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INTRODUCTION AND INTERESTS OF *

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

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

including scarce resources, small-scale staffs, and the need for specialized legal expertise—conspire to en-

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

STATEMENT

1. This case involves a claim under 42 U.S.C. § 1983 by Respondent, a firefighter for the City of Rialto, California,

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

2. To conduct that inquiry, the City retained Petitioner Steve Filarsky, an attorney in private practice with significant experience conducting internal investigations. Pet. App. 44. Petitioner ha

Petitioner subsequently consulted with the Fire Chief, who signed an order requiring Respondent to produce

der § 1983.

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

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

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

For example, fully two-thirds of America's 3,068 counties have fewer than 50,000 people—a

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

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

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

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

lized fields of law. A small staff of in-house lawyers can hardly be expected to have skill and ex

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

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

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

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

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

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

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

- Meanwhile, to the south, the City of Ojai, California has retained a private lawyer to advise on the acquisition of a water company.[12]
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for investigations of wrongdoing to be handled by outside counsel. See Jonathan D. Greenberg & Heather R. Baldwin Flasuk, *When Public Officials Go Rogue: The Importance of Hiring Outside Counsel to Perform Investigations into Allegations of Employee or Officer Wrongdoing*, Cities & Villages (May/June 2010).[15] This avoids conflicts of interest and ensures public confidence that an investigation is being conducted objectively and taken seriously by public officials. The city council of Sheboygan, Wisconsin, for example, recently retained a former U.S. Attorney in private practice to investigate complaints of public drunkenness and lewd conduct by the city's mayor. See *Sheboygan Retains Counsel to Investigate Complaints Against Mayor*, Wisconsin Law Journal (Sept. 15, 2011)[16]; see also City of Vernon News Release (Feb. 16, 2011) (announcing city's retention of former California Attorney General to serve as independent ethics advisor).[17]

As all of these examples illustrate, government entities around the country are historically and increasingly dependent on outside counsel to support a

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local government, however, would be the best-case scenario, as even worse consequences may well result. Lawyers subjected to suit face not only the risk

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

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

immunity to private prison guards, *Richardson* did not hold that all private contractors performing public functions lack qualified immunity. Rather, *Richardson* expressly reserved the possibility that certain public functions—those involving an "essential governmental activity"—deserve qualified immunity regnre(or)-14(m)-5(i)-9(n)-3a did

approach. *Ibid*.;

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

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

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

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

APPENDIX

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

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

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

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

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

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

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