

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 PETITIONER

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QUESTION PRESENTED

Whether a lawyer retained to work with government employees in conducting an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a “private” lawyer rather than a government employee.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38) is reported at 621 F.3d 1069. The district court's opinion (Pet. App. 39-51) is not reported.

JURISDICTION

The court of appeals entered its judgment on September 9, 2010. Pet. App. 1. A timely petition for rehearing *en banc* was denied on November 8, 2010. *Id.* A timely petition for a writ of certiorari was filed on February 3, 2011, and the petition was granted by this Court on September 27, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The text of 42 U.S.C. § 1983 is reproduced in the addendum to this brief.

STATEMENT OF THE CASE**A. Factual Background**

1. The City of Rialto, California has a population of approximately 99,000. *See* 2010 United States Census Bureau, City of Rialto, *available at* <http://2010.census.gov/2010census/popmap/ipmtext.php?fl=06:0660466>. Many governmental positions, including that of the Mayor and City Council, are filled on either a part-time or volunteer basis. *See* Rialto City Council Members, http://www.ci.rialto.ca.us/citycouncil_council-member_s.php (mayor, mayor pro tem, and council members all part time). The City has no full-time legal staff. *See* League of Calif. Cities & Calif. State Ass'n of Counties, Cert. Amicus Br. 10 (“California Cities Cert. Amicus Br.”).¹

Respondent became a firefighter for the City in July 2000, and eventually rose to the rank of Engineer. Pet. App. 43. In June 2006, respondent was demoted for sending racially derogatory and pornographic emails. *Id.* at 43-44; J.A. 48-54, 69-73.

¹ Eighty-five percent of all city mayors are part-time, as are the vast majority of local supervisors, commissioners, and council members. *See* FORMS OF LOCAL GOVERNMENT: A HANDBOOK ON CITY, COUNTY AND REGIONAL OPTIONS 5-7, 201 (1999) (Roger L. Kemp., ed.).

Two months later, on August 10, 2006, respondent complained that he was feeling ill while assisting in the control of a toxic spill. Pet. App. 5. Respondent then obtained a series of letters from his doctor that, while excusing him from work for successive shifts, did not place any other activity restrictions on him at all. *Id.* at 5-6. Because of those letters, he did not return to work until September 3, 2006. *Id.*

Given respondent's recent discipline, the City became suspicious of respondent's lengthy work absences, particularly given the omission of any activity restrictions imposed by the doctor. *See* Pet. App. 44. After respondent was seen during a work absence purchasing and loading home-renovation supplies like plywood, lumber, and fiberglass insulation, the City decided to commence an internal affairs investigation to determine whether he was "off-work on false pretenses." *Id.* at 6.

2. The City retained petitioner, Steve Filarsky, to assist with its internal affairs investigation. He was retained because he had 29 years of specialized experience as a labor, employment, and personnel-matters attorney with expertise in conducting internal affairs investigations. Pet. App. 59, 89; J.A. 156. His responsibilities were to provide legal analysis during the investigation, to propose disciplinary actions, and to participate in legal proceedings and hearings. Pet. App. 44-45, 59.

The City asked petitioner, as its legal counsel, to examine respondent. Pet. App. 6-7; *see also* J.A. 156-157. Also present at the interview were respondent's

attorney and two Fire Battalion Chiefs. In addition, Fire Chief Stephen Wells was nearby in the building and consulted with petitioner. Pet. App. 7-8. When respondent was informed that he had been seen purchasing home-improvement materials on a sick-leave day, he admitted making the purchases, but asserted that he had not yet incorporated the materials in his home-improvement project and that the materials were stored unused at his residence. *Id.* at 7, 45.

Petitioner then “confer[red] with ‘the Chiefs,’” Pet. App. 7, advising them that, if respondent were telling the truth and had not been conducting a home-remodeling project on sick days, the investigation should end without respondent suffering any disciplinary action, *id.* at 90-91. After Fire Chief Wells adopted the advice, *id.* at 91, petitioner informed respondent that, if he could produce the unused materials for inspection, he would be exonerated and the investigation would end, *id.* at 46. Petitioner and respondent’s attorney then engaged in “a fairly heated dispute over whether an inspection would be allowed,” and respondent’s counsel threatened to sue both Fire Battalion Chiefs. *Id.* Petitioner stressed repeatedly that, to end the investigation, respondent need only verify his story by producing a sample of the unused materials to his supervisors outside of his house. *Id.* at 8, 61-63, 91-92; *see* J.A. 128-131, 142-145. Respondent continued to refuse. Pet. App. 8.

After consulting with petitioner, Chief Wells signed an order requiring respondent to produce a sample of the unused materials to his supervisors

outside of his home. Pet. App. 46-47. Petitioner himself had no authority to sign that order. *Id.* at 92; see J.A. 134, 156-158. After obtaining the City Attorney's approval, petitioner conveyed the Fire Chief's order to respondent in the presence of his attorney and four union representatives who had been summoned to the interview by respondent's attorney. Pet. App. 93. Respondent "was not threatened with insubordination or termination if he did not comply with [the] order." *Id.* at 48.

While petitioner remained behind, the Battalion Chiefs followed respondent to his home, parked outside, and watched as he produced a sample of unused insulation. The supervisors departed immediately. The entire production process took one minute. Pet. App. 47-48. The City then terminated its investigation of respondent without subjecting him to any disciplinary action. *Id.*

B. Procedural History

1. Respondent filed suit under 42 U.S.C. § 1983 against the City, its Fire Department, the Fire Chief, both Battalion Chiefs, petitioner, and ten unnamed, unidentified individuals. J.A. 18-25. Respondent alleged that the order to produce the building materials for inspection violated his federal constitutional rights to privacy and to be free from unreasonable searches under the Fourth and Fourteenth Amendments. J.A. 19. Respondent's complaint identified petitioner as, "at all times relevant, an employee of the City of Rialto" and "an official policy-maker for the City." J.A. 21. The complaint further alleged that petitioner's actions

“represent actions by the municipality itself.” J.A. 24. The complaint sought compensatory and punitive damages for the one-minute-long inspection, as well as attorneys’ fees. J.A. 24-25.

The district court granted summary judgment and dismissed the suit. Pet. App. 39-51. The court held that all of the individual defendants, including petitioner, were entitled to qualified immunity because respondent failed to demonstrate any “violation of a clearly established constitutional right in that [respondent] was not threatened with insubordination or termination if he did not comply with any order given and none of these defendants entered plaintiffs house.” *Id.* at 48.

2. The court of appeals affirmed in part and reversed in part. Pet. App. 1-38. The Ninth Circuit agreed that, under the circumstances, the order to respondent to briefly produce a sample of the building materials for inspection outside his home did not violate respondent’s clearly established constitutional rights. *Id.* at 37. The court accordingly affirmed the dismissal of all the individual governmental defendants on qualified immunity grounds. *Id.* at 37-38.

The Ninth Circuit, however, held that petitioner alone must be denied summary judgment because, “as a private attorney,” he categorically “[wa]s not entitled to qualified immunity.” Pet. App. 25-26 (following *Gonzalez v. Spencer*, 336 F.3d 832, 834-835 (9th Cir. 2003)). The court of appeals also noted that, while petitioner’s status as a privately retained attorney deprived him of qualified immunity, he

could still be held liable for violating the Fourth and Fourteenth Amendments if he “act[ed] as [an] agent[] of the government.” Pet. App. 27 n.6.

SUMMARY OF ARGUMENT

There can be no serious dispute that the conduct at issue here—legal advice rendered by a member of a governmental investigative team pursuing possible violations of law—falls within the heartland of the qualified immunity doctrine’s protection. The conduct entails discretionary judgments made in close coordination with government employees as part of the execution of an essential governmental activity.

The only question is whether that traditional protection evaporates solely because the lawyer providing the legal advice is temporarily, rather than permanently, engaged by government officials, even though he works in close coordination with government officials and under their direction in performing governmental activities. Both history and reason answer that question “no.”

Historically, the broad sweep of state and local governmental positions, particularly those discretionary decisionmaking positions traditionally filled by attorneys, were staffed by persons working jointly in the private and public sectors. There was no developed civil service in the mid-nineteenth century, so that commonly the full panoply of government officials—everyone from judges, to legislators, to prosecutors—combined public service with private occupations. That was especially necessary at the state and local levels of government,

which lacked both the resources and consistent volume of work that would justify the full-time employment of legal staff.

Accordingly, eligibility for immunity turned not on a person's formal institution into a governmental position, but on whether the temporarily engaged private individual was the functional equivalent of a government employee, considering (i) the nature of the role performed or the service provided, (ii) the close supervision of or coordination with governmental officials, and (iii) the immunity that would have attached to government employees performing the same essential governmental task. Here, petitioner performed the same roles of legal advisor and representative that in-house lawyers routinely provide in larger governments and for which they are routinely accorded (at least) qualified immunity. Petitioner did so, moreover, by working in close coordination with government officials and under their direct supervision, as part of a seamless governmental investigatory team.

The extension of immunity in that context makes particular sense for attorneys because of their distinctive fiduciary obligation to serve zealously the best interests of their governmental clients. Retained attorneys, in other words, must make exactly the same type of client-focused judgments as in-house government lawyers, motivated exclusively by the best interests of the governmental client and the public that it serves, to the exclusion of personal interests.

The central justification for the immunity doctrine is to protect precisely such government-focused decisionmaking from being adversely influenced and contaminated by personal-liability concerns and the enormous distractions of personal-damages litigation. Because temporarily engaged attorneys make the exact same government-focused decisions as permanently engaged attorneys, the public interest requires that they equally come under the umbrella of qualified immunity. Otherwise, given the frequency with which Section 1983 actions are filed, private attorneys face the very real prospect of being left litigating alone and saddled with full responsibility for the entire damages judgment themselves, when all of the governmental employees with and for whom they worked are dismissed on immunity grounds. That risk, in turn, will drive attorneys away from accepting governmental representations, depriving state and local governments across the Nation of critically needed, affordable legal advice.

That result makes no sense at all. The whole *raison d'être* of Section 1983 is to hold *government* officials responsible for improving government's compliance with the law. Contorting the statute into a liability scheme in which only *private* defendants are left holding the liability bag and governments are deprived of a central source of quality legal counsel would stand Section 1983 and its animating purpose on their heads. Both the public interest and taxpayers' wallets will suffer.

ARGUMENT

QUALIFIED IMMUNITY EXTENDS TO PRIVATE ATTORNEYS TEMPORARILY ENGAGED TO PERFORM ESSENTIAL PUBLIC-SERVICE REPRESENTATION IN CLOSE COORDINATION WITH AND UNDER THE DIRECT SUPERVISION OF GOVERNMENT EMPLOYEES

Section 1983 creates a private cause of action against persons who, “under color of [state law],” deprive another “of any rights, privileges, or immunities secured by the Constitution and laws” of the United States. 42 U.S.C. § 1983 (1996). This Court has repeatedly cautioned, however, that “the tort liability created by § 1983 cannot be understood in a historical vacuum.” *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). Rather, “[o]ne important assumption underlying the Court’s decisions in this area is that members of the 42d Congress” that enacted Section 1983 “were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.” *Id.*; see also *Briscoe v. LaHue*, 460 U.S. 325, 330 (1983) (Section 1983’s “all-encompassing language” incorporates common-law immunities).

For that reason, this Court has repeatedly held that Section 1983’s cause of action must “be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.” *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976).

Immunities that are “well grounded in history and reason” will shield or limit the liability of Section 1983 defendants. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

There is no dispute that, as a general matter, the qualified immunity doctrine extends to the type of discretionary judgments made by governmental actors conducting an official investigation into potential wrongdoing that occurred here. *See Malley v. Briggs*, 475 U.S. 335 (1986) (immunity for law enforcement investigators); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (immunity for Executive Branch officials engaged in investigative measures); *cf. Imbler*, 424 U.S. 409 (prosecutorial immunity). Indeed, the court of appeals agreed that all of the other defendants in the case were shielded from suit by immunity. Pet. App. 37-38.

The only question is whether petitioner, who worked hand in glove with his immune co-defendants with the same single-minded focus on governmental and public interests, should be selectively deprived of that qualified-immunity protection solely because he was temporarily, rather than permanently, engaged by the City. Both “history and reason,” *Buckley*, 509 U.S. at 268, foreclose such artificial line drawing and, in fact, establish that private attorneys temporarily retained to provide legal services to the government are not categorically excluded from qualified immunity. When, as here, the nature of the attorney’s role renders him the functional equivalent of a government employee, working in close coordination with and under the direct supervision of

other public employees as an integral participant in essential governmental activities and decisionmaking, the retained attorney enjoys the protection of qualified immunity.

A. History Establishes That Qualified Immunity Shields Private Attorneys Temporarily Engaged To Provide Legal Counsel To The Government In The Execution Of Essential Public Duties

When private attorneys are temporarily engaged by government to provide counsel in the execution of the government's essential functions, the qualified immunity doctrine applies. The Ninth Circuit, however, categorically excluded retained private attorneys from the application of qualified immunity. Pet. App. 27. That categorical holding is wrong and defies both this Court's precedent and history.

1. Precedent Precludes a Categorical Line

When it comes to analyzing the application of qualified immunity to private individuals working for the government or enforcing public laws, this Court has foreclosed the very categorical line that the Ninth Circuit adopted. Instead, this Court has decided immunity cases involving private individuals narrowly and circumspectly.

In *Wyatt v. Cole*, 504 U.S. 158 (1992), this Court held that qualified immunity is not available to private litigants who invoke state replevin, garnishment, or attachment statutes, *id.* at 168-169. The Court stressed, however, that its decision was “a very narrow one,” that turned on the “attenuated”

“nexus between private parties and the historic purposes of qualified immunity,” *id.* at 168, rather than any reflexively wooden barrier to extending qualified immunity to private individuals under any circumstances.

Underscoring that there is no categorical rule against extending immunity to individuals who conjoin public work with private employment, this Court extended qualified immunity to school board members in *Wood v. Strickland*, 420 U.S. 308 (1975), even though, as the Court noted, “[m]ost of the school board members across the country receive little or no monetary compensation for their service,” *id.* at 320 n.11 (citation omitted), and thus are not full-time government employees. Instead, the financial reality is that those school board members who enjoy the protection of qualified immunity, like a large percentage of individuals who fill state, county, municipal, and local governmental positions, must conduct their work for the government in combination with ongoing private employment. See National School Boards Ass’n, *School Boards Circa 2010: Governance in the Accountability Era* § 4, available at <http://www.nsba.org/Board-Leadership/Surveys/School-Boards-Circa-2010/SBCirca10-Section4.pdf> (nearly two thirds of school board members nationally report receiving no salary and only 2% receive more than \$15,000 per year).

Finally, in *Richardson v. McKnight*, 521 U.S. 399 (1997), this Court held that independent-contractor, private prison guards were not shielded by qualified immunity in the absence of historical precedent or policy reasons for extending such protection, *id.* at

405-412. In so ruling, this Court stressed that it was deciding the question “narrowly, in the context in which it arose.” *Id.* at 413. Importantly, the Court expressly left open the availability of immunity to private individuals “briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision.” *Id.*

There thus has been nothing remotely categorical about this Court’s immunity judgments in cases involving private individuals and, in fact, *Richardson* expressly left open the availability of qualified immunity to attorneys like petitioner who are retained to work in close coordination with government employees in the execution of essential governmental activities.

2. History Documents the Extensive Conjunction of Private and Public Service

The Ninth Circuit’s categorical exclusion from qualified immunity of individuals who serve the government in a temporary or partial capacity not only ignores precedent, but also blinks away historical reality. The overwhelming evidence is that, at the time of Section 1983’s enactment, a great percentage of governmental activities were performed by private individuals working on an interim basis for local and state governments. The small size of such governments, tight budget constraints, and the more limited role of government in daily life led to the absence of any extensive or formalized public service at the State or local level in the post-Civil

War era generally, and in particular in the employment of legal counsel. And history documents that immunity protections for such privately retained individuals were a “firmly rooted’ tradition.” *Richardson*, 521 U.S. at 404. Indeed, “[u]pon this point a page of history is worth a volume of logic.” *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

First, “[p]rivate organizations have been involved in public undertakings throughout history.” John D. Donahue, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 34 (1989). The United States in the eighteenth and nineteenth centuries was no exception. Indeed, history documents an extensive “mixture of public and private means and ends in the administration of policies concerning such things as crime, health, education, and welfare.” William J. Novak, “Public-Private Governance: A Historical Introduction,” in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 31 (Jody Freeman & Martha Minow eds., 2009).

Much like local governments of the present day, their predecessors in the first century of the Republic could not financially justify employing a full-time contingent of in-house lawyers, so “government has long engaged in the practice of contracting with private lawyers to represent public interests” and to provide a wide range of legal services vital to the fulfillment of essential governmental activities. Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U. C. DAVIS L. REV. 411, 415 (2009).

Second, those privately assigned legal services included many functions generally considered “public” today—and routinely accorded qualified or absolute immunity—such as criminal prosecution. See “Public-Private Governance,” *supra*, at 31 (“Private prosecution allowed for the wide distribution of the policing function—stretching capacity, spreading costs, and lessening the need for an expansive, professional bureaucracy”); see also *State v. Wilson*, 24 Kan. 189, 193 (1880) (because of the demands of the job and inability to “employ counsel at the public expense,” “public justice sometimes requires that the public prosecutor shall have assistance, and that, too, when the assistance can only come from private sources”).

Indeed, at the time Section 1983 was enacted, “there generally was no such thing as the modern public prosecutor.” *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring). Instead, “[u]p until the late nineteenth century, when the office of the public prosecutor developed, private lawyers regularly prosecuted criminal cases on behalf of both crime victims and the state.” *Delegation of the Criminal Prosecution Function*, *supra*, at 413; see also *Kalina*, 522 U.S. at 124 n.11 (noting that “the office of the public prosecutor in its modern form” was not “common” before 1871).²

² The prevailing practice in England was similar, with prosecutions predominantly conducted by private persons “into the nineteenth century.” See John H. Langbein, *The Origins of*

Third, the Congress that enacted Section 1983 was acutely conscious of the dependence of the federal government on private attorneys. Less than one year before it passed Section 1983, Congress had created the United States Department of Justice to streamline the legal costs that had arisen as a result of different agencies' spending on private counsel. See Homer Cummings & Carl McFarland, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 218-229 (1937); *id.* at 224 (quoting contemporary newspaper account reporting that a bill establishing a government law department "would reduce the expenses of government by more than \$100,000 a year").

Furthermore, the United States Attorney General himself had been expected to maintain simultaneously with his public service an active private law practice until 1853, when the position first became a full-time job. See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 *AM. U. L. REV.* 275, 285 n.46 (1989); see also Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 *DUKE L. J.* 561, 619 (1989).

Even federal judges could and did maintain their own legal practices before state courts until 1812. See James E. Pfander, *Judicial Compensation and*

Public Prosecution at Common Law, 17 *AM. J. LEGAL HIST.* 313, 317-318 (1973).

the Definition of Judicial Power in the Early Republic, 107 MICH. L. REV. 1, 23 (2008).

Fourth, this Nation has a great tradition of private attorneys stepping temporarily into public representations to answer the needs of their government. Many of the early Republic's most storied attorneys had exemplified the practice of joint private and public service. For example, John Marshall was a private lawyer when the Virginia General Assembly retained him to "examine [a dispute] and recommend a settlement" between the Commonwealth and Philadelphia merchant Simon Nathan arising out of Nathan's provision of military supplies during the Revolution. Jean Edward Smith, JOHN MARSHALL: DEFINER OF A NATION 109 (1996). Other governmental roles that Marshall performed while in private practice included those of the Richmond City Recorder, magistrate of the Richmond City Hustings Court, and Virginia's Acting Attorney General. *Id.* at 105, 163. And on an *ad hoc* basis, Marshall served on committees assessing the mental capacities of criminal defendants for the Governor of Virginia. See Leonard Baker, JOHN MARSHALL: A LIFE IN LAW 170-171 (1974).

Daniel Webster likewise was in private practice when he was retained to represent the Second Bank of the United States in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). That was not the only case in which Webster represented the government while practicing privately. See, e.g., *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591 (1846) (representing Massachusetts); *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836)

(representing New Orleans); *President of Cincinnati v. Lessee of White*, 31 U.S. (6 Pet.) 431 (1832) (representing Cincinnati).

Nor would it have been lost on those who enacted this post-Civil War legislation that the late President Abraham Lincoln himself had donned the hat of governmental representation while engaged in private law practice. He accepted an appointment as the Illinois State Attorney *pro tempore* in a number of criminal prosecutions. *See, e.g., An Awful Crime and Speedy Punishment*, SPRINGFIELD DAILY REGISTER (May 14, 1853) (“A. Lincoln, esq. was appointed prosecutor” in a rape case, securing the defendant’s conviction and an eighteen-year prison sentence as “[a] mob came very near getting possession of the base wretch and hanging him.”). Lincoln also served as a judge *pro tempore* in several state cases when the regular circuit judge was conflicted or otherwise unavailable. *See* Harry E. Pratt, “*Judge*” *Abraham Lincoln*, 48 J. ILL. STATE HIST. SOC’Y 28 (Spring 1955). And in 1852, the Illinois General Assembly appointed Lincoln and his law partner to investigate and report on civil claims arising out of the construction of the Illinois and Michigan canal. *See* Letter from Aug. C. French, Gov. to Ill. H.R., *Transmitting the Report of the Comm’rs Appointed to Investigate Canal Claims* (Jan. 8, 1853).

It seems dubious that those who enacted Section 1983 to impose liability on *governmental* actors would have intended a scheme of immunities in which all the government officials would have been excused from the case with only a *private* attorney who temporarily stepped into governmental

representation like Abraham Lincoln left holding the bag. That, however, is where the Ninth Circuit's categorical rule has left Section 1983 law.

Fifth, a critical consideration in the immunity inquiry is the legal environment that the “members of the 42d Congress” that enacted Section 1983 “were familiar with.” *City of Newport*, 453 U.S. at 258. There is no question that those legislators would have been fully familiar with and acutely sensitive to the frequent employment of private attorneys by local and state governments to provide public legal services because they practiced that symbiotic relationship themselves. Representative Samuel Shellabarger, “the author and manager of the bill in the House,” *Owen v. City of Independence*, 445 U.S. 622, 636 (1980), represented governmental entities before this Court while in private practice. *See, e.g., Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888) (representing Wisconsin); *California v. Central Pac. R.R. Co.*, 127 U.S. 1 (1888) (representing California); *Iowa v. McFarland*, 110 U.S. 471 (1884) (representing Iowa and Illinois); *Shields v. Ohio*, 95 U.S. 319 (1877) (representing Ohio). Congressional committees also retained Shellabarger to assist with investigations while he was in private practice. *See* William A. Kinnison, HON. SAMUEL SHELLABARGER: LAWYER, JURIST, LEGISLATOR 42 (1966).

Representative Benjamin F. Butler, another of the bill's “chief supporters” in the House, *City of Newport*, 453 U.S. at 265, had previously been “employed [while in private practice] by Mr. Speed, the Attorney General of the United States, to assist Mr. Stansbury in the argument of the case of

Milligan v. United States” before this Court. Benjamin F. Butler, AUTOBIOGRAPHY AND PERSONAL REMINISCENCES OF MAJOR-GENERAL BENJAMIN F. BUTLER 1007-1008 (1892); see *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (Butler appearing for the United States as “special counsel”).

Finally, Senator George F. Edmunds, who managed the Civil Rights Act in the Senate, see *Monell v. Department of Soc. Servs. of N.Y.*, 436 U.S. 658, 684 (1978), also represented government entities before this Court as part of his own private practice. See, e.g., *Douglass v. County of Pike*, 101 U.S. 677 (1879) (representing Pike County); *Interstate Commerce Comm’n v. Alabama Midland Ry. Co.*, 168 U.S. 144 (1897) (representing federal agency); *O’Neil v. Vermont*, 144 U.S. 323 (1892) (representing Vermont); *Chicago v. G. T. Ry. Co. v. Wellman*, 143 U.S. 339 (1892) (representing Chicago).

3. Immunity Precedent Applied Equally to Private Attorneys Providing Governmental Representation

The dual roles that private attorneys commonly performed, moving fluidly between private practice and governmental representations, was reflected in the even-handed application of immunity principles to private attorneys performing governmental services in the nineteenth century. There certainly was no legal precedent for denying immunity solely because the attorney’s engagement for public representation was temporary rather permanent.

a. Common law defenses available

To begin with, both private and public individuals were equally able to invoke the common law defenses of good faith and probable cause when sued for such torts as malicious prosecution or false imprisonment. *Compare Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 404-405 (1851) (naval captain not liable for false imprisonment absent proof of malice), and *Parker v. Huntington*, 68 Mass. (2 Gray) 124 (1854) (overruling demurrer to complaint for malicious prosecution by State's Attorney where malice and lack of probable cause were alleged), *with Barker v. Stetson*, 73 Mass. (7 Gray) 53, 54 (1856) (private parties not liable for securing a search warrant absent proof of both malice a lack of probable cause), *Carey v. Sheets*, 67 Ind. 375 (1879) (same), *Randall v. Henry*, 5 Stew. & P. 367, 378 (Ala. 1834) (private prosecutor was liable for instituting criminal proceedings maliciously and without probable cause), *Bell v. Keepers*, 14 P. 542, 543 (Kan. 1887) (same), and *Finn v. Frink*, 24 A. 851, 852-853 (Me. 1892) (same).

Courts have continued to evaluate immunity identically for public and private *prosecuting* attorneys, whether that immunity is absolute, *see Kalina*, 522 U.S. at 129, or qualified, *see Buckley*, 509 U.S. at 273 (qualified immunity for investigative functions); *Burns v. Reed*, 500 U.S. 478, 487 (1991) (qualified immunity for providing legal advice to police). *See Polzin v. Gage*, 636 F.3d 834, 838 (7th Cir. 2011); *Forste v. Hensley*, 405 F. App'x 94, 96 (8th Cir. 2010); *Voytko v. Ramada Inn*, 445 F. Supp. 315, 328 (D.N.J. 1978); *Rao v. State*, 425 N.Y.S.2d 888,

890 (N.Y. App. Div. 1980). Even the Ninth Circuit has done so, *Lacey v. Maricopa County*, 649 F.3d 1118, 1131 (9th Cir. 2011) (extending immunity to private attorney acting as special prosecutor on behalf of State), rendering that court's categorical exclusion of petitioner from immunity based on his "private" status here all the more inexplicable. See also *Richardson*, 521 U.S. at 418 (Scalia, J., dissenting) ("I think it 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.").

Those common law defenses, of course, are the foundation on which this Court has grounded qualified immunity. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 815-819 (1982); see also *Malley*, 475 U.S. at 340-341; *Kalina*, 522 U.S. at 132-133 (Scalia, J., concurring).³ Because the common law did not treat private individuals temporarily engaged by the government differently from those permanently engaged, neither should contemporary entitlement to the qualified immunity defense diverge on that basis.

³ The *Malley* court, in fact, specifically cited to *Barker*, *Carey*, *Randall*, and *Finn*, all of which involved private complaining witnesses, in determining the level of immunity accorded to a public officer sued in his capacity as a complaining witness. *Malley*, 475 U.S. at 341 n.3.

b. Judicial and quasi-judicial immunity applied

Courts in the 19th century did not apply the common law doctrines of judicial and quasi-judicial immunity differently based on whether an attorney carrying out quasi-judicial functions came from “private” employment to temporarily fill that governmental role or was, instead, a permanent governmental employee. Instead, the common law rule was that “[w]henver * * * the State confers judicial powers upon an individual, it confers them with full immunity from private suits” in order to ensure that “the officer [to whom] these duties are confided * * * exercise[s] his judgment fully, freely, and without favor * * * [or] fear.” Thomas M. Cooley, *A TREATISE ON THE LAW OF TORTS* 477 (2d. ed. 1888). Judicial and quasi-judicial immunities were thus consistently accorded not only to “judges proper,” *id.* at 479, but to any person, private or otherwise, performing any one of a wide variety of judicial and quasi-judicial functions including:

- justices of the peace, *see Pratt v. Gardner*, 56 Mass. (2 Cush.) 63, 70 (1848) (same immunity extends “to a justice of the peace as to any other judicial officer”); *Reardon v. Russell*, 75 Mass. (9 Gray) 366, 366-367 (1857) (citing statute prohibiting justices of the peace from being employed only by clients who had previously appeared before them); *Coleman v. Roberts*, 21 So. 449, 450 (Ala. 1896) (ex officio justice of the peace was immune to same extent as any judicial officer); *Pruitt v. Armstrong*, 56 Ala. 306, 307 (1876)

(analogizing justice of the peace to a “private agent,” as distinguished from a sheriff);

- witnesses “governmental or otherwise” who testify in court proceedings, *Briscoe*, 460 U.S. at 335;
- arbitrators to private disputes, *see* *Cooley*, *supra* at 480; *accord Burns*, 500 U.S. at 500 (Scalia, J., concurring) (“As is evident from the foregoing catalog, judicial immunity extended not only to public officials but also to private citizens (in particular jurors and arbitrators)”); *Jones v. Brown*, 6 N.W. 140, 142 (Iowa 1880) (arbitrators hired by plaintiffs were immune because they were “in a certain sense a court”);
- grand and petit jurors in their deliberations, *see* *Cooley*, *supra* at 479; *Turpen v. Booth*, 56 Cal. 65, 67 (1880);
- notaries public, *see* *Henderson v. Smith*, 26 W. Va. 829 (1885) (superseded by statute in 1985 as stated in *Galloway v. Cinello*, 188 W. Va. 266, 271-272 (1992)); *First Nat’l Bank of Broadway, Va. v. Cootes*, 81 S.E. 844, 845 (W. Va. 1914) (notary public was cashier of private bank); and
- architects and engineers acting in a judicial capacity, *see* John Cassan Wait, *THE LAW OF CONTRACTS* 239 (1st ed. 1901) (describing the “universal custom in construction contracts” at that time of designating the engineer or architect on the project as “a referee, umpire or arbitrator for the determination of questions in dispute, or of matters of facts necessary to be determined in order to

complete the works or to pay for them,” and compiling English authorities).

The extension of judicial and quasi-judicial immunity to private attorneys has carried through to the present day. *See, e.g., Constant v. Wilson*, 856 F.2d 202 (Fed. Cir. 1988) (immunity conferred upon private individuals appointed to serve as special masters); *Bailey v. Utah State Bar*, 846 P.2d 1278, 1281 (Utah 1993) (state bar associations with respect to their judicial functions); *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993) (members of those associations who conduct bar disciplinary proceedings); *Kissell v. Breskow*, 579 F.2d 425, 429-430 (7th Cir. 1978) (same); *Tindell v. Rogosheske*, 421 N.W.2d 340, 341 (Minn. Ct. App. 1988) (private persons appointed as guardians ad litem); *In re Scott County Master Docket*, 618 F. Supp. 1534, 1573 (D. Minn. 1985) (same), *aff'd sub nom. Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987).

Whether or not all of those immunities would be incorporated into Section 1983, the historical record is clear that immunity principles commonly extended to private attorneys temporarily retained to contribute their skills to the execution of essential governmental functions and services.

c. The unique fiduciary role of attorneys

Unsurprisingly, given that history, the common law generally “*did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.” *Richardson*, 521 U.S. at 407 (citing Joel Prentiss Bishop, COMMENTARIES ON NON-CONTRACT

LAW §§ 704, 710 (1889)). English barristers historically enjoyed (and still enjoy) a common law immunity from suit for professional negligence. *See Tower v. Glover*, 467 U.S. 914, 921 (1984); Bishop, *supra* § 704. As *Richardson* recognized, that immunity derives from the barrister's role as both a private advocate and a public officer owing "a duty, not to his client only, but also to the court, to the members of his own profession, and to the public." *Rondel v. Worsley*, 1. A.C. 191 (H.L.) 227 (Scot.) (1969). At common law, "a barrister [wa]s to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client, but the Court in which the duty is to be performed, and the public at large, have an interest," *Swinfen v. Lord Chelmsford*, 157 Eng. Rep. (Ct. of Exchequer) 1436, 1448 (1860). Rooted in the barrister's public role and responsibilities, the purpose of the common law rule of immunity thus was to ensure that the barrister remained "entirely independent, and act[ed] according to his own discretion and judgment in the conduct of the cause for his client." *Batchelor v. Pattison & Mackersy*, 3 R. (Ct. of Sess.) 914, 918 (Scot.) (1876).

American courts have likewise long recognized the attorney's dual role as a private advocate and public officer deriving from English common law. *See, e.g., Ex parte Bradley*, 74 U.S. (7 Wall.) 364, 374 (1868) (recognizing attorneys as officers of the court); *Robinson's Case*, 131 Mass. 376, 379 (1881) ("An attorney at law is not indeed, in the strictest sense, a public officer. But he comes very near it."); *In re*

Mosness, 39 Wis. 509, 509 (1876) (“[A]ttorneys and counselors of a court, though not properly *public* officers, are *quasi* officers of the state whose justice is administered by the court.”); *In re Austin*, 5 Rawle 191 (Pa. 1835) (“An attorney-at-law is an officer of the court.”).

Indeed, unlike the vast majority of private individuals and entities that may contract for work with the government, *see Richardson, supra*, attorneys—like the governmental employees with whom they team—are sworn to uphold the Constitution and laws. *See* CAL. BUS. & PROFESSIONS CODE § 6067 (West 2011) (“Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability.”); SUP. CT. R. 5.4 (“I,, do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.”); *see also In re Griffiths*, 413 U.S. 717, 725-727 (1973) (noting that attorneys take an oath to uphold the Constitution).

To be sure, mere status as a lawyer and officer of the court alone does not suffice to entitle an attorney to immunity under Section 1983. *See Tower*, 467 U.S. at 923 (no immunity from allegations of intentional misconduct by public defenders). Instead, *Richardson* properly cabined the relevant context to work “at the behest of the sovereign,” 521 U.S. at 407, thereby implicitly recognizing the long

tradition, well-known to both the common law and those who enacted Section 1983, of private attorneys temporarily imbedding themselves within public agencies to provide representation and legal counsel in the execution of important governmental operations.

Immunity for attorneys is appropriate in that specific context because lawyers that take on the representation of a governmental entity have a fiduciary duty to act in the government client's best interests, heedless of their own private interests. *See Forrester v. White*, 484 U.S. 219, 223 (1988) (immunity applies to government officials, in part, because their decisions "above all are informed by considerations other than the personal interests of the decisionmaker"). Unlike the private prison guards in *Richardson*, who were presumed to act out of economic motivation and business self-interest, 521 U.S. at 409-411, "[t]he relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity," *Cox v. Delmas*, 99 Cal. 104, 123 (1893); *see Griffiths*, 413 U.S. at 724 n.14 (noting the attorney's fiduciary duty to further the clients' interests, rather than personal interests, "by all lawful means"). It thus is "an attorney's duty to protect his client in every possible way" and to "devot[e] his entire energies to his client's interests" rather than his own. *Santa Clara County Counsel Attorneys Ass'n v. Woodside*, 869 P.2d 1142, 1155 (Cal. 1994) (internal quotation marks and citation omitted); CAL. RULES OF PROF'L CONDUCT R. 3-120 cmt. (2010) ("The relationship between an attorney

and client is a fiduciary relationship of the very highest character.”); *see also* American Bar Ass’n, MODEL RULES OF PROF’L CONDUCT, PREAMBLE ¶ 2 (2010) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”); *id.* R. 1.7 cmt. ¶¶ 1, 31 (providing that “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client”).⁴ The “nature of the [temporarily engaged attorney’s] relation to the government” and to the pursuit of governmental ends thus is no different from a permanently engaged government lawyer. *Richardson*, 521 U.S. at 404.

That fiduciary duty likewise ensures that attorneys retained to represent governmental clients work under the direction and control of the governmental client. *See* American Bar Ass’n, MODEL RULES OF PROF’L CONDUCT R. 1.2 (2010) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation * * * [and] shall consult with the client as to the means by which they are to be pursued.”); CAL. RULES OF PROF’L CONDUCT R. 3-120 cmt. (2010) (“In all client matters, a member is advised to keep clients’ interests paramount in the course of the member’s representation.”).

Attorneys, in other words, bear little resemblance to the independent-contractor private

⁴ The only qualifications are the same duties of ethical conduct, candor, and honest dealing as officers of the court that apply with equal force to attorneys in permanent government employment.

prisons, subject only to “limited direct supervision,” in *Richardson*, 521 U.S. at 413, or to public defenders whose central duty is to work at cross-purposes with the government. Attorneys like petitioner who are temporarily retained to represent and advise the government commonly work hand in glove with their public clients, imbedded right alongside government employees. They provide their legal services and advice in direct and close coordination with their governmental clients, with the ultimate decisionmaking authority resting in the fully and candidly informed governmental client. *See* Pet. App. 7-8 (petitioner recommends legal strategy to Fire Chief Wells, but Chief Wells executes the order to view respondent’s unused building materials).

Those fundamental characteristics of the attorney’s role and its relation to the governmental interest, when combined with the extensive history of private attorneys representing governmental entities, explain why this Court properly noted in *Richardson* the distinct historic claim to immunity that private attorneys historically enjoyed when “serving as an adjunct to government in an essential governmental activity, or acting under close official supervision,” 521 U.S. at 413, and “at the behest of the sovereign,” *id.* at 407. When, as here, the legal service is closely integrated with government officials and governmental activities, temporarily engaged attorneys are making the same judgments for the same public purposes with the same commitment to the government’s and public’s institutional interests and the same public policy consequences as permanently engaged government lawyers. And

qualified immunity's protection of that same area of discretionary judgment is just as necessary.

In short, the line that the Ninth Circuit perceived between public and private practice was, in historic actuality, a bridge. History documents that the type of temporary or interim adjunct governmental representation provided by petitioner in this case was paradigmatic of how government executed its legal functions and operations at the time of Section 1983's enactment. That is the reality against which immunity principles necessarily were formulated in the common law, and that is what Section 1983 carried forward. *See Kalina*, 522 U.S. at 123 ("Congress intended the statute [Section 1983] to be construed in the light of common-law principles that were well settled at the time of its enactment.").

4. The Historically Proper Test is Whether the Temporarily Retained Attorney Worked Under the Direction of Government Employees in Executing an Essential Governmental Activity

Because private attorneys pervasively represented governmental entities and were a primary source of the legal services and counsel that State and local governments obtained at the time of Section 1983's enactment (as well as now), immunity doctrines protecting governmental activities and court processes would be of little value if they did not extend to governmentally retained private attorneys. For example, a prosecutorial immunity doctrine that walled off all private attorneys would have been a feeble protection for the government's interests

because the number of *public* prosecutors, rather than temporarily engaged, private-attorney prosecutors in 1871, was low. See *Kalina*, 522 U.S. at 132 (Scalia, J., concurring); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995) (“[B]ecause of deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century.”) (footnote omitted).

Likewise, the immunity afforded to executive branch officials administering and enforcing laws, see generally *Mitchell v. Forsyth*, *supra*, would have been a hollow promise if it did not extend to the manifold attorneys general, county attorneys, and city attorneys providing vital legal counsel to core governmental operations in conjunction with their private practices.

Still other executive, legislative, and judicial branch functions were also commonly performed by private persons temporarily engaged to fill the public role. Indeed, were the police activities immunized in *Malley* confined to formally employed public police officers, the immunity doctrine would have had little meaning at the time of Section 1983’s enactment because, until the mid-nineteenth century, police duties were performed by a “patchwork of private and quasi-public” individuals. Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 579 (2005). To conclude that immunity principles do not include such temporarily retained

private individuals thus would be to open a yawning chasm between doctrine and historical reality.

Accordingly, the test for immunity that is most consonant with historical practice is whether the attorney is the functional equivalent of a government employee based on (i) the nature of the advisory or representative role the attorney performs, (ii) the control exercised by and close coordination with government employees or officials, (iii) the role that the attorney's legal counsel plays in the execution of "an essential governmental activity," *Richardson*, 521 U.S. at 413, and (iv) the immunity accorded to government employees performing the same role. Particularly when combined with the attorney's fiduciary duty to advance exclusively the governmental interests of his government client subject to that client's control and direction, those factors ensure that the immunity attaches only to the extent that the attorney's work serves the same public ends as the work of an attorney internal to the government would.

First, that approach to identifying who is eligible for qualified immunity based on their functional equivalence to government employees comports with this Court's precedent. In *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), this Court extended legislative immunity to local legislators because of the "functional equivalen[cy]" between local and regional legislators, the latter of which already had been accorded immunity, *id.* at 53. Likewise, in both *Mitchell* and *Harlow*, *supra*, this Court held that entitlement to immunity focused on the governmental role performed by individuals, not their

title or “station,” *Harlow*, 457 U.S. at 812. See *Mitchell*, 472 U.S. at 521; see also *Kalina*, 522 U.S. at 127 (“[I]n determining immunity, we examine ‘the nature of the function performed, not the identity of the actor who performed it.’”). Finally, *Richardson* itself stressed that the “nature of the[]” private individual’s “relation to the government” is a relevant factor in immunity analysis, *id.* at 404, and that immunity might be most appropriate when a private attorney “serv[es] as an adjunct to government in an essential governmental activity,” *id.* at 413.⁵

⁵ In *Richardson*, this Court stated that the “functional approach” to immunity analysis is used “to decide which type of immunity—absolute or qualified—a public officer should receive.” 521 U.S. at 408. The point here, however, is not that an attorney’s function is dispositive of entitlement to immunity, but that the nature of the role played by the attorney and the service provided to the governmental entity are important factors in determining the character of the attorney’s relationship to the government and whether the temporarily retained attorney is providing, as an adjunct, the same services for which permanently engaged lawyers in a larger governmental entity would be immune.

Having said that, it is far from clear why, if a functional analysis is appropriate to discern the line between absolute and qualified immunity, it is not equally adept at discerning the line between no immunity and qualified immunity. See *Forrester*, 484 U.S. at 224 (“Running through our cases, with fair consistency, is a ‘functional’ approach to immunity questions other than those that have been decided by express constitutional or statutory enactment.”); cf. *West v. Atkins*, 487 U.S. 42, 56 (1988) (the nature of the function performed by a private person for the State determines whether he “is acting under color of state law” for purposes of Section 1983 liability).

Here, petitioner worked arm in arm with a team of governmental employees fulfilling the quintessential governmental role of conducting an investigation into the possible violation of civil service laws and the supervision of a governmental servant responsible for providing critical health and safety services to the public. Petitioner performed the same role that an in-house lawyer in a government with a larger legal budget and staff would provide, and was obligated by his fiduciary duty to serve zealously and forthrightly the same public and governmental interests that the Fire Chief and Battalion Chiefs protect. Whether that conduct merits immunity should “be determined by its character, and not by the character of the agent” as temporarily or permanently engaged government counsel. *Ex parte Virginia*, 100 U.S. 339, 348 (1879) (judicial immunity).⁶

Second, to deprive individuals of the protection of qualified immunity simply because they were not permanent members of the civil service or formally deputized government employees would inject a level of formalism and asymmetrical liability into the immunity inquiry that has no anchor in historical practice. Indeed, the qualified immunity doctrine largely predates the development of a formalized or

⁶ In all likelihood, the county judge whose immunity was at issue in *Ex parte Virginia* would have also been engaged in private practice. The Virginia Constitution did not bar the “practice of law” by county judges until 1902. *Compare* VA. CONST., ART. VI, § 24 (1872), *with* VA. CONST., ART. VI, § 105 (1902).

comprehensive cadre of governmental lawyers, let alone any evidence of formal deputization processes by local and state governments. See FEDERAL JUSTICE, *supra*, at 225 (“[T]he Department of Justice came into formal existence on July 1, 1870.”); *Delegation of the Criminal Prosecution Function*, *supra*, at 432 (“[F]rom the Founding until the early twentieth century, the state and even victims themselves regularly retained private attorneys to prosecute criminal offenses.”); *Privately Funded Prosecution*, *supra*, at 43 (although by 1820 “most states had established local public prosecutors[,] * * * because of deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century”); David A. Sklansky, *Private Police*, 46 UCLA L. REV. 1165, 1205 (1999) (early American law enforcement “drew no clear lines between public and private”) (internal quotations and citation omitted).

Indeed, “one of the dominant characteristics of American policymaking over time has been the curious blending of public and private initiatives, techniques, and institutions.” “Public-Private Governance,” *supra*, at 26. Throughout the nineteenth century, the blurred and overlapping boundaries of public and private work for attorneys and others served the public interest as “cash-starved state governments” relied on private parties to “stretch[] capacity, spread[] costs, and lessen[] the need for an expansive, professional bureaucracy.” *Id.* at 30-31 (describing, *inter alia*, advantages of private

prosecutions of local regulatory laws in nineteenth century).

Third, the common law forecloses overlaying immunity doctrine with formalisms like job title or heavily paperworked appointments. Rather, the common law focused on the governmental role and activity in question and whether the private individual was performing, at the behest of the government, the same function that a government employee would otherwise perform. In *Dunn v. Mellon*, 23 A. 210 (Pa. 1892), for example, the Pennsylvania Supreme Court held that immunity attached to a private citizen “as the mere representative of a municipal officer,” since the officer himself could have performed the duty “without any personal liability,” *id.* at 210. The public-private distinction made no difference to the court. What was critical was that the private person was performing activities for which a government employee in the same position would have enjoyed immunity. “If, in such circumstances, the municipal officer would be exempt from individual liability for executing the orders of the city, we know of no reason why the citizen should be subject to such liability,” especially since he was “apparently subject to the duty of obeying the mandatory order of the authorities.” *Id.* at 210-211; *see also Lee Tung v. Burkhart*, 116 P. 1066, 1069 (Or. 1911) (no liability for private defendant sued for evicting plaintiffs at behest of municipal authorities, because “the whole transaction * * * was merely an assertion of her claim of right to render to the municipal officers of Portland assistance, by vacating the building and preparing it

to be taken down in obedience to their command, the authority for which defendant appears not to have questioned”).

Fourth, nor would such paperwork or labeling formality do anything to serve the purposes of Section 1983 or its immunity doctrines. A government’s level of bureaucratic hierarchy or complexity says nothing about that government’s respect for the constitutional or civil rights of the individuals with whom it deals, nor does it alter the need for and value of obtaining affordable legal counsel for governmental operations. To be sure, such bureaucratic formalities may well reflect the size and financial resources of the government at issue. But those factors are utterly irrelevant to the rights that Section 1983 seeks to protect and the valuable public purposes that the qualified immunity doctrine advances.

On the other hand, hinging immunity critically on the formality or permanency of governmental appointments would turn qualified immunity into a complex factual inquiry, infused with fine line-drawing, and capable only of (i) derailing qualified immunity’s protection from suit by injecting fact disputes that must be resolved at trial, or (ii) rewarding bureaucratization for the sake of bureaucratization, rather than encouraging the compliance with federal law that is the aim of Section 1983. *Cf. Anderson v. Creighton*, 483 U.S. 635, 645-646 (1987) (noting that “entangling” the qualified

immunity inquiry in excessive “complexity” can “utterly defeat[]” the protection that qualified immunity is meant to provide).⁷

B. Extending Qualified Immunity To Private Attorneys Retained To Provide Legal Counsel To Governmental Entities In The Execution Of Essential Public Duties Fulfills The Purposes Of The Immunity Doctrine

Extending the same qualified immunity that is already accorded to permanently engaged government attorneys to temporarily engaged attorneys, who (like petitioner) provide legal counsel to local and state governments in the execution of their essential public functions, fully comports with the reasons for the immunity doctrine.

1. Private Attorneys Remain a Critical Source of Legal Advice for Local and State Governments

Ensuring that government officials have access to legal counsel in the execution of their important public functions is critical to the integrity of governmental operations and their compliance with

⁷ For example, how precisely it could be determined when a mayor paused from being a mayor or when a state legislator took off her legislative hat, or which hours in the day a private prosecutor counts as public and which as private are intractable inquiries turning on standards nowhere articulated in the common law. *See Richardson*, 521 U.S. at 422 (Scalia, J., dissenting) (“I see no sense in the public-private distinction, neither do I see what precisely it consists of.”).

the same federal laws and constitutional provisions that Section 1983 enforces. But, given the realities of State and local budgets, limitations on the size of government, and the variety of legal needs that can confront public agencies, commonly the most “cost-effective and fiscally responsible manner” for governments to “meet their needs for legal services * * * is to hire private attorneys either to provide specific services on an ad hoc basis or to serve as city attorney or county counsel.” California Cities Cert. Amicus Br. 5-6; *see id.* at 8-9.⁸

Indeed, the need to employ private attorneys cuts across governments. With respect to city attorneys, for example, 78% of those employed by California cities—including the City of Rialto—assume that role of public representation while engaged in private

⁸ Governmental reliance on private individuals to execute critical governmental operations and functions, of course, is not limited to attorneys. Volunteer firefighters, police reserve corps, and adjunct university professors are also commonplace means of providing governmental services in a cost-effective and resource-calibrated manner. *See, e.g., Griffith v. Lanier*, 521 F.3d 398, 399 (D.C. Cir. 2008) (The Metropolitan Police Department’s Reserve Corps is a body of “unpaid volunteers who assist full-time officers * * * in the provision of law enforcement services.”). But because this Court’s precedent has approached immunity questions narrowly, *see Richardson*, 521 U.S. at 413, this brief focuses on the distinctive claim to immunity, grounded in both history and “special policy concerns,” *id.* at 404 (citation omitted), presented by privately retained attorneys that work in close coordination with government officials in rendering essential governmental services.

practice. California Cities Cert. Amicus Br. 6 (quoting Philip D. Kahn, *Privatizing Municipal Legal Services*, 10 Local Gov't Studies, No. 3, at 1 (1984)). Water districts, school districts and boards, and counties rely heavily on private counsel as well. *Id.* (citing Kahn, *supra*, at 2 & n.8).⁹

State governments also rely upon private attorneys to meet their needs for distinctive legal services. *See, e.g., Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez*, 130 S. Ct. 2971 (2010) (California public law school represented by private attorney); *Kansas v. Marsh*, 548 U.S. 163 (2006) (Kansas represented by private attorney); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Michigan public university represented by private attorney); *Florida ex rel. Attorney General v. United States Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (States challenging legality of Patient Protection and Affordable Care Act represented by private attorneys), *cert. granted*, Nos. 11-393, -398, -400 (Nov. 14, 2011).

So too does the federal government. *See, e.g.,* General Accounting Office, PRIVATE ATTORNEYS: INFORMATION ON THE FEDERAL GOVERNMENT'S USE OF PRIVATE ATTORNEYS (Oct. 1992); William V. Luneburg, *Contracting by the Federal Government for*

⁹ "Few cities and counties provide any compensation for service on school boards, and often it is difficult to persuade qualified persons to assume the burdens of this important function in our society." *Wood*, 420 U.S. at 331 (Powell, J., concurring in part & dissenting in part).

Legal Services: A Legal and Empirical Analysis, 63 NOTRE DAME L. REV. 399 (1988); 31 U.S.C. § 3718 & 42 U.S.C. § 404 (both: authorizing the engagement of private attorneys for debt collection); 48 C.F.R. § 7.503(d)(18) (Federal Acquisition Regulations authorize contracts for “legal advice and interpretations of regulations and statutes to Government officials”); Sara Forden, *U.S. Justice Department Said to Hire Lawyer for AT&T Trial*, BLOOMBERG, Oct. 18, 2011; Brian Baxter, *TARP Ends and Treasury Hires 13 Firms to Run What Remains*, THE AM LAW DAILY, Oct. 4, 2010; Federal Deposit Ins. Corp., *MANAGING THE CRISIS*, CH. 18: THE FDIC’S USE OF OUTSIDE COUNSEL (1998).¹⁰

Ensuring that governments have affordable access to high-quality legal representation promotes the same compliance with the law that Section 1983 seeks to enforce. So too does an immunity doctrine that ensures the affordability of legal counsel and the even-handed treatment of governments regardless of their size or legal budgets.

¹⁰ While the federal government is not subject to suit under Section 1983, litigation under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), presents the same qualified immunity questions, and the scope of immunity in both contexts is coextensive. See, e.g., *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (“Although this case involves suits under both § 1983 and *Bivens*, the qualified immunity analysis is identical under either cause of action.”).

2. Immunity Prevents Timidity in the Provision of Legal Advice

“[U]nwarranted timidity” is “the most important special government immunity-producing concern.” *Richardson*, 521 U.S. at 409. That is because immunity at common law existed in large part to mitigate “the danger that the threat of * * * liability would deter [a government employee’s] willingness to execute his office with the decisiveness and judgment required by the public good.” *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974), *abrogated in part not relevant by Harlow*, 457 U.S. 800; *accord Butz v. Economou*, 438 U.S. 478, 495, 507 (1978) (immunity for federal officials). Indeed, a primary reason for this Court’s adoption of an objective test for qualified immunity in *Harlow* was “the danger that 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.’” 457 U.S. at 814 (alteration in original; citation omitted). Qualified immunity thus recognizes that, “where an official’s duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken ‘with independence and without fear of consequences.’” *Id.* at 819 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)); *see also Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (qualified immunity’s “accommodation for reasonable error exists because ‘officials should not err always on the side of caution’ because they fear being sued”).

That vital interest in ensuring that the public interest alone, and not concerns about personal

liability, motivates governmental decisionmaking applies doubly to temporarily retained attorneys.

First, immunity would ensure that the advice rendered by retained attorneys to government officials is comprehensive, candid, and unflinching even when sensitive, hurried, or unpopular decisions must be made. What is critical is that the legal advice given to guide the actions of government officials be motivated exclusively by professional judgment and responsibility, rather than be hesitant or hemmed in by litigation intimidation. Whether the attorney providing the advice spends the rest of her day advising other public clients or private clients is quite beside the point. Qualified immunity's concern is the comprehensive protection of discretionary governmental decisionmaking during those times devoted to governmental service.

Purely public-minded advice, however, subsists with great difficulty in an environment in which retained attorneys face the substantial risk of personal liability created by Section 1983, a statute that now "pours into the federal courts tens of thousands of suits each year." *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting); see Martin A. Schwartz, SECTION 1983 LITIGATION: CLAIMS & DEFENSES § 1.01[B] & n.15 (2011) ("[T]oday, between 40,000 and 50,000 § 1983 actions are commenced in federal court each year.") (citing 1998-1999 statistics); David W. Neubauer, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM 73 (10th Ed. 2010) ("Approximately 1250 *Bivens* cases are filed annually in the Federal Courts.").

But that is not all: temporarily engaged attorneys face the even greater risk that they *alone* will be left holding 100% of the liability bag for collective governmental actions because (as occurred here) all of the permanent government employees will be dismissed on immunity grounds. Section 1983 actions not uncommonly seek to impose joint and several liability on multiple defendants. “In joint and several liability systems,” however, “a solvent defendant, if found to be responsible for the plaintiff’s harm, must bear the entire cost of the injury even if other potential defendants are immune, insolvent, or excluded from liability for any other reason.” Jonathan Cardi, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293, 1294-1295 & n.7 (1997) (citing Edward J. Kionka, *Recent Developments in the Law of Joint and Several Liability and the Impact of Plaintiff’s Employer’s Fault*, 54 LA. L. REV. 1619, 1620 (1994)).¹¹

¹¹ According to the article, only a handful of jurisdictions soften this rule when the immune entity has a greater degree of fault than the remaining defendant. *See, e.g., Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1180 (5th Cir. 1987) (limiting joint and several liability when immune employer had greater degree of fault than remaining defendant); *Apportioning Responsibility, supra*, at 1294-1295 n.7; *see also* Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 51-52 (1992).

The selective withholding of immunity from temporarily engaged attorneys thus exposes them to an extraordinary liability risk.

Second, qualified immunity encourages governmental officials and employees to seek out the best legal advice available unconstrained by concerns about imposing the heightened financial risk of indemnification on the government. The use of Section 1983 to hold temporarily engaged private attorneys liable for 100% of that attorney's *and the immune defendants'* liability, *see Apportioning Responsibility, supra*, thus not only would be textually and historically anomalous, but also would have profoundly adverse consequences for the quality and caliber of governmental decisionmaking. That is because, if joint and several liability is alleged, any duty to indemnify the private attorney would sweep in with it the duty to indemnify the full damage award, including those damages attributable to the dismissed, immune government defendants. The indemnification obligation accordingly would unravel the immunity accorded to the permanent government defendants, and would confront any indemnifying government with the full measure of liability. That is precisely what qualified immunity is supposed to protect against. *See, e.g., Harlow*, 457 U.S. at 807, 819 (immunity justified by "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of public authority," and because "the public interest may be better served by action taken with independence and without fear of

consequences”) (internal quotations and citation omitted).

That risk of liability, moreover, is especially chilling in cases like this that involve labor and employment law. This Court has long recognized the distinct risk to governmental effectiveness and interests posed by litigation over governmental employment and personnel decisions. Accordingly, “government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary,” *Connick v. Myers*, 461 U.S. 138, 146 (1983), which “could compromise the proper functioning of government offices,” *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004). Whether the advising attorney is temporarily or permanently engaged by the government, the risk that the attorney will temper advice or refrain from action out of concern about “what conclusions a jury would later draw” remains the same. *Waters v. Churchill*, 511 U.S. 661, 676 (1994) (plurality opinion).

Particularly in those areas of governmental activity most susceptible to civil rights claims, like criminal and labor law, it can take both substantive limitations on legal claims (like *Connick*) and strong immunity protections to fend off “a systematic disincentive” to “underenforce[]” the law. *Atwater v. City of Lago Vista*, 532 U.S. 318, 351 (2001). That protection cannot exist, however, under the type of asymmetrical liability scheme devised by the court of appeals here, where the viability of suit (or forced settlements) has everything to do with the size of the relevant government’s bureaucracy, and nothing to

do with any material difference in the governmental function performed or the legal service provided.

3. Litigation Will Deter Private Attorneys from Providing Governmental Service and Representation

Qualified immunity is also needed to ensure that private attorneys are not deterred from representing governmental clients by the “heavy burdens upon their private resources from monetary liability” that the substantial volume of Section 1983 and *Bivens* litigation would impose. *Wood*, 420 U.S. at 320; see *Richardson*, 521 U.S. at 408 (qualified immunity seeks “to ensure that talented candidates [a]re not deterred by the threat of damages suits from entering public service”) (internal quotations and citation omitted).

The risk of deterring attorneys from accepting governmental clients is substantial. Unlike private prisons that have no practicable customer for their detention services other than governmental clients, attorneys can choose to represent private clients just as easily as governmental clients. Thus, if the burdens of governmental representation become too high, attorneys can avoid the world of civil rights liability altogether by simply forgoing governmental representations in their entirety. *Cf. Richardson*, 521 U.S. at 409-410.

Moreover, unlike the highly competitive marketplace for private prison services, *Richardson*, 521 U.S. at 409, private attorneys not uncommonly sacrifice ordinary remuneration levels when

representing the government out of a sense of public duty.

In addition, denial of immunity will lead to skyrocketing professional insurance premiums as private-practice plans have to expand to cover a whole new species of liability—constitutional torts—and the even more substantial risk of being forced to pay the costs of litigating through trial the frequently leveled claims that arise under Section 1983. In this case, for example, it took nothing more than the suggestion that respondent corroborate his explanation to have his attorney threatening to sue almost everyone in the room. Pet. App. 46.

There is no “free lunch”: “as civil-rights claims increase, the cost of civil-rights insurance increases” commensurately. *Richardson*, 521 U.S. at 419 n.3 (Scalia, J., dissenting). Professional liability policies typically exclude various kinds of claims from their coverage, including in some cases claimed violations of the plaintiff’s constitutional rights. *See generally* Willy E. Rice, *Insurance Contracts and Judicial Decisions Over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights: An Historical and Empirical Review of Federal and State Court Declaratory Judgments 1900-2000*, 35 TORT & INS. L. J. 995 (2000) (surveying widespread variations in coverage for claimed civil rights violations). Furthermore, the insured remains liable for the amount of any adverse judgment in excess of the coverage provided by the policy.

Still worse, while qualified immunity determines the defendant’s amenability to suit using an objective

standard, *see Harlow*, 457 U.S. at 816-817, an insurer's duty to defend depends entirely on the language of the plaintiff's allegations as the plaintiff chooses to plead them, *see* 44 Am. Jur. 2d Insurance § 1400 (2011) ("Generally, the obligation of a liability insurance company under a policy provision requiring it to defend an action brought against the insured by a third party is to be determined by the allegations of the complaint or petition in such action.") (footnote omitted).

The risk of making governmental representation cost prohibitive for both the government and the attorneys is particularly acute when, as commonly occurs and happened here (J.A. 24-25), punitive damages are sought. California, like sixteen other States, forbids insurance coverage for punitive damages awards against individuals liable for non-vicarious tort violations.¹²

¹² *See PPG Indus., Inc. v. Transamerica Ins. Co.*, 975 P.2d 652, 657 (Cal. 1999) ("[O]ur public policy prohibits indemnification for punitive damages."); *Bohrer v. Church Mut. Ins. Co.*, 12 P.3d 854, 856 (Colo. App. 2000); *Bodner v. United Servs. Auto Ass'n*, 610 A.2d 1212, 1221-1222 (Conn. 1982); *United States Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1064 (Fl. 1983); *Beaver v. Country Mut. Ins. Co.*, 420 N.E.2d 1058, 1061 (Ill. App. Ct. 1981); *Grant v. North River Ins. Co.*, 453 F. Supp. 1361, 1370-1371 (N.D. Ind. 1978); *Hartford Accident & Indem. Co. v. American Red Ball Transit Co.*, 938 P.2d 1281, 1286 (Kan. 1997); *Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359, 361-362 (Me. 1982); *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 216 (Minn. 1984); *Johnson & Johnson v. Aetna Cas. & Sur. Co.*, 667 A.2d 1087, 1091 (N.J. Super. Ct. App. Div. 1995); *Biondi v. Beekman Hill House Apartment Corp.*, 692

The consequence is obvious: facing “potentially disabling threats of liability,” *Harlow*, 457 U.S. at 806, attorneys will no longer be willing or able to afford to take on governmental representations.

There is, moreover, no countervailing gain for civil rights enforcement accomplished by a liability scheme in which recovery depends entirely on the lottery-like happenstance that one of the governmental defendants turns out to have been temporarily engaged from private practice. The seriousness of civil rights violations and the need for remediation has everything to do with the nature of the governmental activity engaged in and the supervisory responsibility of governmental officers, and nothing whatsoever to do with whether, at other times, one of the defendants dons a non-governmental hat.

N.Y.S.2d 304, 309 (N.Y. App. Div. 1999); OHIO REV. CODE ANN. § 3937.182(B) (West 2001); *Dayton Hudson Corp. v. American Mut. Liability Ins. Co.*, 621 P.2d 1155, 1160 (Okla. 1980); *Butterfield v. Giuntoli*, 670 A.2d 646, 654-655 (Pa. 1995); *Allen v. Simmons*, 533 A.2d 541, 544 (R.I. 1987); *City of Fort Pierre v. United Fire & Cas. Co.*, 463 N.W.2d 845, 848 (S.D. 1990); UTAH CODE ANN. § 31A-20-101 (West 2003).

Tennessee is not one of those States, *West v. Pratt*, 871 S.W.2d 477, 480 (Tenn. 1994), which simply underscores the unusual “marketplace” conditions in which *Richardson* was decided.

4. Qualified Immunity Will Prevent Attorneys from Being Distracted in the Performance of Their Duties

Finally, qualified immunity is an immunity from suit, *Mitchell*, 472 U.S. at 526, precisely because of the extensive distraction that litigation causes from the performance of ongoing responsibilities, *see Richardson*, 521 U.S. at 411. *See Harlow*, 457 U.S. at 814, 816 (social costs of suits against government officials include “diversion of official energy from pressing public issues” and “distraction of officials from their governmental duties”).

In other words, the prospect of damages liability is just the beginning of the toll that vulnerability to litigation exacts. Absent qualified immunity *from suit*, privately retained attorneys must now also factor into retention decisions the enormous time and resource costs associated with being subjected to defending against damages claims for years going forward, and enduring “the costs of trial or * * * the burdens of broad-reaching discovery.” *Mitchell*, 472 U.S. at 526 (citation omitted). For example, more than five years after he provided legal advice to Chief Wells, petitioner is left fighting and litigating all alone constitutional tort claims and punitive damages arising from an order he never gave and an alleged search that he did not conduct.

Unlike the prison contractors in *Richardson*, whose customer base is confined to governmental entities, private attorneys can eschew the representation of governments. Given the time, resource, and financial costs that the Ninth Circuit’s

rule has laden onto governmental representations, only “the most resolute” public-minded attorneys, “or the most irresponsible” will be willing to take on such cases. *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.)).

Such a compelled withdrawal of private attorneys from public service due to financial and resource exhaustion would have devastating consequences for the large number of State and local governments that depend critically upon those attorneys in the performance of essential governmental activities and that would be deprived of affordable access to quality legal advice. *See generally* League of California Cities Cert. Amicus Br. at 4-9. When resource-constrained and “cash-starved” state and local governments can no longer rely on private attorneys to “stretch[] capacity, spread[] costs, and lessen[] the need for an expansive, professional bureaucracy,” “Public-Private Governance,” *supra*, at 30-31, many governments will have no choice but to forgo legal advice and representation. That is because expanding governmental bureaucracies is commonly neither politically nor financially viable and, quite frankly, makes no sense at all for small governments for which the need for legal services is sporadic and variable.

What a surprise it would be to those who enacted Section 1983 to *enhance* state and local governments’ compliance with the law to discover that, through convoluted contortions of statutory purpose and history, Section 1983 now affirmatively *obstructs* the

efforts of government to understand their legal obligations and to comply with them.¹³

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

¹³ See *Wyatt*, 504 U.S. at 180 (Rehnquist, C.J., dissenting) (“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.’”) (citation omitted).

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ADDENDUM

**TITLE 42. THE PUBLIC HEALTH AND
WELFARE**

CHAPTER 21. CIVIL RIGHTS

SUBCHAPTER I. GENERALLY

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.