No. 17-_____

In the Supreme Court of the United States

RICHARD L. LAMBERT,

Petitioner,

–v–

JEFFERSON B. SESSIONS, III,
ATTORNEY GENERAL, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

RICHARD LAMBERT
PETITIONER PRO SE
929 GREGG ROAD
FRIENDSVILLE, TN 37737
(865) 456-0039
LAMBERT0618@GMAIL.COM

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QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the Sixth Circuit erred in holding that a Designated Agency Ethics Official, who is government attorney, owes no duty of care to a former agency employee in providing legal counsel to the former employee?

2. Whether the U.S. Court of Appeals for the Sixth Circuit erred in holding that the statute of limitations for *Bivens* claims is determined by the statute of limitations from the state where the claim was filed rather than the state in which the cause of action arose?

PARTIES TO THE PROCEEDING

Petitioner is Richard Lambert, who was the appellant in the court of appeals. Respondents are the United States, Attorney General Jefferson B. Sessions III (in his official capacity); Former Federal Bureau of Investigation Director Robert S. Mueller III (in his official capacity); Federal Bureau of Investigation employee Patrick W. Kelley (in his official and individual capacities); An Unknown Number of Unknown Employees of the U.S. Department of Justice; An Unknown Number of Unknown Employees of the Federal Bureau of Investigation; the U.S. Department of Justice; and, the Federal Bureau of Investigation. Respondents were appellees in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Richard Lambert respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is unreported. The order denying rehearing en banc (App., *infra*, 31a-32a) is unreported. The opinions of the district court (App., *infra,* 8a-18a and 19a-30a) are reported by Westlaw at 2016 WL 632461 and 2017 WL 238435.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2017. A timely petition for rehearing was denied on January 4, 2018. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App.37a-43a.

STATUTORY PROVISIONS

- **18 U.S.C. § 207(c)**
  One-Year Restrictions on Certain Senior Personnel of the Executive Branch and Independent Agencies.
- **18 U.S.C. § 207(j)(1)**
  Exceptions. Official Government Duties.—
- **18 U.S.C. § 216**
  Penalties and Injunctions
- **28 U.S.C. § 530B**
  Ethical Standards for Attorneys for the Government
- **28 U.S.C. § 1346**
  United States as Defendant

REGULATORY PROVISIONS

- **5 C.F.R. 2638.202(b) (2012)**
  Selection of a Designated Agency Ethics Official
- **5 C.F.R. 2638.203(b) (2012)**
  Program Elements
- **5 C.F.R. 2638.302 (2012)**
  Who May Request a Formal Advisory Opinion

- **5 C.F.R. 2638.501(c) (2012)**
  Violations of Criminal Statutes
- **5 C.F.R. 2638.505(b) (2012)**
  Notice
- **5 C.F.R. 2641.301 (2012)**
  Statutory Exceptions and Waivers
- **48 C.F.R. 7.500 (2012)**
  Scope of Subpart
- **48 C.F.R. 7.503 (2012)**
  Policy

JUDICIAL RULES

- **District of Columbia Rule of Professional Conduct 1.1**
  Competence

STATEMENT

The duty of care owed by attorneys for the federal government is fixed by 28 U.S.C. § 530B. The statute requires government lawyers to comply with the Rules of Professional Conduct in the states where they perform their duties. When a government attorney violates the duty of care prescribed by those rules and injures the person to whom the duty of care is owed, a claim for legal malpractice may be asserted under the Federal Tort Claims Act (FTCA). In this case, the Sixth Circuit denied Petitioner's FTCA claim for legal malpractice against the FBI's Designated Agency Ethics Official (DAEO) by exempting the DAEO from the ambit of 28 U.S.C. 530B and the D.C. Rules of Professional Conduct. It did so by holding that the DAEO, who is a government attorney, owed no duty of care to a former agency employee when the DAEO exercised his regulatory authority to provide unsolicited legal counsel to the former employee and erroneously adjudicated the former employee a violator of federal criminal ethics law. That holding is wrong. It misapprehends the Ethics in Government Act of 1978 and the regulations of the Office of Government Ethics. It also ignores the black letter language of the federal conflict of interest statute, disregards the express factual allegations in Petitioner's complaint, contravenes established precedent of the D.C. Court of Appeals, and invalidates 28 U.S.C. 530B.

The Sixth Circuit also wrongly held that Petitioner's related *Bivens* claim for deprivation of due process was time barred. It erroneously applied the statute of limitations from the state where the claim was filed (Tennessee) rather than the state where the claim arose (District of Columbia). This holding is inconsistent with this Court's and the Sixth Circuit's prior precedents and it conflicts with the holdings of other circuits and the district courts within the Sixth Circuit.

This Court's review and reversal is warranted.

Petitioner Lambert is a retired member of the FBI's Senior Executive Service and the former Inspector in Charge of FBI Major Case #184–"Amerithrax." App.9a. Amerithrax was the FBI's investigation into the anthrax mailings of 2001 which killed five and sickened 17. App.9a. Special Agent Lambert led the investigation from 2002 through 2006. App.9a. In July

2006, Lambert filed a Report of Mismanagement regarding the FBI's handling of the investigation pursuant to 5 U.S.C. 2303, commonly known as the "FBI Whistleblower Protection Act." App.9a. Lambert conveyed his report only to the FBI. He did not send it to Congress or the U.S. Department of Justice (DOJ). App.9a. Nonetheless, CBS News obtained and publicized portions of Lambert's confidential and internal reporting in a 60 MINUTES segment critical of the FBI's handling of the investigation. App.9a. In light of the notoriety of his whistleblower report, Lambert retired from the FBI in 2012, the year he became eligible to do so. App.1a

Immediately upon retiring, Lambert went to work for the U.S. Department of Energy (DOE) as a Senior Counterintelligence Officer (SCIO) responsible for protecting eight DOE facilities in Tennessee, Ohio, and Kentucky from terrorist attack and the activities of foreign intelligence services. App.2a, 9a. Lambert's SCIO office was physically housed at Oak Ridge National Laboratory (ORNL) in Oak Ridge, Tennessee pursuant to a contract stipulation between DOE and ORNL's managing contractor, UT-Battelle (a not-for-profit partnership between the University of Tennessee and Battelle Memorial Institute). App.1a-2a. Lambert was appointed to the SCIO position by DOE[1] and reported directly to DOE officials in Washington.

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[1] DOE Order 475.1 provides: "SCIOs are appointed by the [DOE] OCI Director or the [National Nuclear Security Administration] ODNCI Chief directly or in consultation with local management." U.S. Dept. of Energy, Counterintelligence Program, Order 475.1, Attachment 2 at 13 (2004); https://www.directives.doe.gov/directives-documents/400-series/0475.1-BOrder/@@images/file

App.2a. The entirety of Lambert's SCIO salary was paid by DOE and disbursed to Lambert through UT-Battelle's financial management system. App.46a. These arrangements are consistent with the government's Federal Acquisition Regulations which expressly prohibit government contractors from directing and controlling counterintelligence operations because such operations are "inherently governmental functions." 48 C.F.R. § 7.503(a), (c)(8); App.40a.

Pursuant to the terms of Presidential Decision Directive 61 (PDD-61)[2], a number of FBI Special Agents were embedded in Lambert's SCIO office at ORNL. App.46a-47a. Lambert was in communication with these FBI agents almost every day to share threat intelligence, deconflict operations, and collaborate in joint FBI/DOE investigations. *See* App.2a, 46a-47a. The FBI supervisor of these agents was a frequent visitor to Lambert's office at ORNL to coordinate in matters of mutual concern. *See* App.2a, 46a-47a. Lambert's communications with these FBI agents were required by the terms of the job posting for Lambert's SCIO position, the contract between DOE and UT-Battelle, PDD 61, DOE Order 475.1, and numerous FBI/DOE memoranda of understanding and other policy

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[2] Due to numerous problems with the DOE counterintelligence program, in 1998 the Clinton Administration issued PDD 61 which "mandated that the FBI assume leadership of DOE's CI program." Alfred Cumming, Congressional Research Service, Counterintelligence Reform at the Department of Energy: Policy Issues and Organizational Alternatives 1 (2003), https://www.everycrsreport.com/files/20030721_RL31883_45b1a8e50f12ff2ff188ea0fb7a76df2334528a7.pdf. Because portions of PDD-61 are classified "Confidential," its text is not included in the appendix.

documents, all of which are detailed in Lambert's Second Amended Complaint. App.9a, 20a.

Respondent Kelley is an FBI attorney, a member of the FBI's Senior Executive Service and the FBI's DAEO. App.2a. As the DAEO, he was empowered by the United States Office of Government Ethics (OGE) to "counsel" "former agency officials on post-employment conflict of interest standards." 5 C.F.R. 2638.202(b)(4) (2012); App.36a. Seven months after Lambert assumed his DOE SCIO position, Kelley opined and counseled that Lambert's service as an SCIO violated the federal criminal conflict of interest law found at 18 U.S.C. 207(c). App.2a, 10a. Section 207(c) generally imposes a one year "cooling off" period which prohibits former agency executives from communicating with current agency employees for a year after leaving the agency. App 2a, 33a. Kelley determined that Lambert's ongoing communications with the FBI counterintelligence agents embedded in Lambert's office violated the statute. App.2a, 45a-46a.

Lambert contends Kelley's determination was error because § 207(c) contains a key exception that Kelley negligently overlooked and failed to apply. App.2a, 45a. The statute does not prohibit a former executive from communicating with current agency employees when the communications are made "on behalf of" "the United States." 18 U.S.C. 207(c). This exception is emphasized in § 207(j): "The restrictions contained in this section [207] shall not apply to acts done in carrying out official duties on behalf of the United States . . . ." 18 U.S.C. 207(j)(1)(A); App.34a. Regulations promulgated by the OGE reiterate the statutory exception: "A former employee is not prohibited by any of the prohibitions of 18 U.S.C. 207 from engaging in any activity on behalf of the United States." 5 C.F.R. 2641.301(a) (2012); App.39a.

Lambert alleges Kelley did not perform any legal research or conduct any legal analysis in making his determination that Lambert was violating federal ethics law. App.48a. Instead, Kelley concluded that Lambert was violating § 207(c) by telephonically canvassing other lawyers at DOE and DOJ. App 46a-48a. An e-mail crafted by Kelley establishes that Kelley failed to gather the relevant facts and ascertain the applicable law in making his determination, causing him to miss the "on behalf of the United States" exception to § 207(c). App.46a-47a. Kelley's telephone polling also sidestepped the established process in place for resolving DAEO uncertainty. OGE regulations expressly authorized and implicity encouraged Kelley to seek an advisory opinion from OGE–the preeminent authority in this matter: "A designated agency ethics official may always request an opinion [from OGE] concerning a situation about which he or she has knowledge." 5 C.F.R. 2638.302 (2012); App.37a. The record is devoid of any evidence that Kelley sought such an opinion from the OGE.

Upon opining that Lambert was violating 18 U.S.C. 207(c), Kelley informed other FBI officials that he would "deliver the determination" to Lambert by e-mail. App.46a. Kelley did. App.2a. He also telephoned Lambert to "deliver the determination." App.47a. Kelley provided no advance notice to Lambert that he was officially adjudicating the issue of Lambert's compliance with § 207(c), nor did he provide Lambert with the opportunity for a hearing on the issue. *See* App.3a, 13a. When Lambert inquired as to the legal rationale for Kelley's "determination," Kelley was unresponsive. App.2a, 21a, 47a-48a. Kelley provided no application of law to fact to support his conclusion. App.21a, 47a-48a. Accordingly, Lambert rejected Kelley's opinion and his "determination" explaining to Kelley that Lambert's service as a DOE SCIO plainly fell within the "on behalf of the United States" exception to § 207(c). App.47a. In response to Lambert's rejection, Kelley delivered his legal determination to DOE and UT-Battelle, accusing Lambert of violating federal criminal ethics law. App.2a, 47a. As a result, Lambert's employment was terminated on June 10, 2013. App.2a. Kelley also delivered his determination to the DOJ Office of the Inspector General (IG) and the DOJ Public Integrity Section, triggering year long criminal investigations by both entities. App.2a, 47a. These investigations failed to adduce any evidence of a § 207(c) violation by Lambert.[3]

The Government avers that Kelley's DAEO mantle was paladinian–vesting him with "complete discretion" to adjudicate Lambert in violation of § 207(c) and conferring the unilateral authority to convey his determination to whomever he chose. App 54a. In support of its position, the Government anchors on an OGE regulation which empowers DAEOs to "take prompt and effective action . . . to remedy . . . [v]iolations or

[3] The Government has not obtained a complaint, information, or indictment charging Lambert with a violation of § 207(c) and the statute of limitations for doing so expired on March 12, 2018 (five years after the one-year "cooling off" period in § 207(c) expired on March 12, 2013). *See* 18 U.S.C. 3282 (general five-year statute of limitations for non-capital federal crimes).

potential violations, or appearances thereof, of the agency's standards of conduct including post employment regulations." 5 C.F.R. 2638.203(b)(9)(i); App.54a. The government's trumpeting of this provision falls flat for two reasons. First, OGE regulations expressly forbid Kelley from making the determination that Lambert was violating § 207(c). Title 5, Code of Federal Regulations, Section 2638.501(c) admonishes: "Nothing contained in this part gives the Director [of OGE] <u>or any agency official</u> authority to make a finding that <u>any criminal statute</u> relating to conflicts of interest is being or has been violated." App at 37a (emphasis added). Second, the "prompt and effective [remedial] action" regulation the Government advances is inapplicable on its face. The regulation applies to "[v]iolations or potential violations, or appearances thereof, <u>of the agency's standards of conduct including post employment regulations</u>." 5 C.F.R. 2638.203(b)(9)(i) (emphasis added); App.37a. The law at issue here is 18 U.S.C. 207–a federal <u>statute</u>. Section 207(c) is not an "agency standard of conduct" promulgate by the FBI, nor is § 207(c) an agency "post employment <u>regulation</u>." Nothing in this OGE regulation cited by the Government gives a DAEO the authority to adjudicate an ostensible violation of 18 U.S.C. 207(c).

For the last two decades, Congress has mandated that federal government attorneys follow the Rules of Professional Conduct in the states in which they perform their duties: "An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. 530B, App.35a. In the District of Columbia, D.C. Rule of Professional Conduct 1.1 requires that a lawyer shall provide "competent representation" which "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." App.40a. Paragraph 5 of Rule 1.1 elucidates the duties of "thoroughness and preparation" as follows:

> (5) Competent handling of a particular matter includes <u>inquiry into and analysis of the factual and legal elements of the problem</u>, and <u>use of methods and procedures meeting the standards of competent practitioners</u>. It also includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake . . . .

App.42a. These precepts resound in D.C. cases involving claims for legal malpractice. *See, e.g.*, *Biomet v. Finnegan Henderson, LLP*, 967 A.2d 662, 665 (D.C. 2009) (a lawyer owes a duty to use a "reasonable degree of knowledge, care, and skill in practicing law"); *Morrison v. MacNamara*, 407 A.2d 555, 561 (D.C. 1979) ("a lawyer must exercise that degree of reasonable care and skill expected of lawyers acting under similar circumstances").

Because Kelley counseled Lambert regarding a legal determination that Kelley had no authority to make and which was negligently derived, Lambert sought redress for the termination of his employment caused by that determination. On April 2, 2015, Lambert filed a legal malpractice claim in the Eastern

District of Tennessee against the United States under the FTCA (28 U.S.C. 1346(b)(1)); App.35a-36a. Lambert also asserted two related FTCA negligence claims: (1) failure to properly train and supervise Kelley as required by 5 C.F.R. 2638.202(b)(4) ("the head of an agency should ensure that the experience of such appointees [DAEOs] in administrative, legal, managerial, or analytical work demonstrates the ability to— . . . [c]ounsel departing and former agency officials on post-employment conflict of interest standards") and (2) failure to ensure the requisite level of staffing for the DAEO position as required by Executive Order No. 12731 ("[e]ach agency head is directed to . . . [e]nsure that the rank, authority, staffing and resources of the Designated Agency Ethics Official are sufficient to ensure the effectiveness of the agency ethics program." Exec. Order No. 12731 § 301(e), *reprinted in* 55 Fed. Reg. 42,547, 42,549 (Oct. 17, 1990); App.3a, 22a. The district court had exclusive jurisdiction over Petitioner's FTCA claims pursuant to 28 U.S.C. 1346(b)(1).

Based on DAEO Kelley's alleged failure to provide Lambert with notice and a hearing prior to making his determination that Lambert was violating § 207(c), Lambert amended his complaint on June 20, 2015 to assert a constitutional tort claim against Kelley for deprivation of Lambert's Fifth Amendment procedural due process rights, relying on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). App.2a-3a, 22a. *See also, Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) ("[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential"); 5 C.F.R. 2638.505(b) (2012); App.38a (notice and hearing required before OGE Director makes a determination that ethics provisions have been violated). The district court had jurisdiction over Petitioner's *Bivens* claim pursuant to 28 U.S.C. 1331.[4]

The district court dismissed Lambert's legal malpractice and related claims under the FTCA, finding those claims barred by the FTCA statutory exceptions in 28 U.S.C. 2680(h). App.25a-27a. Those exceptions specify that the United States retains sovereign immunity under the FTCA for, *inter alia*, claims "arising out of . . . libel, slander, [and] misrepresentation." 28 USC 2680(h). The district court held that "[b]ecause Mr. Lambert's three claims brought under the FTCA arise out of defamation or misrepresentation, this Court lacks subject matter jurisdiction and must dismiss them." App.25a. The district court also dismissed Lambert's *Bivens* claim as time barred, applying the Tennessee one-year statute of limitations. App. 17a. It declined to apply the three-year statute of limitations from D.C. (where the deprivation of due process occurred), holding, "This suit was filed in Tennessee, and so arose in Tennessee." App.15a.

The Sixth Circuit affirmed the district court's dismissal of the FTCA claim but relied upon an entirely different premise. App.5a. The panel held that DAEO Kelley owed no duty of care to Lambert because it found (1) there was no attorney-client relationship between Kelley and Lambert and, (2) Lambert was not the "intended beneficiary" of Kelley's legal counsel:

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[4] Petitioner also brought a claim for violation of the Privacy Act, 5 U.S.C 552a, which was dismissed by the district court (App. 28a-30a), was not appealed (App.4a) and is not a subject of this petition.

"We need not determine whether Lambert's legal malpractice claim is barred by § 2680(h) because it fails on its own terms–the complaint does not show that there was an attorney-client relationship between Kelley and Lambert." App.5a. The panel cited four findings in support of its conclusion that no attorney-client relationship existed between Kelley and Lambert: (1) Kelley was employed by the FBI, not by Lambert; (2) Kelley was really providing legal counsel to the FBI, not to Lambert; (3) Kelley initiated contact with Lambert to convey Kelley's legal opinion rather than Lambert soliciting Kelley's legal opinion, and (4) "nothing in the complaint suggests that Kelley and Lambert mutually consented to form an attorney client relationship." App.5a-6a.

The panel also recognized but declined to apply an established exception to the requirement of an attorney client relationship in legal malpractice cases. That is, in the absence of a traditional attorney-client relationship, an attorney also owes a duty of care to the "intended beneficiary" of their services. The panel held, however, that Lambert was not the "intended beneficiary" of Kelley's legal counsel because: (1) "In the District of Columbia, only the intended beneficiary of a will can sue for legal malpractice in the absence of an attorney-client relationship;" and (2) Kelley unilaterally provided legal advice to Lambert rather than Lambert seeking out Kelley's legal opinion. App.6a.

The panel also affirmed the district court's dismissal of Lambert's *Bivens* claim, likewise applying the Tennessee one-year statute of limitations. It similarly held: "Lambert filed his complaint in Tennessee;

therefore, Tennessee's one-year statute of limitations for *Bivens* claims applies in this case." App.6a-7a.

REASONS FOR GRANTING THE PETITION

There are two reasons for granting this Petition for Certiorari. First, the panel's holding that DAEO Kelley owed no duty of care to Lambert is wrong. The decision misapprehends the Ethics in Government Act of 1978 and the regulations of the Office of Government Ethics, ignores the black letter language of the federal conflict of interest statute, disregards the express factual allegations in Petitioner's complaint, contravenes controlling precedent of the D.C. Court of Appeals, and invalidates 28 U.S.C. 530B. The panel has decided an important question of federal law that has not been, but should be, settled by this Court.

Second, the panel's holding that the *Bivens* statute of limitations claim is controlled by the state where the claim was filed (Tennessee) rather than the state where the cause of action arose (D.C.) warrants an exercise of this Court's supervisory powers. The panel's decision contravenes the prior precedent of this Court and the Sixth Circuit and conflicts with the holdings of other United States Courts of Appeal and the district courts within the Sixth Circuit.

A. The Panel's Holding That No Attorney-Client Relationship Existed Between DAEO Kelley and Lambert Because Kelley Was Employed by the FBI Misapprehends the Ethics in Government Act and 5 C.F.R. § 2638.202(b)(4)

The panel held that "Kelley was employed by the FBI, and therefore the attorney-client relationship in this case was between Kelley and the FBI, and not between Kelley and Lambert." App.5a. The panel cited no authority for the proposition that only the person paying for an attorney's services is owed a duty of care by the attorney. Indeed, in the government context, a wealth of case law demonstrates that a lawyer's federal paycheck is no litmus test for the absence of an attorney-client relationship between the attorney and the recipient of their advice. An attorney's employment by the government does not, *ipso facto*, preclude an attorney-client relationship from arising between that government attorney and the private citizen to whom the attorney is providing counsel. *See, e.g., Sullivan v. United States*, 21 F.3d 198 (7th Cir. 1994) (FTCA legal malpractice claim against a federal public defender); *Mossow by Mossow v. United States*, 987 F.2d 1365 (8th Cir. 1993) (FTCA legal malpractice claim by civilian son of Air Force parents against U.S. Air Force attorney); *Matthews v. United States*, 456 F.2d 395 (5th Cir. 1972) (FTCA legal malpractice claim by civilian wife of serviceman against Air Force legal personnel); *Knisley v. United States*, 817 F. Supp. 680 (S.D. Ohio 1993) (FTCA legal malpractice claim by civilian wife of serviceman against U.S. Army Legal Assistance Officer). Thus, while remuneration of the attorney by the person receiving the attorney's counsel is probative of an attorney-client relationship, it is not singularly dispositive as the panel proclaimed.[5]

Kelley's legal counsel to Lambert was intended by Congress and authorized by OGE. In the 1978 enabling legislation establishing the OGE, the Senate noted that "[p]erhaps, most importantly, the Ethics Office [OGE] . . . bear[s] responsibility for conducting an on-going program to inform employees of those laws and regulations which govern their conduct." Ethics in Government Act of 1978, Sen. Rep. No. 95-170, at 31 (1977), reprinted in 1978 U.S.C.C.A.N. 4216, 4247. In reauthorizing appropriations for the OGE in 1996, Congress listed OGE's first duty as "employee education and counseling," emphasizing that one of OGE's principal obligations is to "provide advice to outgoing government employees about negotiating for new jobs and post-employment restrictions." Office of Government Ethics Authorization Act of 1996, H. R. Rep. No. 104-595(I), at 1-2 (1996), reprinted in 1996 U.S.C.C.A.N. 1356, 1356-57 (emphasis added).

In 1981, the OGE delegated much of its ethics advisory responsibility to individual executive branch agencies, requiring that "[e]ach agency shall have a designated agency ethics official [DAEO] to . . . coordinate and manage the agency's ethic's program." 5 C.F.R. § 2638.201 (2012). OGE expressly mandated that these "designated agency ethics officials" "[c]ounsel. . . former agency officials on post-employment conflict

[5] The panel's finding trods a slippery slope. Logically extended, it would allow the Department of Veterans Affairs (VA) to dodge FTCA liability for medical malpractice by asserting its negligent physician was performing medical services for the VA rather than the injured service member.

of interest statutes." 5 C.F.R. § 2638.202(b)(4) (2012). App.36a. Thus, the attorney-client relationship between Kelley and Lambert arose by operation of this regulation based on Kelley's conduct. When Kelley chose to exercise his authority under OGE's regulations to contact Lambert to counsel Lambert on the applicability of § 207(c) to Lambert's position, Kelley created an attorney-client relationship.

B. THE PANEL'S HOLDING THAT NO ATTORNEY-CLIENT RELATIONSHIP EXISTED BETWEEN DAEO KELLEY AND LAMBERT BECAUSE "KELLEY GAVE LEGAL ADVICE TO THE FBI, NOT TO LAMBERT" DISREGARDS THE COMPLAINT'S WELL PLEADED FACTUAL ALLEGATIONS AND MISAPPREHENDS 18 U.S.C. 207(c)

The panel found that "[a]lthough Kelley allegedly forwarded his legal opinion to other parties, including Lambert and UT-Battelle, the complaint is clear that Kelley gave legal advice to the FBI, not to Lambert." App.5a. This finding disregards the black letter language in the complaint and contravenes the pleading standards announced by this Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

Kelley personally provided legal counsel to Lambert. He did so by telephone and by e-mail. Lambert expressly pleaded these facts in his second amended complaint:

1. "This complaint describes how the Defendants constructed, published and disseminated an erroneous legal opinion <u>to Plaintiff</u> . . ." App.45a (emphasis added).

2. "I [Kelley] will send an email to . . . Rick [Lambert] today delivering the determination [that Lambert was violating § 207(c)]." Verbatim recitation of Kelley's email to the FBI Counterintelligence Division. App.46a (emphasis added).

3. "Kelley then caused his erroneous legal opinion to be disseminated, published and conveyed to Plaintiff." App.47a (emphasis added).

4. "Immediately upon receiving Defendant Kelley's legal opinion, Plaintiff informed Defendant Kelley that his legal opinion was wrong and provided him with the controlling law and operative facts which are comprehensively detailed in this complaint." App. 47a.

5. "Plaintiff requested that Kelley provide Plaintiff with the legal and factual basis for his conclusion that Plaintiff was violating Title 18, Section 207(c). Kelley failed, refused, and otherwise declined to provide Plaintiff with any citation to law or fact to support his legal conclusion . . . ." App.47a-48a.

6. "Kelley . . . provided legal counsel to Plaintiff with Plaintiff being the direct and intended beneficiary of such counsel." App. 48a.

7. "Kelley repeatedly contacted Plaintiff by both telephone and in writing to foist upon Plaintiff his erroneous legal opinion, accuse Plaintiff of violating section 207(c), and

forbid Plaintiff from having any contact with the FBI counterintelligence Agents embedded in Plaintiff's office." App.48a-49a (emphasis added).

8. "Defendant Kelley's erroneous legal advice and counsel was loaded, aimed, and fired squarely at Plaintiff, not the United States government, the DOJ, the FBI or any other party." App.49a (emphasis added).

These assertions that Kelley provided legal advice and counsel to Lambert are essential allegations of fact in support of Lambert's claim that Kelley committed legal malpractice. These assertions are not conclusions of law. The panel was therefore required to accept as true Lambert's allegations that Kelley provided him legal advice unless Lambert's allegations were "mere conclusions." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940 (2009) ("mere conclusory statements" will not support a cause of action's elements).

Lambert's contentions that Kelley provided him with legal counsel are not conclusory, for four reasons. First, Lambert identified the regulation empowering Kelley to provide legal counsel to Lambert–5 C.F.R. § 2638.202(b)(4) (authorizing DAEOs to "[c]ounsel . . . former agency officials on post-employment conflict of interest statutes"). App.50a. Lambert alleges that Kelley acted pursuant to this regulation. App.49a-50a. Second, Lambert's complaint includes the verbatim e-mail authored by Kelley in which Kelley expressly stated his intent to counsel Lambert by delivering his legal determination to Lambert. App.46a. The authenticity of Kelley's e-mail message is not disputed by the Government. Third, Lambert has expressly pleaded that Kelley did, in fact, contact Lambert by phone and e-mail to provide legal counsel to Lambert just as he said he would. App.48a-49a. Fourth, Lambert pleaded with factual specificity the substantive content of Kelley's counsel. App.48a-49a. Accordingly, the OGE regulation authorized Kelley to counsel Lambert, Kelley said he was going to counsel Lambert, and Lambert avers that Kelley did, in fact, provide legal counsel to Lambert by e-mail and telephone. Because Lambert's allegations that Kelley provided legal counsel to him were well pleaded, the panel should have assumed their truth. *Iqbal*, 129 S.Ct. at 1940-41 ("When there are well pleaded factual allegations, a court should assume their veracity."); *Twombly*, 550 U.S. 544, 545 (2007) (a court must proceed "on the assumption that all of the complaint's allegations are true"). The panel's wholesale rejection of Lambert's factual allegations regarding Kelley's legal counsel to him contravenes this Court's holding in *Iqbal* and *Twombly*.

There is another practical reason why Kelley was not providing legal advice to the FBI. Section 207(c) is a penal statute. 18 U.S.C. 216. It criminalizes the conduct of certain <u>former</u> agency employees who appear before or communicate with current agency employees within a year of leaving the agency. But the prohibition runs only one way—exclusively to former employees. The statute imposes no restriction or sanction on an agency or its current employees who contact a former employee. Under the facts alleged in the complaint, it was metaphysically impossible for Kelley to provide legal advice <u>to the FBI</u> regarding § 207(c) because the statute neither compelled nor restricted the FBI's nor its employees' conduct in any manner. There was simply nothing in § 207(c) affecting the FBI for Kelley to opine about. Moreover, there was no benefit to be had by the FBI in Kelley's legal counseling of Lambert; Lambert was a private citizen, not an employee of the agency. Kelley's actions were plainly undertaken on behalf of Lambert pursuant to the DAEO's discretionary authority to "[c]ounsel . . . former agency officials on post-employment conflict of interest statutes." 5 C.F.R. § 2638.202(b)(4) (2012). The only fair reading of the complaint (and Kelley's incorporated e-mail) is that Kelley notified other FBI officials that he had determined Lambert to be in violation of § 207(c) and would be counseling Lambert to that effect (*i.e.*, "delivering the determination" to Lambert). Kelley's notification does not constitute "legal advice to the FBI" and even if it did, it does not vitiate Kelley's legal counsel to Lambert.

C. The Panel's Holding That No Attorney-Client Relationship Existed Because DAEO Kelley Contacted Lambert to Counsel Him is Inconsistent with Congress' Intent and OGE's Regulations

In further support of its holding that there was no attorney-client relationship between Kelley and Lambert, the panel cited Kelley's initiation of contact with Lambert, rather than vice versa. The panel found: "Lambert moreover admits that he "did not seek or initiate contact with Defendant Kelley to seek his opinion or counsel regarding the applicability of the § 207(c) to his position." App.5a-6a. The panel, however, cited no authority for the proposition that an attorney owes no duty of care in providing legal counsel unless the recipient is also the solicitor. What the panel overlooked is that a DAEO's discretionary provision of unsolicited legal counsel is precisely what Congress envisioned and the OGE authorized. As noted *supra*, the Senate instructed that OGE (and now DAEOs) "bear responsibility for conducting an on-going program to inform employees of those laws and regulations which govern their conduct." Ethics in Government Act of 1978, Sen. Rep. No. 95-170, at 31 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4247. In addition, Congress declared the DAEO's preeminent duty as "employee education and counseling," emphasizing that one of their principal obligations is to "provide advice to outgoing government employees about negotiating for new jobs and post-employment restrictions." Office of Government Ethics Authorization Act of 1996, H. R. Rep. No. 104-595(I), at 1-2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1356, 1356-57 (emphasis added). To implement this congressional intent, the OGE authorized DAEO's to "[c]ounsel . . . former agency officials on post-employment conflict of interest standards." 5 C.F.R. § 2638.202(b)(4) (2012). These policy pronouncements do not mandate the DAEO's receipt of a request or petition as a condition precedent to the performance of these functions. By exercising his discretionary authority to counsel Lambert under these provisions, Kelley instituted an attorney-client relationship with Lambert and owed Lambert the duty of care outlined in the D.C. Rules of Professional Conduct. The fact that Kelley unilaterally exercised his power does not exempt him the operation of 28 U.S.C. 530(B) which required his compliance with D.C.'s ethics rules.

Section 323 of the Restatement of Torts concerning "Negligent Performance of Undertaking to Render Services," underscores this principle:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm.

Restatement (Second) of Torts § 323 (Oct. 2017 Update). Stated more trenchantly: "[T]he law imposes an obligation upon everyone who attempts to do anything, even gratuitously, for another not to injure him by the negligent performance of that which he has undertaken." *United States v. Lawter*, 219 F.2d 559, 562 (5th Cir. 1955).

D. THE PANEL'S HOLDING THAT NO ATTORNEY-CLIENT RELATIONSHIP EXISTED BETWEEN KELLEY AND LAMBERT BECAUSE THERE WAS NO MUTUAL CONSENT TO SUCH A RELATIONSHIP WRONGLY APPLIED TENNESSEE LAW AND FAILED TO APPLY D.C. LAW

As an additional reason for its holding that no attorney-client relationship existed between Kelley and Lambert, the panel stated: "Tennessee requires the consent of both parties to establish an attorney-client relationship [citation omitted] and nothing in the complaint suggests that Kelley and Lambert mutually consented to form an attorney-client relationship." App.6a.

Tennessee law is not controlling here. D.C. law governs this case. While some of Lambert's injuries accrued in Tennessee where the termination of his employment occurred, Kelley's alleged negligence (legal malpractice) took place in D.C. In multistate FTCA actions, the law of the place where the acts of negligence took place is controlling. 28 U.S.C. 1346(b)(1); *Richards v. United States*, 369 U.S. 1, 9-10 (1962) ("Congress has, in the Tort Claims Act, enacted a rule which requires federal courts, in multistate tort actions, to look in the first instance to the law of the place where the acts of negligence took place").

The District of Columbia follows the American Law Institute's Restatement (Third) of the Law Governing Lawyers. *In re Nace*, 98 A.3d 967, 975 (D.C. 2014). The Restatement provides:

> A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . . .

In re Nace, 98 A.3d at 975 (quoting Restatement (Third) of the Law Governing Lawyers § 14 (2000)).

Kelley manifested his consent to an attorney-client relationship when he chose to exercise his power to counsel Lambert pursuant to 5 C.F.R. § 2638.202(b)(4). Lambert consented to the relationship because he had to. It arose by operation of OGE's regulation. *See Knisley*, 817 F. Supp. at 685 (Army Legal Assistance Officer "enters into an attorney-client relationship" when he "provide[s] legal advice and assistance to eligible persons about their personal legal affairs" pursuant to Army enabling regulations). Lambert did not have the option not to consent. OGE clothed Kelley with the authority to counsel Lambert whether or not Lambert concurred with Kelley's legal determination. Lambert manifested his consent to the relationship by engaging with Kelley: accepting his telephone calls, replying to his e-mails and confuting his counsel. Lambert disagreed with Kelley's legal determination, not with his imprimatur to counsel. If a client's variance with his lawyer's opinion were sufficient to extinguish the attorney-client relationship, few claims for legal malpractice would proceed.

E. THE PANEL'S HOLDING THAT IN D.C., ONLY THE INTENDED BENEFICIARY OF A WILL CAN SUE FOR LEGAL MALPRACTICE IN THE ABSENCE OF AN ATTORNEY CLIENT RELATIONSHIP, CONTRAVENES D.C. LAW

Pleading in the alternative as permitted by Federal Rule of Civil Procedure 8(d)(2), Lambert also asserted that he was the "intended beneficiary" of Kelley's legal counsel–an exception to the usual requirement that an attorney owes a duty of care in providing legal counsel only where an attorney-client relationship exists. The panel held:

> Lambert's contention that he can sue for malpractice because he was an intended beneficiary of Kelley's legal advice is without merit. In the District of Columbia, only the intended beneficiary of a will can sue for legal malpractice in the absence of any attorney-client relationship.

App.6a. The panel cited two cases in support of its holding: *Taylor v. Akin, Gump, Strauss, Hauer & Feld*, 859 A.2d 142, 147 & n.4 (D.C. 2004) and *Clark v. Feder Semo & Bard, P.C.*, 634 F. Supp. 2d 99, 107 (D.D.C. 2009). App.6a. Neither case stands for the proposition asserted by the panel.

The *Taylor* court stated: "With rare exceptions, a legal malpractice claim against an attorney cannot withstand a summary judgment motion unless there is evidence showing the existence of an attorney-client relationship." *Taylor*, 859 A.2d at 147 (emphasis added). The *Taylor* court used the word "exception" in the plural and provided as one example that the "intended beneficiary of a will may sue the drafting attorney for legal malpractice in failing to include him in the will as a beneficiary." *Taylor*, 859 A.2d at 147 n.4. (citing *Needham v. Hamilton*, 459 A.2d 1060, 1062 (D.C. 1983)). In 2014, the District of Columbia Court of Appeals amplified this point:

> In this jurisdiction, whether a plaintiff falls into the class of persons who may sue an attorney for malpractice has been resolved as "a matter of law." "It is well established that 'the general rule is that the obligation of the attorney is to his client, and not to a third party . . . .'" However, "[t]he rule requiring privity is not . . . without exception." We may allow legal malpractice suits by "third parties not withstanding a lack of privity where the impact upon the third party is 'not an indirect or collateral consequence,' but the 'end and aim of the transaction.'" Otherwise put, third party claims may be

> sustained where the plaintiffs were "the direct and intended beneficiaries of the contracted for services."

Scott v. Burgin, 97 A.3d 564, 566 (D.C. 2014) (internal citations omitted). Here, the United States "contracted for" Kelley's legal services by requiring the FBI to appoint a DAEO to, *inter alia,* provide legal counsel to former employees on post-employment conflict of interest standards. 5 C.F.R. § 2638.202(b)(4) (2012). As a former employee, Lambert was the "end and aim" of that transaction and therefore the direct and intended beneficiary of those services.

The panel also cited *Clark v. Feder Semo & Bard, P.C.*, 634 F. Supp. 2d 99, 107 (D.D.C. 2009) for the proposition that "<u>only</u> the intended beneficiary of a will can sue for legal malpractice in the absence of an attorney-client relationship." App.6a (emphasis added). That is not what the *Clark* opinion says. *Clark* aligns with *Scott.* The court in *Clark* began by noting that "[t]he <u>primary</u> exception to the requirement of any attorney-client relationship occurs in a narrow class of cases where the 'intended beneficiary' of a will sues the attorney who drafted that will." *Clark*, 634 F. Supp. 2d at 107 (emphasis added). But the *Clark* court further explained that "[t]he few cases that apply the intended beneficiary exception <u>in other contexts</u> [other than wills] require that third-parties allege more than 'mere harm' from the conduct in question, but rather that they were the 'direct and intended beneficiaries of the attorney client relationship.'" *Clark*, 634 F. Supp. 2d at 107 (emphasis added) (citation omitted). Thus, if the panel was correct in its finding that an attorney-client relationship existed between Kelley and the FBI (App.5a), then Lambert was clearly the intended beneficiary of that relationship by virtue of the plain wording in 5 C.F.R. § 2638. 202(b)(4) (tasking DAEOs with counseling former agency employees on post-employment conflict of interest standards).

The "intended beneficiary" precept announced in *Clark* and *Scott* finds implicit expression in at least one other case like this one, where a government attorney allegedly breached his duty of care in rendering legal advice and injured a party who was not his client. *See Mossow by Mossow v. United States*, 987 F.2d 1365 (8th Cir. 1993) (FTCA legal malpractice claim by civilian disabled child of Air Force parents against an Air Force attorney who wrongly advised the active duty parents they could not file a medical malpractice claim against the Air Force for delivery-related injuries sustained by the child at birth).

F. THE PANEL'S HOLDING THAT LAMBERT'S *BIVENS* CLAIM IS BARRED BY THE TENNESSEE ONE-YEAR STATUTE OF LIMITATIONS CONTRAVENES THE PRIOR PRECEDENT OF THIS COURT AND THE SIXTH CIRCUIT AND CONFLICTS WITH THE HOLDINGS OF OTHER CIRCUITS AND THE DISTRICT COURTS WITHIN THE SIXTH CIRCUIT

Lambert's *Bivens* claim is grounded upon Kelley's denial of Lambert's procedural due process rights in failing to afford Lambert notice and a hearing before determining that Lambert was violating § 207(c). App.3a, 13a. Kelley's decision not to provide due process entitlements to Lambert occurred in the District of Columbia where Kelley's office was located in FBI Headquarters. The complaint does not allege and the

Government does not contend that Kelley ever traveled to Tennessee to make his legal determination or to counsel Lambert. Both the required notice of a pending adjudication and the offer of a pre-determination hearing would have and should have emanated from Washington. The damage to Lambert's reputation and ability to practice his chosen profession transcends geographic boundaries and is unmitigated by Tennessee state lines. Thus, the issue here is which statute of limitations is appropriate when the constitutional tort occurred in a state other than the forum of the litigation.

The panel found the *Bivens* claim arose no later than June 2013 when Lambert's employment was terminated. App.7a. It borrowed Tennessee's one-year statute of limitations to bar the claim because Lambert did not assert it until June 2015. App.7a. The panel held: "The local statute of limitations applies to *Bivens* claims. *See Zundel v. Holder*, 687 F.3d 271, 281 (6th Cir. 2012). Lambert filed his complaint in Tennessee; therefore, Tennessee's one-year statute of limitations for *Bivens* claims applies in this case." App.6a-7a. In D.C., however, a three-year statute of limitations applies to *Bivens* claims. *Loumiet v. United States*, 828 F.3d 935, 947 (D.C. Cir. 2016). Consequently, if D.C.'s statute of limitations is applied to this case instead of Tennessee's, the *Bivens* claim is timely.

In *Wallace v. Kato*, a constitutional tort case brought under 42 U.S.C. 1983, this Court clearly stated the rule that courts should apply the statute of limitations of the state where the cause of action arose:

Section 1983 provides a federal cause of action,

> but in several respects relevant here federal law looks to the law of the State in which the cause of action arose. This is so for the length of the statute of limitations: It is that which the State provides for personal injury torts.

Wallace v. Kato, 549 U.S. 384, 387 (2007) (emphasis added). The statute of limitations in *Bivens* claims is, in general, construed in parallel to § 1983 claims. *Harris v. United States,* 422 F.3d 322, 331 (6th Cir. 2005); *Indus. Constructors Corp. v. United States Bureau of Reclamation*, 15 F.3d 963, 968 (10th Cir. 1994) (citing cases). Accordingly, *Wallace v. Kato* was cited by the district court as applicable to this *Bivens* claim. App.12a, n.2. Indeed, the *Wallace* formulation had been embraced by the Sixth Circuit in previous *Bivens* cases: "For purposes of the applicable statutes of limitations, we apply the most analogous statute of limitations from the state where the events giving rise to the claim occurred." *Baker v. Mukasey*, 287 F. App'x. 422, 424 (6th Cir. 2008) (emphasis added). The *Zundel* case, cited by the panel, also hewed to the Court's rule in *Wallace*: "Because these acts [the alleged government wrongdoing] occurred in Tennessee in 2003 and the applicable statute of limitations for *Bivens* claims in Tennessee is one year, Zundel's claim made in 2008 was not timely." *Zundel,* 687 F.3d at 281 (emphasis added) (internal citation omitted).

But *Wallace*, *Baker*, and *Zundel* differ from this case in one important respect. In all three former cases, the state where the claim was filed (the forum state) and the state where the officials' actions giving rise to the claim occurred, were identical.[6] Thus, as is often the circumstance, in these three cases the forum state was the state where the cause of action arose. Accordingly, it was literally, if not doctrinally, true that forum law applied. Because the distinction made no difference in those cases, it was not considered or discussed. Thus, as the language in *Baker* and *Zundel* demonstrates, the Sixth Circuit followed the Court's holding in *Wallace* by applying the statutes of limitations of Kentucky and Tennessee, respectively, because they were the states where the claims arose, not because they were the forum states. In this case, however, the panel departed from the rule in *Wallace* by holding that "Lambert filed his complaint in Tennessee; therefore, Tennessee's one-year statute of limitations for *Bivens* claims applies in this case." App.6a (emphasis added). This echoes the district court's discordant language: "This suit was filed in Tennessee, and so arose in Tennessee." App.15a (emphasis added).

There is scant precedent on this issue because it rarely arises. For it to be consequential, the three conditions present here must exist: (a) the forum state must be different from the state where the claim arose; (b) the two states' statutes of limitation must differ; and (c) the claim must be timely under one, but not the other. Unlike the panel here, the few

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6 *Wallace* was filed in the district court for the Northern District of Illinois based on an arrest in Chicago. 549 U.S. at 387; 472 F. Supp. 2d 942 (N.D. Ill. 2004); *Baker* was a *Bivens* case filed in Kentucky by a Kentucky inmate claiming Kentucky prison officials interfered with his mail. 287 F. App'x. at 422. *Zundel* involved a *Bivens* claim filed in Tennessee by a deported alien claiming mistreatment in a Tennessee county jail. 687 F.3d at 280-81.

courts that have grappled with this circumstance have concluded that a lack of identity between the forum state and the state where the claim arose do not justify a departure from the principle stated in *Wallace*–that the court must apply the statute of limitations "of the state in which the cause of action arose." *See Malone v. Corr. Corp. of America*, 553 F.3d 540, 541-43 (7th Cir. 2009) (applying Oklahoma statute of limitations to § 1983 claim filed in Wisconsin where plaintiff alleged use of excessive force by guards in Oklahoma prison); *Aleynikov v. McSwain*, No. 15-1170, 2016 WL 3398581, at *4-6 (D.N.J. June 15, 2016) (applying New York statute of limitations to *Bivens* claim filed in New Jersey where plaintiff alleged malicious prosecution in New York); *Burke v. MacArthur*, No. 15-6093, 2015 WL 5970725, at *1, *4 (D.N.J. Oct. 13, 2015) (applying Illinois statute of limitations to *Bivens* claim filed in New Jersey where plaintiff's "injuries arose out of the criminal proceedings against him in the Northern District of Illinois"); *Cedillo v. TransCor America, LLC*, 131 F. Supp. 3d 734, 743-44 (M.D. Tenn. 2015) (applying the individual statutes of limitation from six different states to a § 1983 action in the Middle District of Tennessee where plaintiff prisoners claimed they were subjected to substandard conditions of transportation during trips to correctional institutions in six states).

Only the United States Court of Appeals for the D.C. Circuit has characterized the *Wallace* rule as "dictum" and declined to follow it in a case like this one. In *Jones v. Kirchner*, 835 F.3d 74, 80-81 (D.C. Cir. 2016), the court applied the D.C. statute of limitations to *Bivens* and § 1983 claims filed in D.C. alleging an unreasonable search and seizure in Maryland. Instead of deferring to "the law of the State in which the cause of action arose" (Maryland), the court "imported the forum state's [D.C.'s] choice of law rules to determine which statute of limitations the forum state would apply." *Id.* at 81. It concluded that D.C.'s choice of law rules "mandate[d] application of the District's own statute of limitations" for personal injury actions. *Id.*

But in this case, borrowing the anomalous rubric of *Jones* produces the same result as the *Wallace* rule–the D.C. statute of limitations governs. It does so because in choice of law for personal injury cases, the Tennessee Supreme Court has adopted the "most significant relationship" approach of the Restatement (Second) of Conflict of Laws. *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992). The Restatement provides that "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state, which, with respect to that issue, has the most significant relationship to the occurrence and the parties . . . ." Restatement (Second) of Conflict of Laws § 145 (1971) (emphasis added). The deprivation of Lambert's due process rights to notice and a hearing ("the occurrence") were perpetrated in D.C. Kelley's legal determination giving rise to the deprivation issued from D.C. The FBI's ethics program and the DAEO have their situs at FBI Headquarters in D.C. The controversy arises from Lambert's membership in the FBI's Senior Executive Service, a headquarters' entity. D.C. therefore has the "most significant relationship" to the due process deprivation and to Kelley and Lambert.

The holding in *Cedillo*, *supra,* underscores the incertitude of the law on this point. Notwithstanding the internal inconsistency in the Sixth Circuit's decisions in *Baker* and *Zundel* versus this case, *Cedillo* evinces incongruity even among the district courts within the state of Tennessee, with the Middle District applying the *Wallace* rule in *Cedillo* (statute of limitations from the state in which the cause of action arose) and the Eastern District applying the statute of limitations from the forum state in the instant case.

Such inconsistency is not confined within the Sixth Circuit. Similar conflict among the circuits has been observed: "[C]ourts apply . . . at least in the statute of limitations context of *Bivens* actions, either the law of the forum state or the law where the claim arose." *Haggard v. Stevens*, No. 2:09-CV-1144, 2010 WL 3658809, at *7 (S.D. Ohio Sept. 14, 2010). The "forum state" statute of limitations is cited as governing constitutional tort claims in the First, Fourth and Fifth Circuits. *Conjugal Partnership Acevedo-Principe v. United States,* 768 F.3d 51, 56 (1st Cir. 2014); *Scurlock v. Lappin*, No. 7:12-CV-00322, 2013 WL 4508343, at *4 n.9 (W.D. Va. 2013) (citing *Blanck v. McKeen*, 707 F.2d 817, 819 (4th Cir. 1983)); *Rankin v. United States*, 556 F. App'x. 305, 310 (5th Cir. 2014).

Conversely, the Second, Third, Sixth, Seventh, Tenth and Eleventh Circuits adhere to the *Wallace* rule and look to the state where the claim arose in determining the statute of limitations for constitutional torts. *Dukes v. City of Albany*, No. 1:17-CV-865, 2018 WL 722414, at *5 (N.D.N.Y. Feb. 6, 2018) ("state in which the cause of action arose" in 2d Cir.); *Pearson v. Sec. Dep't of Corr.*, 775 F.3d 598, 602 (3d Cir.

2015) ("state in which such a claim arises"); *Baker v. Mukasey*, 287 F. App'x. 422, 424 (6th Cir. 2008) ("state where the events giving rise to the claim occurred"); *Crowder v. True*, 74 F.3d 812, 814 (7th Cir. 1996) ("state where the cause of action arose"); *Van Tu v. Koster*, 364 F.3d 1196, 1198 (10th Cir. 2004) ("state where the action arose"); *Salley v. Goldston*, No. 17-12112, 2018 WL 1061391, at *2 (11th Cir. Feb. 27, 2018) ("state where the cause of action arose").

Within the Eighth Circuit, the rule for choosing a statute of limitations in *Bivens* actions is apparently different from § 1983 claims. *Compare Hernandez v. Mueller*, No. 2:15CV00032, 2015 WL 13236729, at *1 (E.D. Ark. Sept. 18, 2015) ("forum state" in *Bivens* action) *with Foster v. Cerro Gordo County*, 33 F. Supp. 3d 1052, 1057 (N.D. Iowa 2014) ("state in which the cause of action arose" for § 1983 claim).

The Ninth Circuit has cited different rules for *Bivens* and § 1983 actions. *Compare Schulze v. Maglasang*, 376 F. App'x. 741, 741 (9th Cir. 2010) ("forum state's personal injury statute of limitations applies in *Bivens* actions") *with Faile v. Geary*, 958 F.2d 376, 376 (9th Cir. 1992) ("[f]ederal courts apply the statute of limitations of the state in which the claim arises for 42 U.S.C. § 1983 claims").

CONCLUSION

The panel erred in departing from the rule this Court announced in *Wallace v. Kato*. It should have followed the lead of the vast majority of courts that have considered similar cases and adhered to *Wallace* by applying a statute of limitations in this *Bivens* case from the "[s]tate in which the cause of action arose" (D.C.) rather than the state where the lawsuit was filed (Tennessee). Inconsistency abounds between and within the circuits on this issue. The applicable statute of limitations in multi-state federal civil rights cases should not be perplexing or determined by caprice. Clarification from the Court is needed.

In *Davis v. Passman*, 442 U.S. 228, 246 (1979), the Court observed that "All officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." The panel's decision that a DAEO owes no duty to care to a former agency employee when he provides legal counsel turns *Davis* on its head–ironically exempting the FBI's chief ethics lawyer from his congressionally imposed obligation to comply with the D.C. Rules of Professional Conduct. The Court's review is warranted.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD LAMBERT
PETITIONER PRO SE
929 GREGG ROAD
FRIENDSVILLE, TN 37737
(865) 456-0039
LAMBERT0618@GMAIL.COM

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