NO. _____

In the Supreme Court of the United States

MICHAEL SINEGAL,

Petitioner,

v.

DAWN POLK,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

County Commissioner Michael Sinegal terminated Dawn Polk for being a bad employee. The termination occurred after she had unsuccessfully run for office for the position of Precinct 8, Justice of the Peace. Polk sued Commissioner Sinegal for terminating her in violation of her First Amendment right to run for office. The trial court and the Fifth Circuit denied Sinegal qualified immunity holding, in opposition to other federal circuits, that candidacy alone is protected by the First Amendment.

The questions presented are:

1. Whether candidacy for political office, standing alone, is a protected right under the First Amendment.

2. Did the Fifth Circuit err in holding that Sinegal was not entitled to qualified immunity when Fifth Circuit precedent did not clearly establish that candidacy alone was a protected First Amendment right until a year after Polk's termination?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Fifth Circuit, whose judgment is sought to be reviewed, are:

- Michael Sinegal, County Commissioner for Jefferson County, Texas, defendant, appellant below, and petitioner herein.
- Dawn Polk, plaintiff, appellee below, and respondent herein.

Jefferson County, Texas was a defendant in the underlying action but was dismissed by summary judgment prior to this appeal being taken and Jefferson County was not a party on appeal. Consequently, Jefferson County is not a party to this petition.

No Corporations are involved in this proceeding.

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Petitioner Michael Sinegal respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals was not selected for publication, *See Polk v. Sinegal,* 714 F. App'x. 457 (5th Cir. 2018). The opinion is reproduced in the appendix at pages 1–6.

The court of appeals unreported decision to deny Petitioner's motion for rehearing is reproduced in the appendix at pages 39–40.

The memorandum opinion of the United States District Court for the Eastern District of Texas denying the motion for summary judgment and qualified immunity filed by Petitioner Michael Sinegal has not been reported. It is reproduced in the appendix at pages 7–38.

STATEMENT OF JURISDICTION

The Fifth Circuit had appellate jurisdiction because the district court's order denying Petitioner's motion for summary judgment was a "final decision" within the meaning of 28 U.S.C. §1291 and the collateral order doctrine. *See Mitchell v. Forsyth,* 472 U.S. 511, 527–30 (1985)

The court of appeals entered its order denying Petitioner's motion for en banc rehearing on April 30, 2018. (App.39). Petitioner Sinegal timely filed this

petition on July 24, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent brought the underlying action pursuant to 42 U.S.C. §1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges that Petitioner violated her rights under the United States Constitution's First Amendment, which states,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

In 2009, Michael Sinegal, became the newly elected Commissioner of Precinct 3 in Jefferson County, Texas and hired Dawn Polk as his administrative assistant. (App. 8). At that time, Polk was a court clerk in the Jefferson County Justice of the Peace Court for Precinct 2. (App. 8). Sinegal asked Polk to come work for him as his administrative assistant, which she did by transferring to the Jefferson County Road and Bridges Precinct 3 in January, 2009. (App. 8).

Shortly thereafter, Sinegal began having employment issues with Polk. Specifically, Polk was insubordinate to the maintenance supervisor in the office, she used county fuel for personal use in violation of county policy, she would not forward calls or give Sinegal messages and she consistently submitted poor work product that needed an unacceptable amount of correction. (App.34-35). Just as one example, Sinegal assigned Polk to write an article about him and submit it to a Houston magazine for publication. (App.35). Upon receiving the submission from Polk, the magazine editor contacted Sinegal during his vacation because the article was so fraught with errors the magazine could not use her submission. (App. 35). Polk was disruptive, sarcastic, had a bad attitude and made off-color comments about members of the public in the courthouse. (App. 35). Sheriff Deputy Boykin and Sheriff Deputy Lowe each submitted affidavits testifying that they witnessed occasions where Polk was insubordinate to Sinegal and rude to patrons.

(App. 35). Other people witnessed Polk ignoring County calls and rolling her eyes at Sinegal. (App. 35).

Sinegal witnessed Polk disrespecting a Jefferson County probation officer, Joe Champ, who ultimately refused to return to Sinegal's office because of Polk's behavior. (App. 35–36). She made patrons feel uncomfortable, including a constituent, Oscar Dwin who also refused to return to Sinegal's office because of Polk. (App. 36). Everything came to a head in December 2012 when Deputy Gunner called Sinegal about Polk's rude behavior towards him and Sinegal decided he was going to terminate Polk. (App.36). However, before Sinegal could terminate Polk after returning from Christmas vacation in 2012, she notified him she planned to run in the 2014 election for Justice of the Peace, Precinct 8. (App. 9, 36). Sinegal hoped she would win the election so he would not have to terminate her, but she did not win the election and her performance did not improve. (App. 36).

Polk had four opponents in the Democratic prmary, including the incumbent, Tom Gillam III (Gillam). (App. 9). According to Polk, Sinegal told her he thought it was a good idea for her to run. (App. 9). However, Polk contends that Sinegal asked Polk why she had not told him that she was running and that Gillam was "going around telling people that [Sinegal had] put [Polk] up to running."[1] (App. 9). Sinegal told

[1] Polk testified in her deposition that Sinegal and Gillam had an altercation in December 2011 over redistricting and Polk believed that Sinegal was afraid of Gillam by testifying, "Gillam can be a bully, and I just think Sinegal was afraid of him." Unfortunately these facts, which were addressed in Sinegal's motion for summary judgment reply is not part of the trial court's Memorandum and Order.

Polk that she would need to follow the County's rules regarding an employee running for office and set up a meeting on October 17, 2013 with the County's Human Resource director to go over the rules. (App. 9).

On October 24, 2013, Polk formally announced her plans to run in the Democratic primary.[2] (App. 9). The Democratic primary was held March 4, 2014, and Polk lost to Gillam. (App. 10). On March 19, 2014, Sinegal called Polk into his office and informed her that "things were not working out" and that Polk was "missing calls, not typing memorandums and not giving him his calls." (App. 10). Polk asked Sinegal if he was firing her for running against Gillam. (App. 10). At that point, Sinegal called another employee into the meeting. (App. 10). He then advised Polk that she "had two days to find a job in Jefferson County, but as of Friday, March 21, 2014, she would no longer be employed at Precinct 3." (App. 10). At no time did Sinegal ever make any negative comments about Polk's decision to run for office or try to persuade her against doing so.

Polk brought suit against Sinegal for violation of her First Amendment right. (App. 11). Sinegal moved the district court for summary judgment and qualified immunity, arguing that Sinegal did not violate the First Amendment by terminating an at-will employee. (App. 33). Specifically, Sinegal argued that Polk's First Amendment claim was based solely on her running for Justice of the Peace, a right that was not clearly established at the time of her termination. (App. 4).

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[2] There were no Republican candidates running for the position of Justice of the Peace, Precinct. 8, therefore the winner of the Democratic primary would be unopposed in the November general election. App. 9, n.2.

United States District Judge Marcia A. Crone denied Sinegal's summary judgment on October 11, 2016. The district court found that Polk was an at-will employee and "could be discharged for any legitimate reason or for no reason at all." (App. 33). The trial court focused on Polk's allegation that "Sinegal . . .violated the First Amendment by retaliating against her for speaking out against Gilliam." (App. 3). There was no evidence of any such "speaking out" or that Sinegal knew of Polk's campaign platform. Without analysis, the court held that "[t]he government may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment" and concluded that Polk "sufficiently demonstrated a constitutional right that was clearly established at the time of her termination." (App. 33). The district court further found that the record contained disputes of material fact regarding the purported reasons for Polk's termination. (App. 37). The disputed facts identified by the district court was whether Sinegal's calendar entries and his collection of statements made after her termination to respond to Polk's EEOC claim, was pretextual. (App. 37).

Sinegal appealed the district court's order to the Fifth Circuit under the collateral order doctrine. On appeal the Fifth Circuit wrote, "[T]his court has been unequivocal in its recognition of a First Amendment interest in candidacy." *Polk,* 714 F. App'x at 459 (citing *Phillips v. City of Dallas,* 781 F.3d 772, 778 (5th Cir. 2015)). (App.5). Notably, the Fifth Circuit decided *Phillips* on March 27, 2015, a year after Polk's termination. (App. 5). The Fifth Circuit also agreed with the district court that Polk's pretextual argument

was a fact issue and qualified immunity is unavailable. (App. 5).

Sinegal sought a rehearing en banc review in the Fifth Circuit, but the court denied his request. (App.39–40).

BASIS FOR FEDERAL JURISDICTION

Respondent filed her complaint in Texas state district court. Petitioner removed the case to the United Stated District Court for the Eastern District of Texas based upon federal question jurisdiction, 28 U.S.C. §1331. Sinegal sought qualified immunity and summary judgment. The district court denied Sinegal's summary judgment and request for qualified immunity. Sinegal then appealed to the United States Court of Appeals for the Fifth Circuit; the Fifth Circuit exercised jurisdiction under 28 U.S.C. §1291.

REASONS FOR GRANTING THE PETITION

I. Case of first impression: This Court should settle the issue of whether candidacy alone is a fundamental right under the First Amendment because it has created dissension among the circuit courts.

This case brings before this Court a case of first impression; whether a public employee has a First Amendment right in candidacy alone. Polk argues that she is entitled to §1983 relief because she was discharged for the exclusive reason that she ran for Justice of the Peace, a right she contends is secured by the First Amendment of the United States Constitution. Polk's claim does not extend from expressive speech, conduct, assembly, association or

the constitutionality of a statute imposing obstacles to her campaign or in being a candidate. Polk campaigned freely with no interference of any kind from Sinegal. Polk did not win in the primary election. Shortly thereafter, Sinegal terminated Polk because her work performance was unacceptable not because she ran for public office.

This Court has never defined candidacy alone as a fundamental right but has mentioned it within cases involving prerequisites or obstacles to candidacy. In *Bullock v. Carter,* the issue was the constitutionality of a Texas statute that required a candidate to pay a filing fee. 405 U.S. 134, 142–43 (1972). In that context, this Court stated that ". . . the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review." *Id*. The Court's wording is ambiguous as to the question of whether there is or is not a fundamental right to candidacy. *See id.*

This Court again touched on this issue in *Clements v. Fashing*, 457 U.S. 957, 963 (1982). In *Clements*, appellees challenged two provisions of the Texas Constitution that limit a public official's ability to become a candidate for another public office. *Id.* at 959. In addressing whether the statute placed a burden on a constitutional right that is deemed "fundamental", this Court stated, "[f]ar from recognizing candidacy as a 'fundamental right', we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" *Id.* at 965 (citing *Bullock*, 405 U.S. at 143).

This Court has not answered or revisited the issue of whether candidacy alone is a fundamental right

under the First Amendment since *Clements.* However, the majority of the appellate circuit courts have held, based on *Clements*, that candidacy alone is not a fundamental right. *Claussen v. Pence*, 826 F.3d 381, 385 (7th Cir. 2016) (explaining that the "right to be a candidate for office is not a fundamental right"); *Lewis v. Guadagno*, 445 F. App'x 599, 603 (3d Cir. 2011) (interpreting *Clements* and holding that there is not a fundamental right to candidacy); *American Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1101 (10th Cir. 1997) (holding that while voting is a fundamental right under the First Amendment, candidacy is not); *Greenwell v. Parsley*, 541 F.3d 401, 404 (6th Cir. 2008) (holding that First Amendment protection does not extend to candidacy alone).

The Fifth Circuit does not follow the majority of circuits and has stated that it is a fundamental right. *See Phillips,* 781 F.3d at 778. Therefore, this Court should grant Sinegal's petition for writ of certiorari to answer this fundamental question that has caused a conflict among the circuit courts.

A. The Fifth Circuit's decision stands in opposition to its own and other circuits' precedent establishing that candidacy alone is not a fundamental right under the First Amendment.

To prevail on a retaliation claim stemming from the exercise of First Amendment rights:

> an employee must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination. If the employee discharges that

> burden, the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct.... And even termination because of protected speech may be justified when legitimate countervailing government interests are sufficiently strong.

Board of County Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996).

In response to Sinegal's argument that he did not violate Polk's First Amendment right, the Fifth Circuit states in its opinion that they have "been unequivocal in its recognition of a First Amendment interest in candidacy" citing *Phillips*, 781 F.3d at 778. (App.5). However, that case came a year after Polk was terminated. The Fifth Circuit further states that "[w]e have recognized that right in the public employment context since at least 1992." App.5, citing *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992).

1. The majority of circuits have held that candidacy for political office is not a fundamental right.

The First, Third, Sixth, Seventh, and Tenth Circuits have held that there is no First Amendment right to candidacy for political office. The First Circuit has held that "candidacy is a First Amendment freedom." *Magill v. Lynch*, 560 F.2d 22, 29 (1st Cir. 1977). A district court within the First Circuit held that candidacy for political office "is not a fundamental right[.]" *Simmons v. Rotenberg,* No. 87-2568-Z, 1988 WL 76526 at *1 (D. Mass. July 13, 1988) (citing *Bullock*, 405 U.S. at 143).

The Second Circuit has not addressed the issue but district courts within the Second Circuit have considered this issue. The United States District Court for the Southern District of New York has held that "candidacy is not a fundamental right in our political system." *Fulani v. McAuliffe*, No. 04-CIV.6973, 2005 WL 2276881 at *3 (S.D.N.Y. Sept. 19, 2005) (citing *Clements*, 457 U.S. at 963). Eight years later, the Northern District of New York addressed this issue by stating "[t]he extent of a public employee's right to run for public office is not clearly established." *Matters v. Estes*, No. 1:13-CIV-578, 2013 WL 2403663 at *3 (N.D.N.Y. May 31, 2013).[3]

The Third Circuit has answered this issue in an unpublished opinion. See *Lewis*, 445 F.App'x. at 603. In interpreting *Clements*, the Third Circuit held that "the Supreme Court has rejected the argument that an individual has a fundamental right to candidacy." *Id.* citing *Clements*, 457 U.S. at 963.

The Fourth Circuit has not recognized a First Amendment right to hold elected office. *Loftus v. Bobzien*, 848 F.3d 278, 285 (4th Cir. 2017). Because the court resolved *Loftus* on other grounds, the court did not address the issue of whether the right existed. *See id*. However, Fourth Circuit district courts have held that there is no fundamental right to candidacy. *Taylor v. Ohio Cty Comm'n*, No.5:17-CV-148, 2017 WL

[3] While the *Matters* court cites *Clements v. Fashing* for its position, it is also interesting to note that the court also cites the Fifth Circuit case of *James v. Texas Collin County*, 535 F.3d 365, 377 (5th Cir. 2008)("it is unclear that the First Amendment provides a right to run for office that extends generally to government employees").

5761610 at *9 (N.D.W.V. Nov. 28, 2017); *see also Welton v. Durham Cnty*, No. 1:17-CV-258, 2017 WL 3726991 at *2, n.2 (M.D.N.C. Aug. 28, 2017).

The Sixth Circuit held that "[w]hile the First Amendment protects the right of public employees to speak out on matters of public concern [. . .] it has not been extended to candidacy alone." *Greenwell*, 541 F.3d at 404 (citing *Carver v. Dennis*, 104 F.3d 847, 850–51 (6th Cir. 1997) (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

The Seventh Circuit has held that "the right to be a candidate for office is not a fundamental right." *Claussen* 826 F.3d at 385 (citing *Brazil-Breashears v. Bilandic*, 53 F.3d 789, 792 (7th Cir. 1995) (holding the right to candidacy is not a fundamental right)).

The Eighth Circuit has not addressed this issue, but district courts within the Eighth Circuit have mentioned the issue and that it is unclear. *Nord v. Walsh Cty*, No. 2:10-CV-114, 2015 WL 11348175 at *2, n.15 (D.C N.D. Feb. 24, 2015) (discussing that *Clements* never defined candidacy as a fundamental right in light of the Eleventh Circuit's opinion in *Randall v. Scott*, 610 F.3d 701, 713 (11th Cir. 2010) (holding the Supreme Court and circuit precedent is not clear regarding the First Amendment protection for candidacy.)

The Ninth Circuit, in determining a ballot restriction, followed *Clements* when it stated that "[f]ar from recognizing candidacy as a 'fundamental right', the existence of barriers to a candidate's access to the ballot does not of itself compel close scrutiny."

O'Connor v. Nevada, 27 F.3d 357, 360 (9th Cir. 1994) (quoting *Clements*, 457 U.S. at 963.)

The Tenth Circuit followed *Bullock* when it reiterated that "the Court stated it had not 'attached such [a] fundamental status to candidacy as to invoke a rigorous standard of review." *Thournir v. Meyer*, 909 F.2d 408, 411 (10th Cir. 1990) (citing *Bullock*, 405 U.S. at 142–43). The Tenth Circuit touched on the issue again in *American Constitutional Law Found., Inc.*, which held that while voting is a fundamental right under the First Amendment, candidacy is not. 120 F.3d at 1101.

The Eleventh Circuit was presented with the question of whether a public employee has a First Amendment right to run for office in *Randall v. Scott*, 610 F.3d at 704. The Eleventh Circuit held,

> Supreme Court and circuit precedent is not entirely clear regarding the degree of First Amendment protection for candidacy, however, every case addressing the issue has found at least some constitutional protection. A plaintiff's candidacy cannot be burdened because a state official wishes to discourage that candidacy without a whisper of valid state interest. An interest in candidacy, and expression of political views without interference from state officials who wish to discourage that interest and expression, lies at the core of values protected by the First Amendment.

Id. at 713.

Therefore, the Third, Sixth, Seventh and Tenth Circuits hold there is no First Amendment right in

candidacy alone. The First, Second, Fourth, and Eighth have not addressed the issue but district courts within those circuits have held there is no fundamental right in candidacy alone. The Ninth Circuit has not addressed the issue but has followed *Clements* in a ballot restriction case. The Eleventh Circuit leans towards following the Fifth Circuit but holds the issue is still unclear.

2. The Fifth Circuit's holding herein that a person has a First Amendment interest in candidacy contradicts the precedent established in the majority of circuit courts.

In its opinion, the Fifth Circuit explained that "[T]his court has been unequivocal in its recognition of a First Amendment interest in candidacy." *Polk*, 714 F. App'x at 459 (citing *Phillips,* 781 F.3d at 778). (App. 5). The Court further states that is has "recognized that right in the public employment context since at least 1992." *See Polk*, 714 F. App'x at 459 (citing *Click*, 970 F.2d at 112. (App. 5). Discussed in greater detail below, the County strongly disagrees that the Court has been unequivocal in its recognition of this right and that it has recognized the right since at least 1992. However, for purposes of this point, what is important is that the Fifth Circuit has ruled opposite of the majority of other circuit courts.

B. Because the law was not "clearly established" at the time Sinegal terminated Polk, Sinegal is entitled to qualified immunity.

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al–Kidd*, 563 U.S. 731, 743 (2011). Under this doctrine, courts may not award damages against a government official in his personal capacity unless "the official violated a statutory or constitutional right," and "the right was 'clearly established' at the time of the challenged conduct." *Id*. at 735.

This Court has held "that courts may grant qualified immunity on the ground that a purported right was not "clearly established" by prior case law, without resolving the often more difficult question whether the purported right exists at all." *Reichle v. Howards,* 566 U.S. 658, 664 (2012) (citing *Pearson v. Callahan,* 555 U.S. 223, 227 (2009). "This approach comports with [this Court's] usual reluctance to decide constitutional questions unnecessarily. *Reichle*, 566 U.S. at 664; *see also Camreta v. Green*, 563 U.S. 692, 706–09 (2011).

In *Reichle* this Court stated,

> To be clearly established, a right must be sufficiently clear "that every 'reasonable official would [have understood] that what he is doing violates that right.'" *Id*., at ——, 131 S. Ct., at 2078 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987)). In other words, "existing precedent must

> have placed the statutory or constitutional question beyond debate." 563 U.S., at ——, 131 S. Ct. at 2083. This "clearly established" standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can "'reasonably ... anticipate when their conduct may give rise to liability for damages.'" *Anderson*, *supra*, at 639, 107 S. Ct. 3034 (quoting *Davis v. Scherer*, 468 U.S. 183, 195, 104 S. Ct. 3012, 82 L.Ed.2d 139 (1984)).

Reichle, 566 U.S. at 664.

The "clearly established" standard is not satisfied in this case. This Court has never recognized a First Amendment right in candidacy alone. In addition, the Fifth Circuit did not clearly establish this as a right until 2015, a year after Polk was terminated.

It is unclear why the Fifth Circuit relies on *Click* when sixteen years after *Click*, the Fifth Circuit was presented with this very issue and refused to interpret *Click* as holding candidacy alone was a protected right. *Jordan v. Ector Cnty.,* 516 F.3d 290, n.29 (5th Cir. 2008).

In *Jordan*, the Fifth Circuit held that "Defendants protest that *Click* did not decide whether 'candidacy alone' is protected conduct; as this is not such a case, we do not pause on whether *Click* should be so interpreted." *Jordan,* 516 F.3d at n. 29. Later in 2008, the Fifth Circuit was presented with this issue again in *James v. Texas Collin County*, 535 F.3d 365 (5th Cir.

2008), which was the precedent at the time of Polk's termination.

In *James,* the plaintiff worked as a foreman in the county's public works division. *Id*. at 369. During his tenure with the county, the plaintiff sought public office in 2000 and in 2004. *Id.* Both times he lost. *Id*. When the plaintiff lost the election the second time, and less than a week later, he was terminated. *Id*. The plaintiff filed a §1983 action against the county and several individuals claiming he was discharged in violation of his First Amendment right because he campaigned against an incumbent. *Id.* at 373.

The Fifth Circuit stated "[w]hile it is unclear that the First Amendment provides a right to run for office that extends generally to governmental employees, [the plaintiff's] broader claim would nevertheless fail [. . .]" *Id.* at 377. Accordingly, it is confusing why the Fifth Circuit holds in the instant case that they "recognized that right in the public employment context since at least 1992" when in 2008 the Fifth Circuit expressly found this issue unclear. *See id.* Therefore, at the time of Polk's termination, this issue was not beyond debate.

It was not until 2015—a year after Polk's termination— that the Fifth Circuit issued *Phillips*, which clearly explained its position on this issue for the first time. While the *Phillips* case involved questions about a city's charter, the city in that case argued that the issue on whether running for office was protected by the First Amendment was still an open question and cited to the *James* case. *Phillips*, 781 F.3d at 778. The Fifth Circuit reviewed its precedents and held, "…we hold today, in harmony with those decisions, that candidacy alone constitutes speech on a matter of

public concern." *Id*. at 779. Since the Fifth Circuit's holding in *Phillips* was not in existence at the time of Polk's termination, Sinegal would not have been on notice that his action was unlawful and the Fifth Circuit should be reversed and qualified immunity granted to Sinegal.

C. The district court applied "clearly established" law at too high a generality.

Even assuming Polk provided evidence of a constitutional violation, Sinegal is still entitled to qualified immunity because there was no clearly established law to the "particularized" facts of this case.

This Court has reiterated "the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly,* ___ U.S. ___, 137 S. Ct. 548, 552 (2017) (citing As*hcroft,* 563 U.S. at 742). "The clearly established law must be 'particularized' to the facts of the case." *Anderson,* 483 U.S. at 640. "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.'" *Id.* at 639.

Here, neither the district court nor the Fifth Circuit "particularized" the law to the facts in this case. Instead the courts relied on a "high level of generality" and, in doing so, denied Sinegal's right to qualified immunity. "Because qualified immunity is 'an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.'" *Pearson,* 555 U.S. at 231 (citing *Mitchell,* 472 U.S. at 526).

It is clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims" against government officials [will] be resolved prior to discovery." *Anderson*, 483 U.S. at 640. Accordingly, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

While Sinegal contends that Polk has failed to establish a constitutional violation, he is still entitled to qualified immunity because his conduct was objectively reasonable in light of clearly established law. However, the district court merely addressed this issue at the highest level of generality. The district court stated that "it is clearly established that the First Amendment generally prohibits a public employer from retaliating against an employee because she exercised her right to engage in protected speech". . ."[t]hus, Polk has sufficiently demonstrated a constitutional right that was clearly established at the time of her termination." (App. 33). The district court failed to address the clearly established law to the specific facts of this case and in doing so, allowed Polk to assert "unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 640. Consequently, the district court's ruling suggests that anyone who runs for public office can never be terminated. This is clearly not the law.

This Court stated a reminder regarding the number of opinions it has issued in the last five years reversing federal courts in qualified immunity cases. *White,* 137 S. Ct. at 551. "The Court has found this necessary both

because qualified immunity is important to 'society as a whole,' and because as 'an immunity from suit', qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.'" *Id.* at 551–52. (internal quotations omitted). This Court reiterated in *White* that "clearly established law" should not be defined "at a high level of generality." *Id.* at 552 citing *Ashcroft,* 563 U.S. at 742. In *White*, the Court held that the panel majority "misunderstood the 'clearly established' analysis: it failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." *Id*. The Court further held that the *White* case presented "a unique set of facts and circumstances", specifically White's late arrival. *Id*. "This alone should have been an important indication to the majority that White's conduct did not violate a 'clearly established' right." *Id*.

Applying the analysis from *White* to the instant case, Sinegal is entitled to qualified immunity. Like *White*, the district court has applied the "clearly established right" at only a general level. Also like *White*, this is not a case where it is obvious that there was a violation of a clearly established right. Similar to *White*, there are a unique set of facts and circumstances in this case such as Sinegal's problems with Polk that started long before she ever decided she would run for office as well as his decision to terminate her, which also occurred before she told him she planned to run for office.

Clearly, there is no federal law that prohibits Sinegal from firing a bad employee. There is no settled First Amendment principle that requires an employer

to keep a bad employee just because they have run for public office. Nowhere does Polk allege that she was prevented from speaking on issues pertinent to her campaign or any other issues of public importance. Nor does she allege she was prevented from conducting her campaign for Justice of the Peace. Polk's does not allege any restraint on her First Amendment rights. Her complaint is that she was terminated solely because she ran for Justice of the Peace. In fact, Polk does not allege, nor is there any evidence whatsoever, that she lost her position because of her political beliefs. She was not running against Sinegal nor was she running for any position that was a rival position of Sinegal. The position of Justice of the Peace is a judicial position whereas Sinegal is a county commissioner.

Therefore, there is no "fair notice" that would advise Sinegal that his terminating Polk was unconstitutional. No reasonable official, including Sinegal, would understand that it was unlawful to terminate Polk for being a bad employee. Therefore, the district court improperly analyzed "clearly established right" and committed error in denying Sinegal qualified immunity.

Sinegal is entitled to qualified immunity since he did not violate a constitutional right of Polk. This Court has never held that candidacy alone is a fundamental right protected by the First Amendment. The majority of circuit courts hold that it is not a fundamental right. The Fifth Circuit precedent, at the time of Polk's termination, was *James* that held the issue to be "unclear." Therefore, even if this Court finds a constitutional protection in candidacy alone, the

law was not "clearly established" at the time of Sinegal's conduct and the denial of qualified immunity should be reversed.

CONCLUSION

This Court should grant the petition for writ of certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted

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