No. 1034822
(Court of Appeals, Division III, No. 39670-3)

SUPREME COURT
OF THE STATE OF WASHINGTON

Donna Zink, et al.

Petitioners

v.

CITY OF MESA, et al.,

Respondent.

RESPONDENT CITY OF MESA'S ANSWER TO PLAINTIFF'S PETITION FOR REVIEW

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Table of Contents

Table of Authorities

Cases

Federal Statutes

State Statutes

Other Authorities

Rules

Constitution

I. INTRODUCTION AND IDENTITY OF DEFENDANTS-RESPONDENTS

This case arises from Petitioner Donna Zink's 20-year dispute with the City of Mesa regarding her brief arrest after video-recording a Mesa City Council meeting in 2003.

Respondents are the City of Mesa and its former mayor, Duana Ross. Zink seeks this Court's review of Division III's decision affirming qualified immunity for Mayor Ross. In so doing, Petitioner fundamentally misstates both the holding of the Court of Appeals and federal case law on qualified immunity's "clearly established" prong. The single substantive issue Zink raises here is whether in 2003, the law clearly established that a municipal official may not prohibit a citizen from video-recording a city council meeting as a precondition to that citizen's attendance. In support of her argument, Zink cites only an opinion of the Washington Attorney General's Office from 1998 stating that video-recording was not a permissible reason to remove a member of the public. Because it is well settled that a

state attorney general opinion, alone, is insufficient to clearly establish the law for qualified immunity purposes, Zink's argument fails. There is nothing meriting this Court's review and Zink's frivolous petition should be denied.

Although not articulated, Zink seeks review under to RAP 13.4(b)(3) and (4): involvement of a "significant question of law under the Constitution of the State of Washington or…the United States," or "an issue of substantial public interest that should be determined by the Supreme Court." However, this case presents no novel constitutional issues. Nor is any other substantial public interest raised here because this issue is not likely to affect other proceedings in courts below.

Because Zink can demonstrate no basis for this Court's review under RAP 13.4(b), Respondents respectfully request that the Court decline review. Further, the Court should award Respondents the costs and fees reasonably incurred in answering this frivolous petition pursuant to RAP 18.9.

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II. ISSUE PRESENTED

Whether a Washington Attorney General opinion, alone, clearly established, for qualified immunity purposes, that citizens had a right to video-record a city council meeting under the Open Public Meetings Act in 2003.

III. STATEMENT OF THE CASE

A. Factual History.

The underlying facts of this case are straightforward and have been extensively described in multiple Division III opinions. *See Zink v. City of Mesa*, No. 39670-3-III, 2024 WL 3887289 at *1, (Aug. 20, 2024 Wn. Ct. App) (unpub'd) (*Zink II*); *Zink v. City of Mesa*, 17 Wn. App. 2d 701, 704-707, 487 P.3d 902 (2021) (pub'd in part and unpub'd in part) (*Zink I*). On May 8, 2003, Zink attended a meeting of the Mesa City Council at city hall with her digital camcorder. She began to video-record the meeting, including the individual city councilmembers and

individual staff. Given Zink had a long, antagonistic relationship[1] with the City, councilmembers, City staff and the mayor were uncomfortable being recorded by her. One councilmember, who was also a deputy sheriff, opined that Zink's recording violated Washington's two-party consent law. *See* RCW 9.73.030. Zink refused to cease recording. Mayor Ross called the Franklin County Sheriff, and a discussion ensued in which Sheriff deputies attempted to convince Zink to stop recording voluntarily. When she refused, the deputies arrested her without force. Zink was driven to the Franklin County Jail, roughly 25-

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[1] A 2007 Division III opinion under the same case name details this relationship. Zink is a former councilmember and mayor of Mesa and generally acts as a self-appointed "watchdog" over City activities. *See Zink v. City of Mesa*, 140 Wn. App. 328, 333-34, 166 P.3d 738 (2007). During a 2002 public records request, Zink demanded of the then-city clerk "'you better do this,' 'look this up,' and 'if you don't do this just right, I'm gonna sue ya.'" *Id*. at 343. Managing Zink's approximately 163 public records requests became a full-time job for the City's assistant clerk and consumed 50 percent of the city clerk's time (a total of 75 percent of the employee-hours of the two-person clerk's office). *Id*. at 342.

minutes away, where she was cited and released. Zink was arraigned on May 12, but on May 20, charges were dropped with no further action.

B. Procedural History.

Zink sued the City and Ross, among others. The case went to trial in January 2018 on federal §1983 claims against the City and Ross for deprivation of liberty without due process (the Fourteenth Amendment claim), a Fourth Amendment claim, and violation of the OPMA. Mid-trial, the court directed a defense verdict on the §1983 claims. The jury found for defendants on the OPMA claim. Post-trial, the court entered JNOV on the OPMA for Zink against the City only.

Zink appealed, and on June 1, 2021, Division III of the Washington State Court of Appeals reversed the directed verdict for the Fourteenth Amendment claims and the directed verdict for Mayor Ross on the Fourth Amendment claim. On remand, the City and Ross sought qualified immunity. The trial court granted the defendants' motion and dismissed all claims.

Zink appealed again, and Division III affirmed qualified immunity to Ross on the grounds that the right to video-record public meetings was not, in 2003, "sufficiently clear that every reasonable official would have understood [her] conduct violated that right." *Zink II*, 2024 WL 3887289 at *4. Division III reversed on qualified immunity for the City itself. *Id*. at *3. Zink timely brought this petition for review, focusing solely on the issue of qualified immunity for Mayor Ross.

IV. ARGUMENT

A. Standard of Review.

Zink's Petition urges this Court to review the decision below because it raises a significant constitutional question or an issue of substantial public interest.[2] This argument fails.

This Court reviews cases only where they conflict with its

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[2] *See* Petition at 3 ("This is a legal question that affects … nearly all Washington state officials and the public…concerning statutory and constitutional requirements.")

prior decisions or another published decision of the Court of Appeals, or if they raise significant Washington or federal constitutional questions or issues of substantial public interest. RAP 13.4(b). A decision that has the potential to affect multiple proceedings below may warrant review as an issue of substantial public interest, if review will avoid unnecessary litigation and confusion on a common issue. *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413, 413-14 (2016).

B. Zink's Petition for Review Does Not Satisfy RAP 13.4(b).

Zink cites no cases of this Court or the Court of Appeals conflicting with the holding below. Nor does Zink even contend a conflict exists. Instead, Zink focuses on the constitutional nature of the question, and the purportedly "monumental" opinion that an attorney general opinion is not sufficient to clearly establish the law for federal qualified immunity purposes.

First, this Court's constitutional review is only merited where the issue is "significant." *See e.g. Flippo*, 185 Wn.2d at

1032; *Matter of Sanchez*, 198 Wn.2d 1023, 408 P.3d 1089 (2017); *and see Aji P. v. State*, 198 Wn.2d 1025, 497 P.3d 350, 352-53 (2021) (Gonzalez, C.J. *and* Whitener, J., *dissenting*). As discussed *infra*, if this case presents any constitutional issue, it is well settled under Washington law. *See Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308, 268 P.3d 892 (2011) (an attorney general opinion is not binding but is afforded great weight); *Price v. Akaka*, 3 F.3d 1220, 1225 (9th Cir. 1993) (an attorney general's opinion cannot by itself establish "clearly established law").

Second, Zink overstates the public interest at stake. This case is a standalone, unique to its facts. There are not multiple cases of municipal officials allegedly precluding individuals from video-recording public meetings in Washington's courts. Stated simply, in 2024, municipal officials are not confused about this issue, and this Court hastening to decide it will not clarify other pending litigation or efficiently use judicial resources. Nothing in Zink's Petition or the record suggests that

wide official confusion exists, or that members of the public are denied the opportunity to record public meetings if they want to. Instead, as Zink's own briefing argues at length,[3] municipal officials in 2024 generally understand the OPMA's broad prohibition against imposing conditions precedent allows people to video-record meetings. Many Washington cities today record their council meetings themselves. *See e.g.* City of Seattle, Watch Council Live (last visited Oct. 5, 2024), https://seattle.gov/council/watch-council-live; City of Bellingham, City of Bellingham Meetings, (last visited Oct. 5, 2024), https://meetings.cob.org/; City of Battle Ground, Battle Ground City Council, (last visited Oct. 5, 2024) https://www.cityofbg.org/96/City-Council (via YouTube link); City of Roy, Council Meetings & Minutes, (last visited Oct. 5,

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[3] *See generally* Petition for Rev. at 21-26 (and throughout), arguing that it has long been obvious to all municipal officials that they may not prohibit members of the public from video-recording open public meetings in an orderly manner.

2024) https://cityofroywa.us/council-minutes. This increasing expectation of recording public meetings should not be surprising, since between 2003 (when this case occurred) and 2024, the cell phone video has become commonplace. After the Covid-19 pandemic, municipalities adopted video recording and streaming to govern through the crisis. The issue of video recording public meetings in 2024 is simply not of controversy in Washington. Absent some showing of a substantial public interest to Washingtonians today, such that a decision would simplify other litigation, the Petition does not satisfy RAP 13.4(b) and this Court should deny review.

C. Zink Misstates Division III's Holding Below.

In further attempting to position this case for review, Zink misstates Division III's holding below to make it seem much broader than it is. Zink characterizes the opinion as standing for the proposition that *only* binding precedent may, for federal qualified immunity purposes, render a right "clearly established" and that absent a binding opinion "possibly at the highest level,"

no right is clear. *See* Petition for Rev. at 9. However, the Division III opinion was not so broad. Division III held narrowly that an attorney general opinion, alone, is insufficient to render a right "clearly established" for qualified immunity. *See Zink II*, 2024 WL 3887289 at *4 ("As [the 1998 opinion] was not binding, it cannot be said that on its own, it clearly established Zink's right to video record the city council meeting.") Put differently, Division III held that *an attorney general opinion such as the 1998 Opinion* does not clearly establish the contours of a right in part because it was not and is not binding,[4] not that *only a binding decision by this Court* may satisfy the "clearly established" prong of qualified immunity.

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[4] Also key to Division III's holding was the U.S. Supreme Court's repeated caution that rights may not be defined at a high level of generality for the purposes of qualified immunity. *See Zink II*, 2024 WL 3887289 at *4 (citing *Feis v. King County Sheriff's Dep't*, 165 Wn. App. 525, 583, 267 P.3d 1022 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034 (1987)).

D. The 1998 Attorney General Opinion, Alone, Did Not Clearly Establish the Law.

Ultimately, Zink takes issue with Division III's holding that in 2003, the right to video-record a council meeting under the OPMA was not "clearly established."

The discussion of qualified immunity in this case has not always been clear. The City briefs the entire doctrine to reduce confusion.

1. Qualified Immunity Generally.

Qualified immunity applies to §1983 claims to shield municipal officials from suit unless the plaintiff shows (1) the official violated a statutory or constitutional right, and, if so, (2) that right was "clearly established" at the time of the challenged conduct such that it would have been clear to every reasonable official that her conduct was unlawful in that situation. *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), *abrogated in part by Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808 (2009) (it is not always necessary to first determine whether a

constitutional violation occurred); *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 2083 (2011). A right is clearly established in law if its contours are sufficiently clear that every reasonable official would understand at the time that what he is doing violates that right. *Ashcroft*, 563 U.S. at 741. The focus is on whether the official had fair notice that his or her conduct was unlawful. *Kisela v. Hughes*, 548 U.S. 100, 104, 138 S. Ct. 1148, (2018). This *generally* requires existing precedent to have placed the statutory or constitutional question beyond debate. *Id*.

Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions…it protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft,* 563 U.S. at 743. Qualified immunity is an immunity from suit, not a mere defense to liability. It is effectively lost if a case is erroneously tried, so qualified immunity should be resolved early. *Wyatt v. Cole*, 504 U.S. 158, 166, 112 S. Ct. 1827 (1992); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6, 107 S. Ct. 3034 (1987).

2. The Claimed "Obviousness" Exception in *Lanier* is Inapplicable Here.

Zink devotes extensive briefing to federal cases describing a narrow exception to the rule that existing precedent must make the conduct clearly illegal, but she misapprehends the test. As the U.S. Supreme Court explained, "while this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question *beyond debate.*" *White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548 (2017) (emphasis added). To find that a municipal official had fair warning that his or her conduct was illegal under clearly established law, a court must identify a factually similar case where an official was held to have violated a constitutional or statutory right. *Id*. The exception to this rule described in *Lanier* and its progeny applies only to an "obvious" case such that, in the light of pre-existing law, the unlawfulness is apparent. *Id.* at 80 (citing *United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219 (1997) and other cases).

Zink's cited cases show how courts should apply this "obviousness" exception, and its inapplicability here. In *Lanier*, a judge sexually assaulted several women in chambers (some repeatedly) after luring them there ostensibly on court business. *Id*., 520 U.S. at 261. In *Hope v. Pelzer*, a prisoner was handcuffed to a post in "a restricted position" for seven hours under direct sun and subjected to "prolonged thirst and taunting" without bathroom breaks, although he was already shackled and posed no threat. *Hope v. Pelzer*, 536 U.S. 730, 738, 122 S. Ct. 2508 (2002). In *Taylor v. Riojas*, plaintiff was confined in two "shockingly unsanitary [prison] cells." *Taylor v. Riojas*, 592 U.S. 7, 8, 141 S. Ct. 52 (2020). The first was covered floor-to-ceiling with feces, including the faucet—so plaintiff could not eat or drink for four days fearing contamination. The second cell was "frigidly cold" with only a clogged drain for waste, which overflowed when plaintiff involuntarily relieved himself covering the floor with sewage, on which plaintiff was forced to sleep. *Id*.

The 7th Circuit cases Zink cites do not bind this Court.

Landstrom, *Kernats* and *Denius* affirm qualified immunity because the right was not clearly established. *See Landstrom v. Illinois Dep't of Children and Family Svcs.*, 892 F.2d 670, 678 (7th Cir. 1990); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1181 (7th Cir. 1994); *Denius v. Dunlop*, 209 F.3d 944, 955 (7th Cir. 2000). Because these cases only state the existence of an exception in cases of "obvious" illegality, they furnish no authority for Zink's argument.

In the last case Zink references, plaintiff was terminated from his position as an assistant U.S. Attorney solely for writing a fictional novel. *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994). The 7th Circuit held that it was obvious to any reasonable official that terminating a public employee for writing a fictional book violated the law. *Id*. at 1028. While *Eberhardt* lacks the morally appalling conduct described *supra*, the First Amendment violation is well supported by case law even without an on-point case. *See Id.* at 1026 (citing cases affording constitutional protection to artistic writings).

Zink's reliance on *Lanier* and related cases is a red herring. Quite obviously, this is not a case where a municipal official tortured the plaintiff and deprived her of her right to be free from gross bodily invasion or cruel and unusual punishment. Nor did that official punish her solely for engaging in harmless artistic speech near the First Amendment's core. Here, Mayor Ross and the other Mesa officials engaged in an extended legal debate with Zink about whether filming the council meeting was, on one hand, prohibited by Washington's two-party consent law or, as Zink (correctly) said, protected by the OPMA. In doing so, the Mayor and City officials attempted to call an attorney, relied on the training of at least one Franklin County sheriff's deputy, and repeatedly consulted the RCWs to determine what law applied in the situation. After this fairly searching review, Mayor Ross found that the law supported removing Zink and requested the deputies do so, leading to Zink's brief arrest. Qualified immunity protects these kinds of "reasonable but mistaken judgments" about the law by municipal officials. They are not held to a

standard of perfection.

This was far from an "obvious" case of illegality. Zink bears the burden of citing a case turning on the same or similar facts to show that the right she claims Mayor Ross violated was "clearly established" at the time. Because she cannot, Division III properly upheld qualified immunity for Mayor Ross.

3. Clearly Established Law Should Not Be Defined at a High Level of Generality.

Since no case law in 2003 clearly defined Zink's right to record, she attempts to backstop her qualified immunity argument by saying that the OPMA, in RCW 42.30.040, clearly established her right to record. This argument fails.

In articulating what it means for a right to be "clearly established," the U.S. Supreme Court has repeatedly emphasized the need for courts to exercise caution in how rights are defined for qualified immunity purposes.

> [C]learly established law should not be defined at a high level of generality. As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. Otherwise,

> "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."

White, 580 U.S. at 552. (internal citations omitted). Zink argues that RCW 42.30.040 clearly established in law her right to record the council meeting in 2003. However, RCW 42.30.040 nowhere mentions recording. Instead, the statute in 2003 stated:

> A member of the public shall not be required, as a condition to attendance at a meeting of a governing body, to register his name and other information, to complete a questionnaire, ***or otherwise fulfill any condition precedent to his attendance.***

RCW 42.30.040 (1971) (emphasis added). Zink construes "any condition precedent" to unambiguously include all conditions apart from orderly conduct. *See* Petition at 20.[5]

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[5] The Court of Appeals in 2021 agreed. *Zink I*, 17 Wn. App. 2d at 710-11. It held that the plain meaning of a "condition precedent" "would appear to" encompass recording the meeting. That even the Court of Appeals, in holding the statute was susceptible to plain-meaning analysis, nevertheless could not go beyond what the statute "appear[ed] to" encompass is strong evidence that the statute in 2003 guaranteed the right to record only abstractly, if at all.

A broad prohibition against applying "any condition precedent" to person's attendance at an open public meeting is the definition of a right articulated "at a high level of generality." As Zink explicitly argues, the OPMA is broadly interpreted such that no conduct—save undefined disruptions—can furnish a basis to exclude a member of the public. Locating a right to video-record a meeting in RCW 42.30.040 is akin to arguing that qualified immunity is properly denied whenever a police officer's search is "unreasonable," or an official restricts "free speech." Merely reciting that RCW 42.30.040 prohibits imposing "conditions" except orderly conduct, as Zink does, also begs the question what conduct is disorderly under the OPMA. Mayor Ross certainly believed that Zink's videotaping was disorderly as it made all the city officials and staff present highly uncomfortable. This is, again, the kind of mistaken legal judgment which qualified immunity protects.

Thus, Zink's argument that the statute is not abstract because it is not "ambiguous" misses the point. Such

considerations are appropriate in interpreting the OPMA statute to determine whether it substantively protects the right to video-record a meeting. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (courts do not construe unambiguous statutes). Stated differently, the statutory interpretation question Division III decided in 2021 is relevant to qualified immunity's first prong—whether a substantive violation of a right occurred when Mayor Ross prohibited Zink from recording the meeting.

The "clearly established" prong of qualified immunity asks a different question: whether the *right guaranteed* (here, to attend a meeting without preconditions as set forth in RCW 42.30.040) is sufficiently particularized to the question of video recording, such that *any reasonable person* in Mayor Ross's shoes would know her conduct was illegal at the time. In a case such as this, resting on "unique facts and circumstances," qualified immunity protects a municipal official from suit for simply misapprehending what a broad statute covers in real time.

4. Federal Courts Hold that a State Attorney General Opinion Alone is Insufficient to Render a Right "Clearly Established" for Qualified Immunity.

No case law clearly established in 2003 that the OPMA protected Zink's right to record, and the OPMA's text, which was abstract, did not settle the question with particularity, such that any reasonable person in Mayor Ross's shoes would know that preventing recording was illegal. As a final argument, Zink says the 1998 Washington Attorney General opinion suffices to clearly establish the law for qualified immunity purposes. She is incorrect.

For a right to be clearly established by law, some *law* must place the question beyond debate. *See White*, 580 U.S. at 79. An opinion of the Attorney General is not the law in Washington. *Five Corners Family Farmers*, 173 Wn.2d at 308.

Federal courts resolved this question against Zink decades ago. "[A]n Attorney General's opinion cannot by itself establish 'clearly established law.'" *Price*, 3 F.3d at 1225 (citing 9th Circuit cases). A robust line of cases accords with the holding in

Price. *See Kulick v. Leisure Village Association, Inc.*, No. Cv 20-6079 DSF (PVC), 2020 WL 5752875 at *4 (C.D. Cal. Sep. 14, 2020) (citing cases).

Prior to 2021, no Washington court had ever determined whether the OPMA protected the right of a citizen to video-record a meeting. *See Zink II*, 2024 WL 3887289 at *4 n.2 (the 2021 decision in *Zink I* arguably clearly established the right to record under the OPMA). A court in its holding "say[s] what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803); Wash. Const. Art. 4, § 1 (vesting the judicial power in this Court and superior courts). Prior to 2021, though the OPMA might well have protected the right to video-record a meeting as a condition precedent, that right was defined only abstractly. The 1998 attorney general opinion is entitled to great weight, but is still only persuasive authority, not the law itself. *Five Corners Family Farmers*, 173 Wn.2d at 308. If a particular interpretation is not law, it perforce cannot clearly establish the law for qualified immunity purposes by opining on the meaning of other

sources of law, such as statutes or court decisions. Simply put, the Washington Attorney General does not *make* law; only the legislature or courts do that. And absent citation to some source of law placing a statutory or constitutional question beyond doubt, a plaintiff cannot meet her burden of showing that a government official's conduct violated a right "clearly established" in law. *Ashcroft*, 563 U.S. at 741.

By relying on the 1998 attorney general opinion and nothing more, Zink shows that she is incapable of meeting her burden. This Court should decline review of Division III's decision affirming qualified immunity for Mayor Ross.

E. The City of Mesa is Entitled to Costs and Fees Incurred in Responding to Zink's Frivolous Petition.

Costs and fees are available on appeal if allowed by statute, court rule, or contract. RAP 18.1(a). Where a party seeks a frivolous appeal, the court may order sanctions in the form of attorneys' fees and costs. RAP 18.9(a). "An appeal is frivolous if, considering the whole record, the court is convinced that there

are no debatable issues on which reasonable minds may differ and it is totally devoid of merit." *Matter of Recall of Boldt*, 187 Wn.2d 542, 556, 386 P.3d 1104 (2017).

Zink asks this Court to review a question of federal law—whether a state attorney general opinion alone can clearly establish the law for qualified immunity purposes—that has been conclusively settled since the 9th Circuit decided *Price v. Akaka* in ***1993***. Washington has long agreed that an opinion of its attorney general is not binding law. *Five Corners Family Farmers*, 173 Wn.2d at 308; *and see Huntworth v. Tanner*, 87 Wn. 670, 682, 152 P. 523 (1915) (same). Zink cites no authority saying that an attorney general's advisory opinion clearly establishes a right guaranteed by law for the purposes of qualified immunity. There is none.[6] But there is substantial contrary

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[6] Where a party cites no authority in support of his or her proposition, "the court is not required to search out authority, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

authority—none of which was cited in Zink's Petition.

Federal case law controls these federal questions related to a claim under §1983. *See James v. City of Boise*, 577 U.S. 306, 307, 136 S. Ct. 685 (2016). By simply turning a blind eye to what the federal courts have said about the applicability of state attorney general opinions to qualified immunity's "clearly established" prong, Zink's Petition raises a question over which reasonable minds cannot now differ and argues a position devoid of legal merit.

Moreover, in arguing that the *Lanier* and *Hope* exception applies, Zink severely misstates the case law. As set forth above, *Lanier* and the other cases stand for the proposition that in cases of extremely obvious illegality, a generalized guarantee of a legal right can render the contours of that right "clearly established" for qualified immunity purposes. But merely stating that the exception exists is not enough to prove that it applies, *ipse dixit*, to this case. Zink relies on these older cases but does not grapple at all with cases like *White* and *Kisela*, which reverse when courts

deny qualified immunity based on extremely abstract rights. But though she omits these cases, Zink *does* cite a recent 2020 case, *Taylor v. Riojas*, which recites the *Lanier* and *Hope* exception without illuminating its scope. This undercuts any argument that Zink simply did not know about *White*, *Kisela*, and other recent Supreme Court qualified immunity cases. In sum, throughout her Petition, Zink cites the limited authority that she claims supports her position but wholly omits that which defeats it. Zink urges an incorrect result contrary to case law.

Were Zink an attorney, this Petition would violate RPC 3.3(a)(3), prohibiting a lawyer from "fail[ing] to disclose…legal authority…known to the lawyer to be directly adverse" to her position. While an award of attorneys' fees or costs cannot generally rest on violation of the RPCs alone (*see Hizey v. Carpenter*, 119 Wn.2d 251, 250, 830 P.2d 646 (1992)), and the RPCs do not apply to Zink in any event, the failure to disclose authority to the tribunal harms the justice system directly by hiding what the law is. *See* RPC 3.3, cmt. [4].

Zink's *pro se* status does not relieve her of obligations under RAP 18.9. *In re Connick*, 144 Wn.2d 442, 455, 28 P.3d 729 (2001) (*pro se* petitioner must follow court rules). Zink has successfully litigated this matter for 20 years—longer than many attorneys practicing daily before Washington courts. It defies credulity to believe that she is unable to research law and familiarize herself with controlling decisions.

Zink's argument lacks legal basis. Both Washington and federal courts analyzing whether a state attorney general opinion clearly establishes the law for qualified immunity uniformly find it cannot. Considering these holdings going back decades, reasonable minds cannot differ. Respondents are entitled to their costs and fees.

V. CONCLUSION

In seeking review of Division III's opinion upholding qualified immunity for Mayor Ross, Zink misstates the qualified immunity test and the breadth of Division III's holding. Division III did no more than correctly say that where a municipal

official's legal error was reasonable since the right she is alleged to have violated was not "clearly established," qualified immunity protects that official. In reaching that conclusion, Division III followed decades of state and federal precedent that an opinion by the Washington Attorney General does not clearly establish the contours of a right granted by statute, particularly where the statute is general.

Zink fails to cite landmark qualified immunity cases. She omits critical facts from the cases she does cite. By arguing in conclusory fashion that the Mayor's conduct was obviously illegal, she urges this Court to adopt an interpretation of qualified immunity repeatedly reversed by the U.S. Supreme Court. Because Zink's position is devoid of legal merit and reasonable minds cannot differ, Zink's petition is frivolous.

The City respectfully requests that this Court deny Zink's Petition for Review and award it the costs and fees reasonably incurred in answering it.

This document contains 4,965 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 21st day of October, 2024.

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CERTIFICATE OF SERVICE

On said day below, I electronically served a true and accurate copy of ***RESPONDENT CITY OF MESA'S ANSWER TO PLAINTIFF'S PETITION FOR REVIEW*** in the Supreme Court of the State of Washington, Case No. 1034822 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this day 21st of October, 2024.

/s/ Stefanie Palmer
STEFANIE PALMER, Paralegal

BAKER STERCHI COWDEN & RICE LLC

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