

No. 18-330

**In The
Supreme Court of the United States**

DOUGLAS WALTER GREENE,

Petitioner,

v.

FROST BROWN TODD, LLC,
MARK FRANCIS SOMMER, and TONY C. COLEMAN,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The only question that would be properly before this Court if certiorari were granted is whether the United States Court of Appeals for the Sixth Circuit erred in affirming the district court in granting summary judgment in favor of Respondents, resulting in the dismissal of Petitioner's legal malpractice claims against Respondents. As this matter rests on a state common law legal malpractice claim, though, it is not a proper question for this Court's review.

Contrary to Petitioner's Questions Presented in his Petition for a Writ of Certiorari ("Petitioner's Brief"), Page i, there were no Constitutional Amendments raised in the underlying matter. For the first time in this litigation, Petitioner raises violations of the First, Fourth, Fifth, Seventh, Eighth and Fourteenth Amendment in his Questions Presented, but these were not resolved by the lower courts.

PARTIES TO THE PROCEEDINGS

Petitioner seeks certiorari from the Sixth Circuit’s unpublished decision which consolidated three cases from the United States District Court Western District of Kentucky. All three cases involved Petitioner as the Plaintiff and stemmed from his termination from United Parcel Service Co. (“UPS”). Respondents Frost Brown Todd, LLC, Mark Francis Sommer, and Tony C. Coleman were Defendants in *Greene v. Frost Brown Todd, LLC, Mark Francis Sommer and Tony C. Coleman*, United States District Court Western District of Kentucky, Case No. 3:14-cv-00619. This brief is submitted on behalf of these three Respondents.

Petitioner’s Brief also addresses the other two cases consolidated by the Sixth Circuit, which involved Independent Pilots Association (“IPA”), Robert Travis, Erick Gerdes, Thomas Kalfas, Bill Cason and Harry Trefes, Defendants in *Greene v. Independent Pilots Association, et al.*, United States District Court Western District of Kentucky, Case No. 3:14-cv-00628; and IPA/UPS System Board of Adjustment, United Parcel Service Co., and Independent Pilots Association, Defendants in *Greene v. IPA/UPS System Board of Adjustment, et al.*, United States District Court Western District of Kentucky, Case No. 3:15-cv-00234. These two matters will not be addressed in this Brief in Opposition.

CORPORATE DISCLOSURE STATEMENT

Respondents, Frost Brown Todd, LLC (“FBT”), Mark Sommer, in his capacity as member of Frost Brown Todd (“Sommer”), and Tony Coleman, in his capacity as member of Frost Brown Todd (“Coleman”) (collectively “Respondents” and/or “FBT”), in compliance with Supreme Court Rule 29.6, state that FBT is not a wholly owned subsidiary and no publicly held corporation owns 10% or more of its stock. FBT is not aware of any other publicly owned corporation who is not a party to this proceeding that has a financial interest in the outcome of this proceeding.

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OPINIONS AND ORDERS

U.S. Court of Appeals Sixth Circuit Order entered December 4, 2017 in Case Nos. 16-6761; 16-6763 and 16-6772, *Douglas Walter Greene v. Frost Brown Todd, LLC*, 2017 WL 6210784 (C.A.6 (Ky.) 2017) (unreported); attached to Petitioner’s Brief at Appendix, Pages 1-15 (“Sixth Circuit’s Order”)

U.S. District Court, W.D. Kentucky Memorandum Opinion entered November 21, 2016 in Civil Action No. 3:14-CV-00619, *Greene v. Frost Brown Todd, LLC*, 2016 WL 6877746, at *1 (W.D.Ky. 2016); attached to Petitioner’s Brief at Appendix, Pages 16-44 (“Dist. Court Opinion”)



STATEMENT OF JURISDICTION

Petitioner’s Brief seeks review of the Sixth Circuit Court of Appeals Order affirming the District Court, issued on December 4, 2017. The Sixth Circuit denied Greene’s three petitions for rehearing en banc on April 13, 2018. On June 29, 2018, Petitioner filed his Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, which was granted on July 5, 2018, extending Petitioner’s deadline to September 10, 2018.

This case was originally filed by the Petitioner, Douglas Walter Greene (“Petitioner” and/or “Greene”), in the United States District Court, Western District of Kentucky, Louisville Division (“District Court”) on

September 9, 2014 due to diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). [Complaint, attached as Respondents' Appendix, Page A1.] Petitioner is requesting jurisdiction of this Court under 28 U.S.C. § 1254.

Respondents do dispute the jurisdiction as far as the issues actually raised and reviewed by the lower courts. Greene's brief presents issues well outside the scope of review. Specifically, as to Greene's "Statement of Jurisdiction" [Petitioner's Brief, Page 1], Respondents contest and disagree with any assertion that this Court has jurisdiction pursuant to "28 U.S.C. § 1651(a), and 28 U.S.C. § 2403(a) raising a constitutional question" as there were no constitutional questions presented to the courts below.

◆

CONSTITUTIONAL PROVISIONS AND STATUTES

There are no constitutional provisions, treaties, statutes, ordinances, or regulations involved in this case.

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INTRODUCTION

Although somewhat difficult to discern from the excessive briefing presented to this Court and the multiple pages titled "Statement of Consolidated Cases," it appears that *pro se* Petitioner Greene's petition challenges the District Court's award of summary judgment in favor of Respondents, and the Sixth Circuit's

affirmation of the summary judgment, on the grounds that essentially there is a “Stranglehold of Corruption by a Few Denying Americans Access to Justice” because of “Dark Money” influencing the judges in both the Western District of Kentucky and the Sixth Circuit. [Petitioner’s Brief at Pages 6-20.] Greene does not appear to actually challenge the factual or legal findings of the Sixth Circuit; instead he attacks senators, judges, and attorneys in the state of Kentucky. Respondents disagree with the misstated allegations and conspiracy theories as well as Petitioner’s incorrect statements of the law at issue laid out in his Brief. However, these misstatements of facts and law are not relevant to the underlying matter as they have only been alleged for the first time in Petitioner’s Brief, and do not warrant a writ of certiorari. The District Court did not err in granting summary judgment to Respondents, and the Sixth Circuit correctly affirmed the District Court’s order. This case, based on state legal malpractice claims, does not present any compelling reasons justifying a review on certiorari.



COUNTERSTATEMENT OF THE CASE

Petitioner Greene is a commercial airline pilot, formerly employed by United Parcel Service (“UPS” or “Company”). He was terminated from that employment in 2013 after he refused to submit to a medical examination. Greene’s 2013 termination proceedings gave rise to three lawsuits. In the first, *Greene v. Independent Pilots Association, et al.*, No. 3:14-CV-00628, Greene

alleged that IPA, the union that represents UPS's pilots, failed to fulfill its duty of fair and adequate representation. In *Greene v. IPA/UPS System Board of Adjustment, et al.*, No. 3:15-CV-00234, Greene sought to overturn the arbitration that concluded UPS had just cause to terminate him under the terms of the UPS-IPA Collective Bargaining Agreement ("CBA"). Finally, in this case, Greene claims that Respondents had a conflict of interest that ultimately caused his 2013 termination.

The only order arguably subject to review by certiorari is the Sixth Circuit's Order affirming the District Court's summary judgment order in favor of Respondents. The facts of the case are set out fully in the Sixth Circuit's Order and the District Court's Memorandum Opinion. Petitioner does not appear to challenge these underlying facts, and instead conducts unsupported smear campaigns on judges, attorneys and senators in the Western District of Kentucky. While the underlying facts of this case are not expressly challenged, Respondents will briefly address the relevant facts and procedural history for this Court's convenience and for the purpose of countering the misstatements of fact set forth in Petitioner's Brief.

I. MATERIAL FACTS

Greene served as a pilot for UPS from 1994 until November 2013. [Sixth Circuit's Order, Petitioner's Appendix, Page 2.] His termination from UPS is the basis of his three lawsuits. Greene, without any support or reference to the record, discusses "Dark Money" connected to Respondent FBT and alleged political alliances with Mitch McConnell, and virtually every judge in the Western District of Kentucky, and one judge on the Sixth Circuit. Greene places the blame for his termination on a conspiracy theory involving Respondents, UPS, IPA, Mitch McConnell and these judges concocted solely for the purpose of firing him from UPS. In reality, Greene was terminated from UPS for failure to submit to a medical examination. [Dist. Court Opinion, Petitioner's Appendix, Page 18.] He asserted in the underlying litigation that a conflict of interest at FBT caused his termination, and a conflict of interest caused a Kentucky tax dispute to be prolonged despite his ultimate success. These claims were held to be without merit.

The facts of the underlying case are laid out fully in the Sixth Circuit's Order, December 4, 2017 [Petitioner's Appendix, Page 1] and in the District Court's Memorandum Opinion, November 21, 2016 [Petitioner's Appendix, Page 16.]

a. UPS Served with Subpoenas Regarding Greene's Tax Information.

Prior to Greene's termination, on March 25 2010, UPS was served a subpoena duces tecum by the Commonwealth's Attorney requesting "a certified copy of all United Parcel Service records that specifically address and establish the Louisville assign domicile at which crewmembers are based[.]" [Dist. Court Opinion, Petitioner's Appendix, Page 18.] Respondent Coleman was retained by UPS to represent UPS in compliance with the subpoena. [*Id.*]

On June 22, 2010, UPS was served another subpoena duces tecum. This subpoena specifically requested all of Greene's personal tax information for a grand jury investigation regarding Greene's failure to pay Kentucky income taxes. [*Id.*] Again, on September 16, 2010, UPS was served a second subpoena duces tecum requesting Greene's personal tax information for a grand jury investigation regarding Greene's failure to pay Kentucky income taxes. Coleman, on behalf of his client UPS, submitted the requested documents related to Greene to the Commonwealth Attorney. [*Id.* at Petitioner's Appendix, Pages 18-19.] At this point in time, as such, UPS was specifically aware of Greene's tax issues no later than June 22, 2010.

b. Greene's 2011 Termination.

In 2011, Greene became involved in his first termination proceeding after UPS discharged Greene for making threats to a pilot supervisor. The Independent

Pilots Association (“IPA” or “Union”) is the recognized bargaining representative for pilots in the employ of UPS; and IPS and UPS have entered into a Collective Bargaining Agreement (“CBA”). [*Id.* at Petitioner’s Appendix, Page 18.]

Ultimately, the issues in Greene’s 2011 discharge were settled the morning of the arbitration hearing and he continued employment with UPS. Respondent Coleman represented UPS in the 2011 termination hearing regarding Greene. [*Id.* at Petitioner’s Appendix, Page 19.] Per his own admission, Greene’s personal tax matters were addressed during the 2011 termination hearing. [*Id.*] Thus, UPS was again independently aware of Greene’s personal tax matters in 2011.

c. Sommer’s Tax Representation of Greene.

On or about December 13, 2012, Greene sought out the services of Respondent Sommer, an attorney with Bingham Greenebaum Doll, LLP (“BGD”). [*Id.* at Petitioner’s Appendix, Page 19.] Greene requested Sommer’s services in regards to the Kentucky income tax audit and investigation by the Kentucky Department of Revenue (“KDOR”) regarding residency issues. [*Id.* at Petitioner’s Appendix, Pages 19-20.] Greene was disputing Kentucky’s tax assessment against him as Greene was not a resident of Kentucky. [*Id.*]

Sommer withdrew as a member of BGD and began practicing with Respondent FBT in February of 2013. [*Id.* at Petitioner’s Appendix, Page 20.] Sommer sent Petitioner a letter indicating Sommer’s withdrawal from

BGD and move to FBT. [*Id.*] Sommer continued to act as Greene’s counsel and attempted to resolve Greene’s tax matter from February 18, 2013 through October 17, 2013, when Greene terminated Sommer by letter. [*Id.*] Ultimately, Greene was successful in challenging the investigation performed by the KDOR. [*Id.* at Petitioner’s Appendix, Page 19.]

d. Greene’s 2013 Termination.

On March 19, 2013, Greene was involved in an incident in which he attempted to take a pair of scissors onto a FedEx airplane while riding in a “jump seat” and was requested to remove the scissors by a security officer. [*Id.*] Following the incident, the FedEx security unit sent a report describing the incident to the security department at UPS. [*Id.*] UPS Chief Pilot Roger Quinn (“Quinn”) requested that the report be notated in Greene’s Crewmember Exception/LOA History, called the “EHR.” [*Id.*] The EHR is computerized and maintained on a chronological basis to include both positive and negative remarks regarding events such as performance observations, leaves of absence and other incidents. Greene was upset by the EHR entry regarding this incident and requested the report be removed. [*Id.* at Petitioner’s Appendix, Page 21.] Ultimately, Quinn determined that the EHR notation would not be removed; however, Quinn agreed to the addition of an amendment indicating that Greene “acted properly” during the scissor incident. [*Id.*; see also Sixth Circuit’s Order, Petitioner’s Appendix, Page 3.] “Greene, nevertheless, became fixated on the incident”

and persistently continued to vocalize his displeasure with the EHR notation. [*Id.* at Page 21.]

UPS became concerned with Greene's behavior following this incident. UPS removed Greene from service and placed him on paid leave after discovering during an investigation that Greene had secretly recorded conversations with company officials, and alluded to using painkilling drugs to manage a back injury. [Dist. Court's Order, Petitioner's Appendix, Page 21.] UPS then requested Greene to be medically examined pursuant to the CBA to which Greene repeatedly refused. [*Id.*; *see also* Sixth Circuit's Order, Petitioner's Appendix, Page 3.] After refusing to submit to the third request, Greene was terminated for refusing to submit to a medical examination on November 22, 2013. [*Id.* at Page 21.]

Respondent Coleman, a member of Respondent FBT, was retained on approximately August 22, 2013 to initially represent UPS in this employment matter. [*Id.*]

e. System Board Arbitration and Award.

Preparations for the arbitration pursuant to the terms of the CBA were commenced after Greene made several challenges and grievances surrounding his termination. Greene's employment grievances were submitted to a binding arbitration before a System Board of Adjustment. [*Id.* at Petitioner's Appendix, Page 22.] Respondent Coleman was originally scheduled to represent UPS at the arbitration but withdrew from

representation prior to the arbitration. [*Id.*; *see also* Sixth Circuit's Order, Petitioner's Appendix, Page 4.]

The arbitration was held September 15-17, 2014, and the parties were all afforded the opportunity to examine and cross-examine witnesses and to introduce documentary evidence. [*Id.* at Petitioner's Appendix, Pages 23, 37.] Greene was permitted to be represented individually by separate counsel. [Sixth Circuit's Order, Petitioner's Appendix, Page 4.] The System Board kept a detailed record of the hearing and permitted post hearing briefing. [District Court's Order, Petitioner's Appendix, Page 37.] The arbitrator ultimately issued a fifty-six page decision explaining that Greene's termination was proper. [*Id.*]

In the lengthy decision, the System Board catalogued the evidence presented at the hearing including the "objective evidence" related to Greene's medical issues, and included the following in his brief as objective evidence:

[Greene's] acknowledgement of a longstanding back injury, his use of pain-killing drugs to treat that injury, his "unrelenting and wildly speculative" statements during discussions with UPS's managers, and his fixation on the scissor incident and EHR notation.

[*Id.* at Pages 22-23.] In sum, the Award determined that Greene was properly requested to have a medical examination and properly terminated when Greene did not comply with that request despite multiple opportunities to do so.

II. PROCEDURAL HISTORY

Despite the allegations set forth in Greene's brief regarding "Dark Money," "Stranglehold of Corruption," "false claims and fabrication of evidence," and "workplace violence" [Petitioner's Brief, Pages 5, 6, 17], this case is an attorney malpractice action. [Complaint, Respondents' Appendix, Page A1.] Greene alleged that FBT had a conflict of interest representing Greene in an investigation by the KDOR and representing Greene's employer, UPS, in termination proceedings. Greene asserted two theories of malpractice in the District Court.

First, Greene asserted that but for the conflict of interest, "Mr. Greene's personal [tax investigation] matters would not have been known to UPS and used against him in his termination matter, and Mr. Greene would have been more likely successful in mediating his conflict with UPS and avoiding termination." [Complaint, ¶25, Respondents' Appendix, Page A6.] The District Court, however found this argument without merit. The record in the underlying binding arbitration of Greene's dispute with UPS confirmed: (1) that UPS was independently aware of the KDOR's investigation of Greene through direct receipt of subpoenas from the Commonwealth Attorney regarding Greene and comments in UPS's 2011 termination proceeding against Greene which took place before any conflict of interest involving FBT existed; and (2) that Greene was properly terminated for failure to submit to a contractually required medical examination. The District Court properly determined that, as a matter of law, the findings of the arbitration panel are given

preclusive effect, thus, preventing Greene from re-litigating the cause of his termination in the current action. [Dist. Court Opinion, Petitioner's Appendix, Pages 30-41.]

As the KDOR's investigation was determined not to be a factor in or the cause of Greene's termination by the arbitration panel, and the District Court upheld the System Board's determination that UPS had just cause to terminate Greene for his failure to submit to the required medical examination in *Greene v. IPA/UPS System Board of Adjustment, et al.*, No. 3:15-CV-00234, the District Court correctly concluded that Greene could not establish that the alleged conflict of interest caused his termination. [Dist. Court Opinion, Petitioner's Appendix, Pages 30-41.] Greene was unable to prove the requisite element of causation under this malpractice theory and his claim was dismissed by the District Court. [*Id.*].

Second, Greene asserted that "[b]ut for the conflict of interest, Mr. Greene's dispute with the Kentucky Department of Revenue would have been more vigorously pursued by Mr. Sommer and more expeditiously resolved." [Complaint, ¶26, Respondents' Appendix, Page A7.] However, Greene proffered no evidence that Sommer failed to take any appropriate actions and offered no evidence, other than mere speculation, to indicate that his tax issues could have been resolved any "more expeditiously." The District Court properly concluded that, under Kentucky law, expert testimony is required in malpractice cases to prove both the breach of the standard of care and causation of damages from the

underlying legal matter. [Dist. Court Opinion, Petitioner's Appendix, Pages 41-43.] Greene had named no expert witnesses and the time for disclosing expert witnesses had long passed. As such, the District Court found that Greene was unable to prove this second theory of malpractice and properly dismissed his Complaint. [*Id.*]

The Sixth Circuit affirmed the trial court finding that Greene's theory on appeal that the KDOR, the IPA, UPS, FBT, Coleman and the arbitrator "conspired to drum up false insubordination charges against him in order to rid UPS of an allegedly troublesome employee" was "not supported by any reasonable reading of the record." [Sixth Circuit Order, Petitioner's Appendix, Pages 13-14.]



ARGUMENT FOR DENYING THE PETITION

I. PETITIONER'S BRIEF CONTAINS NUMEROUS MISSTATEMENTS OF BOTH FACT AND LAW THAT ARE NOT PROPERLY BEFORE THIS COURT.

To point out all of the misstatements of fact and law included in Petitioner's brief in accordance with U.S. Sup. Ct. Rule 15.2 would essentially be discussing the entire brief word for word. In short though, Respondents adamantly disagree with Petitioner's discussion of FBT, FBT's attorneys (particularly those not even involved in this matter) and the judges sitting in the Western District of Kentucky, as well as on the

Sixth Circuit. [Petitioner's Brief, Pages 5-20.] These new allegations are misstatements which are completely unsupported by the record, and they are offensive to the many principled judges in the Western District of Kentucky.

As to the misstatements of law contained in Petitioner's Brief, this case is simply about a state law legal malpractice claim. Petitioner's claims against Respondents have morphed into something that is unrecognizable from his initial Complaint. For example, Petitioner first mentioned a Racketeer Influenced and Corrupt Organizations ("RICO") claim in his appellate brief and continues to list this claim in his Petition. [Petitioner's Brief, Page 5.] Asserting that a RICO claim is a part of this underlying case is a misstatement of the law involved in this matter. Respondents also disagree that this case involves any Constitutional provisions, treaties, statutes, ordinances, regulations or federal questions, and any such statements in Petitioner's Brief are a misstatement of the law involved in this matter. As stated, Petitioner's claims against Respondents only involve a state legal malpractice claim, and as Petitioner does not even discuss the legal malpractice claim in his brief, any discussion of the law in his brief related to this case is a misstatement.

II. THE UNITED STATES SUPREME COURT SHOULD NOT GRANT A PETITION FOR A WRIT OF CERTIORARI WHICH FAILS TO SET FORTH ANY LEGITIMATE QUESTIONS.

The review on a writ of certiorari is one of judicial discretion. U.S. Sup. Ct. R. 10. “A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” *Id.* As is the case here, Petitioner attempts to argue that there were incorrect factual findings and misapplications of Kentucky state law. However, he fails to point to anything specific in the record that contradicts the factual findings, and fails to even address the relevant law. There are no compelling reasons for this Court to grant this petition for writ of certiorari.

First, this Court should deny writ of certiorari because the brief does not accurately represent the underlying case. Petitioner was terminated from his position at UPS and his underlying case stems solely from this termination. This Court would not know that from his confusing and misleading brief. Instead, Petitioner discusses the alleged “Dark Money” involving Respondent, as well as conspiracies involving the KDOR, UPS, IPA and FBT. Petitioner barely discusses his underlying legal malpractice claims, and if he does, they are inaccurate representations of both fact and law. A petition must give “adequate information concerning the record and essential facts.” *Erie R. Co. v. Kirken-dall*, 266 U.S. 185, 185-86 (1924). Petitioner has failed

to give an accurate representation of the record and essential facts. In fact, Petitioner is making allegations regarding “Dark Money” for the first time, and referencing attorneys and judges that were never involved in this case. He is also alleging constitutional questions for the first time. The record below does not support a review of such claims and should be dismissed. *See Ellis v. Dixon*, 349 U.S. 458, 464 (1955) (“[W]e could not on this vague and empty record decide the constitutional issues sought to be presented. This Court has often refused to decide constitutional questions on an inadequate record.”); *see also* U.S. Sup. Ct. Rule 14.4 (“The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.”).

Second, this Court does not review and decide questions that were “neither raised nor resolved below.” *Glover v. U.S.*, 531 U.S. 198, 204 (2001); *see also U.S. v. Wells*, 519 U.S. 482, 488 (1997) (This Court’s rule is that “we may address a question properly presented in a petition for certiorari if it was pressed in or passed on by the Court of Appeals.”). Ultimately, this Court is one of “final review and not first review.” *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 202 (2012). In his brief, Petitioner states that his question presented relates to several Constitutional Amendments [Petitioner’s Brief, Page i]; however, these constitutional questions were raised for the first time in his Petition, and several are inapplicable to a civil case such as this one. Petitioner’s allegations and claims are not properly

before this Court; as such, this Court should deny Petitioner's writ of certiorari.

Lastly, and most importantly, this case does not involve a compelling reason for such a review. Importantly, the underlying case does not involve conflicting decisions between United States courts of appeals, it does not involve a federal question, and it does not even involve federal law. *See* U.S. Sup. Ct. Rule 10. Again, as such, it is not an appropriate case for the United States Supreme Court's review.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Supreme Court of the United States deny Petitioner's Petition for a Writ of Certiorari.

October 12, 2018	<p>Respectfully submitted,</p> <p>DENNIS D. MURRELL, ESQ. <i>Counsel of Record</i> KATHERINE T. REISZ, ESQ. MIDDLETON REUTLINGER 401 South 4th Street, Suite 2600 Louisville, KY 40202 Tel: (502) 584-1135; Fax: (502) 561-0442 dmurrell@middletonlaw.com kreisz@middletonlaw.com</p> <p><i>Attorneys for Respondents</i> <i>Frost Brown Todd, LLC,</i> <i>Mark Francis Sommer,</i> <i>and Tony C. Coleman</i></p>
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