No. 21-152

IN THE

Supreme Court of the United States

THE ESTATE OF MADISON JODY JENSEN,
BY HER PERSONAL REPRESENTATIVE JARED JENSEN,

Petitioner,

v.

KENNON TUBBS, M.D.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether private medical personnel working in correctional or mental-health facilities can assert qualified immunity.[1]

[1] While this is the question formally presented by Petitioner, at times the Petition appears to request certiorari on the issue of whether *any* medical personnel—even those employed directly by the state—can assert qualified immunity.

CORPORATE DISCLOSURE STATEMENT

There are no publicly held corporations involved in this proceeding.

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RESPONDENT'S BRIEF IN OPPOSITION

The Court should deny certiorari on the question of whether private medical personnel working in correctional or mental-health facilities can assert qualified immunity because the applicable rule of law is properly stated and has been consistently applied among the circuit courts of appeal. Respondent respectfully requests that the Court deny Petitioner's Petition for a Writ of Certiorari for at least three reasons:

First, contrary to Petitioner's contention, there is no circuit split regarding the circumstances under which private medical personnel working in correctional or mental-health facilities can assert qualified immunity.

Second, the question does not merit the Court's attention because the standard for assessing a private-actor's eligibility for qualified immunity does not need to be clarified, and the fact-specific, two-part analysis is an effective method for lower courts to decide these issues.

Third, the Tenth Circuit's decision was correct because both the historical analysis as set forth in *Filarsky* and the public policy considerations set forth in *Richardson* and *Filarsky* strongly support Dr. Tubbs's qualified immunity defense. And, allegations of "erroneous factual findings or the misapplication of a properly stated rule of law" rarely justify granting certiorari.

STATEMENT OF THE CASE

While Petitioner's summary of the factual and procedural history of this case is largely accurate, Respondent perceives some misstatements of fact and law that must be corrected. The following factual assertions appear in the record as well as in the factual

findings identified by the Tenth Circuit Court of Appeals in *Estate of Jensen by Jensen v. Clyde*, 989 F.3d 848 (10th Cir. 2021).

Dr. Tubbs contracted with the Duchesne County[1] Jail to provide *some* medical services for the inmates at the Jail. *Id.* at 852 (emphasis added). Specifically, Dr. Tubbs agreed to provide medical services such as telephone on-call service for consultation and a once-a-week sick call. *See id.* Dr. Tubbs subcontracted with a physician's assistant ("PA"), who made weekly visits to the jail to provide medical care. *See id.* It is undisputed that the Jail and nursing staff (including Nurse Jana Clyde) knew that they could call Dr. Tubbs or his PA any time with medical questions or concerns. *See id.*

The Duchesne County Jail directly employed Nurse Jana Clyde, the only full-time medical provider at the Jail. *See id.* While Dr. Tubbs agreed to "provide training, instruction, support, and a supervisory role" to Nurse Clyde "on how to appropriately handle triage, sick call, medical protocols, and health care complaints/grievances," he did not have the authority to fire or discipline Nurse Clyde. *Id.* at 856. Furthermore, Dr. Tubbs did not contract to create medical protocols or policies for the jail. *See id.*

The Petition points out that Nurse Clyde had "not receive[d] any training . . . on the Jail's medical policies and procedures." However, the Petition does

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[1] Duchesne County is a rural county in northeastern Utah. As of the 2010 United States Census, there were 18,607 people in the county. The median income for a household in the county was $31,298, and 16.8% of the population lived below the poverty line. *See* 2010 United States Census Report, https://www.census.gov/quickfacts/fact/table/duchesnecountyutah/PST045219.

not mention that Nurse Clyde knew that she should call Dr. Tubbs if an inmate was violently vomiting over a 12-hour period or if she had seen an inmate's vomit. *Id.* Because Dr. Tubbs' contract with the Jail is for telephonic on-call services and a once-a-week in-person sick call, Dr. Tubbs must rely on County employees to contact him with any inmate's medical concerns. Dr. Tubbs was never contacted regarding Madison Jensen's condition. *See id.* at 854. Furthermore, in Dr. Tubbs' 19 years of experience, he had never had any inmate die as a result of opiate withdrawal. *See id.*

The Tenth Circuit found that Dr. Tubbs' employment with the Duchesne County Jail was strikingly different from employment with a private prison. *See id.* at 856. Dr. Tubbs essentially ran a two-man shop (including his subcontract with his PA) providing a discrete function to the Jail. *See id.* While Dr. Tubbs had some leeway in his decisions, it was Duchesne County that was charged with implementing policies and training its employees, including Nurse Clyde and enforcement officers. *See id.* Dr. Tubbs was required to provide care in accordance with Utah Department of Corrections and Utah Medicaid guidelines, the County had to authorize any elective care, and Dr. Tubbs could only prescribe medication from the prison's formulary. *See id.* Even though Dr. Tubbs had agreed to supervise and provide some training to Nurse Clyde, she was a County employee, whom Dr. Tubbs had no ability to discipline or fire. *See id.* Given these facts, the Tenth Circuit found that had Dr. Tubbs been working as a doctor for the County on a full-time basis, he would have certainly been able to raise a qualified immunity defense, fulfilling the historical common law analysis addressed in *Filarsky v. Delia, 566 U.S. 377* (2012). *See id.*

Petitioner also wrongly asserts that the Tenth Circuit "acknowledged an entrenched circuit split about whether 'qualified immunity is . . . available to a private medical professional providing services to a jail.'" Pet. at 11 & Pet.App.14a-15a. The Tenth Circuit did not acknowledge such a split, but instead found that "*the circumstances of this case*—i.e., an individual doctor with limited control over policy working alongside government employees — compel a different result [than the circuit decisions denying qualified immunity to private medical providers in other contexts.]" *Jensen*, 989 F.3d at 857 (emphasis added). In doing so, the Tenth Circuit did not acknowledge a circuit split.[2] Instead, the court concluded that Dr. Tubbs' situation is factually dissimilar to employees of large private firms that are systematically organized to perform a major administrative task for profit—like the employees who were not entitled to qualified immunity in *Richardson v. McKnight*, 521 U.S. 399 (1997). Rather, his situation is similar to the individual defendant who was entitled to qualified immunity in *Filarsky v. Delia*, 566 U.S. 377 (2012).

Petitioner's characterization that "[t]he Tenth Circuit sided with the Fifth Circuit's minority view" and "reject[ed] the majority position" is not accurate. In fact, on the same day that the Tenth Circuit allowed Dr. Tubbs to assert qualified immunity, using the same two-part analysis defined by *Richardson* and

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[2] To support Petitioner's argument that a circuit split exists, Petitioner relies upon *Estate of Clark v. Walker*, 865 F.3d 544 (7th Cir. 2017); *McCullum v. Tepe*, 693 F.3d 696 (6th Cir. 2012); *Hinson v. Edmond*, 192 F.3d 1342 (11th Cir. 1999); and *Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000). As demonstrated below, these cases employ the same two-part analysis used by the alleged "minority view."

Filarsky, the Tenth Circuit held that the employees of a large, private medical provider were not entitled to qualified immunity based on the facts of that case. *See Tanner v. McMurray*, 989 F.3d 860, 862 (10th Cir. 2021).

REASONS FOR DENYING THE PETITION

I. The Court should deny the Petition because there is no circuit split.

Petitioner declares this case to be about "the interaction of [the *Richardson* and *Filarsky*] precedents," and requests certiorari based on the inaccurate premise that *Richardson* and *Filarsky* present inconsistent standards that the circuit courts of appeal have "struggled to reconcile." Pet. at 1. In reality, both *Richardson* and *Filarsky* support a two-part analysis for determining whether a private person can assert a qualified immunity defense: (1) whether there is a historical tradition of immunity applicable to that class of persons; and (2) whether three key policies underlying the immunity doctrine support the assertion of a qualified immunity defense. *See Richardson*, 521 U.S. at 404.

A. The Supreme Court has established a consistent two-part analysis for the question presented.

Contrary to Petitioner's assertions, the standard for evaluating whether private persons can assert a qualified immunity defense is clear and consistent. Building on this Court's decision in *Wyatt*, *Richardson* and *Filarsky* establish a clear, two-part analysis where courts look to both history and the purposes of the qualified immunity doctrine to determine whether a private person can assert the defense of qualified immunity.

Although the text of 42 U.S.C. § 1983 does not contain any explicit exceptions for governmental immunity, the Supreme Court has long accorded certain government officials either absolute or qualified immunity. *Wyatt v. Cole*, 504 U.S. 158, 163 (1992). Qualified immunity for government officials was recognized where it was necessary to preserve the individual's ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service. *Id.* at 167. *Wyatt* held that qualified immunity was not available for private defendants "who consipire with state officials to violate constitutional rights" by invoking state replevin, garnishment, or attachment statute." *Wyatt* explicitly limited its holding to what it called a "narrow" question and did not foreclose the possibility that private defendants may be entitled to qualified immunity in other situations. *See Richardson*, 521 U.S. at 404 (quoting *Wyatt*, 504 U.S. at 168-169).

Five years after *Wyatt* was decided, the Supreme Court analyzed and applied the *Wyatt* standard to the question of whether employees of a private prison management firm were entitled to assert qualified immunity. *See id.* To answer that question, *Wyatt* instructed courts to look "*both* to history and to the purposes that underlie government employee immunity." *Id.* (emphasis added). Importantly, *Richardson* noted that the *Wyatt* majority, concurrence, and dissent all agreed that *both* the history and public policy factors should be analyzed. *Id.*

Richardson first found that history did not reveal a "firmly rooted" tradition of immunity applicable to privately employed prison guards. *Id.* Therefore, history did not provide significant support for allowing

the private defendants to assert a qualified immunity defense. *Id.* at 407.

Significantly, *Richardson* did not find the historical factor dispositive, and did not end its inquiry there. The Court next turned to the question of whether the immunity doctrine's purposes warranted immunity for private prison guards, finding that presented a closer question than the historical analysis. *Id.* at 407-408. The Supreme Court evaluated three distinct public policies: (1) discouraging timidity in performing government duties; (2) ensuring that talented candidates are not deterred by the threat of damages suits from entering public service; and (3) limiting the number of lawsuits that may distract employees from their duties. *See id.* at 408-412. *Richardson* ultimately denied the availability of the qualified immunity defense to the employees of the private prison management firm. *Id.*

Richardson "answered the immunity question narrowly, in the context in which it arose." *Id.* at 413. It defined that narrow context as 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." *Id. Richardson* explicitly differentiated the case at hand from a case involving "a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.*

In 2012, the Court distinguished between public employees and private individuals retained by the government to perform essential governmental activity—the very question explicitly left open by *Richardson*. *Filarsky*, 566 U.S. at 384. In *Filarsky*, a small city in

California initiated an investigation into one of its fire department's employees. *See id.* at 381. The city hired an experienced employment lawyer to assist the fire department with this investigation. *See id.* The employee alleged this investigation violated his constitutional rights and sued the city along with four individual defendants: three individuals from the fire department, and the private employment attorney. *See id.* at 382. The Ninth Circuit granted qualified immunity to the three individuals who worked directly for the city but denied qualified immunity to the private attorney because he was not a public employee. *See id.* at 384.

In determining whether this private versus public distinction was a valid basis to deny qualified immunity, the *Filarsky* court looked to the "general principles of tort immunities and defenses" applicable at common law when Section 1983 was enacted, and the reasons the Court had afforded protection from suit under Section 1983. *Id.*

As in *Richardson*, the Court's inquiry began with the common law as it existed when Congress passed Section 1983 in 1871. *See id.* The Court recognized the nature of government in 1871, when government was smaller in both size and reach. *See id.* "Local governments faced tight budget constraints, and generally had neither the need nor the ability to maintain an established bureaucracy staffed by professionals." *Id.* Private citizens were actively involved in government work. *See id.* at 385. The *Filarsky* court found "examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis" that were "as varied as the reach of government itself." *Id.* at 388–89. The Court concluded that "immunity under § 1983 should not

vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis." *Id.* at 389.

Following the *Wyatt* and *Richardson* framework of analysis, *Filarsky* then turned to the question of whether the immunity doctrine's purposes supported qualified immunity in the case at hand. The Court found that affording qualified immunity to private persons who act on behalf of the government in a position substantially similar to a public employee furthered the purposes of the immunity doctrine. *Id.* at 389-90. It does so by helping to avoid the "unwarranted timidity" in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits. *Id.*

Filarsky affirmed *Richardson's* own recognition of its self-consciously "narrow" decision. *Id.* The *Filarsky* court found that the private attorney who had been hired to assist a small city with an employment investigation was distinguishable from the "private firm, systematically organized to assume a major lengthy administrative task with limited direct supervision by the government, undertaking that task for profit and potentially in competition with other firms" analyzed in *Richardson*. *See id.* at 392.

Therefore, despite Petitioner's assertions, *Richardson* and *Filarsky* are not inconsistent with each other. Instead, they arose from different factual scenarios and come to opposite conclusions *while applying the same standard*. Petitioner creates a false dichotomy between the two decisions by arguing that policy considerations can never justify an extension of immunity in the absence of specific and nearly factually

identical historical examples of immunity. Pet. at 27. But as demonstrated above, neither *Wyatt*, *Richardson*, nor *Filarsky* intended the historical factor to be dispositive, and each of those cases analyzed both history and the policies underlying the immunity doctrine regardless of the ultimate outcome. Therefore, the two-part analysis set forth by this Court is clear.

B. The circuit courts of appeal have consistently applied this two-part analysis.

Contrary to Petitioner's assertion, the courts of appeals are not divided. Consistent with *Richardson* and *Filarsky*, the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal have each engaged in a two-part analysis in deciding whether a private medical provider could assert a qualified immunity defense.[3]

By engaging in this two-part analysis, each of these circuits correctly concluded that private medical personnel working for "large firms that are systematically organized to perform a major administrative task for profit are not entitled to assert the defense of qualified immunity." *Davis v. Buchanan County, Missouri*, — F.4th —, 2021 WL 3729050 *9. However, when presented with different factual scenarios involving private medical providers who are not employed by large, for profit firms, but instead worked alongside government employees in similar positions, the Fifth

[3] In *Estate of Clark v. Walker*, 865 F.3d 544 (7th Cir. 2017), the Seventh Circuit held that a privately employed nurse at the jail was ineligible for qualified immunity. In doing so, the court ended its analysis at the historical prong, but adopted the reasoning in *Currie v. Chhabra*, 728 F.3d 626 (7th Cir. 2013), which relies on the two-part analysis conducted in *McCullum v. Tepe*, 693 F 3d 696 (6th Cir. 2012).

and Tenth Circuits decided those private medical personnel could assert a qualified immunity defense. There is no circuit split on this question—only different results from the application of the same standard to different factual scenarios.

1. Petitioner's alleged "majority view" circuits apply the same two-part analysis as the alleged "minority view."

Petitioner asserts that there is a majority view of four circuits, "[r]elying primarily on *Richardson*," who have held that private medical personnel can never assert qualified immunity. However, a closer analysis of the cases cited by Petitioner reveals that the Sixth, Seventh, Ninth, and Eleventh Circuits followed the two-part analysis, looking at both historical immunity and public policy. These cases also all arose from lawsuits against employees of large, private corporations, subject to market forces and incentivization. Not only is the applicable two-part analysis accepted, but also every circuit has uniformly denied qualified immunity to the employees of private corporations that manage prisons or healthcare in prisons for profit.

The decisions from the Sixth, Ninth, and Eleventh Circuits each engage in the same two-part analysis set forth in *Richardson* and later *Filarsky*.[4] In *McCullum v. Tepe*, decided just four months after *Filarsky*, the Sixth Circuit analyzed each of the following questions:

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[4] The Fourth Circuit has also applied the two-part analysis test set forth in *Richardson* (albeit in a law enforcement context) finding that the *Filarsky* decision "did nothing to disturb the test outlined in *Richardson* but instead, by looking to history and the purposes of § 1983, endorsed the [two-part] analysis" of historical and public policy factors. *See Gregg v. Ham*, 678 F.3d 333, 340 n. 4 (4th Cir. 2012).

whether there was a firmly rooted history of immunity for similarly situated parties at common law, and whether granting immunity would be consistent with the history and purpose of Section 1983. *See* 693 F.3d 696, 700 (6th Cir. 2012). The Sixth Circuit decided that there was no common-law tradition of immunity "for a private doctor working for a public institution at the time that Congress passed § 1983." *Id.* at 703. The Sixth Circuit did not find this element dispositive, instead recognizing that "[t]he first piece of the *Richardson* analysis" suggests it should not allow the defendant to assert qualified immunity. *Id.* The Sixth Circuit then moved to "[t]he policy element" of its analysis, finding—unsurprisingly—that the three goals of Section 1983 would not be furthered by allowing an employee of a large, for-profit private entity to assert qualified immunity. *Id.*

The Ninth and Eleventh Circuits' cases cited by Petitioner were decided before *Filarsky*, and therefore have questionable utility. Even so, both the Ninth and Eleventh Circuit engaged in the two-part analysis, looking at both history and policy before denying qualified immunity to the private defendant. In *Jensen v. Lane Cty.*, the Ninth Circuit was presented with "[l]imited information . . . on the historical availability of immunity for doctors asked by the government to make a decision to commit persons suspected of mental illness." 222 F.3d 570, 576 (9th Cir. 2000). Therefore, the Ninth Circuit concluded that there was insufficient historical evidence to support a finding of qualified immunity. *See id.* at 577. Again, the Ninth Circuit did not stop its inquiry there, and moved to the "next step" of examining the policy justifications for qualified immunity. *See id.* The Ninth Circuit concluded that the governmental concerns about timidity, distraction, and deterrence were not present when the

defendant was the employee of a large, private organization subject to market forces and incentives. *See id.* at 577-78.

The Eleventh Circuit followed the same two-part analysis framework in *Hinson v. Edmond*. The Eleventh Circuit found a lack of historical support for immunity for the defendant, a privately employed prison physician. *See* 192 F.3d 1342, 1346 (11th Cir. 1999), *amended*, 205 F.3d 1264 (11th Cir. 2000). It also found that "[i]n addition to the lack of historical support for immunity, the public policy reasons for qualified immunity do not justify the extension of qualified immunity in this case." *Id.* The court's analysis of the policies underlying the immunity doctrine—taking up more time and space than the historical analysis—yielded a similar conclusion that qualified immunity was not warranted. *See id.* at 1346-47.

In 2017, the Seventh Circuit was presented with the question of whether a private healthcare contractor was entitled to assert qualified immunity, and is the only case cited by Petitioner that did not overtly engage in the two-part analysis. *Est. of Clark v. Walker*, 865 F.3d 544, 550 (7th Cir. 2017). However, the Seventh Circuit recognized that it had recently addressed that issue, holding that private medical personnel in prisons are not entitled to the protection of qualified immunity. *See id.* (citing *Rasho v. Elyea*, 856 F.3d 469, 479 (7th Cir. 2017) ("This Court has construed the Supreme Court's holding that employees of privately-operated prisons may not assert a qualified-immunity defense also to deny that defense to employees of private corporations that contract with the state to provide medical care for prisoners."). The Seventh Circuit rejected the defendant's argument that *Filarsky* had overruled *Richardson*, instead find-

ing that *Filarsky* reaffirmed the categorical rejection of immunity for employees of private companies that contract to run correctional facilities for profit. *See id.* The Seventh Circuit found the Sixth Circuit's reasoning in *McCullum v. Tepe*—which analyzed both the historical and public policy prongs—to be persuasive, and denied qualified immunity to the privately employed nurse at issue. *Id.* at 550-51.

While the Seventh Circuit did not explicitly analyze both the historical and public policy prongs of the requisite analysis, it did rely heavily on prior precedents that had analyzed both prongs and reached the same conclusion in similar factual scenarios: that private persons are not entitled to assert qualified immunity when they are employees of private firms, systematically organized to assume a major lengthy administrative task with limited direct supervision by the government, undertaking that task for profit and potentially in competition with other firms.

2. Petitioner's alleged "minority view" correctly applies the two-part analysis to various factual scenarios.

In 2018, the Fifth Circuit was presented with the question of whether two psychiatrists from a nearby university, who contracted to provide psychiatric treatment to a mental-health facility, were eligible to assert the qualified immunity defense when they were not state employees. *Perniciaro v. Lea*, 901 F.3d 241, 251 (5th Cir. 2018). The Fifth Circuit found that after considering the facts of the case "in light of the history and purposes of immunity," the cases disallowing immunity to medical providers who were employed by private companies were distinguishable. *See id.* When it analyzed the historical prong post-*Filarsky*, the Fifth Circuit found significant that at common law,

courts "did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Id.* (citing *Filarsky*, 566 U.S. at 387) Because it was clear that the private defendants' public counterparts would be entitled to assert qualified immunity, the Fifth Circuit found that general principles of immunity at common law supported their right to raise the qualified immunity defense. *Id.* The Fifth Circuit then went on to analyze the purposes of qualified immunity in detail, to determine if they also supported an extension of qualified immunity to the private defendants. *See id.* at 252-55.

By issuing its decision in *Perniciaro*, the Fifth Circuit did not categorically grant qualified immunity to all private medical professionals in correctional facilities, as Petitioner argues. Instead, as demonstrated by *Sanchez v. Oliver*, 995 F.3d 461 (5th Cir. 2021), the Fifth Circuit has successfully employed the two-part analysis set forth in *Richardson* and later in *Filarsky* to address the application of qualified immunity in a thoughtful and fact-specific manner.

In *Sanchez*, the circuit court reversed the district court's decision granting qualified immunity to a privately employed social worker,[5] who provided mental health services in correctional facilities. *Id.* at 466–

[5] The social worker was employed by CHC—"a major corporation in the business of administering correctional health care services. CHC derives well over a billion dollars annually from its contracts in jails and prisons." *Sanchez*, 995 F.3d at 467. Given these facts, the court determined that CHC was "systematically organized to perform the major administration task of providing health care at state facilities." *Id.* CHC was also the employer at issue in *Estate of Clark v. Walker*, 865 F.3d 544, 550–51 (7th Cir. 2017).

472. Because the court could find no tradition of immunity at common law[6] and the purposes of qualified immunity, on balance, weighed against extending immunity, the court held that "as an employee of a large firm systematically organized to perform a major administrative task for profit, [the social worker] is categorically ineligible to assert the defense of qualified immunity." *Id.* at 472 (internal citation omitted). This outcome, which Petitioner may characterize as at odds with *Perniciaro*, does not demonstrate that *Richardson* and *Filarsky* have caused confusion among the circuit courts. Instead, this outcome shows that the circuit courts are consistently and appropriately applying the two-part fact-specific analysis.

Similarly, the Tenth Circuit recently demonstrated the effectiveness of the two-part analysis when it decided two cases involving this question of whether the assertion of qualified immunity was warranted, on the same day, to opposite results. On the same day the Tenth Circuit decided that Dr. Tubbs is entitled to assert qualified immunity, the Tenth Circuit (including one of the same panel judges) reached the opposite conclusion in another case involving a private party asserting qualified immunity. *See Tanner v. McMurray*, 989 F.3d 860, 862 (10th Cir. 2021). An analysis of these two cases, *Tanner v. McMurray* and *Jensen v. Clark*, shows not only that there is not a circuit split

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[6] In response to criticism, like that lodged by the Petitioner, that the Fifth Circuit had failed to undertake a historical analysis in *Perniciaro*, the court clarified that the first prong is not a question of "whether a modern public counterpart would be entitled to immunity, but, rather, whether general principles of tort immunities and defenses under 'the common law as it existed when Congress passed § 1983 in 1871' support the availability of qualified immunity to a private party." *Id.* at 467.

that would warrant granting certiorari, but also that the thoughtful and fact-specific analysis championed by this Court in *Filarsky* and *Richardson* is understood and followed by the circuit courts.

In *Tanner*, the Tenth Circuit reversed a district court's grant of qualified immunity to full-time employees of Correct Care Solutions, LLC. *See id.* The question presented was whether employees of a multi-state corporation, organized to provide medical services in correctional institutions, can assert qualified immunity. *Id.* at 864.

The court acknowledged, in accordance with *Richardson* and *Filarsky*, the "availability of qualified immunity to private parties performing governmental functions depends on (1) 'the common law as it existed when Congress passed § 1983 in 1871,' and (2) the policy reasons the Supreme Court has 'given for recognizing immunity under § 1983." *Id.* at 867 (citing *Filarsky*, 566 U.S. at 384). The court specified that this is "a disjunctive test: Private individuals are entitled to assert qualified immunity if their claim is supported by historical practice or based on public policy considerations." *Id.* (interior citation omitted). In doing so, the Tenth Circuit joined the Fifth, Sixth, Seventh, Eighth, and Ninth circuit courts in denying qualified immunity to "private medical professionals employed full-time by a multi-state, for-profit corporation systemically organized to provide medical care in correctional facilities" because "neither late 19th century common law nor present-day policy considerations counsel in favor of extending qualified immunity." *Id.* at 865, 874. Due to this fact-specific analysis, this holding was limited to circumstances similar to those presented in *Tanner*. *See id.* at 865.

Applying the same test in *Jensen v. Clyde*, the Tenth Circuit granted qualified immunity to Dr. Tubbs, a sole practitioner who was engaged part-time by the Duchesne County Jail to provide medical services to the inmates. The Tenth Circuit again looked "both to history and to the special policy concerns involved in suing government officials." *Jensen*, 989 F.3d at 855. Beginning with history, the Tenth Circuit considered "the common law as it existed when Congress passed § 1983 in 1871. *Id.* (citing *Filarsky*, 566 U.S. at 384). One of the common law principles existing in 1871 "is that immunity should not vary depending on whether the individual works for the government on a part-time or full-time basis." *Id.* Petitioner does not dispute that Nurse Clyde, who was directly employed by Duchesne County, was entitled to assert a qualified immunity defense. Since Dr. Tubbs would have been able to raise such a defense if he too worked for Duchesne County on a full-time basis, the *Jensen* court found a historical basis for extending qualified immunity to him. *See id.* at 855-56.

The *Jensen* court then turned to the policy considerations underlying the doctrine of qualified immunity. *See id.* Taking each of those policy considerations in turn, the Tenth Circuit found that the "unique facts of this case" support the conclusion that Dr. Tubbs could raise a qualified immunity defense. *See id.* at 856-57. Petitioner cannot conflate the different conclusions reached in these cases with an assumption that the courts applied different standards. The recent Tenth Circuit decisions demonstrate the efficacy and flexibility of the two-part analysis in resolving the applicability of a qualified immunity defense to private persons.

3. The Eighth Circuit's recent decision on this issue demonstrates that there is no confusion among the circuit courts.

Since the Petition for Writ of Certiorari was filed, the Eighth Circuit published a decision demonstrating that there is no confusion among the circuit courts of appeal as to the standard to apply to the question of whether a private person is entitled to assert qualified immunity. In *Davis v. Buchanan County, Missouri*, the Eighth Circuit addressed whether employees of Advanced Correctional Healthcare, an Illinois corporation whose employees provided on-site nursing coverage to correctional facilities were entitled to qualified immunity. 2021 WL 3729050 at *2, 4. The court applied the factors outlined by this Court in *Richardson* and *Filarsky*):

(1) the "general principles of tort immunities and defenses applicable at common law, and

(2) "the reasons we have afforded protection from suit under § 1983."

See Filarsky, 566 U.S. at 384 (internal quotations and citation omitted).

When assessing the general principles of tort immunities and defenses applicable at common law, the Court rejected the medical defendants' reliance on *Filarsky*, holding that as "employees of systematically organized private firms, tasked with assuming a major lengthy administrative task. They are factually dissimilar to the individuals entitled to assert qualified immunity in *Filarsky* . . . but like those not entitled to assert qualified immunity in *Richardson*." *Davis*, 2021 WL 3729050, *7. In doing so, the *Davis* court cited

Sanchez v. Oliver, 995 F.3d 461 (5th Cir. 2021); *Tanner v. McMurray*, 989 F.3d 860 (10th Cir. 2021); *Est. of Clark v. Walker*, 865 F.3d 544 (7th Cir. 2017); *McCullum v. Tepe*, 693 F.3d 696 (6th Cir. 2021); *Jensen v. Lane Cty.*, 222 F.3d 570 (9th Cir. 2000); and *Hinson v. Edmond*, 192 F.3d 1342 (11th Cir. 1999), which also did not recognize "a firmly rooted tradition of immunity for similarly situated privately-employed medical professionals." *Davis*, 2021 WL 3729050 *5. It is noteworthy, that unlike Petitioner, the Eighth Circuit did not note any confusion, circuit splits, or inconsistencies in the approach taken by the circuit courts in applying and assessing the historical common law prong.

Following its assessment of the common law, the Eighth Circuit did not cease its analysis by finding that the historical prong was dispositive. Instead, the court moved on to assess the second factor—the weight of the policy reasons for affording protection from suit under section 1983. *Id.* at *7. After assessing each policy consideration (unwanted timidity, attracting talented candidates to public service, and preventing harmful distractions caused by lawsuits), the court held that "the purposes of qualified immunity, on balance, do not favor extending immunity" to employees of large firms systemically organized to perform a major administrative task for profit.

The Eighth Circuit's recent decision in *Davis* demonstrates that the circuit courts of appeal are not at odds, but are consistently applying the factors outlined in *Richardson* and *Filarsky*. And that the alleged circuit split, which Petitioner has championed in the Petition for Writ of Certiorari, is not the result of diverging standards, but the result of the courts appropriately undertaking the same fact-specific, two-part analysis

to determine whether a private person providing health care in a correctional facility is entitled to qualified immunity. Respondent, therefore respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

II. The question presented does not merit the Court's attention.

The question presented by Petitioner does not merit the Court's attention because the circuit courts are uniformly applying the same fact-specific, two-part analysis to determine whether a private person providing health care in a correctional facility is entitled to assert qualified immunity. The purposes underlying qualified immunity are best served by the current fact-specific, two-part analysis used by the courts. Petitioner's claim that certiorari would be helpful to illuminate this standard for private actors seeking immunity in other contexts is similarly unfounded; courts apply the *Richardson* and *Filarsky* standard consistently, albeit reaching different conclusions depending on the facts of the case.

Petitioner points to the trend of privatization of health care services in correctional facilities to support its request that the Court grant certiorari. Petitioner argues that the alleged confusion surrounding whether a private health care provider can assert a qualified immunity defense will hinder private medical personnel in reaching mutually agreeable terms for the provision of healthcare to detainees. This concern is unfounded. As demonstrated in Section I, above, there is no split among the circuit courts of appeal on this issue, and each circuit applies the same fact-specific, two-part analysis. Furthermore, the circuit courts have unanimously held that employees of large firms that are systematically organized to perform a major

administrative task for profit cannot assert a qualified immunity defense. *See, e.g.*, *Davis*, 2021 WL 3729050; *Estate of Clark*, 865 F.3d 544; *McCullum*, 693 F.3d 696; *Hinson*, 192 F.3d 1342; *Jensen*, 222 F.3d 570. Therefore, the question of whether, and under what circumstances, a private healthcare provider can assert a qualified immunity defense is clearer than Petitioner suggests.

Petitioner's request for certiorari—and its implicit request that qualified immunity be categorically denied to *all* private health care providers—would undermine the purposes of qualified immunity and hinder small rural counties, like Duchesne County, from obtaining health care services for its inmates.

Small jails, primarily located in rural areas, often report a lack of funding and personnel that limits their ability to offer critical services, including health care. *See Jails: Inadvertent Health Care Providers*, The PEW Charitable Trusts (Jan. 2018), https://www.pewtrusts.org/-/media/assets/2018/01/sfh_jails_inadvertent_health_care_providers.pdf. Rural jails tend to hold fewer people than urban ones, and therefore lack the resources that are available in large urban jails because they cannot benefit from economies of scale. *See* Aaron Littman, et. al, *Protecting Rural Jails from Coronavirus*, The Justice Collaborative Institute (Apr. 2020), https://www.filesforprogress.org/memos/rural-jails-coronavirus.pdf. Larger, urban jails are more likely to have (and afford) full-time medical care providers with advanced credentials; smaller, rural jails are more likely to have only part-time nursing staff, supervised remotely. *See id.* Administrators of jails in rural or poor counties often complain that they have neither the resources nor the expertise to hire, train, and supervise doctors and nurses in the particular

demands that their facilities require. *See* Steve Coll, *The Jail Health-Care Crisis*, The New Yorker (Feb. 25, 2019), https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis.

The public policies supporting the qualified immunity doctrine are aimed at protecting the government's ability to carry out its activities. *See Richardson*, 521 U.S. at 408-412. The fact-specific, two-part analysis currently employed by lower courts furthers the government's interest in providing healthcare to inmates in rural or poor counties. These counties—much like Duchesne County—may be unable to afford or may lack access to a full-time medical provider or a large, for-profit healthcare company. In Utah, doctors cannot be insured against punitive damages and medical malpractice coverage does not generally cover intentional torts. Therefore private doctors providing healthcare services on behalf of the government cannot rely on private malpractice insurance to ensure them against § 1983 claims, but must self-insure against prisoners' lawsuits if qualified immunity is not available. Furthermore, private doctors providing healthcare services in correctional institutions cannot select their patients; have a much more vulnerable patient population than the general populous; do not have ready access to specialists for consultation; and must provide healthcare under the parameters necessary to secure the safety and security of the health care providers , jail staff, and inmates. For these reasons among others, contrary to Petitioner's assertion, § 1983 lawsuits are not comparable to malpractice suits. If qualified immunity is categorically denied to all private medical providers, counties like Duchesne County will have a significant barrier to obtaining quality healthcare for its inmates.

Petitioner also asks this Court to grant certiorari to address the "very same rift" in cases addressing the availability of immunity for private actors in other contexts. Once again, the cases cited by Petitioner all apply the same two-part analysis from *Richardson* and *Filarsky*, but reach different conclusions as to whether a private actor can assert immunity depending on the specific factual scenario. In *Bracken v. Okura*, the Ninth Circuit "followed the Supreme Court's instruction to 'look *both* to history and to the purposes that underlie government employee immunity in order to find the answer.'" 869 F.3d 771, 777 (9th Cir. 2017) (citing *Richardson*, 521 U.S. at 404; *Jensen*, 222 F.3d at 576). Applying that framework, *Bracken* found that immunity was not historically available for off-duty officers acting as private security guards. *Id.* *Bracken* then found that the policies underpinning qualified immunity did not "warrant invoking the doctrine here." *Id.* at 778. The Fourth Circuit applied the same test in *Gregg v. Ham*, stating that if history does not reveal a firmly rooted tradition of immunity and the policy considerations underlying qualified immunity do not apply to that category of private persons, then it would not allow the private defendant to assert qualified immunity. 678 F.3d 333, 340 (4th Cir. 2012).

In *Lockett*, the Tenth Circuit looked to both history and to the purposes that underlie government employee immunity to determine whether qualified immunity applied to a private physician carrying out an execution at a prison. *The Est. of Lockett by & through Lockett v. Fallin*, 841 F.3d 1098, 1108 (10th Cir. 2016). The Tenth Circuit adopted *Richardson's* finding that there was no conclusive evidence of a historical tradition of immunity for private parties carrying out prison-management activities. *See id.* However, the

Lockett court found that the private executioner was ultimately entitled to assert qualified immunity because the purposes of qualified immunity, as set forth in *Richardson* and *Filarsky*, supported its application given the unique facts of the case. *See id.* at 1108-09. Significantly, the Supreme Court denied certiorari. *Lockett v. Fallin*, 137 S. Ct. 2298, 198 L. Ed. 2d 751 (2017).

Therefore, the question presented by Petitioner does not merit this Court's attention.

III. The Tenth Circuit correctly decided *Jensen v. Clyde* based on its specific facts and relevant policy considerations.

The Court should not grant certiorari based on Petitioner's allegations that the Tenth Circuit's decision was simply wrong. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10.

As demonstrated above, this Court has clearly established precedents for determining when a private actor may invoke qualified immunity, which every circuit has followed. In *Estate of Jensen by Jensen v. Clyde*, the Tenth Circuit followed the historical analysis set forth in *Filarsky*, looking to the common law principles in existence in 1871. 989 F.3d at 855–56. Petitioner wrongly claims that there was nothing "historical" about the *Jensen* court's reliance on *Filarsky*.

Petitioner misstates that this Court has "consistently embraced history as dispositive." Pet. at 31. As demonstrated above, the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have each looked to *both* history and public policy in determining whether qualified immunity is warranted. *See*

Section I, *supra*. And in *Lockett*, the Tenth Circuit found little historical support for qualified immunity, but found the public policy analysis sufficient to extend the qualified immunity defense to a private actor. *The Estate of Lockett by and through Lockett v. Fallin*, 841 F.3d 1098, 1108–09 (10th Cir. 2016). This Court declined to grant certiorari for that decision. *Lockett v. Fallin*, 137 S.Ct. 2298.

Finally, public policy strongly weighs in favor of allowing Dr. Tubbs to assert a qualified immunity defense. Petitioner cites no support for its claim that avoiding unwarranted timidity "is not a serious concern for medical professionals." Pet. at 33.

Petitioner also cites no support for its claim that Section 1983 exposes medical professionals to less liability than ordinary malpractice suits. Petitioner points out in its Petition that detainee deaths are on the rise, and prisoner deaths due to drug or alcohol intoxication have more than quadrupled in the past twenty years. Pet. at 21. Petitioner also points out that the nation's prison population is aging. Pet. at 20. Physicians who provide healthcare at a jail or prison are exposed to significant liability from a health-compromised population. Since Utah prohibits insurance coverage for punitive damages and malpractice insurance covering intentional acts is not easily available, these physicians will be unable to obtain malpractice insurance that can cover the allegations and potential damages involved in Section 1983 lawsuits. What talented candidate would *not* be deterred or distracted by the prospect of self-insuring themselves against an inevitable Section 1983 action from an inmate or inmate's family? This is particularly true when a rural county jail with a limited budget is

contracting with an individual doctor, not a large, for-profit prison or company, to obtain health care.

Boiled down, Petitioner's complaint seems to be less that the Tenth Circuit misapplied the correct standard, but rather a fundamental antipathy towards the very existence of the qualified immunity doctrine, including its extension to any private actor. *See* Pet. at 28 & n. 5. The Court should decline to grant certiorari to entertain Petitioner's quarrels with the general doctrine of qualified immunity.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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