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 NATIONAL SCHOOL BOARDS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF 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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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Amici and their members represent just a few of the many state and local government entities that rely heavily upon outside, "private" counsel to assist in performing their public functions.[1] These government entities have a strong and practical interest in ensuring that outside counsel acting on their behalf are not denied the protection of qualified immunity solely because they are not government employees.

Government entities like the cities, counties, and school districts that *amici* represent, are uniquely creatures of law. Like private entities, they must comply with the complex web of regulations that increasingly governs all aspects of modern life. But unlike those private entities, public entities also make and enforce law; protect citizens from those who would break it; and implement policies to ensure its smooth administration. And governments do all of this within the oft-uncertain constraints of the Constitution.

It is notable, then, that government entities so enmeshed with law commonly employ few in-house lawyers—and often none at all. Many factors—

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[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. See Rule 37.6.

[1] A short description of each *amicus curiae* is set forth in the Appendix.

including scarce resources, small-scale staffs, and the need for specialized legal expertise—conspire to ensure that when local governments and other public entities need lawyers, they must often turn to outside counsel.

And so it is that in communities across the Nation, when a government entity encounters complex legal problems of great public interest—for example, a municipality conducting an investigation into official corruption, or a school district drafting policies for religious displays on campus—these matters are almost certain to be handled by outside lawyers.

There is nothing wrong with this. To the contrary, outside lawyers provide government entities with specialized knowledge and experience otherwise unavailable in-house, and they are able to provide this counsel cost-effectively as needed. The ready availability of skilled outside lawyers is often the surest guarantee that legal obligations will be understood and citizens' rights will be protected.

But there are obstacles to the use of outside lawyers by the government. Skilled lawyers in private practice are in demand; public resources are scarce. And in many jurisdictions, local law prohibits public entities from indemnifying outside counsel. For these reasons, government entities may be less attractive clients for highly qualified outside lawyers.

Depriving those lawyers of qualified immunity aggravates the problem, and indeed threatens government's ability to retain qualified counsel at all. Many of the legal issues for which government entities rely most heavily on outside counsel—such as the internal investigation in this case—are precisely the kind

most likely to trigger § 1983 litigation. Without the protection of qualified immunity, lawyers called upon to perform public duties will have their service rewarded with a lawsuit. The result will be to severely chill lawyers' willingness to undertake important work on behalf of the public, with potentially disastrous consequences for the institutions that rely on them.

STATEMENT

1. This case involves a claim under 42 U.S.C. § 1983 by Respondent, a firefighter for the City of Rialto, California, against Petitioner, an attorney retained by the City to assist with its investigation of Respondent.

Respondent has served as a firefighter for the City of Rialto since July 2000. Pet. App. 43. In that capacity, he was promoted to the rank of Engineer, but by June 2006 he was demoted back to firefighter for sending inappropriate emails. *Id*. at 43-44.

Shortly after his demotion, Respondent complained that he felt sick while attending to a toxic spill and remained off work for several weeks. *Id*. at 5-6. Although doctor's letters excused him from work, they placed no other restrictions on his activity. *Ibid*.

The timing of Respondent's illness, hard on the heels of his demotion, raised suspicions within the City and Fire Department. Pet. App. 44. Those suspicions heightened after Respondent was observed buying and loading building supplies, including fiberglass insulation, at a local home improvement store. *Ibid*. The City thus initiated a formal internal affairs

investigation to determine whether Respondent was absent from work under "false pretenses." *Ibid.*

2. To conduct that inquiry, the City retained Petitioner Steve Filarsky, an attorney in private practice with significant experience conducting internal investigations. Pet. App. 44. Petitioner had routinely represented the City in labor and employment issues over the course of fourteen years. *Id.* at 44-45, 89. On behalf of the City, Petitioner's function was to conduct the interviews and internal investigation, provide legal advice, propose disciplinary courses of action, and conduct or participate in related legal proceedings. *Id.* at 59.

As part of his investigation, Petitioner interviewed Respondent about his absences. Pet. App. 6-7. Two Fire Battalion Chiefs and Respondent's attorney were also present. *Id.* at 7. The interview focused on Respondent's purchase of building insulation while off work on a sick day. *Id.* Respondent acknowledged his purchase of the materials, but claimed he had undertaken no home-remodeling while out on sick leave and that the materials remained unused at his house. *Ibid.*

Following this statement, Petitioner took a break to confer with the Battalion Chiefs and Fire Chief. Pet. App. 7-8. They decided that the investigation could be concluded without disciplinary action if Respondent could demonstrate that the materials had not been incorporated into his house. *Id.* at 90-91. Petitioner then reconvened the interview and informed Respondent that he would be exonerated if he produced the home improvement materials and showed that they were unused. *Id.* at 91. Respondent, on the advice of his counsel, refused. *Id.* at 8.

Petitioner subsequently consulted with the Fire Chief, who signed an order requiring Respondent to produce the unused materials outside his home. Pet. App. 46-47. The Battalion Chiefs then followed Respondent to his house and watched as he produced a sample of the unused insulation. *Id.* at 47-48. Having verified that the material was unused, the City terminated the investigation, and Respondent was not subjected to any disciplinary action. *Ibid.*

3. Respondent subsequently sued the City, the Fire Department, the Fire Chief, the Battalion Chiefs, ten unnamed individuals, and Petitioner, alleging that the order to produce the building materials was an unconstitutional search under the Fourth Amendment. J.A. 18-25. In his complaint, Respondent alleged that Petitioner was "an official policy-maker for the City" whose actions "represent actions by the municipality itself," and thus occurred under color of state law for purposes of § 1983. J.A. 21, 24.

The district court granted summary judgment, concluding that all defendants—including Petitioner—were entitled to qualified immunity. Pet. App. at 48.

The Ninth Circuit affirmed with respect to all of the government employees. But as to Petitioner, the Ninth Circuit reversed, holding that because "Filarsky is not an employee of the City, he was "not entitled to qualified immunity." *Id.* at 27.

Petitioner thus finds himself alone in a peculiar legal limbo: Because he was acting under color of state law "as an official policy-maker for the City" (J.A. 21), he faces liability for constitutional torts un-

der § 1983. But because he is not directly employed by the City, he is not entitled to the qualified immunity that would protect a government-employee attorney performing exactly the same function.

This Court granted certiorari.

SUMMARY OF ARGUMENT

1. For cities, counties, school districts, and other local government entities, the availability of qualified immunity for all of their lawyers is a matter of great importance. Many of those entities rely exclusively on outside counsel who are not employees; in-house counsel is a luxury they cannot afford at all. And nearly all local government entities depend on outside lawyers to handle specialized, sensitive, and complex legal problems—the very problems most likely to trigger the litigation that qualified immunity protects against. Given the extent of local governments' dependence on outside counsel, denying qualified immunity to those counsel—and thus exposing them to suit for their work on behalf of the public—threatens to severely restrict public entities' access to high-quality legal representation.

2. Under this Court's precedents, all of the government's lawyers—whether they serve in-house or as outside counsel—are entitled to qualified immunity. The Court has indicated that qualified immunity attaches to all persons who perform an "essential government function," and the Court's decisions over many decades demonstrate that "essential" government functions are those that are (a) performed on behalf of the public good, and (b) require the exercise of judgment and discretion. Government lawyers, whatever their formal employment status, frequently

exercise judgment and discretion on behalf of the public interest. To deny the protections of qualified immunity to these lawyers merely because of the technicalities of their employment relationship would elevate form over substance, to the detriment of the public they serve.

ARGUMENT

I. Depriving Government Lawyers Of Qualified Immunity Based On Their Status As Outside Counsel Would Impede Local Governments' Access To Effective Legal Advice And Representation.

Government entities have "long engaged in the practice of contracting with private lawyers to represent public interests." Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U. C. DAVIS L. REV. 411, 415 (2009). As Petitioner's brief ably explains, this country has a rich tradition of public legal work being performed by even the most elite lawyers in private practice—from John Marshall to Daniel Webster. See Pet. Br. 18-19.

But it is not only for matters of great public importance that government entities turn to outside lawyers. In fact, the great majority of those entities do not have full-time in-house counsel at all. Throughout the Nation, thousands of cities, counties, school districts, water and sanitation authorities, and many others rely of necessity on outside counsel for *all* their legal work. And many other government entities, even the most well-funded, depend on the expertise of outside counsel for a wide variety of their

day-to-day needs. Depriving those lawyers of qualified immunity threatens to impair the public functions they perform, to make high-quality lawyers scarce at times when they are most needed, and ultimately, to endanger the very individual rights § 1983 aims to protect.

A. Government entities depend heavily—and often exclusively—on the advice and representation of outside lawyers.

For many local government entities, their small size and scarce resources make it impossible to shoulder the expense of employing a full-time in-house counsel. Of necessity, they rely on part-time lawyers and outside firms to provide counsel on a project basis as needed.

For example, fully two-thirds of America's 3,068 counties have fewer than 50,000 people—a population base that typically cannot support even one full-time lawyer. The same goes for thousands of smaller local entities, such as water districts, sanitation authorities, utilities, and redevelopment agencies.

Many of the Nation's 15,000 school districts similarly cannot afford in-house legal departments. Notably, the Council of School Attorneys—a national association of lawyers who represent public schools—has more than 3,000 members, of whom just 355 are employed in-house. And even when a large and relatively wealthy school district can afford to have some lawyers on its staff, it remains heavily dependent on outside lawyers for the bulk of its work.

Take, for example, the school district of Fairfax County, Virginia. With an annual budget of $2 billion, the Fairfax County public school system features

some of the Nation's most highly-regarded public schools. But although the Fairfax County Public Schools employ 22,000 people, its legal department consists of just three.[2] By contrast, Google—a corporation with a similar number of employees—boasts an in-house legal team of more than 200.

Although the work of in-house and outside counsel for government entities is often "substantially similar from a functional stand-point," they "differ primarily with regard to financial considerations." Philip D. Kahn, *Privatizing Municipal Legal Services*, 10 Local Gov't Studies (1984), at 2. By contracting out legal services, local governments save on employee benefits, overhead, pensions, and many other costs associated with hiring full-time public employees. And now more than ever, the need for those savings is acute. See Elizabeth McNichol, et al., *States Continue to Feel Recession's Impact*, Center on Budget & Policy Priorities (June 17, 2011) (estimating $103 billion in budget gaps for fiscal year 2012).[3] State and local governments "continue to struggle to find the revenue needed to support critical public services like education, health care, and human services," and relying on cost-effective outside counsel has become a financial imperative. *Ibid*.

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[2] See Fairfax County, Response to Questions on the FY2012 Budget.*available at:* *http://www.fairfaxcounty.gov/dmb/fy2012/budget_questions/bos_q.htm*. *See* No. 42.

[3] Available at http://www.cbpp.org/files/9-8-08sfp.pdf.

B. Even when governments can afford to employ in-house lawyers, they rely on the expertise of outside counsel to serve a wide variety of public functions.

In addition to cost savings, outside counsel also provide a breadth and depth of expertise unavailable to even the largest and wealthiest public entities. Cities, school districts, and other entities face an enormous variety of complex legal challenges. They must defend employment, tort, and civil rights lawsuits; enforce land use, nuisance, tax, condemnation, and other civil ordinances; prosecute criminal violations; navigate employee pension rules; issue bonds and secure financing; negotiate commercial contracts, from construction projects to information technology licensing; and comply with complex regulatory mandates, such as special education requirements for school districts—just to name a few.

It is no wonder, then, that even some of the Nation's largest and wealthiest counties rely predominantly on outside counsel to assist with their many legal needs. See *L.A. County Counsel Annual Litigation Cost Report*,[4] at 2 (Nov. 18, 2010) (noting that $38.1 million of the county's $51.8 million budget went to outside counsel). Yet, complex legal issues arise regardless of the size, wealth, and sophistication of the entities that must deal with them. For example, even small, rural municipalities and school districts routinely face issues related to collective bargaining, Establishment Clause and Free Exercise Clause rights, and compliance with Title IX and the Americans with Disabilities Act—all highly specia-

[4] http://counsel.lacounty.gov/lit_09-10.pdf.

lized fields of law. A small staff of in-house lawyers can hardly be expected to have skill and expertise in all of these areas. Nor would it be economical to bring many important, but non-routine, matters in-house.

Returning again to the example of Fairfax County, the school district's three-person legal department devotes its time exclusively to "provid[ing] legal services relating to employees and students" in its 194 schools. *Response to Questions on the FY2012 Budget*, *supra*. For all other work in "specialized fields," the school district "utilizes outside counsel." *Ibid*. And Fairfax County is hardly unique. The following are just a few examples of the variety of issues on which local governments routinely seek outside counsel:

- The City of Bend, Oregon uses outside counsel to defend lawsuits against the city.[5]
- The City of Gadsden, Alabama relies on outside counsel to pursue misdemeanors and assist with criminal prosecutions.[6]
- The City of Seattle, Washington recently decided, due to "the austere budget climate," to enlist a variety of private lawyers to defend its

[5] See City of Bend Website, http://www.ci.bend.or.us/depts/administration/city_attorney/index.html.

[6] See City of Gadsden Website, http://www.cityofgadsden.com/Default.asp?ID=12.

police department in wrongful death, misconduct, and civil rights lawsuits.[7]

- In nearby Shoreline, Washington, the city has retained a private law firm for its "expertise and advice" negotiating a contentious redevelopment project.[8]
- The City of Friendswood, Texas contracts with private counsel for general legal advice on zoning, land use, and other issues encountered by its mayor and city council.[9]
- The City of Mountain View, California uses outside counsel to defend and prosecute civil actions.[10]
- To the north, the City of Oakland, California retains outside counsel for a wide variety of transactional and litigation matters that "require specialized expertise," ranging from af-

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[7] Press Release (May 3, 2011), http://www.seattle.gov/law/newsdetail.asp?ID=11692&dept=9.

[8] Press Release, (Sept. 28, 2011), http://www.richmondbeachwa.org/pointwells/documents/City_of_Shoreline_Press_Release_20110928.pdf

[9] City of Friendswood Requests for Proposals (2010), http://old.ci.friendswood.tx.us/Agendas/cc110620%20Regular/CMO%2006-20%20Regular/New%20CA/City_Attorney_RFP.pdf.

[10] See City of Mountain View Website, http://www.ci.mtnview.ca.us/city_hall/attorney/default.asp.

fordable housing development to intellectual property to gang injunctions.[11]

- Meanwhile, to the south, the City of Ojai, California has retained a private lawyer to advise on the acquisition of a water company.[12]
- The City of Henderson, Texas has relied for all matters on an attorney in private practice, who it retained to serve as City Attorney on a contractual basis.[13]

Even well-funded state attorneys general have retained outside law firms for complex or high-profile constitutional litigation. See, *e.g.*, *AG Defends Outside Counsel Decision*, The Topeka Capital-Journal (July 15, 2011) (law firm retained to defend federal lawsuits challenging abortion laws).[14] And, of course, state and local governments have often sought out the very best advocates in private practice to provide high-quality representation before this Court.

Government entities also often rely on outside counsel to handle sensitive internal investigations, like the one at issue in this case. For localities with limited access to in-house counsel, best practices call

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[11] City of Oakland Request for Qualifications (2011), http://www.oaklandcityattorney.org/PDFS/RFQ%20Outside%20Counsel%20(F).pdf.

[12] *Citing Water Issue, Council Retains Attorney*, Ojai Valley News Blog (Nov. 10, 2011), http://ovnblog.com/?p=5313.

[13] http://www.tml.org/legal_pdf/ContractCityAttorneysIncomeTax.pdf.

[14] http://cjonline.com/news/2011-07-15/ag-defends-outside-counsel-decision.

for investigations of wrongdoing to be handled by outside counsel. See Jonathan D. Greenberg & Heather R. Baldwin Flasuk, *When Public Officials Go Rogue: The Importance of Hiring Outside Counsel to Perform Investigations into Allegations of Employee or Officer Wrongdoing*, Cities & Villages (May/June 2010).[15] This avoids conflicts of interest and ensures public confidence that an investigation is being conducted objectively and taken seriously by public officials. The city council of Sheboygan, Wisconsin, for example, recently retained a former U.S. Attorney in private practice to investigate complaints of public drunkenness and lewd conduct by the city's mayor. See *Sheboygan Retains Counsel to Investigate Complaints Against Mayor*, Wisconsin Law Journal (Sept. 15, 2011)[16]; see also City of Vernon News Release (Feb. 16, 2011) (announcing city's retention of former California Attorney General to serve as independent ethics advisor).[17]

As all of these examples illustrate, government entities around the country are historically and increasingly dependent on outside counsel to support a wide variety of public activities. Indeed, many localities are so dependent on these attorneys that the formal distinction between outside and in-house counsel ceases to make much sense. Is the City Attorney of Henderson, Texas, for example, any less the

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[15] http://www.walterhav.com/news/20100713102255775.pdf

[16] http://wislawjournal.com/2011/09/15/sheboygan-retains-council-for-mayor-complaints/

[17] http://www.cityofvernon.org/assets/docs/Vernon%20News_John%20Van%20de%20Kamp%20Retained_21611.pdf

City Attorney because he is retained by contract rather than as an employee? The IRS, for one, does not think so, as it has taken the position that city attorneys will generally be treated as municipal employees even when they are part-time contractors. See Devala A. Janardan, *Contract City Attorneys: The Employee vs. Independent Contractor Conundrum*, Int'l Municipal Lawyers Ass'n (March 2007) (discussing IRS efforts to classify Henderson City Attorney as employee) [18]

C. Exposing outside counsel to liability would drive up the costs of local government, limit the availability of high-quality legal services, and ultimately endanger individual rights.

Given how much local government entities depend on the services of outside counsel, exposing those lawyers to suit for their work on behalf of the government poses serious risks. Municipalities will either have to assume the cost of indemnifying their outside counsel—a practice some local laws prohibit—or they will have to force outside counsel to bear the burden and expense of § 1983 liability on their own. But even if outside counsel bear this liability and purchase insurance to cover it, much of the expense will likely be passed right back to struggling municipalities in the form of higher fees. Whether directly or indirectly, imposing liability for providing legal counsel to the government will increase the cost of legal counsel to the government. There is no "free lunch." *Richardson* v. *McKnight*, 521 U.S. 399, 419 n.3 (1997) (Scalia, J., dissenting). Raising the cost for

[18] http://www.tml.org/legal_pdf/2007-IRScity-attorney.pdf.

local government, however, would be the best-case scenario, as even worse consequences may well result. Lawyers subjected to suit face not only the risk of money damages, but also the disruption, stress, and threat to professional reputation that accompany even the most baseless lawsuit. So the best and most expert lawyers may simply decide that representing the government is not worth the hassle. Unlike the prison industry, where the government is the only entity for which prison operators are able to work, the legal services industry is a competitive market in which the government must compete with private-sector clients. The best lawyers and law firms may sensibly choose to avoid work on behalf of the government rather than open themselves up to lawsuits where they would be the only ones in the room facing liability.

Even more worrisome, if either cost or availability make it more difficult for local governments to retain legal counsel, they may choose to skimp on lawyers altogether. But everyone suffers when the government lacks good lawyers. Citizens and courts, as well as public officials, are all better off when government has high-quality counsel. Indeed, depriving school districts or police departments of ready access to informed legal advice would surely pose a far greater threat to civil rights than the extension of qualified immunity.

Worse still, depriving outside counsel of qualified immunity would limit the availability of legal advice and representation at the very times when they are needed most: when governments must make decisions on issues where the limits of their constitutional authority remain unclear. It is in those areas that

qualified immunity protects the good-faith decisions of government officials; and yet, it is also where the threat of a § 1983 lawsuit is most likely to deter outside counsel from vigorously discharging his duties—and perhaps, from accepting the representation at all.

The record in this case amply illustrates the problem. During his investigation, Petitioner was repeatedly threatened with legal action by Respondent's counsel, who warned Petitioner that "you are the guy to get sued," and that Petitioner will have to "sweat it out as to whether or not [he had] individual liability." J.A. at 134; see also, *e.g.*, *id.* at 131 (threatening to "file claim for violation of [Respondent's] Fourth Amendment rights"); *id.* at 131-32 (warning Petitioner that "you are issuing an illegal order," but that "if you want to take the chance, go ahead"); *id.* at 134 (advising Petitioner that "if you want to issue illegal orders * * * you guys can suffer the consequences"); *id.* at 136 (warning petitioner that "if you guys want to order him * * * you will be named [in the lawsuit] and that is not an idle threat").

Absent the protection of qualified immunity, it is not difficult to imagine the chilling effect of such threats on outside counsel's willingness to act on the public's behalf. Without qualified immunity, outside counsel would be the only person involved for whom such threats have teeth. Private lawyers would be well advised to simply decline such sensitive representations. And yet, outside counsel are often the ones best situated to handle these matters responsibly. The rule adopted below would effectively deny to the public the benefits provided by outside counsel serving the public interest.

Finally, subjecting outside counsel to liability not

faced by in-house counsel could have a potentially corrosive and destabilizing effect on local governments. As explained above, there is often little practical distinction between outside and in-house counsel. But depriving one of qualified immunity would dramatically alter their respective incentives, to the great detriment of the overall legal effort. A private lawyer stripped of qualified immunity will naturally proceed more cautiously than her public counterpart—and may even be unwilling to participate in making difficult legal judgments, lest she be singled out in a subsequent lawsuit as the weak link in the immunity chain.

This strong incentive to avoid risk defeats the primary advantage of employing specialized, experienced outside counsel to perform legally difficult tasks: the ability to rely on that counsel's experienced judgment in making complex, discretionary legal decisions. This is precisely the kind of "unwarranted timidity" in government action that qualified immunity exists to prevent. See *Richardson*, 521 U.S. at 408.

II. Whether They Serve In-House Or As Outside Counsel, Lawyers For The Government Perform An Essential Governmental Function That Merits Qualified Immunity.

The fact that local governments depend so much on outside counsel is not only of great practical significance, but it should also weigh heavily in the qualified immunity calculus. Although the Ninth Circuit relied on *Richardson* v. *McKnight*, 521 U.S. 399 (1997), to deny qualified immunity to outside counsel, that decision should not be read more broadly than it was written. In declining to extend qualified

immunity to private prison guards, *Richardson* did not hold that all private contractors performing public functions lack qualified immunity. Rather, *Richardson* expressly reserved the possibility that certain public functions—those involving an "essential governmental activity"—deserve qualified immunity regardless of whether they are performed by private contractors or government employees. And, as we explain below, lawyers representing the government often perform essential government functions that require them to exercise judgment and discretion on behalf of the public interest. Such functions warrant qualified immunity.

A. Private parties performing essential governmental functions are entitled to qualified immunity.

In a host of decisions prior to *Richardson*, this Court "with fair consistency" applied a "'functional' approach to immunity questions." *Forrester* v. *White*, 484 U.S. 219, 224 (1988). Under that approach, the Court examined "the nature of the functions with which a particular official or class of officials has been lawfully entrusted," and it assessed whether certain immunities protected those functions. *Id.* In doing so, the Court "clearly indicate[d] that immunity analysis rests on functional categories, not on the status of the defendant" as a government employee or private contractor. *Briscoe* v. *LaHue*, 460 U.S. 325, 342 (1983).

Immunity flowed "not from rank or title or 'location within the Government,' * * * but from the nature of the responsibilities of the individual official." *Cleavinger* v. *Saxner*, 474 U.S. 193, 201 (1985) (quotation omitted). And many decisions reflected this

approach. *Ibid.*; *Forrester*, 484 U.S. at 224; *Briscoe*, 460 U.S. at 342; *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993); *Burns* v. *Reed*, 500 U.S. 478, 489-490 (1991); *Malley* v. *Briggs*, 475 U.S. 335, 342-343 (1986); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 810-811 (1982); *Imbler* v. *Pachtman*, 424 U.S. 409, 420-429 (1976).

Richardson created a narrow exception to the "functional" analysis the Court had applied in those prior decisions, but did not wholly abandon it.[19] Although *Richardson* deprived private prison guards of qualified immunity by virtue of their status as private contractors, it took care to emphasize that certain "essential" government functions warrant immunity regardless of the status of the person performing them. As the Court explained, "we have answered the immunity question narrowly, in the context in which it arose." *Richardson*, 521 U.S. at 413. That context "is one in which a private firm" assumes an "administrative task (managing an institution)," and it "does not involve a private individual * * * serving as an adjunct to government in an *essential governmental activity*." *Ibid.* (emphasis added). The status-based distinction *Richardson* drew between public employees and private contractors thus depended on a function-based premise—namely, that the administrative function at issue was not "essential." In other words, there was "nothing special enough about the job" to immunize all who perform

[19] Subsequent decisions have also continued to stress the functional approach. See, *e.g.*, *Van de Kamp* v. *Goldstein*, 555 U.S. 335, 342 (2009) ("To decide whether absolute immunity attaches to a particular kind of prosecutorial activity, one must take account of the 'functional' considerations discussed above.").

it. *Id.* at 412; see also *id.* at 402-404 (relying on *Wyatt* v. *Cole*, 504 U.S. 158, 159 (1992), which afforded no immunity to private individuals' use of replevin, garnishment, or attachment statutes).

Whereas all government employees benefit from qualified immunity even when they serve non-essential functions, private citizens remain entitled to immunities when the government function they perform is essential. See *Imbler*, 424 U.S. at 423 (recognizing absolute immunity for grand jurors because of their "functional comparability" to judges); *Briscoe*, at 335 (recognizing absolute immunity for "all persons—governmental or otherwise"—who testify as witnesses); *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."). *Richardson* did not change this longstanding and fundamental principle.

Hence, the first question to ask in determining the applicability of qualified immunity is whether the function performed under color of state law is an "essential governmental activity." *Richardson*, 521 U.S. at 413. Only when the function is *not* essential does it become necessary to consider whether private contractors who perform that function should be treated differently. And only when the function is *not* essential could it arguably make sense to require "conclusive evidence of a historical tradition of immunity for private parties carrying out these functions." *Id.* at 407. When a private individual performs a government function that *is* essential, however, the burden of proof need not be so high. It is enough in those

cases to acknowledge that the function itself has traditionally warranted immunity, and to extend immunity to those who perform it.

B. Under this Court's precedents, an "essential government activity" is one in which the actor exercises significant discretion on behalf of the public good.

Although the Court in *Richardson* did not define what constitutes an "essential government activity," its qualified immunity jurisprudence suggests that a government actor performs such an activity when (1) he acts on behalf of the public good, and (2) exercises significant judgment and discretion in doing so.

As this Court has explained, qualified immunity is "based on two mutually dependent rationales." *Butz v. Economou*, 438 U.S. 478, 497 (1978). First is "the danger that the threat of such liability would deter [a person's] willingness to execute his office with the decisiveness and the judgment required by *the public good*." *Butz*, 438 U.S. at 497 (emphasis added) (quoting *Scheuer*, 416 U.S. at 240). Second is "'the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to *exercise discretion*.'" *Ibid.* (emphasis added) (quoting *Scheuer*, 416 U.S. at 240); see also *Buckley*, 509 U.S. at 268 (explaining that qualified immunity exists "to protect officials who are required to exercise their discretion"). Both of these factors—a duty to serve the public good and a need to exercise discretion while doing so—characterize most of the activities that have been held to warrant qualified immunity.

With respect to prosecutors, for example, the Court has often stressed "[t]he public trust of the prosecutor's office," and observed that it "would suffer were the prosecutor to have in mind his own potential damages liability when making prosecutorial decisions." *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009) (quotation omitted); see also, *e.g.*, *Imbler*, 424 U.S. at 423 (worrying about "deflection of the prosecutor's energies from his public duties"). The Court has similarly stressed the need for immunity to protect discretionary decision-making, as a prosecutor "inevitably makes many decisions that could engender colorable claims of constitutional deprivation." *Imbler*, 424 U.S. at 425. Immunity prevents "the possibility that [a prosecutor] would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

Furthermore, when this Court has declined to apply qualified immunity, it has typically done so because the activities at issue lacked one or both of "public interest" and "exercising discretion" features that justify the extension of qualified immunity. For example, private parties invoking replevin, garnishment, or attachment statutes do not merit qualified immunity because there is nothing "requiring them to exercise discretion; nor are they principally concerned with enhancing the public good." *Wyatt*, 504 U.S. at 168. Similarly, when the Court declined to apply qualified immunity to government-appointed defense attorneys, it stressed the "marked difference" between appointed defense attorneys representing individual defendants and prosecutors who "represent the interest of society as a whole." *Ferri* v. *Ackerman*, 444 U.S. 193, 202-203 (1979). And in *Richardson* itself, the majority suggested that the private-prison

firm in that case lacked both features, noting that the firm was "systematically organized to perform a major administrative task for profit," while the "important discretionary tasks were reserved for state officials." *Richardson*, 521 U.S. at 411.

Where the twin features of acting in the public interest and exercising discretion are present, however, those features suggest an essential government function to which qualified immunity applies.

C. Private lawyers who act on behalf of public institutions, and who exercise discretion in serving the public good, are performing "essential government activities" that warrant qualified immunity.

There can be little doubt that lawyers representing the government, whatever their employment status, often perform essential governmental functions that distinguish them from both other government employees and fellow lawyers. As agents of the government, they must serve the public interest; as lawyers, they must exercise judgment and discretion in doing so. These two critical functions warrant qualified immunity, regardless of the lawyers' formal employment status.

1. When private lawyers work for public institutions, they have a fiduciary duty to act in the best interest of their client—a duty that, given the public nature of the client, is synonymous with the public interest.

This Court famously observed long ago that a lawyer for the government "is the representative not of an ordinary party to a controversy, but of *a sovereignty* whose obligation to govern impartially is as

compelling as its obligation to govern at all." *Berger* v. *United States*, 295 U.S. 78, 88 (1935) (emphasis added). Those words are chiseled on the walls of the Department of Justice. See also Robert H. Jackson, *The Federal Prosecutor* (April 1, 1940) ("Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just."). And although the Court "was speaking of government prosecutors * * * no one, to our knowledge, has suggested that the principle does not apply with equal force to the government's civil lawyers." *Freeport-McMoran Oil & Gas Co* v *Fed Energy Reg Comm'n*, 962 F2d 45, 47 (D.C. Cir. 1992). It applies with equal force, too, to lawyers for local governments. Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 157, 169 (1966). (explaining complex public interest implications of city attorney's proposed settlement in a condemnation case).

The notion that government lawyers owe a duty to the public interest differs sharply from the ordinary obligation lawyers have to their private clients. Lawyers representing the government often have special authority—for example, to decide upon settlement—that they would not have if representing a private client. Restatement (Third) of Law Governing Lawyers (2000) § 97, comm. g. Lawyers representing the government also often labor under special ethical obligations. See, *e.g.*, *Brady* v. *Maryland*, 373 U.S. 83 (1963). And given that all government lawyers acting under color of state law are subject to constitutional restraints on government action, they remain uniquely vulnerable to suit.

Moreover, the duty of a government lawyer to serve the public interest arises from the special nature of his government client—not from the peculiarities of his employment contract. It applies equally to "a lawyer employed full time by a governmental client as well as a lawyer in private practice who provides legal services to a governmental client." Restatement (Third) of Law Governing Lawyers § 97, comm. a. Thus, for example, "a lawyer in private practice retained to function part-time as a public prosecutor operates in that regard subject to restrictions on prosecutors with respect to their advocacy, disclosure obligations, and similar matters * * * notwithstanding that the lawyer would not be so constrained in representing nongovernmental clients." *Id.* at comm. i. A lawyer, in other words, "cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official." *People ex rel. Clancy* v. *Superior Court*, 705 P.2d 347, 351 (Cal. 1985) (holding that lawyer hired by city for public nuisance abatement could not receive contingency fee). Rather, "the responsibility follows the job." *Ibid.*

Lawyers representing the government thus differ from other lawyers insofar as they represent a unique client—the public interest—that imposes unique responsibilities.

2. The second feature distinguishing government lawyers is the inherently discretionary nature of their work on behalf of the government. In contrast to the prison-guard function that the Court in *Richardson* characterized as merely an "administrative task," the functions of providing legal advice, conducting inter-

nal investigations, and representing the government in litigation are far from merely administrative.

Government prosecutors, for example, are "duty bound to exercise [their] best judgment both in deciding which suits to bring and in conducting them in court." *Imbler*, 424 U.S. at 424. Indeed, the need to protect this "independence of judgment" entitles prosecutors to absolute immunity for their prosecutorial functions (and qualified immunity for others). *Id*. at 423.; see also *Antoine* v. *Byers & Anderson, Inc*., 508 U.S. 429, 436 (1993) (explaining that judicial and quasi-judicial immunities protect people who "exercise a discretionary judgment as part of their function," and thus do not protect court reporters). Similar principles apply to government attorneys in civil proceedings. *Butz,* 438 U.S. at 513-17.

Even outside of litigation, however, government lawyers must frequently make sensitive discretionary judgments. For example, government lawyers at all levels routinely advise agencies about the scope of their authority or the legal consequences of their actions. See generally Thomas O. McGarity, *The Role of Government Attorneys in Regulatory Agency Rulemaking*, 61 LAW & CONTEMP. PROBS. 19 (Winter 1998). Like all lawyers giving legal advice, this entails the difficult task of interpreting vague or conflicting legal obligations and making judgments based on uncertain facts. It is more than a mechanical—or "administrative"—application of law to fact.

Moreover, unlike lawyers for private clients, lawyers giving legal advice to the government have an even more sensitive task. An agency's interpretation of an ambiguous legislative mandate often necessarily involves disputed policy judgments. See *Chevron,*

U.S.A. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). And this is no less true for local government lawyers as for lawyers to federal agencies. As Judge Weinstein has explained, reflecting on his time as County Attorney of Nassau County, there are many "special problems of judgment presented by a local government practice." Weinstein, *Some Ethical and Political Problems of a Government Attorney*, at 158. Most of them "are not so much the legal-technical ones of what can be done, or how to do it, but what should be done." *Ibid.*

Government lawyers at all levels and of all kinds are therefore routinely called upon to exercise judgment and discretion. This sets their activities apart from the merely "administrative" functions performed by (for example) the prison in *Richardson*.

CONCLUSION

In sum, both in-house and outside counsel to the government perform essential activities that make them distinct among government employees, as well as among their fellow lawyers. Not only must they represent the public interest—they must do so while exercising discretion and judgment. These functions warrant qualified immunity regardless of the lawyers' formal employment status. A contrary outcome in this case would seriously undermine the ability of *amici* and other public institutions to retain high-quality, cost-effective counsel to meet the pressing needs of their constituents. We respectfully ask the Court not to countenance that result.

The decision below should be reversed.

Respectfully submitted.

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APPENDIX

The National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States. Through its state associations, NSBA represents the nation's 95,000 school board members, who, in turn, govern approximately 14,000 local school districts serving more than 46.5 million public school students. One of NSBA's constituent groups, the Council of School Attorneys, is the professional organization for approximately 3,000 public and private attorneys who provide legal services to public school districts.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with populations of more than 30,000. There are over 1,200 such cities in the country today. Each of these cities is represented in the Conference by its chief elected official, the mayor.

The International City/County Management Association (ICMA), founded in 1914 as the City Managers' Association, is a not-for-profit professional and educational organization for chief-appointed managers, administrators, and assistants in cities, towns, counties, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 states, its commonwealths and territories. NCSL provides research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and it regularly submits briefs amicus curiae to this Court, in cases that, like this one, raise issues of vital state concern.