No. 18-122

IN THE

Supreme Court of the United States

MICHAEL SINEGAL,
Petitioner,

v.

DAWN POLK,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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November 2018

QUESTION PRESENTED

Dawn Polk ran for Justice of the Peace in Jefferson County, Texas, against the incumbent, Tom Gillam III, campaigning on the basis of her own integrity and Gillam's asserted lack thereof. During the campaign, Polk's supervisor, County Commissioner Michael Sinegal, complained to her about the position her candidacy put him in. When she returned to work after losing the election, Sinegal terminated her employment.

Polk sued Sinegal for violating the First Amendment by retaliating against her based on her protected speech. Specifically, she alleged that Sinegal retaliated against her for speaking out against and opposing Gillam. The only disputed issue in the district court on the question whether Sinegal violated Polk's First Amendment rights was whether Polk's termination was motivated by her speech. The district court determined that there was a genuine issue of material fact on that question, and denied Sinegal's motion for summary judgment based on qualified immunity. The Fifth Circuit affirmed.

The question presented is:

Did the Fifth Circuit correctly affirm the district court's denial of Sinegal's motion for summary judgment based on qualified immunity?

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INTRODUCTION

Petitioner Michael Sinegal asks the Court to grant review to decide whether "candidacy for political office, standing alone" is a protected right under the First Amendment. Pet. i. That question is not presented by this case, and it was not preserved in the court below. Contrary to the petition's assertions, respondent Dawn Polk did not sue Sinegal for violating her "right to run for office," *id.*; she sued him for violating her right to free speech. Specifically, she sued him for terminating her employment in retaliation for her speaking out against and opposing the incumbent, Tom Gillam III, when she ran against Gillam for Justice of the Peace. As Sinegal conceded in the Fifth Circuit, "Polk's running for office involved a citizen speaking on matters of public concern." Br. of Appellant, *Polk v. Sinegal*, No. 16-41521, at 19 (5th Cir. filed Feb. 22, 2017). The lower courts' determination that Polk's speech was protected by the First Amendment is unremarkable, correct, and does not implicate any circuit split.

Sinegal also asks this Court to grant review because, in his view, Polk's First Amendment rights were not clearly established until a year after he terminated her employment in 2014. The Fifth Circuit had previously made clear, however, that running for office involves protected speech. And even apart from that precedent, it was clearly established in 2014 that campaign speech is protected by the First Amendment. The Fifth Circuit correctly determined that Sinegal's retaliation against Polk, "if proven, would be objectively unreasonable in light of clearly established law," Pet. App. 5, and further review is unwarranted.

STATEMENT OF THE CASE

A. Dawn Polk began working for Jefferson County, Texas, in 1996. Starting in 2009, Polk served as an administrative secretary to Michael Sinegal, the County Commissioner for Jefferson County Road and Bridges Precinct 3. Pet. App. 8.

In 2013, Polk decided to run for Justice of the Peace for Jefferson County Precinct 8. One of Polk's opponents was Tom Gillam III, the incumbent. Early in 2013, Polk told Sinegal of her intent to run for the office, and Sinegal told her he thought it was a good idea. *Id.* at 9. Later that year, however, Sinegal called Polk into his office and acted as though Polk had not told him she was running. *Id*. at 2. Sinegal denied his previous expressions of support and complained that "you don't know what type of position you're putting me in because this man Gillam is going around telling everybody that I set you up to run against him." *Id*. at 2, 9.

Polk campaigned on the basis of her own integrity and her assertions that Gillam lacked integrity. *Id*. at 9. Thus, as the district court noted, "Polk's campaign involved negative speech about an elected official." *Id*. at 9–10.

Polk ultimately lost the election to Gillam. *Id*. at 10. During her first week back in the office after the election, Sinegal was on vacation. Two days after his return, however, Sinegal called Polk into his office and told her he had spoken with Human Resources about her. *Id*. Although, during her five years working for Sinegal, Polk had never been written up for unprofessionalism or inadequate job performance or otherwise given any indication that her performance was not satisfactory, Sinegal informed her that he had told

Human Resources that things were "not working out" because she was "missing calls, not typing memorandums, and not giving him his calls." *Id.* Polk asked Sinegal why he would lie to Human Resources and whether he was firing her for campaigning against Gillam. *Id.* Sinegal immediately called another secretary into the meeting to serve as a witness, and told Polk that she had two days to find another job in Jefferson County. *Id.*

Sinegal subsequently went back through his calendar and added entries showing days on which Polk had allegedly behaved in an unprofessional manner or did not do her duties. *Id.*; *see id.* at 37 ("Importantly, at deposition, Sinegal confirmed that some entries were indeed made after Polk filed suit.").

B. Polk filed suit against Sinegal and Jefferson County in state court under 42 U.S.C. § 1983, and the defendants removed the case to federal court. Polk's first amended complaint asserted that the defendants retaliated against her for engaging in speech protected by the First Amendment. Specifically, she alleged that the defendants retaliated against her for speaking out against Gillam and opposing him in the election. *Id.* at 3, 11; *see* 5th Cir. Record on Appeal (ROA) 16-41521.163–64.

The defendants moved for summary judgment, arguing that Sinegal did not violate Polk's First Amendment rights because Polk's "running for justice of the peace had nothing to do with her termination," and that he was entitled to qualified immunity because "no elected commissioner, including Sinegal, would think it was unlawful to terminate Plaintiff" based on her alleged "poor job performance, bad attitude, running off constituents and being unprofessional." ROA

16-41521.426–27. Sinegal did not argue that Polk's activities in opposing and speaking out against Gillam were not protected by the First Amendment, nor did he argue that her First Amendment interests in running for office and speaking out against Gillam were not clearly established.

The district court denied summary judgment as to Sinegal. The court explained that the parties did not dispute that Polk suffered an adverse employment action, that her speech involved a matter of concern, and that her interest in speaking outweighed the employer's interest in efficiency. Pet. App. 31. Instead, "the dispute revolve[d] around whether Polk's exercise of her right to free speech was a motivating factor in her termination." *Id*. The court explained that "if Sinegal's version of events is accurate and he terminated Polk for poor work performance rather than in retaliation for her exercise of free speech, he would be entitled to qualified immunity because there would be no violation of a constitutional right. Conversely, if Polk's version is accurate, and Sinegal is using these events as excuses to mask his unconstitutional conduct, then qualified immunity is unavailable." *Id*. at 32. Because the question whether Polk's speech motivated her termination involved questions of fact, the Court determined that it could not be resolved on summary judgment. *Id*. Likewise, the court determined that it would have to "engage in impermissible credibility determinations" to conclude that Sinegal was entitled to qualified immunity, and that summary judgment was therefore not appropriate on that issue. *Id*. at 37.

Sinegal appealed. In his briefing to the Fifth Circuit, Sinegal conceded that "Polk's running for office

involved a citizen speaking on matters of public concern." Br. of Appellant, *Polk*, at 19; *see also id*. at 17 ("[N]or does Sinegal dispute that running for a public office is speech that involves public concern."). He argued, however, that Polk had not provided sufficient evidence that he terminated her for running for office, and that he was entitled to qualified immunity because "[t]here is no settled First Amendment principle that requires an employer to keep a bad employee just because they have run for public office." *Id*. at 9.

After briefing was finished, Polk filed a motion to dismiss the appeal, noting that the court of appeals' jurisdiction to review interlocutory denials of qualified immunity is limited to questions of law. In his response to the motion, Sinegal argued for the first time that, "at the time of Polk's termination, there was no clearly established law that a government employee had a First Amendment right to run for Justice of the Peace." Appellant's Response to Appellee's Mot. to Dismiss, *Polk v. Sinegal*, No. 16-41521, at 8 (5th Cir. filed May 22, 2017). Sinegal still did not argue, however, that the First Amendment does not protect candidacy or campaign speech; to the contrary, he conceded that it is now clearly established "'that candidacy alone constitutes speech on a matter of public concern.'" *Id*. at 11 (quoting *Phillips v. City of Dallas*, 781 F.3d 772, 779 (5th Cir. 2015)).

The Fifth Circuit affirmed the district court in an unpublished per curiam decision. Like the district court, the court of appeals noted that the questions whether Polk suffered an adverse employment decision, whether her speech involved a matter of public concern, and whether her interest in speaking outweighed the government's interests in efficiency were

not in dispute. Pet App. 4–5. "Sinegal never argues that an interest in governmental efficiency outweighed Polk's interest in engaging in political speech," the court explained. *Id.* at 5 n.1. "[H]e argues that Polk's termination was *unrelated* to her political speech." *Id.*

With regard to whether Sinegal terminated Polk because of her political speech, the Fifth Circuit explained that, on an appeal of a denial of a motion for summary judgment predicated on qualified immunity, the court of appeals lacks jurisdiction to determine whether a genuine question of facts exists regarding whether the defendant engaged in the allegedly wrongful conduct. *Id.* at 3. Rather, the court is "limited to determining only whether the conduct identified by the district court would, as a matter of law, be objectively unreasonable in light of clearly established law, if true." *Id.* at 6.

The court determined that the identified conduct would meet that standard. It explained that the Fifth Circuit had been "'unequivocal in its recognition of a First Amendment interest in candidacy,'" *id.* at 5 (quoting *Phillips*, 781 F.3d at 778), and had "recognized that right in the public employment context since at least 1992," *id.* (citing *Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992)). "Applying that clearly established precedent to this case," the court agreed "with the district court that 'if Polk's version [of the facts] is accurate, and Sinegal is using [poor work evaluations] as excuses to mask his unconstitutional conduct, then qualified immunity is unavailable.'" *Id.*

Sinegal filed a petition for rehearing en banc, which was denied without any judge requesting a vote. *Id.* at 39–40.

REASONS FOR DENYING THE WRIT

I. This case is not an appropriate vehicle for deciding whether candidacy, standing alone, is protected by the First Amendment.

A. This case does not present the question whether candidacy, standing alone, is a protected right under the First Amendment.

Sinegal asks this Court to decide whether "candidacy for political office, standing alone, is a protected right under the First Amendment." Pet. i. This case, however, does not involve claims that Sinegal retaliated against Polk for candidacy "standing alone." Polk does not allege that Sinegal terminated her just because she was a candidate for a public office; she alleges that Sinegal terminated her because, in running for office, she spoke out against and opposed Gillam. *See* Pet. App. 3; ROA 16-41521.163; *see also* Pet. App. 9–10 ("Polk's campaign involved negative speech about an elected official"). Because Polk does not allege that Sinegal terminated her just for being a candidate for a public office, this case does not present an appropriate vehicle for determining whether candidacy alone—apart from any speech, positions, activity, or affiliations associated with the candidacy—is a protected right under the First Amendment.

B. Petitioner waived the argument that candidacy is not protected under the First Amendment.

This case is also a poor vehicle for deciding whether candidacy alone is protected under the First Amendment because the argument that candidacy is not protected by the First Amendment was not presented to the lower courts. Sinegal did not argue below

that candidacy is not protected by the First Amendment. To the contrary, he conceded in the court of appeals that "running for a public office is speech that involves public concern." Br. of Appellant, *Polk*, at 17; *see also id.* at 19 (conceding that "Polk's running for office involved a citizen speaking on matters of public concern"); *see generally Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) ("Speech on matters of public concern is at the heart of the First Amendment's protection." (alterations, internal quotation marks, and citations omitted)).

This Court "normally decline[s] to entertain" arguments that the parties "failed to raise … in the courts below." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016); *see also, e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."). This Court should not grant the petition to consider an issue that was not in dispute in the lower courts. Pet. App. 4–5 (explaining that the only element necessary to establish a First Amendment retaliation claim that was in dispute in the court of appeals was whether Polk's speech was a substantial or motivating factor behind her termination); *id.* at 31 (same in the district court).

II. This case does not implicate a circuit split.

Sinegal contends that there is "dissension among the circuit courts" over whether candidacy is a First Amendment right. Pet. 7. However, Sinegal has not identified any circuit conflict that would affect the outcome in this case.

To begin with, Sinegal claims a split between the decision below and decisions of the Third, Seventh,

and Tenth Circuits. However, the cases on which Sinegal relies for the purported split—as well as the case he cites from the Ninth Circuit—all address the question whether candidacy is a "fundamental right," such that eligibility requirements for running for office would receive heightened scrutiny, and all state that it is not. *See Lewis v. Guadagno*, 445 F. App'x 599, 603 (3d Cir. 2011); *Claussen v. Pence*, 826 F.3d 381, 385 (7th Cir. 2016); *Brazil-Breashears v. Bilandic*, 53 F.3d 789, 792 (7th Cir. 1995); *O'Connor v. Nevada*, 27 F.3d 357, 360 (9th Cir. 1994); *Am. Const. Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1101 (10th Cir. 1997); *Thournir v. Meyer*, 909 F.2d 408, 411, 412 (10th Cir. 1990). There is no split on that issue: The Fifth Circuit agrees that "running for office" is not a "truly fundamental right[]." *Wachsman v. City of Dallas*, 704 F.2d 160, 172 n.18 (5th Cir. 1983) (citing *Clements v. Fashing*, 457 U.S. 957, 962 (1982)); *see also Hatten v. Rains*, 854 F.2d 687, 693 (5th Cir. 1988) (Goldberg, J., with two judges specially concurring in the result) ("[T]here is no fundamental right to be a candidate.").

Moreover, the question whether there is a "fundamental right" to be a candidate is different from the question whether First Amendment interests are implicated when an eligible candidate is retaliated against based on her candidacy. *See Phillips*, 781 F.3d at 779 n.9 ("That candidacy may not be a 'fundamental' right for purposes of the Equal Protection Clause … does not answer the question whether candidacy enjoys some protection under the First Amendment.").

Thus, for example, although the Tenth Circuit recognized, in the cases cited by Sinegal, that candidacy is not a fundamental right, it has also recognized, in a

case in which a deputy sheriff was fired after announcing his intention to run for sheriff, that the deputy's "political speech—his candidacy for office—undoubtedly relate[d] to matters of public concern" and was therefore protected by the First Amendment. *Jantzen v. Hawkins*, 188 F.3d 1247, 1257 (10th Cir. 1999); *see also Kent v. Martin*, 252 F.3d 1141, 1144 (10th Cir. 2001) ("[A]n employee's candidacy for political office 'undoubtedly relates to matters of public concern[.]'" (quoting *Jantzen*, 188 F.3d at 1257)).

Likewise, although the Ninth Circuit explained in *O'Connor v. Nevada* that barriers to a candidate's access to the ballot do not compel close scrutiny, 27 F.3d at 360, it has also explained, in a case in which a district attorney was suspended while running for office, that "[d]isciplinary action discouraging a candidate's bid for elective office represent[s] punishment by the state based on the content of a communicative act protected by the first amendment." *Finkelstein v. Bergna*, 924 F.2d 1449, 1453 (9th Cir. 1991) (internal quotation marks and citation omitted); *see also Randall v. Scott*, 610 F.3d 701, 711, 716 (11th Cir. 2010) (noting that there is "no fundamental status to candidacy requiring the rigorous standard of review that is applied in voters' rights cases," but determining that a public employee who alleged he was fired for running for office stated "a claim for violation of his First Amendment rights" (internal quotation marks and citation omitted)). The decision below is consistent with these cases, and Sinegal's citation to cases stating that candidacy is not a "fundamental right" does not demonstrate a conflict between the decision below and other circuits.

Aside from the cases he cites for the proposition that candidacy is not a fundamental right, the only court of appeals cases that Sinegal cites as purportedly conflicting with the decision below are two Sixth Circuit cases: *Carver v. Dennis*, 104 F.3d 847 (6th Cir. 1997), and *Greenwell v. Parsley*, 541 F.3d 401 (6th Cir. 2008). In *Carver*, a deputy clerk was fired immediately after she announced that she was running against her boss in the next election. *See* 104 F.3d at 848. Explaining that the deputy clerk was fired solely because she was trying to take her boss's job—and not because of her political beliefs or expression—the court held that she had no "First Amendment right to run against the incumbent clerk in the next election and still retain her job." *Id.* at 849. In *Greenwell*, a sheriff fired a deputy sheriff upon learning that the deputy sheriff was planning to run against him in the next election. *See* 541 F.3d at 402. Determining that the case could not be distinguished from *Carver*, the Sixth Circuit held that the sheriff had not violated the deputy's First Amendment rights. *Id.* at 403. The First Amendment, it stated, "has not been extended to candidacy alone." *Id.* at 404. "[T]he First Amendment does not require that an official in [an employer's] situation nourish a viper in the nest." *Id.* (quoting *Carver*, 104 F.3d at 853).

As the Sixth Circuit noted in *Greenwell*, that court has itself "questioned the wisdom of *Carver*." *Id.*[1] But

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[1] To the extent *Carver* and *Greenwell* were motivated by concerns that allowing an employee to run against his boss would disrupt the functioning of the office, the results in *Carver* and *Greenwell* may have been justified under the portion of the test for First Amendment retaliation in which the employee's interest in speaking out is balanced against the defendant's interest in

regardless, this case would not come out any differently in the Sixth Circuit than it did in the Fifth. The Sixth Circuit distinguishes "between the simple announcement of a candidacy, which does not trigger protected political speech, and an announcement coupled with speech critical of one's opponent …, which does trigger constitutional protection." *Greenwell*, 541 F.3d at 405; *see Murphy v. Cockrell*, 505 F.3d 446, 451 (6th Cir. 2007) (noting that the Sixth Circuit "expressly recognized in *Carver* that while the mere fact of candidacy was not constitutionally protected, the expression of one's political belief still fell under the ambit of the First Amendment"). Thus, in *Murphy*, the court held that a candidate who was fired based on her "political speech during the course of her campaign" stated a valid claim for violation of her First Amendment rights. 505 F.3d at 451.

Here, Polk's announcement of candidacy was "coupled with speech critical of [her] opponent." *Greenwell*, 541 F.3d at 404; *see* Pet. App. 9–10 ("Polk's campaign involved negative speech about an elected official."). Polk does not allege that she was retaliated against for the "simple announcement of a candidacy," *Greenwell*, 541 F.3d at 404, but because she spoke out against and opposed Gillam. *See* Pet. App. 11. Polk's speech would be protected in the Sixth Circuit, as it was in the Fifth, and there is no need for review to resolve any circuit split.

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efficiency. *See*, *e.g.*, *Jantzen*, 188 F.3d at 1257 (holding that deputy sheriff's candidacy was protected speech, but that his interest in that speech did not outweigh sheriff's interest in effective law enforcement, which could be put at risk by the candidacy). Here, Polk did not run against her boss, and Sinegal does not argue that Polk's candidacy affected the efficiency of the office.

III. The court of appeals correctly concluded that Sinegal violated Polk's clearly established First Amendment rights.

A. Sinegal also asks this Court to grant certiorari because he believes the Fifth Circuit erred in determining that he violated Polk's clearly established rights when, in his view, the relevant law was not clearly established in the Fifth Circuit until 2015, a year after he fired Polk. Pet. 16. However, although the first case the Fifth Circuit cited in its discussion of clearly established law was a 2015 case explaining that the Fifth Circuit "has been unequivocal in its recognition of a First Amendment interest in candidacy," Pet. App. 5 (quoting *Phillips*, 781 F.3d at 778), the court of appeals proceeded to explain that it had "recognized that right in the public employment context since at least 1992." *Id.* (citing *Click*, 970 F.2d at 112). Indeed, the Fifth Circuit has recognized for decades that "candidacy for office" involves "expression protected by the first amendment." *United States v. Tonry*, 605 F.2d 144, 150 (5th Cir. 1979). And long before Sinegal's actions in this case, that court had denied qualified immunity to officials accused of retaliating against employees based on their candidacies. *See Click*, 970 F.2d at 108 (denying qualified immunity to sheriff who transferred deputy sheriffs "to less desirable positions in retaliation for announcing their candidacy for the sheriff's office"); *see also Looney v. Van Zandt Cty.*, 31 F. App'x 839 (5th Cir. 2002) (denying motion for summary judgment based on qualified immunity in case in which "reasonable jurors could find that [the defendant] would not have fired [the plaintiff] had she not been [the defendant's] political opponent"). Other circuits had likewise recognized, at the time of Sinegal's actions, that retaliating against

employees based on their candidacies implicated First Amendment rights. *See*, *e.g.*, *Randall*, 610 F.3d at 714; *Kent*, 252 F.3d at 1144; *Finkelstein*, 924 F.2d at 1453.

Despite the Fifth Circuit's long history of recognizing a First Amendment interest in running for office, Sinegal contends that he would not have been on notice until 2015 that his conduct was unlawful. Pet. 18. In support of this claim, Sinegal cites two cases: *Jordan v. Ector County*, 516 F.3d 290 (5th Cir. 2008), and *James v. Texas Collin County*, 535 F.3d 365 (5th Cir. 2008). Rather than supporting Sinegal's argument, however, these cases underscore that Polk's rights were clearly established at the time of her termination.

In *Jordan*, the plaintiff alleged that her former boss, the Ector County District Clerk, fired her in 2005 for running against her in the 2002 election and/or for potentially running against her in the 2006 election. The Fifth Circuit determined that the plaintiff's "run for District Clerk in 2002 involved protected First Amendment activity across multiple planes": It fell within the "curtilage of the First Amendment" because it "involved matters of public concern," and it also involved "political affiliation" because the plaintiff was the Clerk's "electoral opponent" and therefore had been retaliated against "because she supported [the Clerk's] political rival." *Id.* at 297. Moreover, the court explained, because of her candidacy in 2002 and political affiliation, the plaintiff was understood to be the Clerk's political rival when she was fired, even though she had not yet announced her 2006 candidacy, and thus the 2006 election was also a "source of protected political activity." *Id.* The Court concluded

that "a reasonable jury could conclude that either [the plaintiff's] run for office in 2002 or her continuing political affiliation as [the Clerk's] rival, or some combination thereof, was a substantial or motivating reason for her termination," and it affirmed judgment for the plaintiff. *Id.* at 300.

Accordingly, *Jordan* should have put Sinegal on notice that running for office involves protected speech under the First Amendment. Sinegal's argument to the contrary relies on a footnote in a portion of *Jordan* in which the Fifth Circuit rejected the defendants' argument that the plaintiff was "in essence claiming a 'fundamental right to candidacy.'" *Id.* at 298. In that footnote, the court noted that the "[d]efendants protest that *Click* did not decide whether 'candidacy alone' is protected conduct," but explained that, "as this is not such a case," the court would not "pause on whether *Click* should be so interpreted." *Id.* at 298 n.29. Rather than helping Sinegal, however, *Jordan*'s statement that the case did not involve "candidacy alone" should have put Sinegal on notice that retaliating against someone for running for "office, engag[ing] in campaign activities, and [being an official's] political rival," *id.* at 297—that is, for engaging in the sorts of conduct that Polk engaged in here—does not implicate the question whether "candidacy alone" is protected conduct, and that such retaliation runs afoul of the First Amendment.

James likewise does not support Sinegal's claim that Polk's rights were not clearly established in 2014. In *James*, a Collin County, Texas, employee contended that he was fired for challenging the incumbent for the Republican nomination for county commissioner. 535 F.3d at 377. The court rejected his claim, stating

that "[w]hile it is unclear that the First Amendment provides a right to run for office that extends generally to government employees, James's broader claim would nevertheless fail because he has presented no competent summary judgment evidence that his employment was terminated because of his decision to run for office." *Id.* at 377–78. Sinegal latches on to the "[w]hile it is unclear" clause, arguing that it shows that the First Amendment interest in candidacy was not clearly established at the time of his conduct. In elaborating on that clause, however, the Fifth Circuit emphasized the importance of neutrality to any restrictions on employees participating in political campaigns and noted that, thus, "it would obviously not be permissible for the government to prohibit employees only from running against incumbents." *Id.* at 378 n.12. That is, the court acknowledged that there could be some restrictions on government employees running for office, but made clear that those restrictions could not be based on whom the employee was opposing. Thus, if anything, *James* should have put Sinegal on notice that he could not retaliate against Polk for opposing Gillam.

In any event, Sinegal should not have needed to look to the Fifth Circuit's caselaw on retaliating against employees for running for office to have known that Polk engaged in conduct protected by the First Amendment. Polk does not claim that Sinegal fired her just because she decided to run for a political office. She claims he retaliated against her because she spoke out against and opposed Gillam. When Sinegal terminated Polk's employment, it was clearly established that the First Amendment applies to "speech uttered during a campaign for political office." *Eu v. San Francisco Cty. Democratic Cent.*

Comm., 489 U.S. 214, 223 (1989). It was also clearly established that a state could not "condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983); *see*, *e.g.*, *Charles v. Grief*, 522 F.3d 508, 511 (5th Cir. 2008) ("Terminating an employee for engaging in protected speech … is an objectively unreasonable violation of such an employee's First Amendment rights."). Polk's right to speak out against Gillam was clearly established at the time of her termination, and Sinegal was on notice that he could not retaliate against her on the basis of that speech.

B. Sinegal also argues that the "district court applied 'clearly established' law at too high a generality" and did not "address the clearly established law to the specific facts of this case." Pet. 18, 19. In particular, Sinegal contends that "[n]o reasonable official, including Sinegal, would understand that it was unlawful to terminate Polk for being a bad employee." *Id*. at 21.

The district court did not hold, however, that it would have been unlawful for Sinegal to terminate Polk for being a bad employee. To the contrary, it stated that, "if Sinegal's version of events is accurate and he terminated Polk for poor work performance rather than in retaliation for her exercise of free speech, he would be entitled to qualified immunity." Pet. App. 32. Instead, the district court determined that there was "a genuine issue of material fact" regarding "the purported reasons for Polk's termination." *Id*. at 37. That is, the court determined that there was a genuine dispute over whether Sinegal terminated Polk for being a bad employee, or whether

his assertion that he did so was pretextual. Thus, Sinegal's argument regarding the "unique set of facts" in this case is based on a faulty premise. Pet. 20. The district court did not fail to "'particularize[]' the law to the facts," *id.* at 18; it determined that there was a genuine issue regarding those facts.

The district court's determination that there was a genuine issue of material fact was not appealable. *See* Pet. App. 3; *Johnson v. Johnson*, 515 U.S. 304, 319–20 (1995) ("[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."). Accordingly, although Sinegal repeatedly inserts his version of the facts into the petition, *see*, *e.g.*, Pet. i (beginning the question presented with the assertion that Sinegal terminated Polk "for being a bad employee"); *id.* at 20 (stating that Sinegal's decision to terminate Polk "occurred before she told him she planned to run for office"), the facts of this case must be viewed in the light most favorable to Polk, *see Johnson*, 515 U.S. at 319. Viewing the facts in that light, Sinegal's conduct was objectively unreasonable in light of clearly established First Amendment law. As the district court and Fifth Circuit explained, if "Sinegal is using [claims of poor performance] as excuses to mask his unconstitutional conduct, then qualified immunity is unavailable." Pet. App. 5, 32.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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