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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 10-1018, Filarsky v. Delia.

5 Ms. Millett.

6 ORAL ARGUMENT OF PATRICIA A. MILLETT

7 ON BEHALF OF THE PETITIONER

8 MS. MILLETT: Mr. Chief Justice, and may it
9 please the Court:

10 When a private attorney is temporarily
11 retained by the government to work in coordination with
12 or under the direct supervision of government employees
13 in fulfilling the government's business, in getting the
14 government's work done, that attorney is entitled to the
15 same immunity that a government employee performing that
16 same function for that same government would receive.
17 In this case, that is qualified immunity. That rule
18 comports with the history and policy concerns that have
19 animated this Court's section 1983 and immunity
20 jurisprudence.

21 JUSTICE GINSBURG: That's across the board,
22 Ms. Millett, the rule you just stated? Is there any
23 situation in which a private attorney engaged to assist
24 a government office in the performance of a public
25 function would lack qualified immunity? Or is it simply

1 wherever a government agency employs a private attorney
2 to assist it in doing its work, that attorney will have
3 qualified immunity?

4 MS. MILLETT: I think it -- it may well be
5 the latter rule, the more broader one, but for these
6 purposes, the Court only needs to decide the situation
7 when they are working in coordination with or under
8 direct supervision of government employees. And I want
9 to clarify that answer because how one defines doing a
10 public service -- for example, if a State government
11 appoints somebody to represent one of their police
12 officers who's sued in a 1983 action, if there's five
13 defendants, the attorney general can't represent them
14 all; they will all commonly appoint people and will pay
15 them -- some States will pay them from the -- from the
16 State fisc.

17 And so, they'll be paid by the government to
18 perform a governmental function in that sense, but their
19 allegiance there is to the individual employee, not to
20 the government. The same with public defenders.

21 So, there are certain situations where
22 someone can be retained by the government in that sense,
23 paid by the government in that sense.

24 JUSTICE ALITO: Why does it matter whether
25 the privately retained attorney works in close

1 cooperation with government employees? Suppose in this
2 case Mr. Filarsky had simply been hired to go off and
3 perform this investigation and, at the end of the
4 investigation, report the results to the town? Would
5 the case come out differently then?

6 MS. MILLETT: I don't think that would, but
7 in this -- but I think it depends on what one means by
8 coordination with or supervision. And with respect to
9 attorneys, attorneys can never be an independent
10 contractor in relationship to their client in the way
11 the prison was in Richardson. Attorneys just can't be.
12 They are always, in the sense of the rule that I'm using
13 it, working for their client agency, their client
14 government, and under its control and authority. And
15 the decisions they make are the decisions of that
16 client.

17 And that's why the whole -- the whole reason
18 we should have this rule is understanding what immunity
19 protects. It protects government decisionmaking,
20 governmental conduct, and its ability to maneuver with
21 an area -- in an area of reasoned decisionmaking.

22 JUSTICE KENNEDY: And I -- I suppose you can
23 argue that there is a built-in limitation because the
24 question doesn't even come up unless there's state
25 action. So, there has to be close enough cooperation so

1 there's state action. I had never thought that when a
2 private attorney gives an opinion letter to a government
3 agency or government entity at its request that there's
4 any state action there at all. So, that question -- so,
5 there the question just wouldn't even come up; am I
6 correct? I assume --

7 MS. MILLETT: Right, because, certainly, the
8 state action limitation both limits the operation of
9 this rule. There's many times attorneys or others who
10 work with the government will not implicate the state
11 action rule. And that's sort of the irony of -- of this
12 case, and I think it would not be uncommon in attorney
13 cases. The only reason this was a tort, or an alleged
14 tort, is because the government was involved, because
15 governmental actors took his advice, conducted a
16 search -- he didn't -- issued an order -- he didn't.
17 And yet we have -- we're left in this is odd world where
18 the only way this tort, constitutional tort lawsuit, can
19 go forward is without the government.

20 Now, 1983 is about deterring governmental
21 conduct, but this Court's immunity jurisprudence says we
22 don't over-deter and we want to allow the government to
23 operate within a realm of reasoned decisionmaking. And
24 they need to operate within that realm, get reasoned
25 advice and make reasoned decisions, regardless of

1 whether the source of the advice is a temporarily or
2 permanently retained attorney.

3 The need is for reasoned decisionmaking.
4 And if you over-deter, which is what an action against
5 the private attorney who is now charged with litigating
6 and defending the government's allegedly
7 unconstitutional conduct, standing all alone while all
8 the government actors have walked away -- that turns
9 section 1983 on its head.

10 CHIEF JUSTICE ROBERTS: But your test -- and
11 this is -- I think goes broader than the articulation of
12 the test -- doesn't give this private attorney much
13 assurance by itself. It's sort of a multifactor, is he
14 coordinating, is he under the supervision, is he really
15 doing public service? I mean, if the idea is to give
16 him sufficient breathing room so he doesn't stop, and
17 when, as in this case, he's threatened that we're going
18 to sue you if you do this, he has to think, well, now,
19 am I being supervised by the government? Am I
20 coordinating with the government? Or I -- am I telling
21 them what -- it -- the test itself undermines the
22 asserted purpose.

23 MS. MILLETT: Well, two responses to that.
24 First of all, the State law requirement -- the state
25 action requirement that Justice Kennedy referred to will

1 up front require allegations by the plaintiffs that will
2 discuss the coordinated -- presumably the coordinated
3 action. There's going to have to be some level of
4 coordination.

5 But the second reason is, as I said, with
6 respect to attorneys, I don't think this is going to be
7 a hard question because they are forever agents and
8 fiduciaries. They can never be the independent
9 contractor that you had in Richardson. They are always
10 answerable to and working for their governmental client.
11 And when I say "supervision" here, I don't think the
12 test here is -- is an on-hands, day-to-day looking over
13 your shoulders. The government has to be able to get
14 the advice of professionals and to trust them --

15 JUSTICE ALITO: Suppose -- suppose the
16 government hires an attorney to do an independent
17 investigation; it hires an outside attorney precisely
18 because it does not want to be faced with allegations
19 that it has manipulated the outcome of the investigation
20 because its own conduct is at issue. So, they say
21 you're going to be independent, hands-off; we're not
22 going to interfere at all. But that would still in your
23 -- in your submission satisfy the coordination
24 requirement?

25 MS. MILLETT: It -- it would in this sense,

1 because there would be -- and I'm assuming here we're
2 not talking like a Bivens appointment or something like
3 that. But here -- because understand what happens in
4 that situation. They're being appointed to investigate
5 for the government and on behalf of the government.

6 And it's not usually because we say the
7 government writ large may have done something that would
8 create a conflict. It may be an individual employee or
9 something. That's where the conflict comes. But
10 they're working for the government. The government is
11 their client. They are not freewheeling independent
12 contractors. And --

13 JUSTICE ALITO: What is the difference
14 between that and the prison situation? The private
15 prison -- the guard in the private prison is performing
16 a function that has been delegated to that or assumed by
17 that entity pursuant to a contract. I don't understand
18 exactly what the difference is.

19 MS. MILLETT: The difference is -- there's a
20 practical difference and then a legal doctrinal
21 difference. The practical difference is that, in
22 Richardson, it was a quite unique situation where the
23 government really had washed its hands of the prison
24 operation. It had put the day-to-day operation of the
25 prison, the decisionmaking of the prison, how we treat

1 the prisoners, entirely in the hands of a private
2 contractor, subject only to what this Court said was
3 very limited supervision, essentially in contract terms.
4 But it had ceded that authority, and it did not exercise
5 a control. It did not exercise the day-to-day
6 decisionmaking. And that's where we get into the
7 doctrinal point.

8 So, the decisions that were being made there
9 and that there were -- the lawsuit concerned, there
10 wasn't a single governmental defendant named in that
11 case. It was just the private -- the private guards
12 that were at issue there. And the decisions that were
13 made were the private company's decisions.

14 And so, this Court said there that's not
15 what qualified immunity is out -- is out to protect. It
16 is to protect what? The government's decisionmaking,
17 the special concerns that arise when you are bringing
18 lawsuits that are designed to regulate, limit, deter
19 governmental decisionmaking. We have to protect that
20 area of reason.

21 If the government's not making the decision,
22 they've passed the buck, they've handed it off, then
23 there's nothing to protect.

24 JUSTICE SOTOMAYOR: Why isn't that the case
25 here?

1 MS. MILLETT: I'm sorry?

2 JUSTICE SOTOMAYOR: It seems to me that
3 there's enough evidence that the lawyer was the one who
4 held the investigation; the people who attended the
5 meeting between the lawyer, the Respondent, and the
6 other personnel that were there were acceding to what he
7 was doing. The chief -- he goes to the chief and he
8 says: I want you to do this. And the chief is relying
9 on him, not his own independent judgment, to issue the
10 command that's contested here.

11 So, that sort of puts your argument on its
12 head because it appears that he was more the independent
13 investigator --

14 MS. MILLETT: No --

15 JUSTICE SOTOMAYOR: -- than he was the
16 individual under the control of the agency.

17 MS. MILLETT: Okay. Well, first of all -- a
18 couple of responses. First of all, no, that's nothing
19 like Richardson. This was the government's
20 investigation. They initiated it. They brought him on
21 to the team for his expertise, much like prosecutors
22 might bring on a psychologist to evaluate a criminal
23 defendant. Now, are the prosecutors going to sit there
24 and say, you know, Psychologist, you should ask this
25 question? Or are they going to defer to the medical

1 expertise? That's a --

2 JUSTICE SOTOMAYOR: This argument seems to
3 fall under what Justice Scalia termed a functional test,
4 that he's serving just like any other government lawyer.
5 If you were going to fit this case under the Richardson
6 majority test, how would you do it?

7 MS. MILLETT: And I'd do that -- first of
8 all, I keep -- I'm putting it right in -- in
9 Richardson's language, which said it was reserving this
10 very question, and that is, when an attorney or any
11 individual is working in close coordination or under the
12 supervision of government officials in the performance
13 of an essential function.

14 And so, that makes clear that Richardson was
15 deciding not that situation, the handed-off turnkey
16 situation. This -- there's no turnkey here. This is
17 Mr. Filarsky being brought on to the team.

18 JUSTICE SCALIA: So -- so, independent
19 counsel would not be covered. I mean, if you have, you
20 know, a counsel appointed because -- to show that the
21 administration is disinterested in this prosecution and
22 you get independent counsel, the Attorney General says:
23 I will not interfere with him. The President says: I
24 will not interfere with him. Then him you can -- you
25 can sue without any immunity, right?

1 MS. MILLETT: No. And that's --

2 JUSTICE SCALIA: Why? He's not working in
3 close coordination. He's not subject to supervision.
4 The whole purpose of an independent counsel is to
5 eliminate supervision.

6 MS. MILLETT: Yes, but independent counsel
7 is still sued in the name of the United States. Their
8 client was the United States Government. That is
9 whom -- that is the interest in which they worked. They
10 were -- they had a client that they were answerable to.
11 They were not freewheeling independent contractors; they
12 were attorneys with a client.

13 JUSTICE SCALIA: Excuse me. Weren't the
14 prison guards who were -- who were suable in
15 Richardson -- weren't they suable under 1983 as acting
16 under color of law?

17 MS. MILLETT: This Court assumed that
18 question; it did not answer it in that -- in that case.

19 JUSTICE SCALIA: Well, the whole issue would
20 have been a nonissue if they -- if they couldn't be
21 sued.

22 MS. MILLETT: This Court assumed it. I
23 think it's fair to assume when you're operating a
24 prison, although I think to -- there's a reason this
25 Court reserved it, because the question there is --

1 certainly, the corporation --

2 JUSTICE SCALIA: Yes.

3 MS. MILLETT: -- was under color of law,
4 whether the individuals who worked for the corporation
5 would also be under color of law.

6 JUSTICE SCALIA: Don't you think the -- the
7 two should go pari passu, as we say, that if you can be
8 sued for acting under color of law, you ought to have
9 the defenses that people who are acting with legal
10 authority have?

11 MS. MILLETT: Well, this Court's already
12 crossed that bridge in cases like Wyatt, where, for
13 example -- and it does because the State law requirement
14 can sweep broadly in some situations.

15 So, I don't think in a situation like
16 Wyatt v. Cole, where you have private plaintiffs
17 pursuing their private agenda and they simply invoke a
18 State law, that that makes them integrated with the
19 government in the way that an attorney is, and certainly
20 the way Petitioner was here, that they're not part of
21 the governmental team, and they're not making -- they
22 weren't making decisions in the interest of the
23 government. There was no governmental decisionmaking to
24 protect there, and that's what -- the rationale this
25 Court gave for denying qualified immunity in Wyatt.

1 The key here is that this is -- you cannot
2 protect governmental decisionmaking in this context
3 without protecting the source of advice for that
4 decisionmaking.

5 CHIEF JUSTICE ROBERTS: Lawyers are not
6 supposed to be cowed by the exigencies of the situation.
7 We're worried in qualified immunity with protecting
8 governmental actors, to make sure they will feel
9 comfortable doing the right thing rather than being
10 intimidated in the situation we had here.

11 Lawyers have that professional obligation in
12 the first place. So, why does a lawyer need the -- the
13 defense of qualified immunity?

14 MS. MILLETT: There are a couple of reasons.
15 First of all, that rationale would mean no government
16 lawyers get the protection either, because they have
17 that exact same obligation of fealty, and we don't apply
18 that rule. That hasn't even been questioned. And the
19 reason we don't is we understand that this is a more --
20 it's a more layered inquiry into timidity.

21 First of all, we don't even want the
22 subconscious pressures that would come with full-freight
23 liability for governmental conduct to any angry third
24 party even subconsciously interfering with the decisions
25 of government lawyers temporarily or permanently

1 retained.

2 Secondly, we want the government to be able
3 to get the advice, to be encouraged to get the advice.
4 Section 1983 must support governments getting legal
5 advice to counsel them in complying with the law that
6 section 1983 enforces, but government will be deterred
7 from obtaining legal advice if the cost of getting an
8 attorney -- especially if you're a small town,
9 municipality, county, you don't -- can't afford a
10 full-time staff, and the cost of getting an attorney is
11 all those things that qualified immunity wanted to
12 protect against.

13 Our decision -- reasonable decisionmaking
14 that we thought was protected by qualified immunity is
15 now on trial. And we have to be there as witnesses, and
16 a jury is going to assess liability for a reasonable
17 governmental decision.

18 JUSTICE KAGAN: Ms. Millett, our cases have
19 said that we're supposed to look not only to policy but
20 also to history. Would you disagree with the premise
21 that a person in your client's position historically
22 would have had at most an actual malice -- a malice
23 defense or a reasonable cause defense? Would a person
24 have anything more than that?

25 MS. MILLETT: They would have had the same

1 sort of good-faith defense that this Court in Harlow
2 turned into qualified immunity, both as lawyers
3 working --

4 JUSTICE KAGAN: But, in Wyatt, we said that
5 that was a very different kind of immunity than the
6 Harlow immunity, and we said historically it provided no
7 basis for giving Harlow immunity.

8 MS. MILLETT: It -- it -- the Harlow
9 immunity came from the same roots. Well, the -- what
10 happened in Wyatt was we said we will turn that into
11 protection for the government when we need to protect
12 the special functioning of government. You had no
13 need -- the Court had no need to do that in Wyatt
14 because there was no governmental decisionmaking at
15 stake there.

16 But the -- the same type of defense -- this
17 Court recognized in Richardson --

18 JUSTICE KAGAN: So, I take it that your
19 answer is, yes, it would only have been a malice
20 defense, but that doesn't matter, notwithstanding Wyatt.

21 Is that your answer?

22 MS. MILLETT: The -- the answer is that it
23 is the same type of defense that this Court recognized
24 in prior cases as supporting qualified immunity when
25 needed to protect the decisions of the government. And

1 Richardson itself recognized this --

2 JUSTICE KAGAN: Doesn't that suggest really
3 that we don't have a historical test anymore, that
4 really all we're looking to is policy considerations?

5 MS. MILLETT: Not this case at all, because
6 you've got layers. You have layers of -- of history.
7 You have the history recognized in Richardson for -- for
8 lawyers who are working at the behest of the government,
9 that specific history. You have the general history
10 where -- where attorneys were provided a reasonable and
11 good-faith, malice, and probable cause type of defense,
12 which again is the type of -- the type of defense that
13 gets turned into qualified immunity when needed to
14 protect government's reasoned decisionmaking.

15 If I could reserve the balance of my time.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Ms. Millett.

18 We'll hear from Ms. Saharsky first.

19 MR. MCGILL: Oh. I'm sorry.

20 CHIEF JUSTICE ROBERTS: That's all right.

21 Ms. Saharsky.

22 ORAL ARGUMENT OF NICOLE A. SAHARSKY

23 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING THE PETITIONER

25 MS. SAHARSKY: Thank you, Mr. Chief Justice,

1 and may it please the Court:

2 Petitioner may assert qualified immunity on
3 the same terms as the fire department officials because
4 he was working side-by-side with them and under their
5 supervision on a personnel investigation. And this is
6 really exactly the situation that the Court reserved and
7 anticipated in Richardson, that when you have a
8 situation where private and government workers work
9 closely together and you deny qualified immunity to the
10 private person, it would directly affect the ability of
11 the government employees to do their jobs.

12 CHIEF JUSTICE ROBERTS: So, if they don't
13 work closely together at all and it's just this one
14 fellow conducting the investigation, he wouldn't have
15 qualified immunity?

16 MS. SAHARSKY: No. This is a situation in
17 which there's a very close working relationship --

18 CHIEF JUSTICE ROBERTS: I'm sorry. No,
19 he --

20 MS. SAHARSKY: I'm sorry.

21 CHIEF JUSTICE ROBERTS: -- I'm wrong, or
22 no --

23 MS. SAHARSKY: He likely would have
24 qualified immunity. The closeness of the relationship
25 is very apparent here, but as a general matter, it is

1 our position that when people are doing the business of
2 government, private people, can be sued under section
3 1983 or Bivens, there should be a presumption in favor
4 of qualified immunity.

5 And Richardson is not to the contrary
6 because that is a fairly unique case in which the
7 private prison was so removed from the day-to-day
8 workings of government officials that it would not have
9 furthered the purposes of qualified immunity to give
10 qualified immunity to the folks in those situations.

11 So, what we're talking about, like --

12 JUSTICE KENNEDY: It's just hard to imagine
13 anything more imbued with state action than imprisoning
14 someone. That's -- that's the problem I have in
15 thinking about the case.

16 MS. SAHARSKY: Right. I mean, several
17 members of the Court said that in Richardson. And
18 the -- the Court's opinion really talked about the
19 uniqueness of the situation there, that Tennessee was
20 doing something really out on the forefront in terms of
21 giving the day-to-day decisionmaking to the folks in
22 that situation in the private prison, and only checking
23 up. There was monitoring, you know, annually. It was
24 really not much ongoing monitoring at all.

25 And the -- the Richardson Court, you know,

1 found that to be a unique situation, but it
2 distinguished the situation that you have here, where
3 you have people --

4 JUSTICE KAGAN: Wasn't Richardson really all
5 about how market forces would make immunity unnecessary?
6 And how is it that market forces play any different role
7 in this case than they do in Richardson?

8 MS. SAHARSKY: Well, we understand the
9 Court's discussion of market forces to be really
10 important in the context there, where you don't have
11 individuals who are working closely with government.

12 The Court needed -- and the purposes of
13 qualified immunity wouldn't be served in terms of
14 deterrence and in ensuring good government
15 decisionmaking. But the market forces discussion was
16 the Court reassuring itself in those circumstances that
17 there would still be private prison companies that would
18 be willing to take on the business of government and
19 would be able to do it, you know, consistent with the
20 Constitution.

21 So, we don't understand the Court to have
22 been setting out market forces as a test for qualified
23 immunity, because, as your question seems to suggest,
24 taken to its logical conclusion, any time a private
25 person is being hired by the government, you could say,

1 well, there's a market for the person, couldn't someone
2 else fill those shoes, et cetera, et cetera. So, we
3 think the Court's market forces decision was -- was
4 fairly confined to what the Court itself described as a
5 unique situation in Richardson. And the Court --

6 JUSTICE KAGAN: Do you think market forces
7 do operate differently here, or is it basically the same
8 thing?

9 MS. SAHARSKY: We do think that there's a
10 difference in that the attorney in this situation has
11 private clients that that attorney can work for, whereas
12 the private prison company really could only work for
13 the government. But --

14 JUSTICE GINSBURG: I thought that in this
15 case the -- the firm that the lawyer was associated with
16 said its dominant business was giving advice to local
17 government, local municipal government units. So --

18 MS. SAHARSKY: Yes. I mean, that was an
19 important part of the firm's business, but Mr. Filarsky
20 is trained as an employment lawyer and has, you know,
21 broad training and expertise in employment-related
22 matters. So, there's certainly other work that could be
23 done. But, you know, we thought the core of the Court's
24 decision in Richardson was really focusing on the
25 purposes of qualified immunity and whether they would be

1 furthered by giving them to the private prison and the
2 private prison guards.

3 JUSTICE SCALIA: You seem --

4 MS. SAHARSKY: The Court --

5 JUSTICE SCALIA: You seem to assume or to
6 acknowledge or to concede that market forces do not
7 operate for government employment, that all government
8 employees are doing it out of love, that --

9 (Laughter.)

10 JUSTICE SCALIA: I mean, why does market
11 force eliminate this defense for somebody who's an
12 employee of a private company but not for somebody who's
13 an employee of the government?

14 MS. SAHARSKY: I'm sorry, Justice Scalia. I
15 didn't mean to suggest that we thought that the market
16 forces inquiry was particularly relevant to the -- to
17 answering the qualified immunity question. I'm just
18 explaining that the way we read the Court's opinion in
19 Richardson, which obviously the members of this Court
20 are the experts on, is that the Court was looking to
21 market forces to reassure itself after it determined
22 that the purposes of qualified immunity just wouldn't be
23 served by giving an organization that was so far removed
24 from the day-to-day workings of government the
25 protection of qualified immunity. The Court just -- the

1 market forces really was just something unique to that
2 case.

3 And what we think is the most relevant is
4 what the Court started with both in the decision in
5 Wyatt and in Richardson, which is, is it necessary to
6 give qualified immunity here to make sure there's
7 principled and fearless government decisionmaking? It's
8 the business of government that's important. And in
9 this case, although Petitioner is an attorney who has
10 his own fiduciary obligations, it is certainly the case
11 that when he was threatened during the conduct of this
12 personnel investigation, that that is something that
13 potentially could chill his behavior.

14 And to the extent that he cabins the advice
15 that he gave to the fire department officials, that
16 affects the ability of government to do their job. And
17 I might give the Court --

18 JUSTICE SOTOMAYOR: Well, that would be a
19 breach of his duty as an attorney.

20 MS. SAHARSKY: I'm saying --

21 JUSTICE SOTOMAYOR: And he would be subject
22 to malpractice in that case. You -- seriously, I find
23 this whole argument about market forces with respect to
24 attorneys representing people odd because there's a
25 whole slew of unemployed lawyers who will be happy to

1 take on any government service they can.

2 So, going back to the -- that's -- what I
3 consider the central argument you're making, which is:
4 Will it chill advice? And I'm not sure how it can,
5 given the independent fiduciary duty that an attorney
6 has to zealously guard his or her client's interest.

7 MS. SAHARSKY: I'm saying that an attorney
8 is in a difficult position there, and it's the same
9 position that a government attorney would be in, and the
10 Court has extended qualified immunity to government
11 attorneys who are in this position, either giving legal
12 advice, like in the Burns case, or serving as
13 prosecutors. And there's just no difference when he's
14 operating in this case that would make him
15 distinguishable from a government attorney.

16 To answer another suggestion, I think, in
17 your question, the Court talked about, in terms of
18 deterrence and chilling, making sure that there were
19 talented candidates who wanted to take on the position
20 of government. So, the Court has never said, you know,
21 we're concerned about wiping out the market entirely.
22 It said, you know, if there is a segment of the market
23 that will not take on this business anymore, that's a
24 fairly serious problem when we need to make sure that
25 the government of -- of business is done.

1 And if I can just make -- give the Court
2 another example to, perhaps outside the context of this
3 case, see how a private person being denied qualified
4 immunity would affect government employees, consider a
5 fire department that has some full-time fire department
6 personnel and also some volunteer firefighters. When
7 they're working together in fighting a fire, you don't
8 want the volunteer firefighter thinking: Should I break
9 down this door? I might face personal liability.

10 You want him to make fearless decisions
11 because whether he breaks down the door or not is going
12 to directly affect the ability of the other folks who
13 are trying to go into those homes, trying to stop the
14 fire, to do their jobs.

15 That would also be true in the context of
16 court security. The United States Marshals Service
17 sometimes uses private security guards, and we have
18 direct supervision and control over them, but --

19 CHIEF JUSTICE ROBERTS: So, what -- what if
20 it's a 100 percent purely volunteer fire department? I
21 mean, the town, whatever, contracts, out-sources,
22 whatever, but it's just run by volunteers. Is your
23 answer the same?

24 I'm trying to get at your point about
25 they're working with or coordinating with government

1 employees. And your argument seems a little derivative.
2 You're saying the whole point is to protect the
3 government employees, and you have to have qualified
4 immunity for the non-employee to do that. But does your
5 argument apply when there are no government employees
6 around?

7 MS. SAHARSKY: It's just difficult in the
8 fire department situation, even if there is an
9 all-volunteer force, that there wouldn't be some type of
10 direct supervision by the mayor, by the city council, et
11 cetera. You know, that's -- particularly in the local
12 government situation, those folks would tend to work
13 fairly closely together.

14 It is, in the case of deterrence and wanting
15 fearless decisionmaking, a primary concern that we have
16 about protecting government. But we need to protect the
17 individuals to protect government. So, we do need to
18 make sure that their decisions aren't chilled, that
19 persons like Petitioner are willing to take on
20 representation of this kind. And the Ninth Circuit's
21 suggestion that no private person should be -- should
22 get qualified immunity, even when they're doing the
23 day-to-day business of government, is just one that
24 can't be reconciled with this Court's decisions in Wyatt
25 and Richardson.

1 JUSTICE GINSBURG: There's another part of
2 qualified immunity, and I know it's not teed up in this
3 case, but why is it reasoned decisionmaking to recognize
4 you can't enter a home without a warrant, but you can
5 tell the occupant to bring out every item you want to
6 see? It seems to me that that's not -- that there --
7 there's clearly established law to say that's wrong.

8 MS. SAHARSKY: Well, the Ninth Circuit found
9 that it wasn't clearly established law. I understand
10 that it's a fairly difficult Fourth Amendment question.
11 But as you say, it wasn't teed up in this case. It
12 wasn't -- there wasn't a petition on this question. It
13 wasn't raised in the brief in opposition. You know, in
14 light of the fact that the Ninth Circuit found it wasn't
15 clearly established, it probably wouldn't make sense for
16 the Court to address it.

17 One thing I might point out along those
18 lines is that both the district court made a finding, on
19 page 49 of the Joint Appendix, and then the court of
20 appeals made a finding in its opinion, and this was the
21 reason that the court of appeals found it wasn't clearly
22 established, was because there was no attendant threat
23 in terms of employment consequences to Respondent in
24 this case.

25 JUSTICE KENNEDY: Another question that's

1 not teed up and I guess not presented -- I'm just
2 curious to know about the history of the case. Was it
3 argued that there was no state action here? Or is there
4 -- and in your view, is that a very simple question to
5 answer?

6 MS. SAHARSKY: In terms of the argument,
7 Petitioner conceded throughout the litigation that he
8 was a state actor. In the complaint, Respondent
9 actually suggested he was an employee of the city. In
10 terms of whether he was asserting the authority of State
11 law, it does seem fairly clear that he was asserting the
12 authority of State law here.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. McGill.

16 ORAL ARGUMENT OF MICHAEL A. MCGILL

17 ON BEHALF OF THE RESPONDENT

18 MR. MCGILL: Thank you. Mr. Chief Justice,
19 and may it please the Court:

20 Petitioner has not demonstrated a historical
21 basis of immunity at common law for somebody in Mr.
22 Filarsky's situation, but the Petitioner has also not
23 shown that the immunity's purposes also serve Mr.
24 Filarsky's situation here.

25 I want to put those two issues aside. We'll

1 talk about that in a minute, but I want to address the
2 issue that has been most -- discussed the most, which is
3 the Petitioner's test.

4 The test that the Petitioner proposes that
5 this Court adopt is one that is very difficult to use.
6 The test is simply whether the individual is temporarily
7 retained in the -- in the functional equivalent of a
8 government employee, considering three factors. The
9 three factors are: one, the nature of the role
10 performed; the close supervision and/or coordination
11 with a government official --

12 JUSTICE ALITO: Well, what about your test?
13 What is your test?

14 MR. MCGILL: Well, our test is Richardson.
15 I think Richardson is the correct analysis. The Court
16 starts with looking at a historical basis of an immunity
17 at common law and then from there works to the policy
18 reasons.

19 JUSTICE ALITO: Well, suppose you have a
20 lawyer who's a part-time employee. Does that matter?

21 MR. MCGILL: A part-time employee of a --

22 JUSTICE ALITO: A part-time employee of a
23 government unit.

24 MR. MCGILL: Well, he would be -- he would
25 receive Harlow immunity.

1 JUSTICE ALITO: So, the difference, your
2 difference, is between an employee and an independent
3 contractor?

4 MR. MCGILL: Absolutely.

5 JUSTICE ALITO: And isn't that often a very
6 difficult determination under the law?

7 MR. MCGILL: No, I don't -- I don't think
8 so. Any time -- like in Mr. Filarsky's situation, Mr.
9 Filarsky is a for-profit law firm. You know, he sells
10 himself as a -- as an experienced professional in the
11 field providing legal services to the city --

12 JUSTICE ALITO: But there are a lot of --
13 there are a lot of -- I think -- well, there are a lot
14 of law firms. I think all law firms other than public
15 interest firms are for-profit firms, and the attorneys
16 are part-time employees of municipalities and other
17 government units to perform various functions, part-time
18 judges, part-time prosecutors.

19 MR. MCGILL: Well, the Court has made a
20 distinction in its past decisions about functions that
21 are integral to the judicial process. So, when you talk
22 about a judge or a prosecutor, that's a -- that's a
23 special function. That's sort of a different situation.

24 But never has there been an immunity for an
25 attorney just because they happen to be an attorney.

1 There is no historical basis for that. Neither the
2 Petitioner nor the Respondent nor the seven amici
3 have found --

4 JUSTICE ALITO: Well, now you're talking
5 about history. But I want to know how we are -- how the
6 courts are to determine and why it should matter how a
7 municipality sets this up.

8 Suppose the town had hired Mr. Filarsky as a
9 part-time town employee. So, he has a certain -- he has
10 a 1-year contract or 6-month contract or something for a
11 certain amount of money to perform services for a
12 certain number of hours. You would say that he would be
13 entitled to qualified immunity then.

14 MR. MCGILL: No I would say that he would
15 not be entitled to qualified immunity.

16 JUSTICE ALITO: Why?

17 MR. MCGILL: Because he's a --

18 JUSTICE ALITO: Because he's an employee.
19 They pass a resolution saying he's an employee of the
20 town.

21 MR. MCGILL: Well, they passed a resolution
22 to hire him and his firm to provide those services on a
23 temporary basis or a basis of 6 months, but he still is
24 an outside attorney, and he's probably got -- has other
25 clients and has other interests involved. And the

1 situation is different. It's an entirely different
2 system when you have a private law firm operating for
3 profit contracting --

4 JUSTICE SCALIA: Year-long employment is not
5 employment? If I accepted a government job for only a
6 year, I'm not a government employee? I don't understand
7 that.

8 MR. MCGILL: Well, as I understood the
9 hypothetical, if -- if that individual is -- is working
10 as an employee of the city, then --

11 JUSTICE SCALIA: He's working as an
12 employee. He's hired for 1 year. It's a 1-year
13 contract. Why -- why does that make him not an
14 employee? Or is it the fact that he's a lawyer? And
15 all lawyers have a certain independent responsibility.
16 They can't do some things that government superiors
17 might tell them to do, right? So, are you going to say
18 all lawyers are -- are -- cannot plead qualified
19 immunity?

20 MR. MCGILL: Well, our position here in this
21 case is that Mr. Filarsky was not necessarily acting in
22 the role of an attorney. He was functioning as an
23 internal affairs investigator. And it's doubtful that
24 he would have maintained an attorney-client relationship
25 with the city given that he was hired or retained to

1 conduct a factfinding report.

2 JUSTICE SCALIA: It makes it even easier
3 then. I -- I thought the attorney thing would help you,
4 but if he's not even functioning as an attorney, he's
5 functioning as a government investigator.

6 MR. MCGILL: But if he has other clients and
7 he works for profit, then he operates in a different
8 system.

9 JUSTICE SCALIA: Okay.

10 MR. MCGILL: Then he's not subject to the
11 same system --

12 JUSTICE SCALIA: But if they had employed
13 him for a year, exclusive employment, no other clients,
14 you'd say that's a different case?

15 MR. MCGILL: If they employed him for longer
16 than a year?

17 JUSTICE SCALIA: No, I'm saying a year; in
18 fact, 364 days.

19 (Laughter.)

20 JUSTICE SCALIA: Okay? And the deal was
21 you're -- you're going to work for us and nobody else.
22 You have no other clients.

23 MR. MCGILL: Well, I think then that
24 that's -- that's where you'd have to look at the policy
25 considerations. If you feel --

1 JUSTICE SCALIA: Yes, I understand that.

2 How do you look at them?

3 MR. MCGILL: If he's still --

4 JUSTICE SCALIA: Does that come out -- case
5 come out the same way or not?

6 MR. MCGILL: No, I don't think it does. If
7 he's taking that position for that term, that 1-year
8 period, to make money for profit, and the next year he's
9 going to work for somebody else --

10 JUSTICE SCALIA: Everybody takes a position
11 to make money for profit. How many government employees
12 work for free?

13 MR. MCGILL: But he may be, in that
14 instance, trying to form a relationship with that
15 municipality and enter into a longer term contract.

16 JUSTICE SCALIA: No, he's not. He's not --
17 I mean, yes, he may be, I guess. But assume he's not.
18 He's just a lawyer who's been hired for 364 days to work
19 for nobody but the -- but the government. And you still
20 say that he has no -- no immunity in what he does.

21 MR. MCGILL: He gets --

22 JUSTICE SCALIA: To investigate for the
23 government.

24 MR. MCGILL: Absolutely not. He gets no
25 immunity in that situation.

1 JUSTICE SCALIA: Two years, though? Three
2 years? I'm a lawyer who --

3 MR. MCGILL: The longer you go --

4 JUSTICE SCALIA: -- enters a contract for
5 life with this -- with this government to investigate.
6 At that point, does he get the immunity?

7 MR. MCGILL: No, because there's --

8 JUSTICE SCALIA: Still not?

9 MR. MCGILL: There is no historical basis
10 for immunity. It just wasn't there. For that function
11 that -- that Mr. Filarsky was providing, there is no
12 historical basis for it. And, typically, that would end
13 the Court's question. That would end the inquiry. You
14 only get to the policy considerations --

15 JUSTICE SOTOMAYOR: But don't we have
16 cases --

17 JUSTICE ALITO: I thought you were drawing a
18 distinction between employees and independent
19 contractors. Is that the distinction you're drawing or
20 not?

21 MR. MCGILL: Well, the distinction really
22 is, if you are a private actor, you're subject to a
23 different set of rules. You're subject to the market
24 pressures and the competition that are going to correct
25 your behavior and are going to satisfy the same purposes

1 that immunity provides.

2 JUSTICE BREYER: What would have happened if
3 Abraham Lincoln today were there? And I gather what
4 happened is they thought the local prosecutor is good,
5 but Lincoln is better. So, we'll let Lincoln prosecute
6 this case.

7 Now, in your view, Abraham Lincoln would not
8 have had immunity, but the local prosecutor would have.

9 MR. MCGILL: Well --

10 JUSTICE BREYER: They did exactly the same
11 thing, by the way; it was just that Lincoln had a better
12 reputation. Every word was the same.

13 MR. MCGILL: As a historical basis, there
14 does not appear to be immunity for private prosecutors.
15 However, this Court over the years has provided immunity
16 for the judicial --

17 JUSTICE BREYER: But in your -- I'm asking
18 you, in your opinion, when I write this opinion, is I
19 could say not even Abraham Lincoln, when he acted as a
20 public prosecutor brought in for the occasion? In your
21 opinion, he should not have the immunity that Joe Jones,
22 the local prosecutor, would have?

23 MR. MCGILL: I --

24 JUSTICE BREYER: I'm just trying to get your
25 opinion.

1 MR. MCGILL: I think that that's a much
2 closer call --

3 JUSTICE BREYER: Is it because it's Abraham
4 Lincoln or --

5 JUSTICE SCALIA: You should say section 1983
6 didn't exist. That's your answer --

7 MR. MCGILL: What?

8 JUSTICE SCALIA: -- to that one, right?

9 MR. MCGILL: But I think it's a much closer
10 call because he was engaged in a prosecutorial function,
11 which this Court over the years --

12 JUSTICE BREYER: But investigatory
13 functions -- they don't get immunity. So, if Lincoln
14 had looked into it and said, you know, I've looked into
15 this; I don't think we should prosecute. And what they
16 said was use your judgment.

17 MR. MCGILL: No.

18 JUSTICE BREYER: Okay. So, there are
19 problems with both standards both ways. This is one of
20 the things that -- that is bothering me.

21 MR. MCGILL: Right.

22 JUSTICE BREYER: Imagine in this case the
23 lawyer sat down with the other firemen, the supervisor
24 and so forth, and they said -- not necessarily this
25 event; they said we want to do X. And the lawyer said:

1 I have to tell you, it's unclear whether X is
2 constitutional or not. Now, because it's unclear, I
3 also have to tell you that if you do it, you will not be
4 held personally liable.

5 Now, can a lawyer give that advice? Yes.
6 When he does, of course, he's subjecting himself to
7 personal liability. Now, it's that conflict that is
8 worrying me, among other things.

9 So, what do we do about that? The lawyer is
10 being asked to give advice to the client. Under the
11 canons of ethics, he ought to have their interest at
12 heart, and in doing that, he's subjecting himself to
13 what could be hundreds of thousands, millions of dollars
14 worth of damages or whatever in suits for malpractice.
15 Is there a way that we side with you out of that
16 dilemma?

17 MR. MCGILL: I don't think that that's
18 necessarily an immunity question; it's more of a
19 liability question because it very well may be that --

20 JUSTICE BREYER: No, no, no. What I'm
21 assuming in the question is, since it's a close
22 question, he has to worry about a court saying: You
23 were wrong in saying it was legal. It was not legal.
24 The matter was unclear, but it was not legal.

25 At that point, he becomes subject to much

1 damages. But, of course, the others do not, and he had
2 to tell them go ahead with it. You understand my point.

3 MR. MCGILL: I do.

4 JUSTICE BREYER: So, what is the answer?

5 MR. MCGILL: But -- but I think what -- what
6 it is -- the difference there is that there you have an
7 attorney just providing advice, which is different than
8 what happened here, where you actually had the attorney
9 engaged --

10 JUSTICE BREYER: Well, that may be, but what
11 I'm trying to work out is what is your set of rules? If
12 we don't say -- if we don't say you have immunity, and
13 you agree that this is a bad dilemma at least in my
14 hypothetical case, I'm trying to work out what set of
15 rules you advocate in order to either say, well, that's
16 too bad, the dilemma is there, we can't get around it,
17 or something else. That's why I want your answer.

18 MR. MCGILL: If the attorney under those
19 circumstances could be held liable for a constitutional
20 violation for simply giving advice and he happens to be
21 a private attorney working for profit, then he wouldn't
22 have immunity.

23 JUSTICE BREYER: I change it slightly, and
24 he puts them up to it.

25 MR. MCGILL: Well --

1 JUSTICE BREYER: Because I don't know why he
2 couldn't. I mean, you know, he says go do it. Or, in
3 other words, my hypothetical -- okay, go ahead.

4 MR. MCGILL: I think the answer's the same.
5 If somehow under those circumstances the attorney could
6 be held liable for giving that advice, and he's -- he's
7 a private attorney, and he doesn't pass the Richardson
8 test, then he would not be entitled to immunity.

9 CHIEF JUSTICE ROBERTS: Your case --

10 MR. MCGILL: So, there's no -- there's no --
11 I'm sorry.

12 CHIEF JUSTICE ROBERTS: No, you can finish
13 your answer.

14 MR. MCGILL: There's certainly no -- there
15 is no historical basis of immunity just for giving legal
16 advice. The Petitioner hasn't pointed this Court to any
17 firmly rooted tradition of an immunity.

18 CHIEF JUSTICE ROBERTS: Your case
19 highlights -- I think is a very good example of why the
20 lawyer ought to have qualified immunity. I mean, this
21 was a case where it looks like there's a lot of
22 threatening and bullying going on. I mean, the -- the
23 lawyer says -- you know, we're going to figure out a way
24 to name you, Mr. Filarsky. You're issuing an illegal
25 order. If you want to take that chance go right ahead.

1 You might want to think -- take a minute to think about
2 it.

3 I mean, it seems exactly the kind of
4 situation for which qualified immunity was -- was
5 developed. We want Filarsky to give what he -- do what
6 he thinks is the right thing in this situation. We
7 don't want him to be worried about the fact that he
8 might be sued. And you have a lawyer here saying, well,
9 if you do that, I'm going to sue you. So, Filarsky
10 naturally, or some lawyer in that situation, is going to
11 think, wow, do I really want to run that risk?

12 Isn't that exactly why we have qualified
13 immunity?

14 MR. MCGILL: No. And the reason for that is
15 that because Mr. Filarsky is a private individual, he
16 doesn't need qualified immunity. You know, Richardson
17 is decided in 1997, but in 2003, the Ninth Circuit
18 issued its decision in Gonzalez v. Spencer. And in
19 Gonzalez v. Spencer, the court held that private
20 attorneys like Mr. Filarsky don't need immunity; they
21 don't get immunity. So, the law in the land since
22 2003 --

23 CHIEF JUSTICE ROBERTS: Well, that's easy
24 for a judge to say because they're absolutely immune,
25 but for the lawyer who is sitting there and saying --

1 (Laughter.)

2 CHIEF JUSTICE ROBERTS: -- saying I'm going
3 to sue you, if you were -- well, you are a lawyer. And
4 you're sitting in that situation. Isn't that going to
5 enter into your mind? You say, well, sue all you want;
6 I don't care; this is the right answer.

7 MR. MCGILL: But, for nearly a decade, the
8 law within the Ninth Circuit has been that private
9 attorneys don't receive immunity.

10 CHIEF JUSTICE ROBERTS: Right.

11 MR. MCGILL: And that -- the fact that is,
12 is that Mr. Filarsky knew going into that -- that
13 investigation that he wouldn't have immunity for
14 anything he -- he did. And it didn't deter him; it
15 didn't make him --

16 CHIEF JUSTICE ROBERTS: Well, how do you
17 know?

18 MR. MCGILL: Well, because he -- in the
19 light of the threats that he received, he still went
20 forward with the -- what was deemed to be an
21 unconstitutional search. So, the policy purposes of,
22 you know, wanting to prevent unwarranted timidity and
23 deterring talented candidates from working for the
24 government --

25 CHIEF JUSTICE ROBERTS: Well, he had -- he

1 had the chief issue the order, right?

2 MR. MCGILL: Well, the --

3 CHIEF JUSTICE ROBERTS: And then the chief
4 later on says, well, he told me to issue the order. I
5 mean, I'm not quite sure that things went exactly as
6 they would if you had qualified immunity.

7 MR. MCGILL: Well, Mr. Filarsky said -- and
8 this is what he said on the record; it's in the
9 transcripts in the Joint Appendix -- is that he's
10 issuing the order on behalf of the department. That's
11 what he said. And then there was some -- some
12 discussion back and forth between Mr. Delia's attorney
13 and Mr. Filarsky, and that's what led to the
14 formalization of -- of the order.

15 JUSTICE SCALIA: Well, I understand that
16 there is a lot of bad, cowardly legal advice being given
17 in the Ninth Circuit.

18 (Laughter.)

19 JUSTICE SCALIA: I don't really know that,
20 but you don't know the opposite, either, do you?

21 MR. MCGILL: I don't.

22 JUSTICE GINSBURG: Why didn't you
23 cross-appeal on the clearly established law? Because
24 then -- then you could concede, so, arguendo, he had
25 qualified immunity, but the advice that he gave was

1 contrary to clearly established law.

2 MR. MCGILL: So, why did the Petitioner --
3 or the Respondent not cross-appeal?

4 JUSTICE GINSBURG: Why didn't you bring up
5 that -- that issue?

6 MR. MCGILL: I think it was -- that's sort
7 of the law of the case, is that the Ninth Circuit found
8 that there was a constitutional violation. So, we
9 obviously didn't want to appeal that.

10 JUSTICE GINSBURG: No, but -- but whether it
11 was clearly established. In other words, what we had
12 here was a recognition: We can't go into the house; we
13 can't go into a house, private house, without a warrant.
14 So -- in fact, Filarsky said something about I know a
15 way -- a way to get around that; we just tell them to
16 bring out the items.

17 MR. MCGILL: Right. I -- my personal
18 opinion and our position has been is that it -- the law
19 was clearly established on that. Why the decision was
20 made not to cross-appeal on that, I'm not -- I'm not
21 sure. But --

22 JUSTICE ALITO: Are you saying it's clearly
23 established that there isn't a difference between going
24 in and looking for the insulation, et cetera, and
25 telling him to bring it out? Is it clearly established

1 that the -- that as a condition of employment in a
2 situation like this, the employee cannot be required to
3 submit to a search?

4 MR. MCGILL: I -- I think it's pretty well
5 known that the house is --

6 CHIEF JUSTICE ROBERTS: Well,
7 particularly --

8 MR. MCGILL: -- is --

9 CHIEF JUSTICE ROBERTS: Well, even as -- the
10 reason it's an issue is because he says, look, I've got
11 this stuff at my house. That's how his -- his defense
12 is. I haven't used it; I've got the insulation there.
13 So, you think it's still clearly established that it
14 violates the Fourth Amendment for the city to say, okay,
15 well, show it to us if you want to use that as your
16 defense?

17 MR. MCGILL: Yes, I do because it -- it --
18 certainly, Mr. Filarsky didn't have any reasonable
19 suspicion to believe that Mr. Delia was lying or was
20 being dishonest. He certainly didn't have probable
21 cause. He had a hunch. And then that's what he said,
22 I -- I -- he said it as -- at the -- during the
23 interview that I -- I don't necessarily know that you're
24 lying; I just -- I want to see if you are.

25 So, you know, the investigation turned from

1 wanting to see whether Mr. Delia was off work on false
2 pretenses into, well, I don't have anything there; so,
3 let me just see if he's lying just for the sake of it.
4 And that's when they ended up issuing that order.

5 I think that would be a different situation
6 if perhaps you could argue that they had a reasonable
7 suspicion or had some cause to search his house, but
8 here they didn't. So, I think it is under those facts
9 clearly established.

10 JUSTICE KAGAN: Mr. McGill, back to
11 immunity, what -- one thing I don't understand about our
12 law here, you say there was no historic basis. And I
13 have to concede that that's right. Seems to me that
14 there's -- there was only a malice defense. But isn't
15 that always true when it comes to a -- a private person?
16 In other words, of course there's no historic basis for
17 qualified immunity. This kind of immunity was developed
18 in 1970. It's sort of by definition there's no historic
19 basis for this sort of immunity.

20 So, to say that the historic basis matters
21 is really to say that private people never get Harlow
22 immunity.

23 MR. MCGILL: Well, I think that that's
24 right. There was not qualified immunity at common law,
25 but there was absolute immunity. And in -- there -- I

1 mean, I can't go back and think about all the different
2 immunities that may or may not have existed, but I -- I
3 do know that the Petitioner has the burden to bring
4 forth a firmly rooted tradition. This Court has said
5 over and over that it's not going to create new
6 immunities.

7 JUSTICE ALITO: But the Court's cases are a
8 mix of history and -- and policy. The Court has
9 recognized both absolute immunity -- has recognized
10 absolute immunity in instances where there wasn't
11 absolute immunity at common law; isn't that true?

12 MR. MCGILL: Right.

13 JUSTICE SCALIA: And -- and the rule about
14 malice being -- being the criterion of liability, that
15 applied not just to -- not just to private lawyers but
16 to government lawyers as well, didn't it?

17 MR. MCGILL: It did. That that -- that that
18 good-faith defense applied --

19 JUSTICE SCALIA: So, if we're going to be
20 historically faithful, we should deny any qualified
21 immunity to government lawyers or expand the government
22 immunity to -- for government lawyers so they can do
23 anything so long as it's not malicious?

24 MR. MCGILL: Well, that -- that's what this
25 Court would have to do.

1 JUSTICE SCALIA: Right.

2 MR. MCGILL: It would have to basically
3 expand what was at common law --

4 JUSTICE SCALIA: Right.

5 MR. MCGILL: -- a defense.

6 JUSTICE SCALIA: So, the devil with history,
7 right?

8 MR. MCGILL: Well, it would result in this
9 Court having to expand that immunity that it expanded in
10 Harlow to private individuals. And our position is that
11 because a private individual like Mr. Filarsky is a
12 market participant, the purposes of immunity aren't
13 served. They just simply aren't needed. And I was
14 mentioning earlier about --

15 JUSTICE GINSBURG: What about -- what about
16 the argument that Filarsky makes, that if there were to
17 be a proceeding against him, inevitably the witnesses
18 would be the government employees? They would be the
19 battalion chiefs, the fire chief. So, one of the
20 reasons for the qualified immunity is you don't want to
21 disturb government employees in the routine performance
22 of their work. Certainly, in this case, there would be
23 disruption, distraction of these government employees.

24 MR. MCGILL: Well, there probably would be
25 some distraction. That would be inevitable, but it

1 would be no different than the distraction that the
2 government would face when a private attorney is sued
3 for any number of claims, malpractice or, you know, some
4 State law violation.

5 And to say that the -- the distraction that
6 the government is going to face based on just what is
7 probably a small sliver of the big pie, which is, you
8 know, 1983 litigation, is pretty speculative. And, of
9 course, it doesn't answer the question that the -- the
10 government employer itself can still be liable under
11 Monell.

12 So, even though the immunity may kick in and
13 the individuals may get off or may not have to stand
14 suit, it -- there are still occasions when the
15 government is still going to be there. So, that
16 distraction is still going to exist.

17 CHIEF JUSTICE ROBERTS: What if Filarsky was
18 there, you know, hired to help the fire department with
19 these -- and he did absolutely nothing? He just sits
20 there and watches. The battalion chief says, I want to
21 do this; I'm going to go get the stuff; you bring it all
22 out. And he just -- he just sits there, doesn't see any
23 reason to offer any legal advice or opinion. Could you
24 still sue him under 1983?

25 MR. MCGILL: Well, I don't think he would be

1 liable, but I don't think under that situation, he would
2 have participated in the --

3 CHIEF JUSTICE ROBERTS: Really? He has an
4 obligation as a lawyer to speak up if he thinks
5 something illegal is going on. That's his job. And he
6 doesn't -- he just sits there quietly?

7 MR. MCGILL: No. I don't know that -- that
8 he would be liable under section 1983. But if he were,
9 and he were a private lawyer, he would not have
10 qualified immunity. He would still be under the same
11 Richardson test where there's no historical basis for
12 it, and because he's the private individual working
13 under -- you know, working for profit and subject to
14 market pressures, he wouldn't --

15 CHIEF JUSTICE ROBERTS: What if he -- this
16 for profits -- I -- the significance of that eludes me.
17 Sometimes people act out of, you know, public service,
18 and particularly in these sorts of situations, the town
19 needs a lawyer, and he's helping out. What -- if he
20 were purely a volunteer, it would be a different answer?

21 MR. MCGILL: If he were purely a volunteer,
22 it very well might be a different answer because some of
23 those policy concerns that -- that Richardson talked
24 about and discussed may not be present. So, you have to
25 apply the test to the situation you have before you.

1 CHIEF JUSTICE ROBERTS: And, well -- and
2 what if he gives the city a discount? He's working for
3 half -- half his fee because it's the city. He wants to
4 help out, but he can't do it totally for free. So, it's
5 50 percent his normal rate.

6 MR. MCGILL: I don't know that 50 percent
7 makes a difference. And earlier, we were discussing
8 that -- the 1-year or the 2-year and so forth, the
9 length of the contract. I don't think that those things
10 necessarily make a difference. The point is whether Mr.
11 Filarsky was undertaking that representation or that
12 role in a manner that made him subject to other regular
13 market pressures.

14 If he was performing a function and
15 competing against other lawyers or other investigators
16 performing that same function, then the point is there,
17 you know, he isn't going to be as timid because he's
18 going to want to do a good job. And the same policy
19 concerns that are present for that government lawyer
20 aren't there for him as a private individual.

21 JUSTICE ALITO: Well, suppose a municipality
22 were to -- or a State were to abolish all the civil
23 service rules and all the special rules and go back to
24 employment at will for government employees. Would that
25 -- would that take with it the whole qualified immunity

1 regime?

2 MR. MCGILL: I don't think that it would.

3 In other words, is the question whether or not, if we
4 abolished the merit system or civil service system,
5 would qualified immunity still be needed?

6 I think if that were the question, that --
7 well, that's a tough question to answer. But it very
8 well may not be because, you know, part of the decision
9 in Richardson here was -- it was -- they are operating
10 within a different system. Private versus public. And
11 if you start to make the public system look more like a
12 private system, then it very well may be that immunity
13 won't be needed at all.

14 JUSTICE ALITO: It seems strange because the
15 immunities, at least some of the immunities, long
16 pre-date the -- the institution of the civil service
17 system. Everybody is subject to market forces. Every
18 person who works is influenced by market forces to some
19 degree; isn't that correct?

20 MR. MCGILL: I think that that's correct,
21 but when you have a civil service system, a merit
22 system, it's -- it is not as easy to correct behavior as
23 it would be for, say, a private person. For, like, Mr.
24 Filarsky, if he was not performing at -- at the level
25 that the City of Rialto had hoped, he can be replaced

1 and quite easily.

2 For a government employee, though, there are
3 obviously the civil service protections, and it's not so
4 easy to do that. So, that's --

5 JUSTICE SOTOMAYOR: That's not true of most
6 lawyers.

7 MR. MCGILL: Pardon me.

8 JUSTICE SOTOMAYOR: Most lawyers are not
9 part of the civil service -- internal lawyers are not
10 part of the civil service system. They're generally
11 considered employees at will, at least most of the
12 circuit courts have so held.

13 MR. MCGILL: I'm not familiar with
14 whether --

15 JUSTICE SOTOMAYOR: That they're
16 policymakers and, as such, are not subject to civil
17 service protections.

18 MR. MCGILL: Well, I -- I know that some
19 subsections of lawyers within a government can be
20 represented. So, they very well may have some
21 protection, but maybe it's not quite to the extent that
22 more of the rank and file would have.

23 JUSTICE ALITO: Well, the political
24 appointees within the United States Department of
25 Justice are not protected by civil service. So, should

1 they lack immunity?

2 MR. MCGILL: No, because they would -- they
3 would get it under Harlow. They would have immunity
4 under Harlow.

5 JUSTICE ALITO: They're subject to market
6 forces, aren't they?

7 MR. MCGILL: They very well may be, and it
8 may be for me to say that maybe they shouldn't have an
9 immunity or it's not needed. But at this point, the law
10 is, under Harlow, that they would receive it.

11 JUSTICE SCALIA: What if I told you that all
12 the lawyers at the Department of Justice are regarded as
13 being employed at will and that all of them can be
14 fired?

15 MR. MCGILL: Well, I --

16 JUSTICE SCALIA: Do you think the rest of
17 them don't -- don't have any protection?

18 MR. MCGILL: I think that the answer would
19 be the same in that they very well may not need
20 qualified immunity because those pressures and those
21 concerns underlying immunity aren't there.

22 JUSTICE SCALIA: Wow. That's going to be
23 disappointing news for all those attorneys at Justice --
24 (Laughter.)

25 MR. MCGILL: I just want to go back and talk

1 about the Petitioner's test a little bit, too, because
2 the Court had some concerns about it. And I share those
3 same concerns, and that's that the test requires a
4 factual analysis, you know, being temporarily retained
5 in close coordination and supervision. Those are highly
6 factual questions that aren't going to bode well for
7 early resolution of a case.

8 And a -- the lawyer is going to be able to
9 plead around that test very easily and take the case
10 into -- into full-blown litigation and discovery and so
11 forth. So, that -- that test is problematic.

12 In addition, as I understand it, the test is
13 going to be extended well beyond attorneys. The test
14 results in anybody working for the government under, you
15 know, close coordination or supervision, whatever that
16 means, is going to get immunity. So, that is well
17 beyond attorneys, to anybody. Anybody who contracts
18 with the government and meets that factual test is now
19 going to have immunity.

20 And that's something -- that's a huge step
21 that this Court, you know, should not take, especially
22 when there is no historical basis for it and the policy
23 concerns are not present.

24 But even if you apply that test to
25 Mr. Filarsky, under these facts, Mr. Filarsky would not

1 have immunity. He wasn't temporarily retained. He
2 worked for the City of Rialto for 14 years as -- as a
3 business, for profit. He had many clients, and the City
4 of Rialto was one of them. It wasn't that he was
5 temporarily retained. So, he doesn't even meet that
6 element of the Petitioner's test.

7 Mr. Filarsky was not performing a --

8 CHIEF JUSTICE ROBERTS: Are all of these --
9 are all of these objections applicable as well to the
10 determination of whether there is state action from the
11 attorney's conduct?

12 MR. MCGILL: The concerns about there being
13 a factual --

14 CHIEF JUSTICE ROBERTS: Yes.

15 MR. MCGILL: -- inquiry?

16 CHIEF JUSTICE ROBERTS: Yes.

17 MR. MCGILL: I don't think so. I mean, as
18 an attorney, I would have to certify in a pleading that
19 -- the relationship between the person I'm suing and the
20 government. So, I think that there would have to be
21 information put forth in the pleading that would
22 establish that, and I don't know that one could simply
23 make up state action for purposes of pursuing a 1983
24 action.

25 So, it -- it may be that there's a factual

1 inquiry, but I don't think it's as great or nearly as
2 great as -- as the temporarily retained or close
3 coordination components to the -- or the Petitioner's
4 test.

5 Mr. Filarsky was not performing a function
6 that is uniquely governmental. Investigating workplace
7 misconduct is not a governmental function, or it's not a
8 prototypical governmental function.

9 CHIEF JUSTICE ROBERTS: But your -- your
10 objection is not that he was investigating workplace
11 conduct; your objection is that he was ordering people
12 to tell your client to bring out stuff that was in his
13 house.

14 MR. MCGILL: Correct. But it was under the
15 -- the auspices of a -- a workplace investigation, if
16 you will.

17 CHIEF JUSTICE ROBERTS: Yes, but telling
18 people basically either executing a search or in effect
19 executing a search, that is a uniquely governmental
20 function.

21 MR. MCGILL: Executing a -- a formal search
22 by the government is something -- that's a role that the
23 government performs, but I wouldn't say that -- I
24 wouldn't equate, you know, executing a search with what
25 occurred here.

1 Well, let me -- let me restate that, I
2 guess. What I mean to say is that --

3 JUSTICE SCALIA: You don't want to say that.
4 (Laughter.)

5 MR. MCGILL: Mr. Filarsky -- the function,
6 the role that he was performing was that of an internal
7 affairs investigator.

8 JUSTICE SCALIA: Yes, but if -- if he did
9 the same thing for a private company -- he could do the
10 same thing for a private company, say, you know, you're
11 going to get fired unless you substantiate your story by
12 bringing the stuff out of your house. That wouldn't be
13 a search -- an unlawful search; right? It could have
14 happened in a private company.

15 MR. MCGILL: It could, and --

16 JUSTICE SCALIA: Yes.

17 MR. MCGILL: Yes, it very well could have.
18 And that's my point, is that what Mr. Filarsky did in
19 his role was not uniquely governmental. He wasn't
20 performing that governmental function.

21 JUSTICE SCALIA: Well, there's very little
22 that is uniquely governmental. I mean, my goodness, if
23 we denied immunity to -- to all those acts that are not
24 uniquely governmental, there would be very little
25 immunity, I'm afraid.

1 MR. MCGILL: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Ms. Millett, you have 3 minutes remaining.

4 REBUTTAL ARGUMENT OF PATRICIA A. MILLETT

5 ON BEHALF OF THE PETITIONER

6 MS. MILLETT: Thank you.

7 Justice Breyer, your dilemma is -- sits at
8 the crux of why qualified immunity is appropriate here
9 because not only do you have the lawyer saying, well,
10 you'll be all okay, but I'm going to be going down in
11 this lawsuit; the lawyer's going to have a duty to
12 inform his client that, in fact, this will lead to
13 litigation. You will be protected in your personal
14 capacity, but guess what, litigation is going to ensue.

15 That can influence and deter both lawyers'
16 willingness to work for the government at these cut
17 rates or pro bono rates, their -- subconsciously, the
18 advice they give, and it can make the government not
19 want to act on the advice, which is precisely what we
20 want to protect.

21 Nothing like that was happening in
22 Richardson. The government was nowhere on the scene
23 when the constitutional decisions being challenged --
24 they weren't even percipient witnesses in that
25 situation.

1 The second point I want to make is fiduciary
2 duty doesn't change it other than it confirms that he's
3 working in the interest of the government, but every
4 agent has a fiduciary duty to their principal. And so,
5 you can't deny qualified immunity on that ground or
6 you'll have a sweeping decision on your hands.

7 The market concerns, Justice Sotomayor --
8 the test is not whether a warm body could be found to
9 fulfill this operation if he won't do it. This is a
10 completely different market from Richardson, where
11 there's only one client for prisons, and that's the
12 government.

13 Here, the government is competing for the
14 services. When it needs a skilled attorney, when it
15 wants people of the caliber that the government service
16 needs and deserves, it is competing. And right now, as
17 the Chief Justice recognized, a lot of times, including
18 for Mr. Filarsky, that's done at discount rates.

19 These folks -- this is already a marginal
20 decision. And if you want to talk about market
21 decisions, then you're going to push that weight. And
22 if the answer is, if you decide to take on this pro bono
23 representation or cut your rates out of public duty and
24 -- and a willingness to serve your government, guess
25 what comes with it: You alone will be left holding the

1 bag at the end of this for the governmental misconduct.

2 Section 1983 is supposed to deter
3 governmental conduct. It is not supposed to deter the
4 reasonable advice given by lawyers to governmental
5 clients.

6 If the Court has no further questions.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel,
9 counsel.

10 The case is submitted.

11 (Whereupon, at 12:04 p.m., the case in the
12 above-entitled matter was submitted.)

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