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 OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF AMICUS CURIAE

Amicus curiae American Bar Association (ABA) respectfully submits this brief in support of petitioner, attorney Steve A. Filarsky.[1] The ABA urges that a loss of qualified immunity for private attorneys retained by government entities to provide legal services will expose them to a risk of liability they would not otherwise face, with the result that they will be substantially deterred from providing services that are essential for the proper performance of many government functions.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from each of the fifty states and other jurisdictions. Membership includes attorneys in private practice, government service, corporate law departments, and public interest organizations, as well as legislators, judges, law professors, law students, and non-lawyer associates in related fields.[2]

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. All counsel of record consented to the filing of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the

(Continued on following page)

Since its inception, and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of the American legal system by "[p]romot[ing] competence, ethical conduct and professionalism," and lawyers have long viewed the practice of law as a public service.[3] The ABA MODEL RULES OF PROFESSIONAL CONDUCT ("ABA MODEL RULES"), which were first published as the ABA'S CANONS OF PROFESSIONAL ETHICS in 1908, reflect the profession's ethical mandate to provide legal services to, *inter alia*, government organizations.[4] *See* ABA MODEL RULE 6.1.

Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] *See* ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html.

[4] The ABA MODEL RULES, available at http://www.Americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html, are developed by task forces composed of members of the ABA and national, state, and local bar organizations, and then reviewed by academicians, practicing lawyers, and the judiciary prior to presentation to the ABA House of Delegates ("HOD"). The HOD is the ABA's policy making body and is composed of more than 550 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. The ABA Model Rules become official ABA policy after approval by vote of the HOD. Information on the HOD is available at http://www.americanbar.org/groups/leadership/house_of_delegates.html.

The standards for imposing liability on attorneys based on the delivery of legal services and, specifically, the threat of liability under 42 U.S.C. § 1983 ("Section 1983") for private counsel retained by government entities to perform legal services, are of intense concern to the ABA and to its Section of State and Local Government Law (the "Section"). The Section, which has a national membership of government lawyers, lawyers in private practice, legal academics, jurists, law students, and others, focuses on issues of importance to state, county, municipal and other government entities, including the issues of liability and defenses under Section 1983. *See, e.g.*, MARY MASSARON ROSS & EDWIN P. VOSS, JR., SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION (ABA SECTION OF STATE & LOCAL GOV'T LAW, 3d ed. 2006).

Having carefully considered the Ninth Circuit's conclusion that a private lawyer retained to provide legal services to a government entity is not entitled to qualified immunity merely because of his or her status as a "private" lawyer, the ABA respectfully asserts that this conclusion, if permitted to stand, will impose new and potentially significant liability risks on private counsel that will seriously impact the vital contributions they make to effective state and local government performance.

SUMMARY OF ARGUMENT

Qualified immunity from Section 1983 suits is essential for private attorneys representing government clients. Governments frequently must retain private attorneys for the effective and efficient performance of core government functions. For smaller entities, it is the only practical way to obtain needed legal advice. Even those that can afford in-house counsel, however, may need to retain private counsel because of conflicts, or for economic or political reasons, because special expertise is needed. In fact, a state's ethics rules may require retention when government attorneys do not have or cannot acquire needed expertise. A decision that these private attorneys are not entitled to qualified immunity would significantly impact these practices.

Such a decision would also deter private attorneys from representing government entities. First, a new duty of care to an opposing party would be created in Section 1983 suits that would interfere with the attorney-client relationship. Second, the potential for Section 1983 suits would impose significant financial and reputational risks, with increased insurance costs and exposure to punitive damages passed on to government clients that today commonly receive reduced rates as a form of public service. Third, the private attorney may attempt to minimize Section 1983 risk by pursuing a less vigorous representation. Finally, the loss of qualified immunity would likely chill the profession's interest in encouraging public service and significantly impact the vital contributions made

by private attorneys to effective government performance. Ensuring qualified immunity, on the other hand, would promote the strong public interest in the continuing representation of public entities by private counsel.

ARGUMENT

Qualified immunity should be afforded to private attorneys when they act under color of state law in providing legal services to government entities. This Court repeatedly has stated that Section 1983 should not be read to abrogate common law immunities when they are needed to "ensure that talented candidates" will not be "deterred by the threat of damages suits" from providing "public service" and "principled and fearless decision-making." *Richardson v. McKnight,* 521 U.S. 399, 407-08 (1997) (internal quotations and citations omitted). As petitioner's brief demonstrates, the common law unquestionably afforded immunity defenses equally to government-employed attorneys and to private lawyers representing government entities. The critical service of private attorneys in the proper performance of important government functions has only increased since *Richardson* was decided. Without those immunities, however, the exposure to potential Section 1983 liability will deter many from undertaking these essential representations or, if undertaken, from

providing the principled and fearless decision-making that is required.[5]

I. THE PRIVATE BAR PROVIDES GOVERNMENT ENTITIES WITH A BROAD ARRAY OF LEGAL SERVICES THAT ARE ESSENTIAL TO THE PROPER PERFORMANCE OF GOVERNMENT FUNCTIONS

State and local governments frequently must retain private counsel for the effective and efficient performance of core government functions. *See* U.S. CENSUS BUREAU, EMPLOYMENT OF MAJOR LOCAL GOVERNMENTS (May 2004) (thousands of government bodies have no in-house lawyers or legal staff).[6] Indeed, the need for outside counsel is especially critical outside of large municipalities. In Alaska, for example, "[m]ost small rural municipalities in the state do not need or have enough money to afford to hire a full-time municipal attorney. Municipal attorneys are often private practice attorneys who have a lot of experience working with municipal law." STATE OF ALASKA, DEPARTMENT OF COMMERCE, COMMUNITY

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[5] Because the issue before the Court is limited to qualified immunity, this brief does not discuss absolute immunity that should be applied when a private attorney is retained to prosecute a case. *See Day, Durham, Eldridge v. Gibson*, 332 F.3d 1019, 1021 (6th Cir. 2003) (private prosecutor entitled to absolute immunity).

[6] *Available at* http://www.census.gov/prod/2004pubs/gc023x1.pdf.

AND ECONOMIC DEVELOPMENT, COMMUNITY AND REGIONAL AFFAIRS, LOCAL GOVERNMENT HANDBOOK: LEGAL REQUIREMENTS – THE MUNICIPAL ATTORNEY (Apr. 18, 2003);[7] *see also* Lester D. Steinman, *Reducing Municipal Legal Costs Through Shared Legal Services*, 22 MUNICIPAL LAWYER 19 ("Not surprisingly, most municipal attorneys worked only part time for the government; those municipalities hiring full-time attorneys typically could only attract younger, inexperienced lawyers.").

The hard reality is that retention of private counsel is the only practical way for many smaller jurisdictions and government entities to obtain needed legal advice. Nor should this be expected to change in today's era of cut-backs and austerity, when local governments that previously had in-house legal departments are eliminating those positions and relying exclusively on private counsel. *See, e.g.*, Gus Burns, *Plan to shut down Saginaw's legal department could save taxpayers $200,000 per year, deputy manager says*, THE SAGINAW NEWS, Aug. 23, 2011, (City planned to eliminate legal department and to contract with outside counsel to reduce budget shortfall);[8] Tim Pfarr, *Council OKs Budget Cuts That Create Surplus*, NEWCASTLE-NEWS, Apr. 2, 2010, at 1

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[7] *Available at* http://www.dced.state.ak.us/dca/logon/pubs/LGH6-2B.pdf.

[8] *Available at* http://www.mlive.com/news/saginaw/index.ssf/2011/08/plan_to_shut_down_saginaws_leg.html.

(city terminated in-house attorney in favor of outside counsel in plan to eliminate budget deficit).

Even those government entities that can afford in-house legal departments often need to retain private counsel when conflicts or potential conflicts arise. *See, e.g.*, *Faith v. Bell*, No. C040663, 2002 WL 31820238 at *4 (Cal. Ct. App. Dec. 17, 2002) (private attorney retained when government's in-house counsel disqualified themselves because of conflict of interest); *Commonwealth* ex rel. *Clay County v. Sizemore*, 108 S.W.2d 733, 735 (Ky. 1937) ("[W]here the interest or duties of the county attorney are in conflict with the interests and responsibilities of the county, the fiscal court has power to engage independent counsel to represent it and to protect its interests."). *See also Romley v. Daughton*, 241 P.3d 518, 521 (Ariz. Ct. App. 2010) (private attorney retained to advise public body whether its attorney had conflict of interest).

In other instances, economic or political reasons may lead a government to conclude that private counsel is needed. *See, e.g.*, Daniel J. Capra, Lester Brickman, Michael Ciresi, Barbara S. Gillers & Robert Montgomery, *The Tobacco Litigation and Attorneys' Fees*, 67 FORDHAM L. REV. 2827 (1999) (states, including Florida, Minnesota, Mississippi, and Texas hired private attorneys to prosecute mass tort claims on contingency fee in 1990s tobacco litigation). Also, governments may need to augment their resources by retaining outside counsel to work with their legal departments on complex matters as an

integrated team. *See, e.g.*, *Perdue v. Kenny A.* ex rel. *Winn*, 130 S. Ct. 1662, 1681 (2010) (in opposing plaintiffs' efforts to have foster-care system reformed, "the State spent $2.4 million on outside counsel (who, because they charge the State reduced rates, worked significantly more hours than that figure alone indicates) and tapped its own law department for an additional 5,200 hours of work."). Indeed, governments retain private lawyers to represent them in the defense of Section 1983 actions. *See, e.g.*, *Trant v. Towamencin Twp.*, No. Civ. A 99-134, 1999 WL 317032 at *4 (E.D. Pa. May 20, 1999) (for former Rule 15(c)(3) purposes, fact that township hired private attorney to represent township, police chief, and officer defendants for Section 1983 defense, "rather than maintaining a full office of government attorneys as does a large city such as Philadelphia, does not change this court's analysis or conclusion").

When special expertise is needed because of the subject matter or because of the court in which the matter is being heard, a government may conclude that private counsel is needed. *See, e.g.*, *Jefferson v. City of Tarrant*, 522 U.S. 75, 77 (1997) (now-Chief Justice Roberts represented city in Section 1983 case); *Yee v. City of Escondido*, 503 U.S. 519, 521 (1992) (private counsel Carter Phillips represented the city in regulatory takings case); *Bunting v. Oregon*, 243 U.S. 426, 430 (1917) (Felix Frankfurter represented the State of Oregon with its attorney general in a wage case).

Criminal prosecutions, insurance claims and the interpretation of government documents may also require private counsel with special expertise. *See*, *e.g.*, *Richardson*, 521 U.S. at 418 (1997) (Scalia, J., dissenting) (high-profile prosecutions may require government to retain private attorneys as prosecutors); *Indiana Ins. Co. v. Pana Cmty. Unit Sch. Dist. No. 8*, 314 F.3d 895, 897 (7th Cir. 2002) (private counsel represented municipal corporation in insurance coverage dispute); *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2008 WL 3845228 at *2 (E.D. La. Aug. 13, 2008) (seven private law firms retained to represent State as putative class representative in State's attempt to recover insurance claims assigned to State); *County of Kauai* ex rel. *Nakazawa v. Baptiste*, 165 P.3d 916, 919 (Haw. 2007) (outside private counsel retained to represent county in case involving interpretation of county charter).

Where specialized expertise is needed, the retention of private counsel will not be merely prudent, but is required when government lawyers have an ethical duty to step aside under their state rules of professional conduct, most of which are modeled after the ABA MODEL RULES.[9] For example, ABA Model Rule 1.1 provides in pertinent part, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill,

[9] *See, e.g.*, CAL. RULES OF PROF'L CONDUCT R. 3-110; FLA. RULES OF PROF'L CONDUCT R. 4-1.1; MICH. RULES OF PROF'L CONDUCT R. 1.1; TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.01.

thoroughness and preparation reasonably necessary for the representation."

As stated in the Commentary to Rule 1.1: "Competence includes the ability to discern when an undertaking requires specialized knowledge or experience that a lawyer does not have and requires that the lawyer either acquire the expertise, associate with a specialist, or decline the undertaking and refer it to a competent specialist [citations omitted]." MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. (2010); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-405 (1997) (while lawyers serving as public officers or employees are singled out under some rules, "it has generally been assumed – correctly in our view – that such lawyers are in most other respects subject to the same obligations in representing their government client that apply to lawyers representing private clients").[10] Thus, under the pertinent state's ethics rules, a government entity may have no choice but to retain private counsel when its employed attorneys do not have or cannot acquire the expertise needed for an undertaking.

Finally, the representation of governments by private attorneys is not a recent development. *See*, *e.g.*, *Hopkins v. Clayton County*, 32 Iowa 15, 15 (1871)

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[10] *Available at* http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions.html.

(county retained private attorney to prosecute capital murder case); *Blair v. City of Chicago*, 201 U.S. 400, 411 (1906) (Clarence Darrow, while in private practice, represented the city in a street railway franchise case). And with today's widespread use of private attorneys by government entities, a loss of qualified immunity for these attorneys would have a significant impact on this essential practice going forward.

II. DENYING QUALIFIED IMMUNITY TO PRIVATE LAWYERS IN SECTION 1983 SUITS WILL DETER THEM FROM REPRESENTING GOVERNMENT ENTITIES

The purpose of qualified immunity is to protect the public as a whole, not to protect private individuals. *Wyatt v. Cole*, 504 U.S. 158, 168 (1992). However, without the same qualified immunity enjoyed by their government-employee attorney counterparts, the potential for Section 1983 suits will deter private attorneys from representing government entities, to the detriment of the public interest. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (recognizing a consequence of Section 1983 liability is "deterrence of able people from public service").

As a general rule, lawyers do not owe duties to non-client third parties. *See, e.g.*, RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51 (2000) (describing limited circumstances in which attorney would be liable to non-client third party); *Rubin v. Green*, 847 P.2d 1044, 1053 (Cal. 1993) ("litigation

privilege" immunizes lawyers absolutely from tort liability to third parties). Ordinarily, an attorney would not be liable to a party opposing his or her client. RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 51 cmt. c. ("A lawyer representing a party in litigation has no duty of care to the opposing party under this Section, and hence no liability for lack of care, except in unusual situations."). As stated by the Supreme Court of Hawaii, the "creation of a duty in favor of an adversary of the attorney's client would create an unacceptable conflict of interest. Not only would the adversary's interest interfere with the client's interests, the attorney's justifiable concern with being sued . . . would detrimentally interfere with the attorney-client relationship." *Buscher v. Boning*, 159 P.3d 814, 832 (Haw. 2007) (quoting *Myers v. Cohen*, 687 P.2d 6, 16 (Haw. Ct. App. 1984)).

A Section 1983 suit against a private attorney based on his or her representation of a government client would stand as an exception to this general prohibition. And Section 1983 litigation has multiplied in frequency over the past fifty years, with the vast majority of suits naming officials among the defendants. Dina Mishra, *When the Interests of Municipalities and Their Officials Diverge: Municipal Dual Representation and Conflicts of Interest in Section 1983 Litigation*, 119 YALE L.J. 86, 88 (2009); *see also Cleavinger v. Saxner*, 474 U.S. 193, 210-11 (1985) (noting increase since 1975 in Section 1983 cases by prisoners). Because government employee defendants are usually dismissed from these cases, it

is all but certain that private attorneys without qualified immunity will be named as defendants when possible and will not be dismissed. In fact, in the instant case, all of the other defendants have been dismissed as immune from suit, leaving petitioner as the sole remaining defendant.

Critically, the "good faith" defense is not an adequate substitute for qualified immunity. The "good faith" defense is an affirmative defense, on which the defendant has the burden. On the other hand, since *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity permits meritless lawsuits to be disposed of quickly: discovery is deferred until the defendant's motion for summary judgment on qualified immunity is decided and, while the "good faith" defense is decided by the jury at trial, the motion on qualified immunity is determined by the court and, if denied, an interlocutory appeal may be taken. Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 CARDOZO L. REV. 81, 95-96 (2004).

Further, the potential for Section 1983 suits would pose significant monetary risks to the private bar. Private attorneys may be faced with the perception that they are the only "deep pocket" available for an alleged civil rights injury. And they may be required to defend against a claim for punitive damages. *Smith v. Wade*, 461 U.S. 30, 56 (1983) ("We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil

motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."). Private attorneys may also face adverse publicity due to the public nature of Section 1983 litigation, which could affect their reputations and their private practices, even if the case is frivolous and later dismissed. The ensuing financial costs, including disruption of business, settlements necessitated by the risks posed by punitive damage trials, and the related increases in insurance premiums and deductibles, would be substantial. And this Court has already recognized the likelihood that similar financial effects of unconstrained exposure to Section 1983 suits would deter government service. *See, e.g.*, *Wood v. Strickland*, 420 U.S. 308, 320 (1975) (recognizing qualified immunity because "[t]he most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure").

Without qualified immunity, the private attorneys who do continue to represent government clients will be forced to pass on the costs of increased risk, making legal services less affordable to their government clients. This will be all the more unfortunate in that currently, public representation is commonly provided at reduced rates as a form of public service. *See, e.g.*, *Perdue,* 130 S. Ct. at 1681 (outside counsel charged State reduced rates); Kevin Sack, *Lawyer Opposing Health Law is Familiar to the Justices*, N.Y. TIMES, Oct. 26, 2011, at A1 (Paul D. Clements

contracted with Florida and other states at discounted rates); Tina Kleist, *Colantuono new Grass Valley lawyer*, THE UNION, Oct. 25, 2011, (city hired attorney as city attorney who offered discounted rates);[11] Press Release, City of South Bend, Ind., *City intervenes in I&M base rate case*, (Nov. 3, 2011) (city negotiated discounted rate with attorneys for representation).[12]

Section 1983 suits would also carry the likelihood of disrupting and distracting private attorneys from performing their public duties. *See Mitchell*, 472 U.S. at 526 (immunity designed in part to prevent the "distraction of officials from their governmental duties"); *Wyatt,* 504 U.S. at 167 ("Accordingly, we have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service."); *Harlow*, 457 U.S. at 816 (1982) (recognizing that Section 1983 actions could be a "deterrence of able people from public service").

Instead, the public has an interest in "encouraging the vigorous exercise of official authority, by

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[11] *Available at* http://www.theunion.com/article/20111025/NEWS/111029904/1001&parentprofile=10533.

[12] *Available at* http://www.southbendin.gov/news_detail_T13_R684.asp.

contributing to principled and fearless decision-making, and by responding to the concern that threatened liability would, in Judge Hand's words, 'dampen the ardour of all but the most resolute, or the most irresponsible,' public officials." *Richardson*, 521 U.S. at 408 (internal quotations and citations omitted). Without qualified immunity, the private attorney may attempt to minimize the risk of Section 1983 liability by pursuing a less aggressive strategy or one aimed at settlement that includes a release from personal liability.

Finally, the loss of qualified immunity would likely chill the profession's interest in encouraging lawyers to serve public entities, whether through government service as an employee or the representation of government clients. Indeed, the ABA's MODEL RULES encourage lawyers to provide representation to public sector clients, which can include:

> [The] delivery of legal services at no fee or substantially reduced fee to . . . *governmental and educational organizations* in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate. . . .

MODEL RULES OF PROF'L CONDUCT R. 6.1 (emphasis added).

Lawyers have long seen the practice of law as a public service. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371 (1977) ("Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on 'trade' as unseemly."). It has been said that public service "is the highest calling of those in our profession." Phillip G. Schrag, *Why Would Anyone Want To Be A Public Interest Lawyer?,* GEO. PUB. LAW RESEARCH PAPER NO. 10-52 (Sept. 23, 2003).[13] The loss of qualified immunity, however, would significantly impact the vital contributions that private attorneys make to effective government performance. On the other hand, ensuring qualified immunity would promote the strong public interest in the continuing representation of public entities by private counsel.

[13] *Available at* http://scholarship.law.georgetown.edu/fac_lectures/1.

CONCLUSION

For the reasons stated above, amicus curiae American Bar Association requests that this Court reverse the decision of the Ninth Circuit.

Respectfully submitted,

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