No. 18-122

# 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*

## REPLY BRIEF OF PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

The petition has clearly shown that the circuits are divided over a question of extraordinary significance in regards to the First Amendment and qualified immunity. Polk's opposition cannot overcome the issues presented in Sinegal's petition and fails to present any meritorious reason for denying the petition.

### I. There is a circuit split.

Had Sinegal been in any other circuit in the entire United States, other than the Fifth Circuit, he would have been entitled to qualified immunity. In every other circuit, the circuit courts have found that candidacy alone is not a protected First Amendment right or that the issue is unclear. Pet. 10-14. This issue has not been, but needs to be, settled by this Court.

While Polk attempts to slice and dice the issue between the difference of a "fundamental right" to be a candidate versus whether candidacy is protected by the First Amendment, the issue was clearly asserted in the Fifth Circuit that "there was no 'clearly established law' that Polk had a First Amendment right to run for Justice of the Peace." Supplemental Br. Appellant, *Polk*. If there is no constitutional protection in candidacy alone, then Polk's termination could not violate her First Amendment right. This issue was reasserted by Sinegal in his request for *en banc* review asking "the question of whether candidacy alone was a protected First Amendment right." *En Banc* Br. Appellant, Issue I.

Polk cites cases that are irrelevant to the issues presented by Sinegal's petition. *Jantzen v. Hawkins* involved claims of violation of freedom of political association and restriction of speech. 188 F.3d 1247, 1252-58 (10th Cir. 1999). Those are not issues involved in this case. Likewise, *Kent v. Martin* deals with the termination of an employee who actively ran against her boss and gave an interview to the local paper describing what she perceived as her boss's abuses of his office. 252 F.3d 1141, 1142 (10th Cir. 2001). There is no allegation by Polk that she published any political statements against Gillam.

Likewise, her cases cited for the Ninth Circuit are irrelevant because the issue of whether barriers to a candidate's access to the ballot compels close scrutiny is not an issue since Polk never alleged any barriers to her being a candidate.

Polk attempts to distinguish the Sixth Circuit cases cited by Sinegal in his petition with *Murphy v. Cockrell*, 505 F.3d 446 (6th Cir. 2007). However, that case dealt with a hotly contested race for Property Value Administer between the appointed official, Cockrell, and her subordinate, Murphy, where Murphy used her campaign signs to attack Cockrell's perceived inexperience in real estate valuations and with Cockrell's change of party allegiance. *Id.* at 448-49. Again, this case is irrelevant to the instant case since Polk has never asserted any expressive speech other than she ran for office and the conclusory phrase that she was "speaking out".

Surprisingly, Polk does not address Sinegal's cases from the First, Third or Seventh Circuits nor the district cases from the Second, Fourth, and Eighth

Circuits that have held there is no First Amendment right in candidacy alone.

## II. This case is an appropriate vehicle for deciding whether candidacy, standing alone, is protected by the First Amendment.

Polk's opposition clearly states what her claim is. She states "that Sinegal terminated her because, in running for office, she spoke out against and opposed Gillam." Opp.7. Polk never claims in any of her pleadings or briefing that her "speaking out" was anything more than the act of running against Gillam. She never states, anywhere, what expressive speech she said or where she said it. Unlike the cases cited by Polk, there are no allegations of interviews to the local paper where she described perceived abuses of office, *see Kent*, 252 F.3d at 1142, or where she used campaign signs to attack her opponents regarding specific allegations. *See Murphy*, 505 F.3d at 448. Polk's claim has always been one where she alleged being terminated because she ran for office, without citing anywhere in her pleadings or briefings to the existence of any expressive message. However, her candidacy against Gillam communicates nothing of substance.

Polk is asking this Court to deny Sinegal's petition based on the general and conclusory statement of "speaking out". While Polk asserts over and over that she was terminated for her "speech", she fails to state what it was that she said or how or where she said it. In her opposition, Polk states that "she sued [Sinegal] 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. . .” Opp.1. Polk further states that “[S]he claims he retaliated against her because she spoke out against and opposed Gillam.” Opp.16. She follows up with “Polk’s right to speak out against Gillam was clearly established at the time of her termination.” Opp.17.

Not once does she ever state what her “speaking out” entailed, what message it conveyed, how it was conveyed or where it was conveyed. While Polk’s first amended complaint states Gillam had rumored integrity issues[1], she fails to allege in any of her pleadings or briefing that she ever spoke out publically about those issues versus those issues being the personal reason she decided to run for office. The basis for why she ran for office is not the same as public speech and Polk never distinguishes between the two. Polk uses these conclusory statements to assert a free speech claim when, in fact, all she can ever point to is that she ran for office and was later terminated.

Polk’s running for office against Gillam is not expressive speech. Denying the petition would create an absurd result. In short, any public employee could place their name on the election ballot for any office and, according to Polk and the Fifth Circuit, that act alone would be protected by the First Amendment. If that were the case, then an elected official could never fire an employee who ran for a public office because the public official would never be entitled to qualified immunity and would always be open to liability. Therefore, if the public employee placed their name on

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[1] Br. of Appellant App 2 at ¶26

the ballot, every two years, they would in essence be untouchable in terms of termination.

### A. There is no waiver.

In arguing against review by this Court, Polk claims that Sinegal failed to present this issue to the lower courts and, therefore, has waived his argument. Opp.7-8. Polk then attempts to argue that Sinegal waived his argument because he "did not argue below that candidacy is not protected by the First Amendment." Opp.7-8. It is unclear why Polk made this argument when Sinegal has maintained that Polk's claims were conclusory and that Polk "failed to establish a violation of her First Amendment right" and "failed to adequately state a First Amendment violation that supports a 1983 claim" and was entitled to qualified immunity.[2] Sinegal has always maintained that Polk's "speaking out" allegation is conclusory.[3]

Polk then brought the same arguments to the Fifth Circuit and presented to the Fifth Circuit that Polk failed to establish a violation of her First Amendment

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[2] These arguments were presented to the trial court in Sinegal's first 12(b)(6) motion, Document 9 at ¶17; Sinegal's second 12(b)(6) motion, Document 16 at ¶¶14, 20; Sinegal's reply motion, Document 23 at ¶4. Unfortunately, the trial court overlooked these arguments as well as the case law presented by Sinegal on "clearly established" and in one sentence determined 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." Pet. App.33.

[3] This allegation was also included in all Sinegal's pleadings addressed in footnote 2 as well as Sinegal's Brief to the Fifth Circuit. *See* Br. Appellant, *Polk*.

right because candidacy is not a First Amendment right. Supplemental Br. of Appellant, *Polk*. It was reasserted again in Sinegal's *En Banc* Petition to the Fifth Circuit. Therefore, the argument that Sinegal did not violate Polk's First Amendment right and is entitled to qualified immunity has been raised to the lower courts. In addition, Sinegal's argument that Polk's conclusory statement of "speaking out" is based solely on her candidacy alone is not a protected First Amendment right and such was briefed in the Fifth Circuit. As a result, Polk's waiver argument is meritless.

### B. Polk's cited cases do not show Polk had a clearly established First Amendment right.

Polk contends that the Fifth Circuit has held a recognition of a First Amendment interest in candidacy long before *Phillips v. City of Dallas*, 781 F.3d 772 (5th Cir. 2015) and cites *United States v. Tonry*, 605 F.2d 144 (5th Cir. 1979) *abrogated on other grounds by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). Opp.13. However that case dealt with Tonry, who was elected to the House of Representatives for Louisiana in 1976, but soon thereafter was indicted on eleven counts of violations of the Federal Election Campaign Act. *Id*. at 146.

Tonry accepted a plea deal with the provisions that he could not run for public office, or engage in political activities on behalf of others including campaign meetings, fund raising or any activities relating to campaigning for public office. *Id*. Tonry sought to clarify his probation on several points including a violation of his First Amendment right. *Id*. at 147.

While Polk cherry picked the wording best suited for her needs, the Fifth Circuit actually stated in *Tonry* that "[T]here is no question that candidacy for office and participating in political activities are forms of expression protected by the first amendment." *Id*. at 150. However, this was not an issue of whether candidacy alone was a protected First Amendment right, but whether a plea bargain condition of being restrained from ever being a candidate or ever campaigning was a violation of the First Amendment. In any event, the Fifth Circuit held it was not a violation of Tonry's First Amendment right because the restraint imposed was "reasonably related" to the purposes of the Act for rehabilitation and protection of the public. *Id*. at 150-51.

Polk relies on other cases involving claims which are clearly distinguishable from the issues in this case. *Looney v. Van Zandt Cty.*, 31 F. App'x 839 (5th Cir. 2002)(Hrobar gave Looney ultimatum of withdrawing as her opponent from the 2000 tax assessor race or lose her job, Looney claimed termination based on party affiliation and decision to remain a candidate.); *Randall v. Scott*, 610 F.3d 701, 713 (11th Cir. 2010)("we have no circuit precedent regarding the right to candidacy in a case squarely similar to this, we conclude the constitutional-right-versus-the-state's-interests analysis to be no different for a restriction of candidacy than a restriction on candidate support."); *Finkelstein v. Bergna*, 924 F.2d 1449, 1453 (9th Cir. 1991)(whether the first amendment was violated when prosecutor leaked confidential personnel file information on his co-worker, who was his opponent in race for district attorney, to the media and was disciplined); *Charles v. Grief*, 522 F.3d 508, 510 (5th

Cir. 2008)(plaintiff terminated after emailing administration about racial discrimination, retaliation against him and other minority employees, violations of the Texas Open Records Act, misuse of state funds and other misconduct of management.) Polk was not restrained or restricted from running for office nor did she publish any expressive speech.

Polk concludes her opposition that the Fifth Circuit was correct in concluding there is a genuine issue of material fact, which is not appealable. Opp.18. However, taking any and all facts alleged by Sinegal out of the equation and leaving only Polk's claim as stated in her first amended complaint, Polk still presents nothing more than she ran for Justice of the Peace coupled with the conclusory statement that she was "speaking out against Gillam." Polk's claim has never been anything other than an allegation of a First Amendment violation based on her candidacy alone. Even assuming she was terminated in retaliation for her candidacy, it would not have been a violation of any constitutionally protected right under the First Amendment and as such was not deemed a "clearly established" right under the First Amendment by the Fifth Circuit at the time of her termination.

## 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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