No. 21-774

IN THE

Supreme Court of the United States

MICHELLE MUNGER, FREDERICK 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

JOINT BRIEF OF CORIZON, LLC AND ADVANCED CORRECTIONAL HEALTHCARE, INC. IN SUPPORT OF PETITION

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INTERESTS OF RESPONDENTS[1]

Respondents Corizon, LLC ("Corizon") and Advanced Correctional Healthcare, Inc. ("ACH"), as private entities that provide medical services for county jails and state correctional facilities, have a vital interest in ensuring that its employees are able to effectively perform government duties ordinarily reserved for public entities without undue fear of litigation and heightened constitutional liability. Furthermore, Respondents have a significant interest in ensuring that their clients, governmental agencies, are able to effectively minimalize costs and increase the efficiency with which these agencies deliver their services to confined individuals. Denial of qualified immunity to Respondents' employees would hinder privatization efforts across the correctional medicine industry, directly threatening these interests and the health of confined individuals by potentially impacting the hiring of sufficient quality doctors and nurses who would be subject to additional liability beyond those in the private sector.

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[1] Under Supreme Court Rule 12.6, counsel of record timely provided Notice of the Intent of Respondents to file this Brief in Support of the Petition for Writ of Certiorari on December 14, 2021.

SUMMARY OF REASONS TO GRANT THE WRIT

In this § 1983 action, the Eighth Circuit Court of Appeals' published opinion, *Davis, et al. v. Buchanan County, et al.*, 11 F.4th 604 (8th Cir. 2021), concludes that the Petitioners in this action, employees of private contractors providing constitutionally-required services to inmates in county and state correctional facilities, are not entitled to assert qualified immunity in response to an inmate's claim that the employees violated the inmate's federal rights in providing vital healthcare services. The Eighth Circuit's decision suggests that private actors may only assert qualified immunity when the governmental entity hires (1) an individual, (2) not employed by a firm, (3) for a discrete and specific task. As explained in the Petition, these factors do not fit the traditional frameworks in *Filarsky v. Delia*, 566 U.S. 377 (2012) and *Richardson v. McKnight*, 521 U.S. 399 (1997), that this Court has applied to decide what actors may assert qualified immunity.

According to several recent studies and, as the Court acknowledged in *Filarsky*, 566 U.S. 377, privatization of state and local government services is already occurring, in some capacity, in a majority of states and it does not appear that this trend will slow down over time. Declining to extend qualified immunity protections to those employed by private firms, as the Eighth Circuit held in this case, threatens the privatization movement across all industries, despite the distinct advantages that privatization offers to both governmental agencies and the recipients of these services.

The Petitioners, Michelle Munger, R.N., Frederick Covillo, D.O., April Helsel, L.P.N., and Ann Slagle,

R.N. have petitioned for a writ of certiorari. The Court should grant their petition and hear this case for the following reasons:

- Flatly denying qualified immunity to healthcare employees working for a private firm—as the Eighth Circuit has done in this case—will lead to unwarranted timidity by these employees both in the provision of medical care and perhaps in the decision to seek employment with an entity that exposes them to greater liability than in private health care settings; and
- Failure to address the dissonance on the availability of qualified immunity to private actors, as a whole, will prevent the beneficial privatization of essential government services resulting in increased costs to governments due to the inconsistent application of that defense across the country.

REASONS TO GRANT THE WRIT

I. THIS CASE PRESENTS AN IDEAL VEHICLE FOR THE COURT TO RESOLVE THE CONTORTIONS AND DISTINCTIONS BETWEEN THE *RICHARDSON* AND *FILARSKY* FRAMEWORKS AND TO CLARIFY THAT QUALIFIED IMMUNITY EXTENDS TO PRIVATE HEALTHCARE PROVIDERS WHO ARE NOT GOVERNMENT EMPLOYEES BUT PERFORM GOVERNMENT FUNCTIONS ALONGSIDE GOVERNMENT EMPLOYEES—AN ISSUE OF VITAL IMPORTANCE TO THEIR EMPLOYERS.

A. Failure to Address the Dissonance on the Issue Presented Will Prevent the Beneficial Privatization of Essential Government Services Resulting in Increased Costs to Governments, and the Issue Presented by Petitioners Merits the Court's Plenary Review to Ensure Consistent Application of the Qualified Immunity Defense and the Provision of Quality Care to Those Confined.

"In an era of ever-increasing fiscal consciousness brought on by financial constraints, local government agencies are constantly exploring methods of continuing to provide public services at their traditional level yet, at the same time, reducing if not stabilizing service costs." Philip D. Kahn, *Privatizing Municipal Legal Services*, 10 Local Government Studies, no. 3 (1984). Despite the passing of time since this observation was made, it is more prescient now considering the unfortunate financial circumstances that most

local government agencies face in today's modern world. One common means in today's ever-evolving world for these agencies to meet their needs for the provision of prison healthcare services—in which the prison population continues to grow—in a cost effective and more efficient manner is to hire private contractors, such as Respondents Corizon and ACH. There are pragmatic and beneficial reasons for States and counties to utilize private actors for the provision of essential government services.

The effectiveness of privatization for reducing strains on state and local government agencies is perhaps most evidenced by the prevalence at which these agencies utilize private contractors to perform government functions. As the Petitioners have previously outlined, the privatization of prison healthcare services has already achieved widespread acceptance throughout a majority of states and counties. At the state level, at least twenty States provide *all* medical services to inmates using private providers, such as Respondents Corizon and ACH, and well over half the States used private providers for at least some medical services in their prisons. *See Prison Health Care: Costs and Quality* at 10-11, 96-97 (The Pew Charitable Trusts Oct. 2017) (emphasis added). As the Petitioners note, there is reason to believe that privatization of prison healthcare is even more prevalent at the smaller county level. Clearly, the States and county governments have recognized the value by way of reduced costs and increased efficiency that they may achieve by utilizing private firms in lieu of purely public actors.

But privatizing services typically provided by the government extends well beyond the prison healthcare industry; privatization across all sectors is

becoming more and more commonplace. In addition to the numerous services referenced in the Petition, many local jurisdictions have privatized such services as solid waste collection, street repair, bus system operation, ambulance service, fire prevention, and hospital operation. *See The Impact of Constitutional Liability on the Privatization Movement After Richardson v. McKnight*, 52 Vand. L. Rev. 489, 514 (1999) (*citing* E.S. Savas, *Privatization: The Key to Better Government*, 70-71 (1987)). By and large, these privatization efforts have been massive successes due to the distinct advantages held by ably staffed private contractors when compared to state and local governments attempting to offer the same services while relying on a sparse number of government employees, particularly at the smaller county levels.

Refusing to provide private actors, who already comprise a large percentage of the prison healthcare system and other government agencies, with the same qualified immunity protection from constitutional liability under § 1983 as state-run healthcare providers and public actors will inevitably lead to both distracted employees and more hesitant decision making on the part of those employees. This was explicitly noted by the Court in *Richardson*. *Richardson v. McKnight*, 521 U.S. 399, 408 ("[D]enying immunity would make contractor defendants—whether individual or corporate—more timid in carrying out their duties and less likely to undertake government service."). And for no reason, as the instances where these private actors are denied the opportunity to assert the protections of qualified immunity will almost certainly involve more public actors than private actors.

The denial of qualified immunity to private actors will prevent innovative and beneficial privatization across various industries by increasing the costs to state and local governments already suffering from dire economic conditions. If private companies that take on governmental functions have more constitutional liability than their governmental agency counterparts, this extra liability will likely outweigh any potential savings from increased efficiency. *See* Edward Felsenthal, *Convict's Suit Threatens Privatized Jail Services*, Wall Street Journal (1997) (quoting a Harvard University professor who argues that imposing any extra constitutional liability on private companies performing governmental services could stop privatization in its tracks).

The threat to privatization as a whole is easily demonstrable: the rule against extending qualified immunity to private providers inequitably subjects a privately-employed government actor to more constitutional liability simply because the private company that employs them has market incentives to operate more effectively. To the individual employee, it makes little difference whether their paycheck comes from the state directly or from a private company that the state pays to provide an essential, nondelegable duty of adequate medical care. A private employee works under the same conditions and performs the same duties as a state-employed employee. The law should treat persons equally who are in like situations performing the same work. *See The Impact of Constitutional Liability on the Privatization Movement After Richardson v. McKnight*, 52 Vand. L. Rev. 489, 514 (1999). If the law does not do so, it necessarily and directly disincentivizes continued privatization. In addition, by not extending qualified immunity to the individual employees (e.g. doctors and nurses)

of correctional medicine providers, it could have a chilling effect on hiring and staffing when those qualified candidates have a choice between working in a private medical office or hospital without facing the risk of increased liability as opposed to working in a jail or a prison where a § 1983 deliberate indifference claim is a possibility.

Not only will savings be reduced and employees disaffected, but denial of qualified immunity also leads to inequitable results for those receiving the services of public, rather than private, actors. For example, refusing to extend qualified immunity protections to private healthcare providers will result in inmates housed in jails and prisons that contract with a private healthcare provider enjoying a distinct legal advantage over inmates housed in jails with a state-run healthcare provider. An inmate in the jail or prison with private healthcare may be able to recover damages in a § 1983 action, when under the exact same facts, an inmate in the prison with state-run healthcare would not even be able to proceed to discovery. This hypothetical can easily be extended to various other privatized industries, depriving the recipients of these government services from equal constitutional remedies.

To demonstrate, in a closely analogous extension of the correctional healthcare situation, imagine a scenario where an inmate of a state operated jail or prison requires transportation via ambulance to the hospital. Emergency medical services providers insert an IV into the inmate's arm en route to the hospital, resulting in significant pain due to improper placement causing extravasation of fluid into the soft tissues resulting in an eventual infection of the insertion site or nerve damage—an injury unrelated to why

the inmate required medical attention in the first place. While this scenario would surely implicate state law tort claims, it is also possible that the incident would implicate due process claims, such as cruel and unusual punishment, under § 1983. If the local government has privatized its emergency medical services, as many state and local governments have, the private employee could not assert qualified immunity as to the § 1983 claims, while a government employee would be able to.

The same is true of a privatized fire department that is accused of selectively denying fire protection to minorities in underserved areas without a local fire station that is subjected to § 1983 claims without immunity while the municipality or county that failed to provide sufficient infrastructure to the area can assert and obtain immunity for essentially the same wrong. Take also the example of privatized versus governmental waste management services that are subject to different liability exposures and rules involving the impact of a landfill leaking refuse biproducts into a water source in minority communities.

Similar examples could be found for any other individual working for an entity that is privatized yet providing the exact same essential government services under close regulation and supervision that may result in injury could find itself in the crosshairs of a constitutional claim for which the legal defenses available to these individuals or entities will arbitrarily—and inconsistently—be determined by the manner in which they are operated, despite performing the same function for the same purpose. These situations highlight an arbitrary and unequal application of the law when all of the potential

defendants are performing the exact same government function, which will discourage continued beneficial privatization. In addition, the litigation then surrounding whether or not someone is a governmental or private actor would needlessly increase the costs to beneficial privatization.

Given that this case involves a wide array of both public and private actors, it is an ideal vehicle for resolving the question presented by Petitioners. The continued denial of qualified immunity to private actors performing essential government functions, as discussed above, result in detrimental consequences to not only private companies, such as Respondents, but also to the governmental agencies that retain these companies and the individuals receiving the privatized government services. These consequences are not required under currently existing law nor do they advance any significant public policy. As such, the Court should exercise its power of plenary review and grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondents Corizon, LLC and Advanced Correctional Healthcare, Inc. support the Petition for a Writ of Certiorari of Michelle Munger, R.N., Frederick Covillo, D.O., April Helsel, L.P.N., and Ann Slagle, R.N.

Respectfully submitted,

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