No. 21-774

IN THE

Supreme Court of the United States

MICHELLE MUNGER, FREDRICK COVILLO, APRIL HELSEL, ANN SLAGLE,

Petitioners,

v.

BRENDA DAVIS, FREDERICK STUFFLEBEAN,

Respondents.

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

BRIEF OF *AMICUS CURIAE* MISSOURI ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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December 23, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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STATEMENT OF INTEREST[1]

Amici is a nonprofit corporation established to provide assistance to its member counties in Missouri in matters pertaining to local, state, and federal government activities. In Missouri, there are 114 counties. Only three other states in the United States have more counties. *Amici* is comprised of more than 1,400 county elected officials which include presiding and associate commissioners, county clerks and local election authorities, recorders, auditors, collectors, prosecutors, sheriffs, assessors, treasurers, public administrators, circuit clerks, and coroners.

Amici and its membership of county elected officials represent a sample of the many state and local government entities in the country that rely upon outside, "private" medical service providers to assist in performing public functions. Public entities have state and constitutional obligations with respect to individuals detained in a correctional facility. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). These government entities and elected officials have a strong and practical interest in ensuring that local governments are in a position to meet their constitutional duties with respect to incarcerated individuals. One of the methods by which local governments satisfy these obligations is by contracting with private employers to supply medical professionals and *Amici* has an interest in these medical service providers having a well-defined right to the protection of qualified immunity.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to this brief's preparation and submission. The parties have consented in writing to the filing of this brief.

Amici has a compelling interest in legal issues that affect local governments, including those impacting Missouri counties, its elected officials, employees, and contractors. *Amici* is uniquely situated to provide insight into this case because its membership includes county governments and elected officials both from large, highly populated counties to rural, less densely populated counties in the State of Missouri. For many of *Amici's* membership, their relatively small size and limited resources make it impossible to recruit and hire qualified medical professionals, to say nothing of the expense of employing full-time medical service providers to treat inmates housed in county facilities. Of necessity, many counties, regardless of size rely on third party private employers to supply medical service providers as needed to jails and correctional facilities.

Another consideration with respect to *Amici's* interest in granting Petitioner's Writ is the well-documented lack of medical service providers in the workforce at-large, but particularly in rural communities. Many rural communities within the State of Missouri, and almost certainly across the nation, do not have access to medical service providers in their geographic location or are confronted with a workforce which is already employed by other entities. In 2021, Missouri had more online job postings for registered nurses than any other occupation. Missouri Economic Research and Information Center, *Missouri Real-Time Labor Market Summaries for April-June, 2021* (2021). In a survey of health care employers, 49% reported a shortage of employees skilled in patient care. Missouri Economic Research and Information Center, Missouri Workforce 2021 Employer Survey Report (2021).

Without ready access to this skilled workforce, it is difficult for a local government to discharge its

constitutional obligations without contracting with a private entity employing these medical service providers. Prior to COVID-19, there was surging demand for medical providers, and now, the demand has only increased to where even highly developed medical provider organizations are having difficulty recruiting and maintaining medical provider staff. Danielle Terry. *Burnout, job satisfaction, and work-family conflict among rural medical providers.* Psychology, Health & Medicine, 26(2), 196-203 (2021) (finding that rural medical providers may be particularly susceptible to burnout and additional demands on personal time, due to the increased demands of health-care shortages in rural areas). For these reasons, *Amici* is uniquely situated, in that it understands and acknowledges the constitutional importance and difficulties with providing medical care to incarcerated individuals and it is through this ground-level, unique insight that *Amici* is able to provide information for this brief.

Government entities and elected officials provide a diverse array of services to citizens and taxpayers. The services provided by local governments include expertise in road and bridge infrastructure, law enforcement, assessment and collection of real and property taxes, conducting elections, and maintaining real estate records to name a few. However, local governments employ few medical service providers and in most instances, none at all. Many factors, including budget constraints and scarce resources, limited in-house medical expertise, small-scale staff, and the need for specialized medical knowledge and expertise unite to ensure that when local governments and other public entities require medical services for detained or incarcerated individuals, they must rely on private employers, vendors, contractors, and providers to fill the need.

In this era of economic uncertainty and responding to the struggles presented by a global pandemic, state and local governments must continue to provide essential services including services for inmates in county jails or state prison facilities while balancing other pressing concerns. In response, many state and local governments have turned to the private sector to provide essential services such as medical care in state, county and municipal jails.

Amici believes that the Eighth Circuit's decision below constitutes an extension of uncertain jurisprudence relating to whether private employees should be entitled to the protections of qualified immunity when contracted with a public government entity. Given the importance of state and local government to the foundation of this nation, the Court should intervene and grant certiorari. The issue in this case, whether a private contractor providing constitutionally-required services to inmates in a county jail or state correctional facility may assert qualified immunity in response to an inmate's claim in a suit under 42 U.S.C. §1983 is a core concern to *Amici*.

The Petitioners in this case acted as medical service providers, employed by private entities which contracted through state and local governments to provide medical services to inmates held in state and county correctional facilities. The Eighth Circuit's opinion denying Petitioners' defense of qualified immunity poses a substantial threat to the public interest. In the course of their duties, medical providers located within a county jail encounter a variety of incidents which require both prompt and decisive response based on incomplete and occasionally unreliable sources of information. However, they must also provide ongoing health services to an ever-changing inmate population,

typically without well-developed records of the inmate's health status. Medical service providers in local jails often face varied physical and mental health issues impacting inmates and must be qualified to respond to the challenges to address the health needs of inmates.

The Eighth Circuit holding, however, subjects private medical providers practicing in state and county jails to liability damages even when caselaw has not been clearly established and instead is subject to a case-by-case review of the facts. Such a position fails to provide certainty of outcomes and will only prompt medical providers in state and county facilities to engage in self-protective behavior, for example, by causing the providers to act timidly when decisive action is necessary or refusing to provide services in state and local facilities for fear of liability.

The Eighth Circuit's denial of qualified immunity is particularly flawed in this instance where it subjects third-party contractors who provide medical care to §1983 claims while failing to afford the protections of qualified immunity. Local governments are faced with few qualified medical service providers capable of responding to the unique circumstances of providing medical services to those individuals incarcerated within its geographic area. Additionally, the lack of resources to effectively recruit and hire medical service providers limits local governments' ability to identify and hire qualified individuals. Further, if a local government can locate qualified candidates, then the constrained budget of the local government prevents it from being a competitive employer.

Consequently, where a local government hires a private employer to supply medical service providers for its facilities, caselaw has inconsistently outlined the circumstances in which medical providers would

be entitled to qualified immunity. If the Eighth Circuit's decision is left to stand, local governments will be presented with the increased costs of hiring a private employer to retain and provide these essential employees to the local government. Imposing liability for providing medical services for inmates will increase the cost of medical services, whether directly or indirectly, for local governments. A local government has few means for raising funds, and the primary means is through the taxpayers. As noted by Justice Scalia, there is no "free lunch." *Richardson,* 521 U.S. at n.3 (Scalia, J., dissenting). Agonizingly, these circumstances are a result of a local government aiming to comply with its Eighth Amendment obligations to inmates in its facilities.

Moreover, the subject of qualified immunity in these circumstances has been presented to this Court on numerous occasions and is a topic that is ripe for review and guidance from the Court. In the past, it has been noted that "qualified immunity jurisprudence stands on shaky ground." *Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1869-72 (2017) (opinion concurring in part and concurring in judgment); *Baxter v. Bracey*, 140 S. Ct. 1862 (2020)(opinion dissenting from denial of certiorari). Additionally, as noted in a recent concurrence, qualified immunity decisions have diverged from the historical application to such an extent that courts are substituting their own policy preferences for the mandates of Congress. *Ziglar*, 137 S. Ct. at 1869-72 (concurring opinion by Justice Thomas). This case poses an appropriate case for the Court to reconsider the current qualified immunity jurisprudence.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici adopts Petitioners' Statement of the Case. However, *Amici* will provide a brief summary of the facts of the underlying case and arguments.

A. Summary of Case

This case involves a claim under 42 U.S.C §1983 by Respondents, the parents of Justin Stufflebean, against numerous defendants, including the nurses and doctors providing care to Mr. Stufflebean while he was detained in the Buchanan County Jail and a State Facility.

During the underlying case in the trial court, Petitioners moved for summary judgment-asserting qualified immunity as a defense. The district court denied the defendants' motions to dismiss and motions for summary judgment, ruling that they are not entitled to qualified or official immunity. *Davis v. Buchanan County, Missouri*, 11 F.4th 604, 613 (8th Cir. 2021). Petitioners appealed and the Eighth Circuit affirmed in part, reversed in part, and remanded. *Id.* The Eighth Circuit concluded that the medical defendants (Petitioners) were not entitled to assert the defense of qualified immunity. *Id.* at 617. In reaching its decision, the Eighth Circuit relied upon both *Richardson v. McKnight*, 521 U.S. 399 (1997) and *Filarsky v. Delia*, 566 U.S. 377 (2012).

The Eighth Circuit determined that the availability of qualified immunity to state actors depends on two factors; the "general principles of tort immunities and defenses applicable at common law, and the reasons we have afforded protection from suit under §1983." *Id.*

The court analyzed two factors to determine the availability of the qualified immunity defense. First, whether the historical availability of immunity supported the asserted qualified immunity. Second, whether the weight of public policy supports protection from suit under §1983. The Court's analysis relied upon inconsistent caselaw regarding qualified immunity and for this reason, a compelling reason exists for this Court to grant Petitioner's application for Writ.

B. Summary of Arguments

Public interest necessitates that employees of private employers providing medical services to inmates of state and local governments receive the same qualified immunity in §1983 suits which is afforded to medical service providers employed by the government entity. Medical service providers employed by private employers deliver the same services that would otherwise be provided by those employed by the government entity. Given the extent local governments depend on private medical service providers, denying qualified immunity-and therefore exposing private providers to liability under §1983 for their work on behalf of the public-threatens to severely restrict local governments' access to qualified medical service providers, and in turn, local governments' ability to discharge its constitutional obligations.

Additionally, this Court has found that a private physician working at a public prison hospital assumes the state's Eighth Amendment duty to provide medical care to inmates just as a government employee would be required to provide care. *West v. Atkins*, 487 U.S. 42, 56 (1988). The consequences of these two approaches being integrated produces an outcome that is senseless, in that the private medical service providers contracted by local governments are saddled with

constitutional obligations without being entitled to the protections of qualified immunity that a medical provider employed directly by the government entity would otherwise be entitled.

In addition to the inconsistencies in the caselaw, public interest also requires that privately employed medical service providers treating inmates in county jails be afforded qualified immunity. Private medical service providers working in state and county jails perform the same functions as those employed directly with the government entity. The functions required of these providers include responding to a variety of situations and needs of inmates that require prompt and decisive action and providing care for the ever-changing population of inmates on an ongoing and persistent manner. In fact, to fail to provide the same level of service could subject the providers and the public entity to Eighth Amendment violations under the Constitution.

The duties of medical providers, whether publicly employed or not, require prompt and effective action which frequently must be undertaken with inadequate and occasionally unreliable information as inmates are apprehended and taken into custody with limited additional information regarding their health status. Denying qualified immunity to medical service providers employed by private entities in state and county jails will only produce outcomes adverse to the goals of these facilities, including, timid decision-making, which could endanger the health of the inmates, leading to death or serious bodily injury and medical providers who refuse to provide services to inmates for fear of liability.

Withholding qualified immunity for privately employed medical providers also interferes with state and local

government's over-arching goals of providing supervision for pretrial detainees and convicted inmates, in that as part of their duties providers are expected to provide care while also complying with all applicable laws and ensuring the Constitutional rights of detainees are protected. Denying providers qualified immunity creates, in effect, strict liability under which providers would be subject to liability for violating constitutional rights even when the law is not clearly established.

ARGUMENT

I. Qualified Immunity Under §1983

To state a claim under §1983, a plaintiff must allege a violation of a right secured by the Constitution and the laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law. *West*, 487 U.S. at 47. The traditional definition of acting under color of state law requires that the defendant in a §1983 action have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941).

To constitute a state action, "the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible," and "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937 (1982). In *West*, the Court explicitly stated that physicians providing medical services to state prison inmates acted under color of state law for purposes of §1983 when undertaking their duties and such conduct is fairly attributable to the state. *West*, 487 U.S. at 54.

Under the Court's precedent, qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. *Taylor v. Barkes*, 575 U.S. 822, 825 (2015). However, this test is solely based on caselaw and is not located in statute. *Ziglar*, 137 S. Ct. at 1869. (Thomas, J., concurring). As noted by Justice Thomas in *Ziglar*, the one-size-fits-all doctrine is an odd fit for many cases because it is applied to a wide variety of situations and to employees across a broad range of responsibilities and functions. *Id.*

The situation before the Court in Petitioners' Writ illustrates this peculiarity and exemplifies the necessity of Court review of the caselaw. In deciding this case, the Eighth Circuit analyzed both *Richardson* and *Filarsky*. For the limited purpose of exemplifying the need for consideration by this Court, a brief summary of these cases and other applicable caselaw is included in the following section.

II. The Current Caselaw Relating To Qualified Immunity of Private Employees Is Inconsistent And Necessitates Review By This Court.

A. *Richardson v. McKnight*

In *Richardson*, an inmate asserted a §1983 action against two prison guards employed by a private, not-for-profit corporation which had a contract with the state to run a private correctional center where the inmate was being detained. *Richardson*, 521 U.S. at 400. The inmate alleged that the prison guards used restraints which caused serious injury. The guards asserted the defense of qualified immunity. The United States District Court for the Middle District of

Tennessee found that the guards were not entitled to qualified immunity and the guards appealed. The Sixth Circuit affirmed the denial of qualified immunity. The Court in a five-four decision held that prison guards who are employees of a private prison management firm are not entitled to qualified immunity from claims of violations of §1983, because history does not reveal "a firmly rooted tradition of immunity applicable to privately employed prison guards." *Id.* at 403.

However, as noted by Justice Scalia in the dissent, the holding in *Richardson* relied upon a lack of case support to create "an artificial limitation upon the scope of a doctrine (prison-guard immunity) that was itself not based on case support." *Richardson,* 521 U.S. at 416. The dissent promoted a functional approach to immunity questions, where the Court would consider the functional categories of the defendant rather than the status of defendant's employment. *Id.* This artificial limitation on the scope of qualified immunity has continued to be used and relied upon in subsequent cases.

B. *Filarsky v. Delia*

In *Filarsky*, a firefighter brought an action under §1983 against a city, fire department and officials, and a private attorney alleging that an internal affairs investigation violated his constitutional rights. *Filarsky*, 566 U.S. at 380. The attorney retained by the city to assist in an investigation sought qualified immunity. The United States District Court for the Central District of California granted summary judgment for all defendants on the basis of qualified immunity, and the firefighter appealed. The Ninth Circuit affirmed in part, reversed in part, and remanded. The Ninth Circuit reversed the decision of the district court to extend qualified immunity to the attorney retained by

the city because he was a private attorney, and not an employee of the city.

The Court in a unanimous opinion held that an attorney who was retained by a city to assist an investigation was entitled to seek the protection of qualified immunity. *Id.* at 394. In *Filarsky*, the Court distinguished the facts of the case from *Richardson* and acknowledged that the holding in *Richardson* was "self-consciously narrow" and that the Court made it clear that the holding was not meant to foreclose all claims of immunity by private individuals. *Id* at 393.

C. *West v. Atkins*

In addition to *Richardson* and *Filarsky* this Court has opined on a case which directly impacts the consequences of the Eighth Circuit's holding in this case. In *West*, an inmate brought a §1983 action against a physician who was under contract with the state to provide medical services and state officials. *West*, 487 U.S. at 44. The physician filed summary judgment on the basis that the physician was not acting "under color of state law" as a private employee. Notably, the physician in *West* did not assert a qualified immunity defense.

The United States District Court for the Eastern District of North Carolina granted summary judgment and the inmate appealed. The Fourth Circuit remanded, and the District Court dismissed the claim. The inmate once again appealed to the Fourth Circuit, which affirmed dismissal of the complaint. This Court held that the physician who was under contract with the state to provide medical services to inmates at a state prison hospital on part-time basis acted under color of state law, within the meaning of §1983, when he treated the inmate. *Id.* at 54. The Court found that the

conduct of the physician in providing medical services was fairly attributable to the State.

III. Depriving Private Medical Providers Employed By A Third-Party Supplying Medical Services To Inmates Of A Local Government Of Qualified Immunity Increases Costs And Impedes Local Governments' Access to Constitutionally Required Services.

The current qualified immunity jurisprudence is inconsistent and relies excessively on individual facts rather than providing lower courts and local governments with guidance on how qualified immunity should be applied. Without further guidance from this Court, local governments are faced with uncertainty and ever-changing caselaw regarding qualified immunity's application to privately employed contractors providing services to the state and local governments.[2]

If the Eighth Circuit's holding stands, local governments are faced with an untenable position of complying with important and significant constitutional requirements and yet being unable to find qualified medical service providers to hire or being unable to afford to hire the providers due to limited resources. The only meaningful option many local governments have is to contract with a private entity to provide medical service providers. However, it is likely that due to the Eighth Circuit's opinion that it will become substantially more difficult and costly for local governments to obtain the assistance of private employers for fear of liability. Instead, local governments will incur

[2] Petitioners provide ample examples of the inconsistent rulings on qualified immunity in the Writ, as such this brief does not restate those decisions here.

the increased costs of privatization at the expense of the taxpayers. In essence, the current path of jurisprudence tends to increase the cost to local governments to comply with the Constitution.

West demonstrates that regardless of the status of the provider, state and local governments have constitutional obligations, under the Eighth Amendment, to provide adequate medical care to those whom it has incarcerated. *Id.* at 54. However, even if the providers have the same Constitutional requirements and obligations as seen in this case, privately employed providers can be denied the protections that public employees enjoy even though the duties and responsibilities are identical.

Depriving private medical service providers supplying medical services to local governments of qualified immunity aggravates the problem, and indeed threatens government's ability to retain qualified medical service providers at all. The case at issue demonstrates the uncertainty in the current caselaw governing qualified immunity. The Eighth Circuit applied both *Richardson* and *Filarsky* when it determined that qualified immunity should be denied to Petitioners. However, this situation is distinct from both *Richardson* and *Filarsky* as it was medical service providers rather than prison guards or an attorney providing services. The Court in *West* carved out a specific rule relating to privately employed medical service providers in state or local government jails and found that these providers were required to abide by the Eighth Amendment because the conduct of providing services to inmates were actions fairly attributable to the State.

It is untenable that the Court would allow the caselaw regarding qualified immunity to be inconsistent, inconclusive, and uncertain to the extent

where a privately employed medical service provider is required to provide the same level of care, subjected to the same Constitutional requirements, and face the same duties and responsibilities to incarcerated individuals, and yet not afforded the protections that a public employee in the same circumstances would enjoy. Therefore, a holding by the Eighth Circuit finding a distinction and failing to acknowledge the consequences of *West* requires reversal in this case and for the Court to provide additional guidance to the courts on the applicability of *Richardson* and *Filarsky* on the subject of qualified immunity.

CONCLUSION

For the reasons stated in this *Amicus Brief* the decision of the Eighth Circuit denying the availability of the qualified immunity defense sets forth a compelling reason for Petitioners' application for Writ to be granted.

Respectfully submitted,

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