No. 14-954

In the Supreme Court of the United States

ANIMAL CARE TRUST, ACTING UNDER THE ASSUMED NAME OF MCKAMEY ANIMAL CARE OR MCKAMEY ANIMAL CARE AND ADOPTION CENTER; PAULA HURN; AND KAREN WALSH, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES,
PETITIONERS

v.

UNITED PET SUPPLY, INC.,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION IN SUPPORT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2, the International Municipal Lawyers Association and the International City/County Management Association respectfully move for leave to file the following *amicus* brief in support of the petition for certiorari.

Petitioners have consented to the filing of this brief. Their consent letter is on file with the Court. *Amici* sought consent from Respondent United Pet Supply, Inc. on February 12, 2015. Respondent did not respond to *amici's* request, thus necessitating the Court's consideration of this motion.

The *International Municipal Lawyers Association* (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. As lawyers who must frequently defend lawsuits against municipalities, their employees, and their contractors, IMLA's members have a strong interest in the law of qualified immunity in general and in the resolution of the Questions Presented in particular.

The *International City/County Management Association* (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world. The availability of qualified immunity for private firms and individuals who perform public functions for local govern-

ments is a key factor in helping to achieve that mission.

The unique perspectives and arguments of IMLA and ICMA and their members, as reflected above and as further set forth in the following brief, demonstrate that this brief will be "of considerable help to the Court" by "bring[ing] to the attention of the Court relevant matter not already brought to its attention by the parties." Rule 37.1.

For these reasons, this motion for leave to file the following brief should be granted.

Respectfully submitted.

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit correctly held, in an acknowledged conflict with other Circuits, that private entities are categorically ineligible to claim qualified immunity.

2. Whether the Sixth Circuit correctly held that employees of a private firm performing an undisputedly public function may be denied qualified immunity solely because their employer is a private entity.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

Amici and their members represent the many local governments and agencies that rely upon private-company contractors and their employees to perform core public functions—from animal control to waste removal to law enforcement. That reliance on skilled private actors, and the public goods that flow from it, may become impracticable if—as a minority of Circuits hold—those contractors are denied qualified immunity simply because they have chosen to organize themselves as business entities, rather than as individuals.

The responsibilities of local government are myriad, and the resources and expertise necessary to perform them are frequently in short supply. Of necessity, municipalities commonly turn to private companies to perform tasks that government cannot practicably or cost-effectively carry out. As this case illustrates, municipal animal control and animal welfare programs are widely contracted out to non-profit animal welfare organizations like the American Society for the Protection of Animals, the Humane Society of the United States, or their local affiliates. But the role of private companies in the conduct of public business is vastly broader than that. A survey of

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[1] Counsel for all parties received timely notice of the filing of this brief. Counsel for Petitioner has consented to its filing, and its letters of consent are on file with the Clerk. Counsel for Respondent did not consent. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

IMLA's members reveals that a large majority of local governments rely on private contractors to perform one or more essential public services, from building security to snowplowing to sanitation and recycling. Under this Court's ruling in *Filarsky* v. *Delia*, 132 S. Ct. 1657 (2012), there is no question that a private *individual* retained by government to perform those services is entitled to seek qualified immunity from suit. The question presented here is whether the same treatment should extend to a private *firm* engaged in the same activity.

The logic of the *Filarsky* decision, and the important policy considerations that underlie it, require that the answer is "yes." The purpose of qualified immunity is to "protect government's ability to perform its traditional functions," by preventing "'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*. at 1665 (citing *Richardson* v. *McKnight*, 521 U.S. 399, 409–411 (1997)). As the Court explained in *Filarsky*, this purpose does not vary with the employment status of the government actor, and therefore, "immunity under §1983" also "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 1666 (emphasis added).

There is nothing about the corporate form of a government contractor that alters the need for or calculus of qualified immunity for that contractor or its employees. The kind of "specialized knowledge or expertise" that governments sometimes require is very likely to be found, not in solitary individuals, but in

companies and firms organized for the purpose of harnessing that knowledge and expertise. Without the protection of qualified immunity, private firms called upon to perform public duties—and their employees—will have their service rewarded with lawsuits. The result will be to create the very "unwarranted timidity" in conducting public functions that qualified immunity exists to prevent, to the great detriment of local governments and the citizens who rely on them. *Amici* respectfully request that the Court grant the petition to confirm that the qualified immunity that protects private individuals serving the state extends equally to the private firms that employ them.

STATEMENT OF THE CASE

A. The Events At Issue

Petitioner McKamey Animal Care and Adoption Center ("McKamey") is a non-profit private entity retained by the City of Chattanooga to regulate pet dealers and enforce the City's animal code. Petitioners Walsh and Hurn and their colleague Nicholson are or were officers or employees of McKamey.

After receiving numerous complaints about the living conditions for animals at The Pet Company, a commercial pet store operated by Respondent in Chattanooga, McKamey representatives visited the store on several occasions. *United Pet Supply, Inc.* v. *City of Chattanooga*, 768 F.3d 464, 473 (6th Cir. 2014). In June 2010, a Pet Company employee notified McKamey that the store's air conditioner had been broken for several weeks; that employees had placed a dead puppy in the store's freezer; and that employees had put an injured (but living) hamster in a trash compactor. *Ibid.*

Petitioner Walsh then contacted the Tennessee Department of Agriculture, which has responsibility for enforcing state animal laws, asking if the Department would assist in McKamey's investigation. *Ibid.* The State Veterinarian directed State Officer Joe Burns, a state Animal Health Technician, to join McKamey in its investigation. *Ibid.*

On June 15, 2010, McKamey Officers Walsh and Nicholson, and State Officer Burns, inspected the store. *Ibid.* What they found inside was alarming: they found "little to no evidence of food or water for the puppies; unsanitary conditions such as dried fecal matter that was matted in the fur of the puppies; damaged and cracked cages; puppies that appeared to be very lethargic and dehydrated, some of whom were struggling to drink water; and that the store's interior temperature was considerably hotter than the Mall's open corridor section." *Ibid.* (internal quotations omitted).

Concerned for the animals' welfare, Petitioners began to remove them from the store. Respondent filed an emergency petition for a temporary restraining order in local circuit court. *Id.* at 474. Following an emergency hearing, the court denied the petition, concluding that McKamey had demonstrated good cause to remove the animals. *Ibid.* Petitioner Walsh then presented Pet Supply with a Summons Ordinance listing 90 violations of the city's Animal Code, which included a handwritten note indicating that the store's permit to sell animals was being revoked pending a court hearing. *Ibid.* Under the City Code, McKamey has express authority to suspend a permit to sell live animals upon a finding of "negligence in

care or misconduct … that is detrimental to animal welfare." *Id.* at 488. The Code does not require any pre-deprivation hearing. *Ibid.*

The scheduled hearing occurred just nine days later, on June 24, 2010. *Id.* at 475. At that hearing, the presiding judge decided that Petitioners' removal of the animals was justified. It further found that Pet Supply's violations either had been or could be remedied, and that the court would withhold ruling for an additional two weeks, during which the premises could be reinspected. *Ibid.* In the follow-up hearing, the court concluded that Pet Supply had remedied the major violations, and that the court would not revoke the store's permit unless the state Department of Agriculture elected to take that action. *Id.* at 476.

After a special judge was appointed to handle the case, McKamey voluntarily agreed to return the city permit for the sale of animals to the store. The special judge subsequently dismissed the case on double-jeopardy grounds; in a footnote, the judge sua sponte expressed the opinion that the city court never had jurisdiction over the permit suspension issue. *Ibid.*

McKamey returned the animals pursuant to an agreed state court order. In total, McKamey incurred approximately $50,000 in unreimbursed expenses to provide shelter and veterinary care for the animals rescued from the Pet Company. *Id.* at 477.

B. Pet Supply's §1983 Suit

Pet Supply subsequently filed this federal lawsuit under 42 U.S.C. § 1983, alleging that Petitioners violated its Fourth and Fifth Amendment rights by seiz-

ing the animals and suspending the store's permit without a pre-deprivation hearing. *Id.* at 471.

McKamey and its employees moved for judgment on the pleadings, arguing that they were entitled to qualified immunity. The District Court denied the motion. Although the court agreed that McKamey and its employees were eligible to claim qualified immunity, it concluded that they were not entitled to immunity on the facts as alleged. *Id.* at 477.

Following discovery, McKamey and its employees filed motions for summary judgment asserting qualified immunity. The District Court summarily rejected McKamey's qualified immunity defense.

On appeal, the Sixth Circuit reversed in part. It held, first, that McKamey's status as a non-profit private entity categorically precluded it from claiming qualified immunity. *Id.* at 483–84. While acknowledging the existence of a circuit split on this issue, the Court of Appeals held that private entities are flatly ineligible to claim qualified immunity if sued in an "official capacity." *Ibid.* & n.3.

As for the individual defendants, the Sixth Circuit held that Officers Walsh and Nicholson could claim qualified immunity despite being private employees because they "were commissioned as special police officers of the City of Chattanooga." *Id.* at 479. The court also held, however, that fellow McKamey employee Hurn could not claim immunity because she "was not commissioned as a special police officer" and "[t]here is no tradition of immunity for animal-welfare officers." *Ibid.*

Addressing the merits of the officers' qualified immunity claims, the Sixth Circuit held that Walsh and Nicholson were entitled to immunity on the animal seizure claims—but that Walsh was not entitled to immunity on the permit suspension claim. According to the court, the post-deprivation hearing was not sufficient to satisfy due process because a special judge subsequently opined that "the city court did not have authority over the permit and could not order the reinstatement of the permit." *Id.* at 488. The court also held that Walsh was not entitled to qualified immunity on the pet store's claim that she unreasonably seized pet store business records. *Id.* at 490–91.

REASONS FOR GRANTING THE PETITION

I. By Categorically Denying Qualified Immunity To Private Firms Performing Essential Public Functions, The Sixth And Ninth Circuits' Minority Rule Impedes Local Governments' Ability To Serve The Public.

Certiorari should be granted to reject the Sixth Circuit's minority view (shared only with the Ninth Circuit) that private *firms* retained by government to perform core public functions are categorically ineligible to claim qualified immunity from suit, even where private *individuals* retained to perform the same functions are entitled to do so. A legal regime in which the availability of immunity for government contactors turns on the corporate form in which they elect to do business makes little sense, and a regime in which the scope of immunity available to private contractors is different in Cincinnati (in the Sixth Circuit) than in Chicago (in the Seventh) makes even less.

Even aside from this illogical asymmetry, however, *amici* are deeply troubled by the substantive impact of the Sixth and Ninth Circuits' rule on local governments and their ability to serve the public. Of necessity, many local governments and their agencies rely heavily on third-party firms to handle myriad tasks that are specialized, complex, or simply too large-scale for the government to perform effectively. Given the extent of local governments' dependence on private firms, denying qualified immunity to those firms and their employees—and thus exposing those firms to suit for their work on behalf of the public—threatens to severely restrict public entities' access to high-quality service providers.

Under this Court's decision in *Filarsky*, all *individuals* contracted to perform essential public functions (i.e., functions that are performed on behalf of the public good and require the exercise of judgment and discretion) are entitled to seek qualified immunity. To deny the protections of qualified immunity to contractors merely because they choose to operate in corporate form would elevate form over substance, to the detriment of the public they serve.

A. Government entities depend heavily—and sometimes exclusively—on private firms to perform essential public services.

For many local government entities, small size, scarce resources, or lack of expertise make it impossible to shoulder responsibility for all the myriad public services their citizens expect. Of necessity, they rely on private parties—and in particular, private companies—to provide essential public services effectively and efficiently.

This reliance on private parties to perform the work of government is not a new development. As this Court explained in *Filarsky*, in the Nineteenth Century, the apparatus of government was smaller and less professional, with private actors frequently charged with performing public functions. 132 S. Ct. at 1662. Accordingly, "the common law 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*. at 1663.

Today, although the administrative state has grown in size and sophistication, private actors remain a key part in the performance of public functions. According to the National Council of Public-Private Partnerships, "[t]he average American city currently works with private partners to perform 23 out of 65 basic municipal services."[2] Some small cities rely almost entirely on private companies to perform public functions: the town of Sandy Springs, Georgia, recently gained notoriety by privatizing essentially all the town's public services, and several other towns have followed its example.[3] Large cities have not gone to such extremes, but they too rely heavily on private contractors: as of 1995, fully half of America's 100 largest cities employed private contractors for solid waste collection, and more than 40%

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[2] Nat'l Council on Public-Private Partnerships, "Top Ten Facts About PPPs," *available at* http://www.ncppp.org/ppp-basics-top-ten-facts-about-ppps.

[3] "A Georgia Town Takes The People's Business Private," N.Y. Times, June 23, 2012; see also Stephanie Rozsa and Caitlin Gregory, National League of Cities Municipal Action Guide at 4 (2010).

used contractors for street repair and building security.[4] A significant number also contracted out ambulance services, streetlight and signal maintenance, drug and alcohol treatment, training, and legal services. *Ibid*. An informal survey of IMLA's members undertaken for this brief indicates that 35% of them rely on private firms to provide some or all municipal animal control and welfare services, and 75% rely on private firms to provide one or more other core municipal services.

Municipalities employ private contractors for many reasons. When implemented correctly, the outsourcing of public services can provide government with a host of benefits, including "technical and financial expertise," superior access to new[ ] technologies," "innovative management practices and flexible operating procedures," "access to an agile talent pool; flexible resource deployment; service improvement without an increase in tax rates or user fees; significant tax benefits that can reduce net costs; and the creation of economies of scale." Municipal Action Guide, *supra* n.3, at 2. In the large-city survey cited above, cities overwhelmingly cited cost reduction and service improvement as the primary goals of their privatization efforts. *Id*. at 24, Table 3. Smaller cities tend to cite the need for expertise that does not exist within the government. Whatever the reason for outsourcing a particular government service to a private firm, it is undeniable that such outsourcing is a critical part of modern municipal governance.

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[4] Robert Jay Dilger, Randolph M. Moffett, and Linda Struyk, "Privatization of Municipal Services in America's Largest Cities," 57 Pub. Admin. Rev. 21, 22 (1997).

B. Categorically denying qualified immunity to private firms would drive up the costs of local government and limit the availability of high-quality public services.

Given how much local government entities depend on the services of private firms, exposing those firms and their employees to suit for their work on behalf of the government poses serious risks. Municipalities will have to either assume the cost of indemnifying their contractors—a practice some local laws prohibit—or force the contractors to bear the burden and expense of § 1983 liability on their own. But even if private-firm contractors bear this liability and purchase insurance to cover it, much of the expense will likely be passed right back to struggling municipalities in the form of higher fees. Whether directly or indirectly, imposing liability for providing public services to the government will increase the cost of government. There is no "free lunch." *Richardson,* 521 U.S. at 419 n.3 (1997) (Scalia, J., dissenting).

Raising the cost for local government, however, would be the best-case scenario, as even worse consequences may well result. Private firms and employees subjected to suit face not only the risk of money damages but also the disruption, stress, and threat to professional reputation that accompany even the most baseless lawsuit. See, *e.g.*, *Filarsky*, 132 S. Ct. at 1665. So the best and most expert contractors may simply decide that contracting with the government is not worth the hassle. Unlike the prison industry, where the government is the only entity for which prison operators are able to work, many of the areas in which governments rely on private firms are competitive markets in which the government must compete with private-sector clients. For example, many

cities and counties use private contractors to provide security at public buildings. A reputable private security firm might well choose to avoid work on behalf of the government rather than open itself up to lawsuits in which all the *other* potential defendants—police, the agency owning the building, even individual private contractors—are immune from liability. No rational private company volunteers to be left holding the liability bag.

Moreover, if either cost or availability make it more difficult for local governments to retain high-quality contractors, they may choose to cease outsourcing altogether, or to limit it to individuals who fall within the protections of *Filarsky*. But everyone suffers when the government is unable to offer the best service provider available. Those providers will often be organized in firms, which offer a number of advantages over individual contractors—not least the ability to provide continuity of services even when individual employees retire or pursue other opportunities. The government and its citizens are all better off when government has the freedom to retain high-quality, reliable, consistent providers.

The record in this case amply illustrates the problem. Rather than fielding its own animal welfare department, the City of Chattanooga elected to contract with McKamey, an established animal welfare organization, to manage the city's animal control and welfare efforts and enforce its ordinances. In the course of performing those public duties, McKamey itself and its employees Walsh, Nicholson, and Hurn were subjected to federal civil rights litigation. There is no question that if the investigation and animal removal actions at the heart of this lawsuit had been conducted by employees of the City of Chattanooga, or if the

three individual defendants had been retained by the City as individual contractors, all the participants would have been eligible to claim qualified immunity from suit. *Filarsky*, 132 S. Ct. at 1667. Solely because Chattanooga made the (very common) choice to contract out its animal welfare enforcement program to a private company, both the company itself and Petitioner Hurn (the only defendant who acted solely in her capacity as a McKamey employee, and not as a commissioned special police officer) were denied immunity and made to bear the entire burden of Pet Supply's lawsuit.

It is not difficult to imagine the chilling effect of this asymmetry on private firms' willingness to provide public services, or on their employees' willingness to exercise discretion with vigor. Without qualified immunity, private companies would be well advised to simply decline to perform public services—or to substantially increase their prices. Either way, under the rule adopted in the Sixth and Ninth Circuits, the public interest suffers.

Finally, subjecting private firms and their employees to liability not faced by government employees and individual private contractors could have a potentially corrosive and destabilizing effect on local government itself. There is often little practical distinction between a private firm operating on a long-term public contract and a government agency performing the same service. But depriving one of qualified immunity would dramatically alter their respective incentives, to the detriment of the public interest. A private party stripped of qualified immunity will naturally proceed more cautiously than her public counterpart—and may even be unwilling to participate in making difficult judgments, lest she be sin-

gled out in a subsequent lawsuit as the weak link in the immunity chain.

This strong incentive to avoid risk, together with the likelihood that private firms denied immunity will raise prices to offset potential liability, defeats two of the primary advantages of employing specialized third-party firms to perform public services: private firms' ability to leverage expertise to offer higher-quality services, and their ability to offer those services at relatively lower costs. This is precisely the kind of "unwarranted timidity" in government action that qualified immunity exists to prevent. See *Filarsky*, 132 S. Ct. at 1665.

These considerations alone are sufficient to require this Court's intervention on the first Question Presented. Resolution of that question would directly affect the result below: because the Sixth Circuit denied qualified immunity to both McKamey and its employee Hurn solely because of McKamey's status as a private firm, answering the First Question Presented in the negative would require reversal of the judgment below.

II. Like Government Employees And Private Individuals, Private Firms And Their Employees Who Perform Traditional Or Essential Governmental Functions Merit Qualified Immunity.

This case also gives the Court the opportunity to resolve a question that lingers in the wake of *Filarsky*, the resolution of which is important to *amici* and their members: whether the primary determinant of the availability of qualified immunity is the public nature of the function being performed, or something else. The Court's older precedents on im-

munity emphasize the importance of the functional inquiry, and *Filarsky* implicitly follows that approach. In what appears to be an outlier, however, *Richardson* can be read (wrongly, as explained below) to reject it. *Amici* urge the Court to grant certiorari on the first Question Presented and hold that private firms are not categorically denied qualified immunity, and in so doing, confirm that in determining qualified immunity in any context, it is the public nature of the function being performed, not the identity or status of the performer, that warrants immunity. Further, the Court should also grant certiorari on the second Question Presented and hold that under the functional inquiry, individual employees performing the same public function should be equally entitled to claim qualified immunity, regardless of the exact nature of their employment status.

A. This Court's precedents dictate that a qualified immunity defense is available to private parties performing traditional or essential governmental functions.

As this Court reaffirmed in *Filarsky*, the purpose of qualified immunity is to "'protect government's ability to perform its traditional functions.'" 132 S. Ct. at 1665 (quoting *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992)). Accordingly, for decades this Court has "with fair consistency" applied a "'functional' approach to immunity questions," under which the Court examines "the nature of the functions with which a particular official or class of officials has been lawfully entrusted" and assesses whether certain immunities protected those functions. *Forrester* v. *White*, 484 U.S. 219, 224 (1988). In doing so, the Court has "clearly indicate[d] that immunity analysis rests on functional categories, not on the status of the defendant."

Briscoe v. *LaHue*, 460 U.S. 325, 342 (1983). Immunity flows "not from rank or title or 'location within the Government,' * * * but from the nature of the responsibilities of the individual official." *Cleavinger* v. *Saxner*, 474 U.S. 193, 201 (1985) (quotation omitted). Thus, a prosecutor may claim immunity for actions taken as part of the prosecutorial function, but she may be denied that protection for other kinds of actions divorced from that function. *Van de Kamp* v. *Goldstein*, 555 U.S. 335, 342 (2009).

Richardson created a narrow exception to the "functional" analysis the Court had applied in those prior decisions, but did not wholly abandon it.[5] In *Richardson*, the Court suggested that the "functional approach" to immunity cases is used "only to decide which type of immunity—absolute or qualified—a public officer should receive." 521 U.S. at 408. In the same opinion, however, the *Richardson* majority took care to emphasize that certain "essential" government functions may warrant immunity regardless of the status of the person performing them. As the Court explained, its denial of qualified immunity to the private prison guards in *Richardson* did not govern a case involving "a private individual * * * serving *as an adjunct to government* in an *essential governmental activity*." *Ibid.* (emphasis added).

Operating a prison would seem on its face to be a paradigmatically "essential government activity," so the Court's rejection of immunity in that case re-

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[5] Subsequent decisions have also continued to stress the functional approach. See, *e.g.*, *Van de Kamp*, 555 U.S. at 342 ("To decide whether absolute immunity attaches to a particular kind of prosecutorial activity, one must take account of the 'functional' considerations discussed above.").

quires careful consideration. Close examination of that decision suggests that unusual factors specific to that case likely contributed to its result—a result that the *Richardson* majority itself took care to characterize as "narrowly" drawn. *Id.* at 413. Notable among those factors is the subject matter at issue—prison management, an area inherently fraught with potential violations of prisoners' constitutional rights. The Court of Appeals in *Richardson* expressly focused on this aspect of the case, observing that "private corporations running correctional facilities have a greater incentive [than government prisons] to cut costs by infringing upon the constitutional rights of prisoners in order to ensure the profitability of the enterprise." *McKnight* v. *Rees*, 88 F.3d 417, 424 n.4 (6th Cir. 1996). This factor (to the extent it is true) is arguably unique to the prison context: in most circumstances, a contractor's profit motive is unlikely to systematically incentivize the violation of constitutional rights.

Moreover, as this Court noted in affirming the Sixth Circuit's decision, there were aspects of Tennessee's private prison law that made the private prisons significantly *unlike* their public prison counterparts. Most notably, the Court repeatedly expressed concern at what it deemed to be inadequate "direct state supervision" of the private prisons. *Id.* at 409. It noted that private prisons, unlike public ones, were "exempt[ed] . . . from certain monitoring" by the state"; that private prisons were subject to less rigorous inspection requirements; and that private prisons were "free[d] from many civil service law restraints" that applied to government-run prisons. *Id.* at 409-10, 411.

The combination of a (purported) profit-based incentive to deprive prisoners of their rights and a markedly reduced regime of supervision made the private prisons at issue in *Richardson* look substantially different from public prisons at which qualified immunity was undisputedly available. Those differences arguably made the private prison company resemble less an "adjunct of government" than a semi-private free agent—and disrupted the analogy with public prisons that would otherwise have given rise to qualified immunity.

Richardson thus does not stand broadly for the proposition that the functional inquiry is irrelevant in determining qualified immunity. At most, it stands for the proposition that in the rare circumstance where (1) there is perceived relationship between the profit motive and a private contractor's incentive to infringe on constitutional rights, *and* (2) the law expressly frees the private contractor from the kind of vigorous supervision that would apply to a public agency as a matter of course, then the need to provide robust protection of constitutional rights warrants the denial of qualified immunity.

Finally, if there were doubt about the survival of the functional inquiry after *Richardson*, it was dispelled in *Filarsky*. There, the Court reaffirmed the functional inquiry, recognizing that the basis for Filarsky's claim to immunity was the nature of the "investigative activities" in which he was engaged during the disputed events. 132 S. Ct. at 1662. That those activities were undertaken by a private contractor rather than a public employee, the Court held, is not a legally significant distinction: the contractor's performance of a public function, not his employment status, is the key issue.

B. The availability of qualified immunity for private firms and employees—like that for government employees and individual contractors—should be based on the function performed.

This Court's emphatic rejection in *Filarsky* of formal or status-based distinctions in determining qualified immunity strongly supports granting certiorari and reversing the Sixth Circuit's decision, which—in categorically denying immunity to private firms and drawing a wholly formal distinction between private firm employees who are commissioned as police officers and those who are not—relies on precisely such distinctions. The logic of *Filarsky*, and the purposes of the qualified immunity doctrine on which it rests, strongly support a ruling confirming the availability of qualified immunity to private firms and their employees in the same circumstances in which it is available to government employees or individual contractors—that is, where they are performing essential public functions as an adjunct to government.

Such a rule would eliminate the asymmetry in the availability of qualified immunity for actors who are similarly situated. In the case at bar, Petitioner McKamey is expressly designated by law as the entity charged with enforcing the City's animal welfare law. As a corporate entity, McKamey can discharge its statutory responsibilities only by acting through its employees—in this case, Petitioners Walsh and Hurn and their co-worker Nicholson. When performing their duties for McKamey under the governing ordinances, those employees are "adjunct of government" serving an "essential function"—enforcing the law.

Under the Sixth Circuit's ruling, however, the public nature of the service provided by Petitioners is irrelevant: none of the Petitioners or Nicholson is entitled to claim qualified immunity unless he or she is also commissioned as a "special police officer." *United Pet Supply*, 768 F.3d at 479. This wholly status-based distinction is foreign to this Court's emphasis on function in determining the availability of immunity, and in any event it makes no sense. Walsh and Nicholson were commissioned as "special police officers" solely in their capacity as employees of McKamey. Yet the Sixth Circuit would permit Walsh and Nicholson to claim immunity, while leaving their employer McKamey and their colleague Hurn—who was enforcing the same ordinances as her colleagues, pursuant to the same legal authority—to hold the liability bag.

In *Filarsky*, this Court held that this kind of status-based asymmetry is inconsistent with the purposes of qualified immunity. By channeling all potential liability toward private actors, the Sixth Circuit's rule "makes it more likely that the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts"; is likely to produce "unwarranted timidity" in the performance of public duties; and undermines "[t]he public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits." *Ibid.* The premise underlying all three justifications for qualified immunity is that the function being performed is a *public* function, such that the harms incurred from discouraging qualified candidates, generating "unwarranted timidity" in deci-

sionmakers, and distracting public servants from their duties are harms *to the public*.

These rationales for extending qualified immunity to private individuals like Filarsky who perform public functions apply with equal force to private firms and private-firm employees performing those functions. Very often, a government's "particular need for specialized knowledge or experience," *id*. at 1665, will lead it not to "private individuals," but to private firms employing such individuals. The advantages of the corporate form for organizing professional expertise are too well known to warrant attention here. It suffices to observe that no public purpose would be served by singling out such firms for liability solely because their proprietors chose to seize upon those advantages.

It is not difficult to imagine other scenarios in which the categorical denial of qualified immunity to private firms yields absurd results inconsistent with the purpose of the doctrine. Consider the example of municipal governments who retain private firms to provide security for public buildings—a very common use of private actors to perform a public function. If a disturbance occurs in such a building—for example, a mentally disturbed citizen begins assaulting passers-by—the private security firm's officers would both summon the police and attempt to defend the innocent from assault. In a subsequent lawsuit alleging a § 1983 violation for excessive force or unlawful restraint, the responding police officers would unquestionably be entitled to assert qualified immunity. See, *e.g.*, *Plumhoff* v. *Rickard*, 134 S. Ct. 2012 (2014).

Under the Sixth Circuit's rule, however, the private contractors would be denied immunity—and so

alone would bear the burden of defending the lawsuit and paying any judgment. This asymmetry has two consequences, both of which result in harm to the public interest. First, the security firm would either have to raise its costs to account for the potential liability and the cost of insuring against it, or simply decline to accept contracts to protect public buildings. Second, and more serious, the firm's employees would have a powerful incentive *not to intervene* to prevent or stop future assaults—that is, a liability-based incentive not to do the job for which the government hired them in the first place.

In short, the Sixth Circuit's rejection of the function-based test for qualified immunity directly undermines *all three* of the rationales most commonly cited by this Court for the existence of the doctrine: the Sixth Circuit's rule "makes it more likely that the most talented candidates will decline public engagements"; may result in "unwarranted timidity in the performance of public duties'"; and will embroil both the private firm's employees and any government employees implicated in the alleged wrong (even if immune) in "the harmful distractions" that necessarily flow from participation in litigation. *Filarsky*, 132 S. Ct. at 1665; e.g., *Richardson*, 529 U.S. at 409-11; *Wyatt*, 504 U.S. at 167; *Butz* v. *Economou*, 438 U.S. 478, 506 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975). *Amici* respectfully request that the Court grant certiorari to remedy this result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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