No. 10-1018

In the Supreme Court of the United States

STEVE A. FILARSKY, PETITIONER

v.

NICHOLAS B. DELIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a private attorney retained by city officials to assist with a personnel investigation may assert qualified immunity when sued under 42 U.S.C. 1983 for a constitutional violation allegedly committed in the course of the investigation.

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INTEREST OF THE UNITED STATES

This case presents the question whether a private attorney retained by city officials to assist with a personnel investigation may assert qualified immunity when sued under 42 U.S.C. 1983 for a constitutional violation allegedly committed in the course of the investigation. The United States often hires private attorneys and other private parties to assist with the work of the federal government. Although those individuals generally are not subject to suit under 42 U.S.C. 1983 (because they do not act under color of state law), they may be subject to suit for damages for alleged constitutional violations under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and under state law. Qualified immunity has been found to

be available in such actions under the same terms as in Section 1983 suits. *E.g.*, *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999); *Martin* v. *Malhoyt*, 830 F.2d 237, 252-253 (D.C. Cir. 1987) (Ginsburg, J.).[1]

The United States has an interest in ensuring that private contractors and volunteers acting on its behalf are able to serve the public good effectively and without undue fear of personal liability. At the same time, the United States has an interest in ensuring appropriate deterrence of, and remedies for, unconstitutional conduct by such private contractors and volunteers. The United States therefore has a substantial interest in the resolution of this case.

STATEMENT

1. Respondent is a firefighter for the City of Rialto in California. Pet. App. 3. In August and September 2006, he was on extended medical leave. *Id.* at 5-6. Respondent had recently been demoted, and was involved in a contentious labor dispute with the City. *Id.* at 43-44; J.A. 155. City officials, suspecting that respondent's claim of medical leave might be invalid, hired a private investigator to follow him while he was off work. Pet. App. 6, 44. The investigator filmed respondent buying

[1] The Court is currently considering the question whether to imply a *Bivens* cause of action against individual employees of private companies under contract with the federal government to provide prison services. See *Minneci* v. *Pollard*, No. 10-1104 (argued Nov. 1, 2011). The United States has argued in that case that, primarily in light of the availability of alternative remedies, recognition of a *Bivens* action would be unnecessary and unwarranted. Insofar as a *Bivens* remedy against private parties acting on behalf of the federal government may be found to exist in certain contexts, the question whether, and to what extent, such parties could assert qualified immunity would assume particular significance.

building materials, including several rolls of fiberglass insulation, during his medical leave. *Ibid.*

City officials initiated an internal affairs investigation to determine if respondent had misused medical leave. Pet. App. 6, 44. The City retained petitioner to assist it with the investigation. *Id.* at 6-7. Petitioner is a private attorney—*i.e.*, "not an employee of the City"—with decades of experience in labor law. *Id.* at 24, 44-45; J.A. 156. Petitioner had worked with the City for 14 years, representing the City in labor litigation, arbitrations, and negotiations; conducting internal affairs investigations; and providing legal advice to city officials. Pet. App. 44-45, 88-89; J.A. 156.

As part of the investigation, city officials arranged to interview respondent. Pet. App. 44-45. Petitioner, respondent, an attorney for respondent, and two fire department Battalion Chiefs were present at the interview. *Id.* at 7, 45. During the interview, petitioner showed respondent the video of him purchasing fiberglass insulation and other building supplies. J.A. 120-123. Respondent said he had not installed the insulation and it was sitting in his kitchen. Pet. App. 7, 45; J.A. 106-108, 123-124. Petitioner consulted with the Fire Chief, and then informed respondent that if he showed city officials the unused insulation, the investigation would be over and he would be exonerated. Pet. App. 7-8, 46, 90-91; J.A. 143-145. Respondent, following the advice of his attorney, refused to do so. Pet. App. 8, 46; J.A. 131-132. Respondent's counsel told petitioner that he would have to procure a written order from the Fire Chief, and counsel further threatened to sue anyone involved in issuing such an order and seek damages against them in their personal capacities. J.A. 130-132, 134, 148.

Petitioner stopped the interview to consult with the Fire Chief and the City Attorney. Pet. App. 7-8, 46, 93. The Fire Chief then issued a written order requiring respondent to produce the insulation, and petitioner gave respondent the order. *Id.* at 46; see J.A. 160-161 (order).

The Battalion Chiefs, respondent, his attorney, and a union representative went to respondent's house. Pet. App. 8-9, 47. Petitioner did not accompany them. *Id.* at 8, 47-48. Respondent entered the house, retrieved three or four rolls of insulation, and placed them on the front lawn. *Id.* at 9, 47. The whole process lasted roughly one minute. *Id.* at 48. The Battalion Chiefs never left their vehicle, and after respondent brought out the insulation, they thanked respondent and drove away. *Id.* at 9, 47-48. City officials closed the internal investigation into respondent's use of medical leave and took no disciplinary action against him. *Id.* at 47-48.

2. Respondent sued the City, its fire department, the Fire Chief, the Battalion Chiefs, and petitioner for money damages under 42 U.S.C. 1983. Pet. App. 3. Respondent contended, *inter alia*, that the defendants had violated his Fourth Amendment rights by requiring him to produce the insulation for inspection. *Id.* at 3-4, 9; see J.A. 23-24 (complaint). The defendants moved for summary judgment, arguing that all individual defendants were entitled to qualified immunity and that there was no basis for imposing municipal liability on the City. See J.A. 182-183. Petitioner, in particular, conceded that he acted under color of state law and argued that he was entitled to qualified immunity on the same basis as the city officials even though he was a private attorney. Pet. App. 54-55, 71-76. Respondent opposed summary judgment on the ground that petitioner and the other indi-

vidual defendants all had violated clearly established law. Br. in Opp. App. 15-20.

The district court granted summary judgment to all defendants. Pet. App. 39-41, 48-49. In an oral ruling, the court explained that the individual defendants were protected by qualified immunity because their actions did not violate respondent's Fourth Amendment rights. J.A. 182-183. The court also concluded that municipal liability was inappropriate because none of the individual defendants had final policymaking authority and there was no pertinent municipal practice or custom. J.A. 182; see *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658 (1978). The court memorialized its oral ruling in a written order. Pet. App. 48-49.

3. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1-38. The court first decided that respondent's Fourth Amendment rights were violated when he "was compelled to enter his own home and retrieve the insulation for public view by order of [the Fire] Chief." *Id.* at 19-20 (emphasis omitted). The court determined, however, that respondent's right to be free from such actions was not clearly established. The court explained that no prior decision "would have put defendants on notice that [the Fire Chief's] order to [respondent], with no attendant threat to his employment, constituted a violation of the Fourth Amendment." *Id.* at 21-24. The court therefore granted qualified immunity to the Fire Chief and Battalion Chiefs. *Id.* at 24.

The court declined to grant qualified immunity to petitioner, however. Pet. App. 24-27. In *Gonzalez* v. *Spencer*, 336 F.3d 832 (9th Cir.) (per curiam), cert. denied, 540 U.S. 940 (2003), the court had held that a private attorney hired to represent a county juvenile court in a lawsuit could not invoke qualified immunity because

she was "a private party, not a government employee," and she "pointed to 'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." *Id.* at 835 (quoting *Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997)). Relying on *Gonzalez*, the court in this case stated that, because petitioner "is not an employee of the City" but is "a private attorney * * * retained by the City to participate in internal affairs investigations," he could not invoke qualified immunity. Pet. App. 24, 27. In light of the court's grant of qualified immunity to the government officers and its denial of qualified immunity to petitioner, petitioner alone faced liability for the order issued by the Fire Chief.[2]

SUMMARY OF ARGUMENT

Although 42 U.S.C. 1983 principally regulates the conduct of government officials, a private person may be liable if he acts "under color of" state law. When a private person is treated as a state actor for purposes of Section 1983 liability, it raises the question whether the individual can invoke the principles of qualified immunity that would apply if he were a government official. Here, petitioner is entitled to assert qualified immunity because he worked directly alongside and under the supervision of public officials in the performance of a government function, and because recognition of immunity in the circumstances would be consistent with historical tradition.

A. This Court's decisions reject an all-or-nothing answer to the question whether a private party acting under color of state law is entitled to invoke qualified

[2] The court of appeals agreed with the district court's rejection of municipal liability against the City. Pet. App. 27-37.

immunity when sued under Section 1983. *Richardson* v. *McKnight*, 521 U.S. 399 (1997); *Wyatt* v. *Cole*, 504 U.S. 158 (1992). While the Court has declined to hold that a private party may assert qualified immunity whenever his conduct amounts to state action subject to liability under Section 1983, the Court has also declined to impose any categorical bar against the assertion of qualified immunity by a private party. Whether a person can invoke qualified immunity depends not merely on his status as a private person or a government employee, but instead turns on the nature of the functions the person performs and whether affording qualified immunity would further the doctrine's underlying purposes and be consistent with historical tradition.

B. A private person acting under color of state law should be entitled to assert qualified immunity when sued for acts taken (1) in service of the public interest as opposed to his own private interests, and (2) while working directly alongside government officials or under close governmental supervision. Although performance of a public function does not itself invariably suffice to justify invoking qualified immunity, recognition of immunity is appropriate when a person both acts in the public interest and does so as an "adjunct to government" or "under close official supervision." *Richardson*, 521 U.S. at 413. Government employees and private persons often work side-by-side in performing important government functions, and when they are sued for constitutional violations committed as state actors, the private person should not be the only party left to face individual liability for money damages. Recognizing immunity in those circumstances would promote the doctrine's core purposes—*viz.*, to prevent unduly timid and cautious performance of government functions based on

fear of personal liability; to avoid deterring capable persons from participating in the performance of public functions; and to limit the distraction of individuals engaged in those functions.

The circumstances of this case are illustrative. Petitioner was retained to assist in the City's investigation of one of its employees and to provide legal advice in the course of the investigation. He worked closely with fire department officials throughout the process and did so under their direct supervision. Denying him qualified immunity not only would tend to encourage unwarranted timidity in the performance of public duties by persons in petitioner's shoes, but it would also directly (and adversely) affect the conduct of official duties by public officials working in close coordination: any effect on the quality of petitioner's legal advice would necessarily affect the decisions of the public officials who rely on that advice. Moreover, if a private attorney who advises a city government can be held personally liable for providing reasonable but mistaken legal advice, such attorneys may be unwilling to take on government clients. At the least, the potential costs of constitutional torts suits will be passed on from attorneys to government clients, and ultimately, to taxpayers. Finally, denying liability not only would distract the private individual engaged in performance of public duties by requiring him to defend against a lawsuit, but it also would distract public officials alongside whom he works insofar as they, too, may be called upon to participate in the litigation as deponents, fact witnesses, and the like.

For those reasons, affording qualified immunity in the circumstances of this case would promote the ability of government to perform its traditional and important functions. Denying immunity, however, would have the

anomalous consequence of leaving a private person as the sole party to face personal liability under a statute chiefly aimed to address unconstitutional action by government officials.

C. Nothing in the historical tradition that informs the availability of qualified immunity counsels against recognizing immunity in the circumstances of this case. To the contrary, there is substantial historical support for affording immunity to a private attorney advising a city government. As this Court has recognized, the common law "provide[d] a kind of immunity for * * * lawyers who performed services at the behest of the sovereign." *Richardson*, 521 U.S. at 407. Nineteenth-century governments relied heavily on private attorneys, both to provide legal advice to government agencies and to serve as government adjuncts in the capacity of a private prosecutor. Lawyers, both public and private, enjoyed a form of immunity for their reasonable, good-faith judgments. Denying petitioner immunity here would stand in tension with that historical tradition.

ARGUMENT

A PRIVATE ATTORNEY RETAINED TO WORK WITH GOVERNMENT OFFICIALS IN THE PERFORMANCE OF A PUBLIC FUNCTION MAY ASSERT QUALIFIED IMMUNITY IN A CONSTITUTIONAL TORT LAWSUIT

Under 42 U.S.C. 1983, a plaintiff may seek damages from a person acting "under color of" a state "statute, ordinance, regulation, custom, or usage" who violates his federal constitutional or statutory rights. Section 1983 aims to deter state actors from "using the badge of their authority to deprive individuals of their federally guaranteed rights" and to "provide relief to victims if such

deterrence fails." *Wyatt* v. *Cole*, 504 U.S. 158, 161 (1992). Section 1983 applies not only to government officials, *Monroe* v. *Pape*, 365 U.S. 167, 175-177 (1961), but also to private parties acting under color of state law, *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 924 (1982).

Although Section 1983 "admits of no immunities" on its face, *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976), this Court has recognized the availability of qualified immunity in circumstances in which the "tradition of immunity was so firmly rooted in the common law" and "was supported by such strong policy reasons" that Congress would have expected the recognition of immunity. *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980). Qualified immunity shields individuals acting under color of law from suit unless their actions "violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). The doctrine is designed to ensure "that fear of liability will not unduly inhibit officials in the discharge of their duties," *Camreta* v. *Greene*, 131 S. Ct. 2020, 2030-2031 (2011) (internal quotation marks omitted), and to avoid unduly deterring capable individuals from participating in public service or distracting them from the performance of their responsibilities, *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985). Qualified immunity furthers those objectives by affording "both a defense to liability and limited entitlement not to stand trial or face the other burdens of litigation." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1945-1946 (2009) (internal quotation marks omitted).

The considerations underlying the doctrine of qualified immunity fully support its application in the circumstances of this case. Petitioner, a private attorney with

decades of labor-law experience, was retained by a city to work alongside and under the direction of city officials in conducting a personnel investigation. All of the individual government defendants involved in the investigation were granted qualified immunity. The issue in this case is whether petitioner alone should be denied qualified immunity merely because he is a private attorney rather than a city employee, even though he performed public functions while acting in direct concert with city officials. The answer is no. Recognizing qualified immunity here would substantially advance the purposes of the doctrine and cohere with historical tradition. Consequently, there is no justification for leaving a *private party*—to the exclusion of all government officers—to bear sole responsibility under a statute that affords redress for unlawful *state* action.

A. This Court's Decisions Support The Assertion Of Qualified Immunity By Private Persons Acting Under Color Of State Law When It Would Advance The Underlying Purposes Of Immunity And Reflect Historical Tradition

The Court has previously considered the circumstances in which private persons sued under 42 U.S.C. 1983 may invoke qualified immunity. The Court has approached that question just as it does for public officials, by examining the nature of the defendant's activities, the purposes of the qualified immunity doctrine, and the historical support for affording immunity in the circumstances.

1. In *Wyatt* v. *Cole*, 504 U.S. 158 (1992), a private party invoked state replevin law to obtain an order to seize his former business partner's property without a hearing. *Id.* at 159-160. The Court considered whether the individual who obtained the seizure order and his

lawyer could invoke qualified immunity in a Section 1983 suit. *Ibid.* The Court assumed that the defendants had acted under color of state law, and assessed their claim to qualified immunity in light of the nature of their activities, whether they would historically have been provided any protection for them, and whether affording qualified immunity would serve the doctrine's purposes. The Court decided that the defendants could not assert qualified immunity. *Id.* at 164-167.

The Court initially observed that, at common law, individuals sued for malicious prosecution and abuse of process did not possess immunity from suit. *Wyatt*, 504 U.S. at 164-165. The Court then turned to the policies served by qualified immunity. The Court concluded that "the special policy concerns" supporting the application of qualified immunity to government officers did not apply to a private person who invoked state replevin law to settle a private dispute. *Id.* at 166-167. Those policy concerns, the Court explained, were to prevent undue timidity in the performance of discretionary action by public officers; to avoid discouraging persons from entering public service; and to limit distracting individuals from their public duties. *Id.* at 167-168. The Court contrasted the private individuals at issue, whose challenged actions were taken in furtherance of their own private financial interests, with individuals like "school board members" or "police officers," who "hold [an] office requiring them to exercise discretion" and are "principally concerned with enhancing the public good." *Id.* at 168. Those individuals, the Court explained, likely should be afforded qualified immunity to encourage them to perform public service and "to act forcefully and decisively" when doing so. *Ibid.*

2. Subsequently, in *Richardson* v. *McKnight*, 521 U.S. 399 (1997), the Court considered whether private prison guards could assert qualified immunity in a Section 1983 action brought by an inmate. The guards were employed by a private, for-profit corporation that was under contract with the State to manage and operate a prison. *Id.* at 409. The Court explained that, as in *Wyatt*, the entitlement of the private prison guards to qualified immunity would turn on "history and * * * the purposes that underlie government employee immunity." *Id*. at 404. With regard to history, the Court observed that there was no "firmly rooted tradition of immunity applicable to privately employed prison guards." *Ibid*. (internal quotation marks omitted). With regard to the purposes of qualified immunity, the Court considered it a "closer question" whether those purposes "warrant immunity for private prison guards" in the circumstances. *Id.* at 407.

The Court concluded that the purposes of qualified immunity would not adequately be served by recognizing immunity. In the Court's view, the "most important" such purpose—preventing "unwarranted timidity" in the performance of public responsibilities—is of diminished concern "when a private company subject to competitive market pressures operates a prison." *Richardson*, 521 U.S. at 409. That is because a private "firm whose guards are too timid will face threats of replacement by other firms," *ibid.,* and also may take action against under-performing individuals without the constraints imposed by civil-service rules, *id.* at 410-411. The same flexibility, the Court reasoned, enables a private firm to offer increased pay or benefits to "potential applicants" as a means of counteracting "the employment-discouraging fear of unwarranted liability." *Id.* at 411. And while

ongoing lawsuits might distract private prison guards from their duties, the Court viewed the risk of distraction alone to afford insufficient grounds for immunity. *Ibid.*

Significantly, however, the Court stressed that its decision was a "narrow[]" one confined to "the context in which it arose"—that of a "private firm, systematically organized to assume a major lengthy administrative task * * * with limited direct supervision by the government." *Richardson*, 521 U.S. at 413. The Court indicated that the case would be different if it involved a "private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Ibid.*

3. The Court's decisions thus establish that "§ 1983 immunity does not automatically follow § 1983 liability." *Richardson*, 521 U.S. at 412. The decisions equally establish, however, that private persons acting under color of state law are not categorically ineligible for qualified immunity. The court of appeals therefore erred at the outset in finding petitioner ineligible for qualified immunity based solely on his status as a "private attorney" rather than "an employee of the City." Pet. App. 24.

Rather than hinge the availability of qualified immunity solely on a person's status as a government employee or private person, this Court assesses the justification for immunity in light of the policy and historical concerns supporting the grant of immunity to government officials. *Richardson*, 521 U.S. at 404-412; *Wyatt*, 504 U.S. at 167. With respect to the policy concerns underlying qualified immunity, the Court considers whether the individual's challenged actions are "principally concerned with enhancing the public good" and

whether recognition of immunity would "protect[] government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167-168. With respect to history, the Court examines whether there is a "tradition of immunity" in comparable circumstances. *Id.* at 164, 167-168; see *Richardson*, 521 U.S. at 403-404.

Although those considerations led the Court to deny qualified immunity to the private defendants in *Richardson* and *Wyatt*, the Court carefully and expressly limited its holdings to the specific contexts it confronted. *Richardson*, 521 U.S. at 413; *Wyatt*, 504 U.S. at 168-169. Of particular significance, the Court suggested that private persons retained to work closely with government officials in furtherance of the public interest would present a different case. *Richardson*, 521 U.S. at 409, 413; *Wyatt*, 504 U.S. at 167-168. Those are precisely the circumstances at issue here.

B. Applying Qualified Immunity To A Private Party Retained To Further The Public Interest Under Supervision Of Government Officials Would Directly Promote The Doctrine's Core Purposes

Qualified immunity generally should be available to a private party acting under color of state law when the party (1) has been retained by government to assist in serving public interests, and (2) works alongside or under close supervision of government officials. Affording immunity in those circumstances, as this case illustrates, directly promotes the same policy considerations that animate the doctrine's application to public officials.

1. Granting qualified immunity to private parties retained to serve public interests while acting in concert with public officials promotes the effective performance of government functions

Once a private party is deemed to be acting under color of state law and hence subject to suit under Section 1983, qualified immunity generally should be available if he is retained to work in furtherance of the public interest and does so alongside or under close supervision of government officials.

a. As an initial matter, the nature of the function performed by the person is significant because the overarching purpose of qualified immunity is to "protect[] government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167. Accordingly, the Court has distinguished between those persons who take on government work in service of the public good and those, as in *Wyatt*, who invoke state law to further their own personal, financial interests. *Id.* at 167-168. Qualified immunity "acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Id.* at 168.

Qualified immunity therefore does not apply to a private person who acts under color of state law in the context of a private business dispute. *Wyatt*, 504 U.S. at 167-168. By contrast, the Court has granted qualified immunity to persons serving the public interest as school board members, recognizing that, without protection from individual damages actions, even the "most conscientious" person would be deterred from "exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students." *Wood* v. *Strickland*, 420 U.S. 308, 319-320 & n.11 (1975).

b. The Court has explained the "mere performance of a governmental function" does not itself invariably suffice to warrant the application of qualified immunity. *Richardson*, 521 U.S. at 408. But while performance of a government function may not be enough, by itself, to justify qualified immunity, there is a sound basis for extending qualified immunity to a private party who performs a public function alongside or under supervision of government officials. Indeed, in stating that performance of a public function would not itself necessarily justify qualified immunity, the Court observed that that was "especially" the case "for a private person who performs a job without government supervision or direction." *Id.* at 408-409. And the Court went on to emphasize that it was not addressing a private individual "serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.* at 413. Those circumstances squarely implicate the core policies underlying qualified immunity and support application of the doctrine.

i. The Court has explained that the "most important" policy concern supporting qualified immunity is the interest in avoiding any "unwarranted timidity" in the performance of public functions that may stem from a fear of personal liability. *Richardson*, 521 U.S. at 409-410. In denying qualified immunity in *Richardson*, the Court believed that employees of private companies under long-term contract with the government (such as contracts to operate a prison) are more likely motivated by "competitive market pressures" than concerns about individual liability. *Ibid.* By contrast, when a private individual is retained to work in close coordination with government officials, concerns about indecisive and

overly timid performance of public functions become acute.

In part, that is because the private party himself may exercise undue caution in the performance of his own responsibilities in light of the prospect of liability. Of particular significance, moreover, when a private party is retained to work alongside and under the supervision of government officials, the denial of qualified immunity not only may tend to produce unduly cautious decisions and actions on the individual's own part, but such timidity in turn would necessarily affect the *public officials* with whom the individual works in close coordination. For instance, if the fear of liability would lead a private party to err on the side of caution in giving advice to, and forming recommendations for, his public supervisors, those public officials would carry out their responsibilities on the basis of deficient (and unduly risk averse) recommendations and advice. Even though they, as public officials, could assert qualified immunity, any inability to invoke immunity by the private individual on whom they rely would adversely affect their performance of their public duties. For that reason, circumstances in which a private party works as part of an integrated team with public officials markedly differ from the circumstances in *Richardson*, and afford a materially stronger foundation for enabling the private party to invoke qualified immunity.

ii. In addition to the concern with encouraging nontimid and decisive action in the public interest, qualified immunity also rests on a concern that the prospect of damages liability would unduly deter individuals from entering public service in the first place. *E.g.*, *Richardson*, 521 U.S. at 411; *Mitchell*, 472 U.S. at 526. That concern is magnified in circumstances in which private

persons are retained to work closely with government officials. They will invariably be required to make the same kinds of difficult judgments, and carry out the same kinds of functions, as their colleagues who are government employees. Such individuals would be less willing to "enter[] public service" and "serve the public good" if they were denied the immunity afforded government employees with whom they work directly and closely. *Wyatt*, 504 U.S. at 167. That is particularly so because, whereas a private prison guard working for a large company operating a prison would face the same prospect of liability as his fellow private employees, a private person retained to work as part of a team composed primarily of public officials would alone face a prospect of liability not shared with any of his fellow workers.

If private individuals were to be deterred from undertaking to perform public functions in such circumstances due to fear of individual liability, the overarching objective of promoting the effective functioning of government would be substantially disserved. A government entity may elect to retain a private party to assist in the performance of public duties for a variety of reasons. Those include, for instance, the availability of particular expertise in the relevant area, or the absence of an adequate long-term need for a given service to warrant creation of a permanent, full-time position.

For instance, the Federal Bureau of Investigation retains technical specialists, such as experts in wiretapping or surveillance, on a contract basis to assist in its law enforcement efforts. Such individuals serve "as an adjunct to government in an essential government activity." *Richardson*, 521 U.S. at 413. Similarly, the federal government hires contractors who work directly for fed-

eral personnel as courthouse security guards. Such officers, although not public employees, play an important role in protecting public buildings and are subject to the oversight of government officials. Private citizens may also cooperate voluntarily in the performance of government functions at the request and under the direction of public officials. For example, federal law enforcement agencies may enlist private citizens or corporate entities to serve as informants in criminal cases and to provide "backstopping" for undercover operations, *i.e.*, to vouch for fictitious business enterprises used in a law enforcement sting. Private parties have been sued when offering that type of assistance to the federal government. See, *e.g.*, *Brown* v. *NationsBank Corp.*, 188 F.3d 579 (5th Cir. 1999) (backstopping), cert. denied, 530 U.S. 1274 (2000); *Unus* v. *Kane*, 565 F.3d 103 (4th Cir. 2009), cert. denied, 130 S. Ct. 1137 (2010) (informant).

Insofar as private persons in such situations may be subject to liability for constitutional torts, granting them qualified immunity would encourage them to work with government officials in these and other ways. And because private parties would generally be subject to close government supervision in such circumstances, there should be no greater likelihood of constitutional deprivations than is the case with government employees subject to the same supervision in the performance of their duties. Denying qualified immunity, however, would substantially constrain the government's ability to carry out its functions. By discouraging private parties from agreeing to assist the government in the performance of its duties, the denial of immunity would tend to deprive the government of an important tool by which to carry out its functions. At the least, the absence of immunity—and the corresponding prospect of personal lia-

bility—would predictably increase the costs to government of retaining private parties to assist with the conduct of government functions.

iii. Qualified immunity also aims to minimize the extent to which lawsuits distract officials from their governmental duties. See *Richardson*, 521 U.S. at 408, 411-412; *Wyatt*, 504 U.S. at 167; *Mitchell*, 472 U.S. at 526. This Court in *Richardson* understood that, even in the context of private prison guards employed by a company operating a prison under contract, the denial of immunity would distract the guards from the performance of their duties. 521 U.S. at 411-412. The Court determined, however, that because the remaining policy concerns favoring immunity were diminished in the circumstances, the interest in avoiding distraction did not alone supply adequate grounds for granting qualified immunity. But when private persons are retained to perform public functions in close coordination with government officials, the circumstances not only implicate policy concerns apart from the interest in avoiding undue distraction, see pp. 16-21, *supra*, but even that concern alone is substantially enhanced.

That is because public officials in that situation, although entitled to assert qualified immunity against any action filed against them, would be distracted from the performance of their responsibilities in connection with any lawsuit initiated against their private-party colleague. Because the private party's challenged conduct would arise in the context of close coordination with (and supervision by) government officials, those officials would frequently need to participate in the litigation as witnesses, deponents, and the like, including to shed light on the nature of the private defendant's conduct and elaborate on the particular facts in issue.

The interest in avoiding distraction, like the remaining policy concerns animating the application of qualified immunity to government officials, thus strongly supports the application of immunity when a private person is retained to assist in the performance of public functions alongside or under the supervision of public officials. Conversely, it would be highly anomalous in those circumstances to deny qualified immunity to the private party alone, leaving a private individual with sole liability for violation of rights under color of state law. 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.") (internal quotation marks omitted).

2. The facts of this case illustrate the basis for qualified immunity when private persons are retained to perform government functions alongside public officials

Because petitioner was engaged to assist with performance of a core public function and to do so under the close supervision of public officials, the policy considerations underlying qualified immunity are fully applicable here. He alone should not be saddled with personal liability while all of the involved city officials gain the protection of qualified immunity.

a. Petitioner indisputably was retained to assist in the performance of a core public function. A governmental entity might retain a private attorney like petitioner because there is a temporary need for assistance with an unusually demanding case; a need for special-

ized expertise in a particular area of the law; a need to avoid actual or potential conflicts-of-interest; or a need for an independent opinion by an outsider.[3]

Here, petitioner was engaged to assist with and provide advice on an internal personnel investigation for a city fire department, performing the same type of work a government official might perform. In particular, he bore responsibility for conducting portions of the investigation and providing legal analysis and advice about how to resolve the investigation. Pet. App. 44-45, 59. All parties agreed that petitioner could be sued for these acts under Section 1983 because he was "clothed with the authority of" the City. *United States* v. *Classic*, 313 U.S. 299, 326 (1941); see J.A. 21; Pet. 3. Indeed, when respondent initiated this lawsuit, he apparently believed that petitioner *was* a city employee. See J.A. 21 (complaint alleges that petitioner "was at all times relevant, an employee of the City of Rialto charged with conducting internal investigations," and that he "acted under color of state law, within the course and scope of his employment").

Respondent's initial belief evinces a recognition that petitioner performed a quintessential government function—a governmental investigation of the government's own employee—in service of the public interest. Petitioner more closely resembles a school board member, who is "principally concerned with enhancing the public good," than an individual acting under color of law to resolve a private business dispute. See *Wyatt*,

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[3] See, *e.g.*, William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 Notre Dame L. Rev. 399, 463 (1988); United States General Accounting Office, *Private Attorneys: Information on the Federal Government's Use of Private Attorneys*, GAO/GGD-93-17FS, at 1 (1992).

504 U.S. at 168. Indeed, an attorney hired by a local government is obligated by applicable professional standards to act in her client's—*i.e.*, the public's—interest rather than her own interest. See, *e.g.*, American Bar Ass'n, Model R. of Prof'l Conduct 1.2, 1.7, 1.8.

b. Petitioner worked side-by-side with government officials during the personnel investigation, and at all times operated under the close supervision of city officials. When petitioner interviewed respondent, two fire department Battalion Chiefs were present in the room and the Fire Chief was close by. Pet. App. 7-8. As the interview progressed, petitioner consulted with the Fire Chief and the City Attorney. *Id.* at 7-8, 46. Petitioner suggested that the investigation could be resolved favorably to respondent by having him produce the unused building materials for inspection, but he did not (and could not) order respondent to do so—rather, the Fire Chief did. *Id.* at 46-47. In short, unlike the private prison guards in *Richardson*, who were employees of "a private firm, systematically organized to assume a major lengthy administrative task * * * with limited direct supervision by the government," petitioner was "associated with a government body, serving as an adjunct to government in an essential governmental activity" and was "acting under close official supervision." 521 U.S. at 413.

Affording qualified immunity to petitioner advances the important policies animating the doctrine. *First*, the circumstances directly implicate the interest in avoiding undue caution in the exercise of public functions. If an attorney can be personally liable for her reasonable but mistaken legal advice to a city government, even the most experienced and talented attorney may hesitate before offering her client advice on unsettled legal is-

sues. See *Harlow*, 457 U.S. at 814 ("[F]ear 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.") (internal quotation marks omitted). In this very case, respondent's counsel threatened petitioner with a lawsuit while petitioner was in the midst of advising city officials about how to proceed with the personnel investigation. See p. 3, *supra*; J.A. 130-132, 134, 148. Without qualified immunity, a private attorney's fear of personal financial liability for reasonable (but ultimately erroneous) legal advice could compromise her ability to fulfill her professional obligation to provide candid and robust advice to her client about the government's legal options.

Any undue caution on counsel's part not only would adversely affect the content of her advice to her public colleagues and supervisors, but would necessarily in turn adversely affect their performance of their own responsibilities. Here, for instance, petitioner gave advice to, and consulted with, his clients in the fire department throughout the course of the investigation. While the fire department officials could invoke qualified immunity in any suit against them, their decisions concerning the conduct of their duties would nonetheless be compromised by any unduly cautious legal advice they might receive from petitioner. The denial of immunity to petitioner thus would predictably affect not only his own conduct of public duties, but also the conduct of those duties by the public officials with whom he works.

Second, denial of immunity would tend to discourage private attorneys like petitioner from taking on representation of government clients in the first place. Unlike a for-profit prison-management firm of the kind at issue in *Richardson*, which serves only governmental

entities, private attorneys may work for a wide variety of clients, both public and private, and they generally may choose their clients. Many attorneys may agree to take on representation of governments as a matter of public service, often at below-market rates. But if representing a government client entails the potential of constitutional tort liability when the attorney's judgment call turns out to be wrong, attorneys will be less willing to participate in the performance of public functions. Here, for instance, petitioner served the City for over a decade by providing advice and representation on labor-law matters. In return, he not only was sued as a state actor, but he is the only defendant left litigating this case and the only one facing the prospect of personal liability.

Further, the threat of personal liability will require those attorneys who take on government work to pass on the potential costs to the government entities who retain them. There is no "free lunch," because "as civil-rights claims increase, the cost of civil-rights insurance increases." *Richardson*, 521 U.S. at 419 n.3 (Scalia, J., dissenting). And insofar as attorneys are unable to obtain malpractice insurance that covers constitutional torts claims, see Pet. Br. 50-51, they would be still less likely to take on government clients without some guarantee of indemnification from those clients.

Third, and finally, denying qualified immunity to private attorneys in petitioner's position would distract both the attorneys and their government-employee counterparts from their official duties. Qualified immunity is immunity not only from damages, but from suit. See, *e.g.*, *Harlow*, 457 U.S. at 814. If that protection is unavailable to private attorneys working for public clients, those attorneys could be forced to forgo substantial

portions of their practice while defending against constitutional torts suits. As explained, this distraction will inevitably spread to government employees as well; they may, for example, be deposed or required to testify in Section 1983 cases—even where they themselves have already been afforded qualified immunity—because a claim remains against a private attorney who lacks immunity.

C. Applying Qualified Immunity In The Circumstances Of This Case Is Consistent With Historical Tradition

When determining whether to enable private parties acting under color of law to claim qualified immunity, this Court assesses both whether the purposes of the doctrine would support recognition of immunity and whether historical tradition would do so. See *Richardson*, 521 U.S. at 404-412; *Wyatt*, 504 U.S. at 163-169. Here, the purposes of qualified immunity support its recognition in the circumstances of this case. In addition, there is substantial historical support for affording qualified immunity to individuals retained to assist with the day-to-day workings of local governments, particularly those who serve the public interest as attorneys.

1. At the time Section 1983 was enacted, private actors routinely participated in important functions of local governments. "From the perspective of American history, public-private governance is distinctly old rather than surprisingly new." William J. Novak, *Public-Private Governance: A Historical Introduction*, in *Government by Contract: Outsourcing and American Democracy* 23, 39 (2009) (Novak). Since the time of the Founding, local governments in the United States operated with substantial assistance from private individuals. The early institutions for governing the American

colonies were based on "early traditions of English legal rule," where the various institutions of local governance relied on charters and bylaws that had "not an absolute demarcation of institutions of public authority, but rather a strange mélange of private, public, and associative functions." *Id.* at 27. The same was true in the American colonies, which substantially relied on the efforts of private citizens for local governance. *Id.* at 28-29; see also, *e.g.*, 1 *Encyclopedia of the North American Colonies* 305-312, 348-360 (1993). In the eighteenth and nineteenth centuries, there was a "mixture of public and private means and ends in the administration of policies concerning such things as crime, health, education, and welfare." Novak 31.

There is a significant history of private attorneys, in particular, providing assistance with local government functions. "Up 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. Even well into the twentieth century, many prosecutors (even federal prosecutors) had a hybrid existence, maintaining private practices while prosecuting criminal matters for the government." Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. Davis L. Rev. 411, 413 (2009); see Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 Am. J. Legal Hist. 43, 43 (1995) ("[P]rivately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century."); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53, 110 (2005) (Johns) ("Throughout the nineteenth century, private prosecu-

tion flourished in most states."). Indeed, "there generally was no such thing as the modern public prosecutor" in 1871. *Kalina* v. *Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring); see *id.* at 124 n.11. Local governments relied on private attorneys to serve as public prosecutors both because of the tradition of such prosecutions in England, but also because of the practical needs to "stretch[] capacity, spread[] costs, and lessen[] the need for an expansive, professional bureaucracy." Novak 31; see Johns 108-109.

Private attorneys served nineteenth-century governments in other roles as well. Before the creation of the Department of Justice in 1870, federal agencies often relied on private attorneys to provide their legal counsel. See Homer Cummings & Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* 218-229 (1937). Private attorneys could serve as federal judges while maintaining their own private law practices. See, *e.g.*, James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 Mich. L. Rev. 1, 23 (2008). Many individual attorneys took on representation of government clients in high-profile cases in addition to their private clients. See Pet. Br. 18-20 (providing examples).

2. At common law, constitutional torts were not recognized as such. But the common law "provide[d] a kind of immunity" for private attorneys who "performed services at the behest of the sovereign," *Richardson*, 521 U.S. at 407, and that immunity provides a historical foundation for affording qualified immunity to attorneys such as petitioner in Section 1983 suits. For some activities, private attorneys could claim an absolute "judicial" immunity, which "protected judges, jurors and grand

jurors, members of courts-martial, private arbitrators, and various assessors and commissioners" who "were charged with resolving disputes between other parties or authoritatively adjudicating private rights." *Kalina*, 528 U.S. at 132 (Scalia, J., concurring).

For other conduct, private attorneys could rely on the defenses of good faith and reasonable cause. At common law, attorneys were ordinarily liable to third parties only for intentional misconduct, when they acted maliciously and without cause. See Joel P. Bishop, *Commentaries on the Non-Contract Law* § 704, at 325 (1889) (cited in *Richardson*, 521 U.S. at 407); see also 3 William Blackstone, *Commentaries on the Laws of England* 126-127 (1768); Edward P. Weeks, *A Treatise on Attorneys and Counselors at Law* § 127, at 267-269 (2d ed. 1892) (Weeks). Both public and private attorneys were able to invoke the defenses of good faith and probable cause. Weeks § 127, at 269; see, *e.g.*, *Tower* v. *Glover*, 467 U.S. 914, 921 (1984) (acknowledging that public lawyers at common law enjoyed immunity from liability for non-intentional conduct). This type of "quasi-judicial immunity" would protect "public officials ma[king] discretionary policy decisions that did not involve actual adjudication" and therefore is "akin to what we now call 'qualified,' rather than absolute, immunity." *Kalina*, 528 U.S. at 132 (Scalia, J., concurring).[4]

There is, accordingly, substantial historical support for petitioner's claim to qualified immunity here. Petitioner was undertaking an official investigation on be-

[4] While this common law immunity was immunity from damages rather than immunity from suit, pre-trial discovery in the nineteenth century was not as burdensome as it is today. See Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 Clev. St. L. Rev. 17, 25-27 (1988).

half of a local government, similar to the actions taken by a police officer or a public prosecutor. Had he been sued by the target of such an investigation in 1871 for malicious prosecution, he would have prevailed in the lawsuit because his legal judgment about how to resolve the investigation was a reasonable one. See Weeks § 127, at 269 ("[A]n attorney is not liable, civilly, for ordering a levy on property, if he acts in good faith and on reasonable cause. To sustain an action against an attorney for acts done in the prosecution of his client's rights, it must be shown that such acts were malicious, and without foundation."). That is especially true because petitioner was at all times supervised by, and was carrying out the orders of, city officials. See, *e.g.*, *Ford* v. *Williams*, 13 N.Y. (3 Kern.) 577, 584-585 (1856) (attorney who executed a seizure of property was not liable for trespass because he "act[ed] only in the execution of the duties of his calling or profession, and does not go beyond it, and does not actually participate in the trespass, he is not liable"; the attorney is "shield[ed]" for "simply convey[ing] to the officer the instructions of his clients"). The historical treatment of attorneys serving the public interest fortifies the conclusion that petitioner should be afforded qualified immunity, so that he is not left as the only person in this case facing personal liability.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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