunity for testifying in a judicial proceeding. *Briscoe*, 460 U.S. 325.

Nor has the function analysis been limited to government officials claiming immunity. Instead, private citizens serving as grand jurors have absolute immunity because of their function in the judicial process. *Imbler*, 424 U.S. at 423 n.20. Similarly, any witness who testifies in a judicial proceeding, whether a government official or a private citizen, has absolute immunity. *Briscoe*, 460 U.S. at 335. And four Justices indicated that it is "highly unlikely that we would deny prosecutorial immunity to those private attorneys increasingly employed by various jurisdictions in this country to conduct high-visibility criminal prosecutions." *Richardson v. McKnight*, 521 U.S. 399, 418 (1997) (Scalia, J., dissenting, joined by Chief Justice Rehnquist, and Justices Kennedy and Thomas).

A functional approach to immunity questions has the advantage of creating relatively clear lines which in turn decreases uncertainty and avoids unnecessary litigation over immunities. "It must be remembered that unlike the common-law judges whose doctrines we adopt, we are devising limitations to a remedial statute, enacted by Congress," *Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring), and thus this Court has some discretion in formulating the immunities accorded defendants in Section 1983 suits. The Court's discretion in this context should be exercised to achieve clarity and consistency. Those goals both counsel in favor of adhering to the Court's traditional reliance on a functional approach to immunity. Providing outside counsel performing government functions with the same immunity that would be accorded a government lawyer in the same circumstances is consistent with the Court's traditional "function" approach to immunity issues.

Otherwise, there is an irony to the situation in which lawyers like Filarsky find themselves to be the *only* defendant in a Section 1983 suit with no immunity. In essence, private outside counsel may be left holding the bag, while every government defendant is protected by immunity. Chief Justice Rehnquist described the irony of such a result: "Our § 1983 jurisprudence has gone very far afield indeed, when it subjects private parties to greater risk than their public counterparts, despite the fact that § 1983's historic purpose was 'to prevent *state officials* from using the cloak of their authority under state law to violate rights protected against state infringement.'" *Wyatt*, 504 U.S. at 180 (Rehnquist, C.J., dissenting, joined by Justices Souter and Thomas) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 948 (1982) (Powell, J., dissenting)).

At bottom, the functional approach would accord all those involved in the legal representation of state and local governments the same level of immunity based on their actual conduct, not their status as a government employee or outside counsel. As explained in the next section, that result makes complete sense in the context presented here.

B. Private Outside Counsel Providing Legal Assistance To The States Function As Government Lawyers; Their Situation Is Distinguishable From That Of Private Prison Guards.

Private outside counsel are distinguishable from the private prison guards the Court addressed in *Richardson v. McKnight*, 521 U.S. 399 (1997), in at least four respects. For these reasons, even if the Court

did not adhere to a functional analysis, it should reverse the Ninth Circuit's decision.

First, private outside counsel work closely with government lawyers and government officials, report to government lawyers, and are supervised and directed in significant respects by government lawyers. Unlike the private prison guards in *Richardson*, private outside counsel in a very real sense effectively *are* government lawyers. The prison guards in *Richardson* did not report to government prison officials and were not directly supervised by government officials.

Private outside counsel, to the contrary, necessarily and by law in many States have to report to, consult with, and be directed by government lawyers.[3] Even absent such an express statutory provision, supervision and control by government lawyers is the reality for private outside counsel. Indeed, the States and their officials necessarily work closely with outside counsel because government ultimately is responsible for the results.

Second, unlike prison guards, lawyers owe professional and ethical duties to their clients. *Restatement (Third) of the Law Governing Lawyers* § 16 (2000) (a lawyer "must" "proceed in a manner reasonably calculated to advance a client's lawful objectives," "comply with obligations concerning the

---

[3] *See, e.g.*, Idaho Code § 67-1409(2) ("The performance of all contracts for legal services shall be monitored and supervised by the attorney general or his designee"); Md. Code Ann. § 6-105(e)(2) (a "special attorney . . . shall perform the assigned duty, subject to the control of the Attorney General").

client's confidences and property, [and] avoid impermissible conflicting interests"). Unlike prison guards, lawyers can be sued for professional malpractice. *Id.*, § 48 ("Professional Negligence—Elements and Defenses Generally"). Moreover, lawyers owe fiduciary duties to their clients, including government clients. *Id.* § 49 ("a lawyer is civilly liable to a client if the lawyer breaches a fiduciary duty to the client"); *see also id.*, Comment b. (listing fiduciary duties that a lawyer owes a client); *id.*, § 74 (attorney-client privilege generally applies when government is the client).

Thus, outside counsel owe duties to their government clients of a nature both different and greater than any "duty" a prison guard may owe to potentially hundreds of prison inmates or indirectly to the government that hired the company that employs the private prison guard. Indeed, outside counsel owe a duty to their government clients to further the government's interests, not the lawyer's interests, or the interests of any private clients the lawyer also might be representing. There is no apparent difference between the duties outside counsel owe a government in providing legal assistance, and the duties that a government lawyer owes that same government.[4]

---

[4] Indeed, private outside counsel regularly appear before this Court representing the States and their officials. Current and recent examples include the following cases: *Florida v. U.S. Dept. of Health and Human Services*, No. 11-400 (Paul Clement representing 26 States); *PPL Montana LLC v. Montana*, No. 10-218 (Greg Garre representing Montana); *Sorrell v. IMS Health, Inc.*, No. 10-799 (David Frederick co-counsel with the Vermont Attorney General's office); *Brown v. Plata*, No. 09-1233 (Carter Phillips representing California and its officials); *South Carolina*

Third, it is the lawyer's ethical, professional, and fiduciary obligations to the client that drive the lawyer's representation of government entities and distinguish outside counsel from private prison guards. Although many outside counsel assisting government are paid for their services, some charge the States below-market rates, and their total fees may be capped, either by state law or by agreement. Furthermore, in a number of situations, private lawyers have provided and will provide *pro bono* assistance to the States and state officials. E.g., *State ex rel. Morrison v. Sebelius*, 179 P.3d 366 (Kan. 2008) (private law firm represented Governor *pro bono*).

The States are not suggesting that private lawyers who serve the States have no interest in compensation. But outside counsel who serve the States often are not driven by the same profit-motive that may well drive private companies operating prisons under a state contract. The very concept of the law as a profession is premised on the notion that the practice of law is not just another profit-making enterprise.

Finally, in very real and material respects, private outside counsel function precisely as government lawyers. Sometimes this fact is recognized formally with designations such as "special assistant attorney

---

v. North Carolina, No. 138 Orig. (David Frederick representing South Carolina); *Perdue v. Kenny A.*, No. 08-970 (Mark Cohen representing Georgia); *Alabama v. North Carolina*, No. 132 Orig. (Carter Phillips and Walter Dellinger representing Alabama and North Carolina, respectively).

general" or "special prosecutor."[5] The presence or absence of such a title, however, should not determine whether outside counsel are entitled to immunity. Rather, the facts that outside counsel are performing government functions and are doing precisely what they would do if the States actually employed them is what warrants according outside counsel the same immunity as a state government lawyer in the same circumstances.

Lawyer Filarsky's actions in this case demonstrate the point. There is not one fact in the reported decisions below that shows Filarsky doing anything that he would not or could not have done had the City actually employed him rather than retained him as outside counsel. Filarsky interviewed the subject of the internal affairs investigation, consulted with fire department officials, and provided the subject with a written order from the fire chief. Had Filarsky been a City employee, he could have and almost certainly would have taken exactly the same actions. For purposes of the internal affairs investigation, Filarsky was *the City's lawyer*, plain and simple. That is generally the case with outside counsel working for government.

Thus, for all of the preceding reasons, it is not surprising that in *Richardson v. McKnight* the Court strongly suggested a difference between private lawyers and private prison guards for immunity purposes: "Apparently the law *did* provide a kind of

---

[5] *E.g.*, *Montana v. Wyoming*, No. 137 Orig. (John Draper, co-counsel on Exceptions to the Special Master's Report, listed as "Special Assistant Attorney General")

immunity for certain private defendants, such as . . . lawyers who performed services at the behest of the sovereign." 521 U.S. at 407 (emphasis original). In this case, the Court should make clear that it meant what it said in *Richardson* about private lawyers, for all of the reasons discussed above. Applying the traditional and straightforward functional approach, as well as recognizing the role and duties of lawyers, the Court should hold that private outside counsel receive the same immunity that would be accorded to a government lawyer in the same circumstances.

C. According Immunity To Private Outside Counsel Serves The Purposes Of Immunity In Section 1983 Cases And Will Avoid Deleterious Effects On The Quantity And Quality Of Legal Assistance Available To The States.

Importantly, according private outside counsel the same immunity for performing government functions as government lawyers performing those same functions furthers the purposes of immunity in the Section 1983 context. When the States hire outside counsel, the States want those attorneys to behave as government lawyers would in vigorously representing the States' interests. The States want private outside counsel to fulfill their duties to their state clients without "fear of personal monetary liability and harassing litigation." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Such fears are very real if private outside counsel have no immunity, and would have negative consequences for both the quality and the quantity of representation the States receive.

Indeed, a holding that outside counsel can never have immunity in Section 1983 suits will adversely affect the operation of state governments in general, and Attorneys General offices in particular. If there is no immunity for private outside counsel, the cost of hiring and utilizing such counsel necessarily will rise. Private attorneys cannot be expected to assume the risk of a lengthy section 1983 suit without reflecting that risk in the rates they charge.

In fact, in some situations, if a private attorney has no immunity, that attorney effectively assumes *all* of the risk, as the facts of this case demonstrate. In situations like the present one, no other actor involved in the situation lacks any and all immunity. At a minimum, private outside counsel will have to insure themselves against the risk, and that will result in higher rates charged to government.

Another readily apparent example of a private attorney assuming all of the risk would be when outside counsel is hired to prosecute a particular criminal case. In that circumstance, the private attorney might sit in the courtroom beside government employees who are prosecutors and conduct the case precisely as the government prosecutors do, but if outside counsel has no immunity, the private attorney—and only the private attorney—is at risk of facing a section 1983 suit. The government-employee prosecutors will have absolute immunity for their prosecutorial actions. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Kalina v. Fletcher*, 522 U.S. 118 (1997); *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009). In the past, four Justices indicated that it is "highly unlikely that we

would deny prosecutorial immunity to those private attorneys increasingly employed by various jurisdictions in this country to conduct high-visibility criminal prosecutions." *Richardson v. McKnight*, 521 U.S. 399, 418 (1997) (Scalia, J., dissenting, joined by The Chief Justice, Justice Kennedy and Justice Thomas).

Nor is there any defensible line to be drawn between outside counsel hired to participate in a criminal prosecution, and outside counsel retained to perform innumerable other government functions. Prosecutorial functions may receive absolute immunity, but all government lawyer functions generally receive at least qualified immunity. Thus, even if prosecutorial immunity would not apply in many situations involving private outside counsel, qualified immunity would apply, as Filarsky argued in this case. The purposes of immunity would be furthered if outside counsel performing government functions receive the same immunity as government lawyers performing the same functions, whether that function is defending the States in civil litigation, providing legal advice in a variety of regulatory settings, or dealing with government personnel matters as occurred in this case.

Even if the government can induce private attorneys to take on the risks (created if such attorneys lack any immunity) by agreeing up front to indemnify private attorneys if and when they are sued under section 1983, that alternative imposes a new financial burden on governments and at most delays the effect on the government treasury. In a case like this, such an indemnity agreement might be a comfort to an attorney in Filarsky's position, but even if the

private attorney ultimately is found not to have violated anyone's constitutional rights, the City would end up paying substantial sums for that litigation and the defense of outside counsel. These are costs that the government would not otherwise incur, and even if they are viewed as a tradeoff for otherwise having to pay outside counsel higher rates up front (to reflect their higher risk with no immunity), these are at best costs that the government may delay paying, but will not avoid.

Finally, the possibility of obtaining additional malpractice insurance or entering an indemnity agreement with a government client likely will not be a sufficient substitute for actual immunity, from the perspective of at least some private outside counsel. Having malpractice insurance, or having an agreement that someone else ultimately will pay litigation and liability costs, is not the same as knowing up front that legal immunity generally will protect a private lawyer performing government functions from suit. The immunity, after all, is an "immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Thus, it is likely that some private counsel who currently do or would provide representation to governments will decline to do so *at all* in a regime where there is no immunity in the event they are sued under § 1983.

*****

Ultimately, the conclusion is inescapable that failing to accord private outside counsel the same immunity that state government lawyers would receive in the same circumstances will result in decreases in both the quantity and the quality of legal

assistance available to the States. If outside legal assistance becomes more expensive, state officials may have no choice but to forgo such advice altogether or, at a minimum, reduce their resort to such advice, at least in some circumstances. Moreover, some private counsel may choose to discontinue altogether their work for state and local governments and their officials, understandably not wanting to ever even conceivably have to face the prospect of potentially lengthy and costly § 1983 litigation against them.

For all of these reasons, the private outside counsel the States retain to perform state governmental functions should be accorded the same immunity as state government lawyers who perform those same functions. That result is fully consistent with the Court's long line of immunity cases applying a functional approach. And it is fully consistent with the policy factors the Court has considered in its previous cases involving the immunity claims of private defendants. Private outside counsel who represent governments and government officials are performing essential government functions; their profession and the services they provide are readily distinguishable from the situations of prison guards, *Richardson v. McKnight*, or persons invoking self-help remedies in a business dispute. *Wyatt v. Cole*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DEREK SCHMIDT
ATTORNEY GENERAL OF KANSAS
STEPHEN R. MCALLISTER
SOLICITOR GENERAL OF KANSAS
COUNSEL OF RECORD
KRISTAFER AILSLIEGER
DEPUTY SOLICITOR GENERAL
120 S.W. 10TH ST., 2ND FLOOR
TOPEKA, KS 66612
(785) 296-2215
(stevermac@fastmail.fm)

November 21, 2011