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 DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

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November 21, 2011

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar ("DRI") is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of the defense attorney, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and consistent. To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system.

This is such a case. Private attorneys frequently work with government agencies in the same capacity as do attorneys who are permanently employed by the government. The decision below, however, adopts an artificial line between the two types of lawyers, and exposes private attorneys to liability risks from which this Court has taken pains to protect permanent government employees. Neither logic nor history calls for such an arbitrary distinction.

Many courts nonetheless have reached similar results in reliance on this Court's opinion in *Richardson v. McKnight*, 521 U.S. 399 (1997). DRI respect-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation and submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief. Letters showing the parties' consent are attached.

fully submits that *Richardson* was wrongly decided and has increased the costs and risks for private attorneys and other individuals working with government agencies. Left uncorrected, the decision portends a continuation of the deluge of litigation that has come about since *Richardson* was decided. Accordingly, DRI urges the Court to reverse the decision below and to overturn *Richardson*.

SUMMARY OF THE ARGUMENT

Petitioner Steve A. Filarsky is a private attorney who was retained by the city of Rialto, California, to assist with an internal affairs investigation. Pet. Br. 3. In the course of the investigation, Petitioner worked closely with government supervisors, who independently decided whether to adopt his advice. *Id.* at 4-5. On these facts, as Petitioner explains, *id.* at 28-30, he is entitled to qualified immunity even under this Court's decision in *Richardson*. *See* 521 U.S. at 407 ("Apparently the law *did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign."); *id.* at 413 (suggesting that immunity would apply to "a private individual briefly associated with a government body, serving as an adjunct to government in an essential government activity or acting under close official supervision").

Reversing the Ninth Circuit's decision on that limited basis, however, would do nothing to resolve the inconsistent standards and decisions that have plagued the lower courts since *Richardson* was decided. DRI respectfully submits that *Richardson* rests on an incorrect premise, employs a faulty historical analysis, and creates a complex and unworkable standard—all in the name of purported policy benefits

that are uncertain at best. Thus, the proper course is not just to limit *Richardson*, but to overrule it.

Richardson's first mistake was its rejection of the "functional approach" that has long guided this Court's qualified immunity case law. Incorrectly asserting that this Court has not applied a functional approach to determine qualified immunity, *Richardson* instead used a complex mix of historical and policy-focused reasoning. This was error.

The Court then compounded its mistake by inferring a dispositive legal distinction from inconclusive historical evidence. Instead of concluding, as it should have, that the historical record provided no basis to treat private actors and government employees any differently, the *Richardson* Court erroneously concluded that the lack of a clear answer was grounds to draw an artificial line between private individuals and permanent government employees performing the same work for the government.

The *Richardson* Court's policy analysis was equally flawed. The Court recited various benefits of qualified immunity that it asserted were not applicable when the beneficiaries of such immunity are private individuals or entities. But the Court failed to offer a sound reason for differentiating between functionally identical government employees and private contractors. At the same time, the Court qualified its holding so thoroughly, and created such doctrinal complexity, that litigation and confusion have abounded in the decision's wake.

Finally, the reasoning set forth in *Richardson* has proven unworkable in the lower courts. Thus, even if *Richardson* had not been a sharp break from this Court's precedent, the general principle favoring *stare decisis* would be overcome by the costs that

Richardson's incoherence has imposed on courts, litigants, and anyone attempting to discern what risks they might face in taking on work for the government. To avoid deterring behavior that is in the public interest, clear rules are necessary. Accordingly, this Court should use the opportunity presented here to revisit and overturn *Richardson*.

ARGUMENT

I. THE PREMISE UNDERLYING *RICHARDSON*—THAT THE COURT DOES NOT USE A "FUNCTIONAL APPROACH" TO DETERMINE THE APPLICABILITY OF QUALIFIED IMMUNITY—IS INCORRECT.

1. The question before the Court in *Richardson* was "whether prison guards who are employees of a private prison management firm are entitled to a qualified immunity from suit by prisoners charging a violation" of § 1983. 521 U.S. at 401. In answering that question, the majority decided "to look both to history and to the purposes that underlie government employee immunity." *Id.* at 404. Significantly, the Court expressly disclaimed a "functional approach" in determining whether qualified immunity extended to private prison guards in the same measure as prison guards employed by a government agency. *Id.* at 408.

In particular, the Court rejected the guards' argument that "[s]ince private prison guards perform the same work as state prison guards, … they must require immunity to a similar degree." *Id.* That argument was said to be unsupported in the Court's case law:

> To say this … is to misread this Court's precedents. The Court has sometimes applied a functional approach in immunity cases, but *only to*

> *decide which type of immunity*—absolute or qualified—a public officer should receive. And it *never* has held that the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity.

Id. (citations omitted) (emphases added).

This fundamental premise of the *Richardson* majority's decision was erroneous. Indeed, the doctrine of qualified immunity was born out of functional considerations, and functional considerations have consistently directed its application by this Court. As the Court summarized in *Harlow v. Fitzgerald*, "in general our cases have followed a 'functional' approach to immunity law." 457 U.S. 800, 810 (1982).

2. Before *Harlow*, the Court had recognized a "good faith" defense to liability under § 1983. *See id.* at 815-16. "Good faith" had both an objective and a subjective component: the defendant would not be "immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of" the affected person, *or* "if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Wood v. Strickland*, 420 U.S. 308, 322 (1975); *accord Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974), *abrogated by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Unlike qualified immunity, the good faith test had direct roots in the common law. *See, e.g.*, *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (noting that the good faith defense was an element of the construction of § 1983 "as not intending wholesale revocation of the common-law immunity afforded government officials"); *Wood*, 420 U.S. at 320. However, the good faith test also proved impractical be-

cause it depended on a factbound, subjective assessment and was thus ineffective in shielding defendants, even those who had acted in good faith, from litigation prior to trial.

For this reason, *Harlow* departed from the common law, eschewed the "good faith" defense, and adopted a more functional and pragmatic test. The *Harlow* Court found persuasive "arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the 'good faith' standard established by our decisions." 457 U.S. at 814-15. As the Court explained, a new approach to qualified immunity was warranted in order to avoid the imposition of "substantial costs" incurred in asserting the good faith defense. *Id.* at 816-17 ("[I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials."); *see id.* ("Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.") (footnote omitted).

To avoid these costs and disruptions, the Court settled on the now-familiar standard for qualified immunity: defendants would be "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Jettisoning the good faith defense in favor of this more expedient version of qualified immunity was deemed consistent with the pragmatic goals of the doctrine. "The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alterna-

tive." *Id.* at 813-14. Thus, practical and functional considerations—not history—mandated that the "balance" be re-struck to achieve better results.

3. Since *Harlow*'s institution of the qualified immunity test that remains in place today, the Court has repeatedly recognized the central role of functionality and practicality in the qualified immunity analysis. In *Anderson v. Creighton*, 483 U.S. 635 (1987), for example, the Court made clear that, although the "'common law tradition'" is relevant to determining the scope of immunity, "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Id.* at 644-45. Indeed, the Court emphasized that fidelity to the common law was "plainly contradicted by *Harlow*, where the court *completely reformulated* qualified immunity along principles *not at all embodied in the common law*" and "clearly expressed the understanding" that qualified immunity "would be applied 'across the board.'" *Id.* (emphasis added) (quoting *Harlow*, 457 U.S. at 821 (Brennan, J., concurring)). The *Anderson* Court adhered to *Harlow* and rejected added "complexity" that would "utterly defeat[]" the security qualified immunity was meant to provide. *Id.* at 645-46. The bottom line was clear: officials need not "entangl[e] themselves in the vagaries of the English and American common law." *Id.* at 646.

The Court even acknowledged the functional foundation of qualified immunity in *Wyatt v. Cole*, 504 U.S. 158 (1992), the case on which the *Richardson* majority extensively relied. *See* 521 U.S. at 402-04 (describing *Wyatt* as "pertinent authority"). The *Wyatt* Court recognized "[t]hat *Harlow* completely reformulated qualified immunity along principles not at all embodied in the common law." 504 U.S. at 166 (in-

ternal quotation marks omitted). And it observed that "[q]ualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Id.* at 167 (citing, *inter alia*, *Harlow*, 457 U.S. at 819). Likewise, in dissent, Chief Justice Rehnquist noted the Court's "abandon[ment of] a strictly historical approach to § 1983 immunities." *Id.* at 179 (Rehnquist, J., dissenting).

In view of these authorities, it is hardly surprising that the Court has repeatedly made express its commitment to a functional analysis of qualified immunity. *E.g.*, *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) ("[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant."); *Forrester v. White*, 484 U.S. 219, 224 (1988) ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions …."); *see generally Richardson*, 521 U.S. at 416 (collecting cases) (Scalia, J., dissenting). After all, the whole point of the qualified immunity doctrine is to eliminate unwarranted distractions and disincentives, and thus to help individuals function better at work. This Court's precedent cannot be squared with the *Richardson* majority's assertion that the Court has taken a "functional approach" "only to decide which type of immunity—absolute or qualified—a public officer should receive." *Id.* at 408. Because *Richardson* rests on a faulty premise that is inconsistent with prior case law, the Court should reconsider *Richardson* and return to the functional analysis that previously guided qualified immunity determinations.

II. IN ANY EVENT, HISTORY DOES NOT SUPPORT *RICHARDSON*'S CONCLUSION.

Quite apart from *Richardson*'s error in eschewing a functional approach, the history of immunity for those performing government functions does not support the result reached in *Richardson*. In dissent, Justice Scalia cited two cases demonstrating that contemporaneous with the enactment of § 1983, private officials likely enjoyed immunity from liability for actions taken under color of state law. *See Williams v. Adams*, 85 Mass. (3 Allen) 171 (1861) (holding that prisoners could not recover damages for negligence against the master of a house of correction, who appeared to be "no more a 'public officer' than the head of a private company running a prison," 521 U.S. at 415 & n.1); *Alamango v. Bd. of Supervisors*, 25 Hun. 551 (N.Y. 1881) (holding that "supervisors charged under state law with maintaining a penitentiary were immune from prisoner lawsuits," 521 U.S. at 417).

The majority brushed aside these authorities, contending that they were insufficient to "prove the existence" of a "tradition" of qualified immunity for private prison guards. *See Richardson*, 521 U.S. at 406 (stating that *Alamango* stands for the proposition that there was "no cause of action against [a] private contractor where [the] contractor [was] designated [a] state instrumentality by statute"; asserting that *Williams* did not "involve a private prison operator"). In doing so, however, the Court overlooked another critical flaw in its analysis—namely, that there is no historical basis for *distinguishing* between state officials and independent contractors doing the work of state officials. The historical lineage is essentially the same for both groups. *id.* at 414-15 (Scalia, J., dissenting) ("The opinion observes that private jailers

existed in the 19th century, and that they were successfully sued by prisoners. But one could just as easily show that government-employed jailers were successfully sued at common law, often with no mention of possible immunity ...."). To the extent that history, and not functionality, should guide the contours of the qualified immunity analysis, there is no basis for the majority's artificial line.

Indeed, historically, the lines between public and private actors were frequently blurred. The career government employee is a relatively modern phenomenon. In the late nineteenth century, when § 1983 was enacted, what now appear to be quintessentially government jobs were routinely performed by private individuals. Accordingly, it was often difficult to discern the difference between the two types of government workers:

> Private police agencies offering patrol and detection services, and often run by former police officers, began to operate in major American cities in the 1840s. The line between public and private policing was *frequently hazy*. Private detectives and privately employed patrol personnel often were publicly appointed as "special policemen," and "the means and objects of detective work," in particular, "*made it difficult to distinguish* between those on the public payroll and private detectives."

David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1210 (1999) (emphases added) (footnotes omitted). While public police departments became more common in urban centers in the late nineteenth century, "[s]tatewide police departments were mostly nonexistent, and the federal government used private guards and detectives for its occasional police work; outside city limits there thus was virtually no public

police protection." *Id.* at 1211 (footnotes omitted). To fill the growing need for police protection felt with the rise of railroads and industrial operations, "new forms of private policing emerged," including "company police" hired by railroads and industrialists and "the national private police agency, epitomized in the late nineteenth century by the Pinkerton agency." *Id.*

Similarly, "[p]ublic prosecutors as we know them today were uncommon in 1871." Anthony Meier, Note, *Prosecutorial Immunity: Can § 1983 Provide an Effective Deterrent to Prosecutorial Misconduct?*, 30 Ariz. St. L.J. 1167, 1172 (1998) (citing *Kalina v. Fletcher*, 522 U.S. 118, 124 n.11 (1997)). Instead, "American citizens continued to privately prosecute criminal cases in many locales during the nineteenth century. … Thus, '[p]arents of young women prosecuted men for seduction; husbands prosecuted their wives' paramours for adultery; wives prosecuted their husbands for desertion.'" John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 518 (1994) (alteration in original) (footnote omitted) (quoting Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia, 1800-1880*, at 48 (1989)). Many states continued to allow the use of private prosecutors to pursue criminal charges in the late nineteenth century, while only a few began to ban the practice in that period. *Id.* at 518-20 & nn.29-31 (citing cases). *See also* Pet. Br. at 15-17.

In light of this historical picture, it is understandable that the drafters of § 1983 did not contemplate the imposition of formal, rigid lines between government employees and private individuals performing work for the government. Such a line would serve no purpose. The overarching reason for the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, was the protection of

individual rights. *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. Rev. 497, 539-42 (1992). This purpose does not distinguish between state employees and independent contractors doing the state's work.

Further, to the extent that the text of § 1983 evinces any distinction at all, it is the exact opposite of the one *Richardson* adopted. Section 1983 provides a cause of action against state officials acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983. Ironically, as a result of *Richardson*, under the decision below, the only defendant who may be held liable is the only person who was *not* a state official. That assuredly was not the intention behind § 1983. *See* Scott C. Arakaki & Robert E. Badger, Jr., Note, Wyatt v. Cole *and Qualified Immunity for Private Parties in Section 1983 Suits*, 69 Notre Dame L. Rev. 735, 759 (1994) ("Holding private parties to a higher level of expertise than public officials runs counter to section 1983, which was intended to uphold individual rights from state actions, not the acts of other individuals."). As Chief Justice Rehnquist observed in his *Wyatt* dissent:

> Our § 1983 jurisprudence has gone very far afield indeed, when it subjects private parties to greater risk than their public counterparts, despite the fact that § 1983's historic purpose was "to prevent *state officials* from using the cloak of their authority under state law to violate rights protected against state infringement."

Wyatt, 504 U.S. at 180 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 948 (1982)); *see also id.* ("it is at least passing strange to conclude that private individuals are acting 'under color of law' because they

invoke a state garnishment statute and the aid of state officers, but yet deny them the immunity to which those same state officers are entitled, simply because the private parties are not state employees") (citation omitted).

III. POLICY CONSIDERATIONS DO NOT SUPPORT *RICHARDSON*'S CONCLUSION.

Richardson's analysis is equally unsupported by policy concerns. In an attempt to support its conclusion, the *Richardson* Court engaged in a policy analysis that rests on untested speculation and pure conjecture. 521 U.S. at 409-12.

The majority first suggested that the major benefit of qualified immunity for government employees—reducing "unwarranted timidity"—"is less likely present, or at least is not special, when a private company subject to competitive market pressures" performs services for the government. *Id.* at 409. But, as Justice Scalia noted in dissent, "it is fanciful to speak of the consequences of 'market' pressures in a regime where public officials are the only purchaser, and other people's money the medium of payment." *Id.* at 418-19. Further, the majority offered no support for its assessment of the comparative psychology of permanent government employees and others doing work for the government.

The majority next stated that "'privatization'" avoids the concern that qualified candidates would be deterred by the threat of suits for damages because of the prospect of "comprehensive insurance-coverage." *Id.* at 411. The majority did not explain, however, why the availability of insurance—which often exists for both private and government entities—compels a different result for private actors working for the government. *See id.* at 420 (Scalia, J., dissenting).

Finally, the majority asserted that "[b]ecause privatization law also frees the private prison-management firm from many civil service law restraints, it permits the private firm, unlike a government department, to offset any increased employee liability risk with higher pay or extra benefits." *Id.* at 411 (citation omitted). But this observation, too, fails to distinguish between government and private entities: just like private companies, "governments *need not* have civil-service salary encrustations (or can exempt prisons from them); and hence governments, no more than private prison employers, have any *need* for § 1983 immunity." *Id.* at 421 (Scalia, J., dissenting).[2]

The majority's unrealized policy justifications can be contrasted with the undeniable costs of the majority's approach. With its closing "caveats," the majority created a road map for further litigation:

> [W]e have answered the immunity question *narrowly*, in the context, in which it arose. That context is one in which a private firm, *systematically* organized to assume a *major lengthy administrative* task (managing an institution) with *limited direct* supervision by the government, undertakes that task for profit and potentially in competition with other firms. The case does not involve a private individual *briefly* associated with a government body, serving as an *adjunct* to government in an *essential* government activity or acting under *close* official supervision.

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[2] As Justice Scalia further noted, "it is poetic justice (or poetic revenge) that the Court should use one of the principal economic benefits of 'prison out-sourcing'—namely, the avoidance of civil-service salary and tenure encrustations—as the justification for a legal rule rending out-sourcing more expensive." 521 U.S. at 420-21.

Id. at 413 (emphases added). The litany of adjectives and other qualifiers only underscores the fertile ground for future lawsuits generated by *Richardson*—as does the curious potential line between a "private firm" and a "private individual." In addition, further sowing confusion is the novel and unexplained concept of "an adjunct to government," coupled with the majority's simultaneous embrace, *see id.*, and disavowal, *see id.* at 409 (relying on government function "bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities"), of the relevance of "essential government functions." *Cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (rejecting "as unsound in principle and unworkable in practice, a rule … that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'").

It is exactly such confusion that the *Anderson* Court feared and rejected. *See* 483 U.S. at 643. In *Anderson*, the Court declined to follow an approach that "would introduce into qualified immunity analysis a complexity rivaling that which we found sufficiently daunting to deter us from tailoring the doctrine to the nature of officials' duties or of the rights allegedly violated." *Id.* at 645. And the Court emphasized that introducing such "complexity" into the qualified immunity analysis would defeat its very purpose:

> The general rule of qualified immunity is intended to provide government officials with the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages." Where that rule is applicable, officials can know that they will not be held personally liable as

> long as their actions are reasonable in light of current American law. That security would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of the English and American common law. We are unwilling to Balkanize the rule of qualified immunity ….

Id. at 646 (citation omitted) (alteration in original).

The inevitable result of such a complex analysis has come to pass: litigation and ambiguity have ensued. From the decision in *Richardson* through March 2010, there has been a "deluge of more than one hundred cases so far over whether qualified immunity applies," creating "an added cost, not considered by *Richardson*, that has been and will continue to be passed on to society." *Developments in the Law—State Action and the Public/Private Distinction: Private Party Immunity from Section 1983 Suits*, 123 Harv. L. Rev. 1266, 1278 (2010). In response to this flood of suits, "[l]ower courts have attempted to apply [the *Richardson*] standard, but they have been confused by *Richardson*'s use of precedent and the complex mix of factors in its analysis and have reached divergent conclusions about various categories of private actors." *Id.* at 1267. Specifically:

> Seven circuits have used *Richardson* as a test, refusing to grant private actors qualified immunity in many circumstances. While only one circuit has explicitly granted private actors qualified immunity under *Richardson*, others have arguably done so implicitly, so immunity is not always categorically precluded. One circuit has held that qualified immunity applied in every case it has considered, though it has not relied on *Wyatt* or *Richardson*. The remaining four cir-

> cuits have no holding applying *Richardson*. Much litigation continues at the district court level without circuitwide resolution.

Id. at 1271 (footnotes omitted).

In sum, any policy benefits from *Richardson*'s analysis are, at best, uncertain. At the same time, the Court's complex and qualified opinion has imposed very real costs on firms and individuals working with the government, as well as litigants and the judicial system, in the form of a multiplicity of lawsuits and the lack of a uniform standard. *See id.* at 1277 ("Patchwork liability across jurisdictions raises privatization costs as firms adapt to each jurisdiction's rules, requiring differences in benefits and personnel practices even within a state."); *cf. also Wyatt*, 504 U.S. at 179 (Rehnquist, C.J., dissenting) ("today's decision will only manage to increase litigation costs needlessly for hapless defendants"). The decision has also made it virtually impossible to provide reliable legal advice to clients who choose to provide services to the government. Accordingly, this Court should take the opportunity to overrule *Richardson* in favor of a simple and straightforward functional approach, consistent with the origins of qualified immunity.

IV. *STARE DECISIS* IS NOT A BARRIER TO OVERTURNING *RICHARDSON*.

The doctrine of *stare decisis* should not prevent the Court from overruling *Richardson*. "*Stare decisis* is a 'principle of policy,' and not 'an inexorable command.'" *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996). "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). "'Beyond workability, the relevant factors in deciding whether to adhere to the

principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.' We have also examined whether 'experience has pointed up the precedent's shortcomings.'" *Citizens United v. FEC*, 130 S. Ct. 876, 912 (2010) (citations omitted). And, *stare decisis* should be given less weight when the precedent at issue is itself a departure from prior case law. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995) (plurality opinion) ("Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it ….").

Together, these factors demonstrate that correcting the erroneous and costly ruling in *Richardson* strongly outweighs any general preference in favor of *stare decisis*. As demonstrated above, *Richardson* was wrongly decided. The Court's opinion rests on the faulty premise that the Court had not previously adopted a "functional approach" in determining qualified immunity. It then relies on an inaccurate historical understanding and reaches a result that will support policy interests that are speculative and uncertain at best. And the *Richardson* analysis has proved entirely unworkable for the lower courts. Specifically, the *Richardson* majority adopted a multivariate analysis with a host of factors of uncertain origin and application. The complexity and opacity of the Court's reasoning has led to a deluge in litigation and left lower courts and litigants uncertain how to proceed.

Moreover, "[n]o serious reliance interests are at stake." *Citizens United*, 130 S. Ct. at 913. Reliance interests "are at their acme in cases involving proper-

ty and contract rights." *Payne*, 501 U.S. at 828. But potential tort victims do not organize their affairs on the ground that they will likely have an easier time suing private individuals performing government functions than government employees. At the same time, however, many private individuals employed by government agencies—like Petitioner here—likely imagine that they will enjoy the same immunities as permanent government employees performing precisely the same functions.

Finally, although Section 1983 is a statute, and the Court typically applies a "general presumption that legislative changes should be left to Congress," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), the qualified immunity doctrines associated with Section 1983 are judicial creations. *See Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (Section 1983 "creates a species of tort liability that on its face admits of no immunities"); *Wyatt*, 504 U.S. at 163-64 (this Court has "accorded certain government officials either absolute or qualified immunity from suit"). The "general presumption" as to legislative changes thus has little force here. *Cf. Khan*, 522 U.S. at 20 ("the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition'"). Indeed, "[r]evisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). *Stare decisis* poses no bar to a decision overruling *Richardson*.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the Ninth Circuit and overrule *Richardson v. McKnight*, 521 U.S. 399 (1997).

Respectfully submitted,

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