No. ______

In the
Supreme Court of the United States

JAMES A. DELANIS,

Petitioner,

v.

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC; ROBERT J. MENDES, individually and in his capacity as a member of the Metro Council,

Respondents,

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

PETITION FOR WRIT OF CERTIOARI

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QUESTIONS PRESENTED

Qualified immunity protects private parties "working for the government in pursuit of government objectives." *Filarsky v. Delia*, 566 U.S. 377, 392 (2012). But it does not extend to those who "pursue[] purely private ends." *Id.*

After the city of Nashville threatened a law firm over an employee's constitutionally protected speech, the firm fired that employee to protect its own financial interests. The Sixth Circuit held that city officials violated the employee's clearly established rights. But it granted the private law firm qualified immunity. That decision was contrary to decisions from the First, Fourth, Seventh, and Eleventh Circuits, which have each held that qualified immunity does not apply to private parties pursuing their own private interests.

The questions presented are:

1. Whether a private entity is eligible for qualified immunity when pursuing personal interests outside the scope of any government function; and

2. Whether a private entity seeking qualified immunity must be treated the same as a public employee when deciding whether it violated any clearly established rights.

PARTIES TO THE PROCEEDING

Petitioner James A. DeLanis was the plaintiff in the district court and the appellee in the court of appeals.

Respondent Baker, Donelson, Bearman, Caldwell & Berkowitz, PC was a defendant in the district court and an appellant in the court of appeals (case no. 23-5948).

Respondent Robert J. Mendes, individually and in his capacity as a member of the Metro Council, was a defendant in the district court and an appellant in the court of appeals (case no. 23-5939).

Metropolitan Government of Nashville & Davidson County was a defendant in the district court.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a natural person and thus no corporate disclosure is required.

STATEMENT OF RELATED PROCEEDINGS

United States District Court for the Middle District of Tennessee (M.D. Tenn.):

James A. DeLanis v. Metropolitan Government of Nashville & Davidson County, Civil No. 3:22-cv-469, reported at 697 F. Supp. 3d 748 (order denying motion to dismiss on qualified immunity grounds entered Oct. 6, 2023)

United States Court of Appeals for the Sixth Circuit (6th Cir.):

James A. DeLanis v. Metropolitan Government of Nashville & Davidson County, Case Nos. 23-5939/23-5948, reported at 160 F.4th 732 (judgment entered Nov. 24, 2025)

James A. DeLanis v. Metropolitan Government of Nashville & Davidson County, Case No. 23-5948 (order denying rehearing en banc entered Jan. 30, 2026)

United States Supreme Court:

James A. DeLanis v. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, No. 25A1081 (application granted by Justice Kavanaugh extending the time to file petition for writ of certiorari until June 29, 2026, order entered April 3, 2026)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions

Statutes and Other Authorities

PETITION FOR A WRIT OF CERTIORARI

James A. DeLanis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

INTRODUCTION

Typically, a private law firm's termination of an employee raises no constitutional problems. But this case is not typical. Baker Donelson only fired James DeLanis after the city of Nashville threatened to punish the firm over DeLanis's constitutionally protected speech. A Sixth Circuit panel upheld the denial of the city official's qualified immunity claim, but divided over whether the law firm—motivated only by its financial interests and with ample time and expertise to weigh the merits of its decision—had qualified immunity from DeLanis's First Amendment claim. The majority held that the firm enjoyed qualified immunity.

If qualified immunity stretches that far, this Court has never said so. Indeed, precedent instructs that while qualified immunity protects private "individuals working for the government in pursuit of government objectives," it does not yet extend to those like Baker Donelson who "pursue[] purely private ends." *Filarsky*, 566 U.S. at 392. That's because qualified immunity only exists to protect the "government's ability to perform its traditional functions." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992). And private parties that act unlawfully for their own personal benefit perform no government function at all.

But the Sixth Circuit saw things differently. It concluded that firing DeLanis in response to the city's threats was no different than any other government function that a private contractor might perform. That decision is not just wrong—it upends decades of this Court's immunity precedent, breaking with four other circuits along the way.

Qualified immunity has already veered away from "the common-law backdrop against which Congress enacted [§ 1983]." *Baxter v. Bracey*, 590 U.S. 1011, 1013 (2020) (Thomas, J., dissenting from the denial of certiorari). It should not stray any further. The Sixth Circuit's novel expansion of the doctrine to cover private parties who lack any concern for the public good merits this Court's review.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 160 F.4th 732. The Sixth Circuit's order denying the petition for rehearing en banc, App.116a–17a, is not reported. The district court's opinion is reported at 697 F. Supp. 3d 748.

JURISDICTION

The court of appeals entered its judgment on November 24, 2025. App.41a–42a. On January 30, 2026, the court of appeals denied Petitioner's timely petition for rehearing en banc. App.116a–17a. On April 3, 2026, Justice Kavanaugh granted Petitioner's application to extend the time to file a petition for writ of certiorari until June 29, 2026. *See DeLanis v. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC*, No. 25A1081. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

Title 42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

STATEMENT OF THE CASE

A. Factual Background

Petitioner Jim DeLanis has practiced law in Nashville for over 40 years, mostly at respondent Baker Donelson. That ended in June of 2022, when the city of Nashville pressured Baker Donelson into firing him for exercising his First Amendment rights.

1. In 2020, Nashville enacted its largest-ever property tax increase. A group of citizens promoted a ballot referendum that would roll back the tax hike and limit future rate increases, but Nashville deployed significant resources to stop the issue from reaching the voters.

The referendum process for Nashville runs through the Davidson County Election Commission. *See* Metro. Gov. of Nasvhille & Davidson Cnty. Charter §§ 19.01, 19.03, 19.04. The commission, comprised of five commissioners appointed by a state agency, operates independently from Nashville's government. *See* Tenn. Code Ann. § 2-12-110(a), (b). As part of its responsibilities, the commission must certify that any referendum petition complies with state law before adding it to the ballot. Metro. Gov. of Nasvhille & Davidson Cnty. Charter §§ 19.03(f), 19.04(a), (b).

In addition to working at Baker Donelson, DeLanis served as one of Davidson County's five election commissioners. App.121a. The job required DeLanis to take positions on matters of significant public interest, which are often "contrary to the wishes, and perceived interests" of the city of Nasvhille. App.122a. That was the case when Nashville found itself embroiled in the fight to repeal its property-tax increase.

2. The first attempt at rolling back the tax increase was quickly defeated. In response to a dispute over the referendum petition's legality, the commission brought a declaratory suit in state court. Nashville successfully urged the court to declare the petition unlawful. App.127a–28a.

But the opponents of Nashville's tax increase did not give up. They filed a second petition that corrected the prior issues and submitted it in early 2021. *Id.* Then, on advice from its outside counsel, the commission approved placing the new referendum on the ballot. *Id.* 130a.

Nashville once again fought back—this time on several fronts. Leading the charge was city councilman Robert Mendes. He tried to derail the petition by adding a poison pill to the ballot that would "forever preclude any public referendum on property tax levies" in the future. *Id.* at 128a–29a. Then, after the commission approved the tax referendum for a public vote, Mendes accused it of engaging in "political theater" at one of the commission's public meetings. *Id.* at 130a–31a. He tried to intimidate them into reversing course, telling the commissioners that they would not get away with their "sham." *Id.* at 131a–32a.

3. Not content with Mendes's public pressure, Nashville also turned to Baker Donelson for help. *Id.* at 132a. But not in the way one might expect. Nashville did not hire Baker Donelson to work on the referendum effort. App.148a. Rather, the city tried to leverage its unrelated business with Baker Donelson to pressure the firm into "influencing" DeLanis. *Id.* at 132a–33a. It asked the firm to "discourage" DeLanis "from taking action to put the [referendum] on the

ballot." *Id.* And the city threatened to pull its business if DeLanis did not change his vote. *Id.* at 134a.

The intimidation worked. Over a period of several weeks, Baker Donelson "berated DeLanis" over his activity as a commissioner, telling him about Nashville's threats. App.133a–34a. It repeatedly asked him to change his vote (or refrain from voting) on the referendum. *Id.* 133a–34a, 138a, 141a. When that didn't work, Baker Donelson fired DeLanis to appease the city and protect the "revenue" it earned from working for the government on unrelated matters. *Id.* at 125a, 142a.

B. Procedural Background

1. DeLanis sued Nashville, city councilman Robert Mendes, and Baker Donelson. Among other claims, DeLanis alleged that Baker Donelson violated the First Amendment by firing him for his constitutionally protected speech and activity on the Commission. App.164a–65a.

Section 1983 imposes liability on private defendants who act in response to government intimidation and coercion. *See Blum v. Yarestky*, 457 U.S. 991, 1004 (1982). DeLanis alleged that Nashville intimidated Baker Donelson into firing him by threatening to withdraw its unrelated business. App.134a, 164a. This makes Baker Donelson a state actor under § 1983, even though the firm was not working for the government when it retaliated against DeLanis. *Id.* at 148a, 164a.

2. Baker Donelson (along with city councilman Mendes) moved to dismiss based on qualified immunity. In doing so, the firm did not dispute that it was a state actor under § 1983. *See* App.100a (citing Dist.Ct.Dkt.44). Nor did it dispute that DeLanis "was engaged in constitutionally protected speech or activity when he sought to cast his vote as an elected official." *Id.* at 77a. Rather, the firm argued only that firing DeLanis to protect its relationship with Nashville did not violate any clearly established rights. *See* Dist.Ct.Dkt.44 at 3–4.

DeLanis objected to the firm's qualified immunity defense because the doctrine only protects private parties when they act within their discretionary authority as agents of the state. Dist.Ct.Dkt.48 at 4–7. The firm, however, did not represent the city on any matters related to the referendum, App.120, and so it lacked any government-conferred authority with respect to DeLanis's termination. DeLanis claimed that Baker Donelson instead fired him to protect its own private, financial interests. Dist.Ct.Dkt.48 at 4–7.

The district court denied qualified immunity to both Baker Donelson and Mendes. It first held that Mendes violated DeLanis's clearly established rights by intimidating the firm in firing him. App.95–99a. It then concluded that qualified immunity only applies to individuals and thus does not protect private entities like Baker Donelson. App.99a–101a. And even if that were wrong, the court explained, Baker Donelson violated DeLanis's clearly established rights for the same reasons that Mendes did.

3. A split Sixth Circuit panel upheld the denial of qualified immunity as to Mendes, but it reversed the

denial of Baker Donelson's qualified immunity claim. That decision rested on three key conclusions.

First, the majority held that Baker Donelson could assert qualified immunity as a private entity even though it acted pursuant to its own private interests. App.15a–18a. As the majority saw it, the firm's status as Nashville's outside counsel for unrelated matters meant that any action Baker Donelson took in response to the city's threats fell within its discretionary authority. *Id.* That Baker Donelson acted for its personal financial gain (outside the scope of any work Nashville hired the firm to do) did not matter. *Id.*

Second, the Sixth Circuit held that Mendes violated DeLanis's clearly established constitutional rights because there is "no doubt that causing an employee's firing due to his protected speech violates the First Amendment." *Id.* at 20a–21a. The court explained that DeLanis plausibly alleged that Mendes caused Baker Donelson to fire DeLanis over his conduct on the commission by threatening the firm, and that doing so clearly violated the First Amendment. *Id.* at 22a–23a.

Third, the majority held that Baker Donelson did not violate DeLanis's clearly established rights by firing him because the firm "sought to protect its client base, not to punish DeLanis for his speech." App.24a. Rather than treating the firm the same as other public employees, the court considered Baker Donelson's status as a private entity pursuing its own interests a material distinction that triggered qualified immunity. *Id.*

4. Judge Clay dissented. He questioned how the majority could dismiss Baker Donelson's private motivation when assessing whether a firm is eligible to assert qualified immunity, yet rely on that same private interest to hold that the firm did not violate DeLanis's clearly established rights. App.39a. As Judge Clay explained, the fact that Baker Donelson's "own business interests" drove its decision-making "illustrates that the firm did not carry out a public function," and so the firm cannot raise qualified immunity because it cannot claim to have worked "in the pursuit of government objectives." *Id.* at 39a–40a (quoting *Filarsky*, 566 U.S. at 392). Unlike the attorney in *Filarsky*, "Baker Donelson neither functioned in a public capacity nor demonstrated any concern regarding the public interest that would warrant extending qualified immunity to the law firm." *Id.* at 40a.

The Sixth Circuit denied rehearing en banc. App.116a–17a.

REASONS TO GRANT THE PETITION

The question presented is an exceptionally important one that the Sixth Circuit got wrong, the decision breaks with other circuits, and this case is the perfect vehicle to resolve the circuit split and clarify the outstanding immunity issues.

I. The decision below undermines this Court's qualified immunity precedent.

Qualified immunity protects private parties "working for the government in pursuit of government objectives" as if they were public employees. *Filarsky*, 566 U.S. at 392. Liability under § 1983, however, is not so limited. A private party can engage in state action even when pursuing private interests outside the scope of any government-conferred authority. *See id.* at 392–93. When that happens, qualified immunity does not apply. *See id.*

As the Court explained in *Filarsky*, this rule strikes an important balance. It protects everyone "engaged in the public's business" regardless of whether they do so on a full-time or part-time basis. *Id.* at 390, 392–94. But it does not shield those motivated by "purely private ends." *Id.* at 392. Immunity, after all, exists only to "protect[] the government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167. It has no place for defendants doing something else entirely. *Id.* at 168.

The Sixth Circuit violated this principle twice over. It ignored Baker Donelson's private interest when deciding whether the firm is entitled to assert qualified immunity. But it relied on the firm's private interest to treat it differently than a public employee when granting immunity. "This 'heads I win, tails you lose' approach cannot be correct." *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 471 (2007) (opinion of Roberts, C.J.). It vastly extends qualified immunity to protect private parties who have no concern for the "public good," *Filarsky*, 566 U.S. at 390, and incentivizes them to acquiesce when the government bullies them into acting unlawfully.

1. Whether private defendants pursuing private interests are entitled to qualified immunity is plainly a question of exceptional importance. That this Court has already endeavored to answer the question confirms the importance of correcting the Sixth Circuit's

error. The lower courts should understand that qualified immunity cannot shield private interests.

Filarsky expanded qualified immunity to cover private "individual[s] hired by the government to assist in carrying out its work." 566 U.S. at 393. But this rule only applies to private parties "retained by the" government to perform an official task. *Id.* It does not cover those acting beyond their delegated power to "pursue[] purely private ends." *Id.* at 392–93.

That simple rule should have resolved this case. Nashville did not hire Baker Donelson to do any work related to the referendum. App. 148a. Instead, the city leveraged its unrelated business with the firm to coerce and intimidate Baker Donelson into retaliating against DeLanis. *Id.* at 134a. And when Baker Donelson acquiesced, it did so to preserve its own private interests, *id.* at 125a, 147a, without concern for "enhancing the public good," *Filarsky*, 566 U.S. at 392 (quoting *Wyatt*, 504 U.S. at 168).

The Sixth Circuit abandoned this Court's framework by treating Baker Donelson's decision to fire DeLanis as a public function that Nashville delegated to the firm. Not only does that conclusion ignore the allegations in the complaint, *see* App.148a, it turns *Filarsky* on its head. Firing an employee out of fear that one might lose work from a government agency is not a "traditional government function." *Filarsky*, 566 U.S. at 389–90. It is a private decision, motivated by private financial interests, beyond the scope of any work the firm was "retained by the [c]ity" to do. *Id.* at 393. Nashville coerced the firm into retaliating against DeLanis—but that does not mean the firm was "working for the government" when it did so. *Id.* at 392.

Nor does extending qualified immunity in these circumstances further the traditional justifications "for recognizing immunity under § 1983." *Filarsky*, 566 U.S. at 389.

Qualified immunity—like all forms of government immunity—exists only to "protect[] [the] government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167. It does so in three ways: Immunity discourages public officials from "unwarranted timidity" in carrying out their duties. *Richardson v. McKnight*, 521 U.S. 399, 409–11 (1997). It "ensur[es] that talented candidates are not deterred from public service." *Filarsky*, 566 U.S. at 389–90. And it "prevent[s] the harmful distractions from carrying out the work of government that can often accompany damages suits." *Id.* at 390.

As *Filarsky* explained, none of these reasons "counsels against" granting immunity to private parties who contract with the government for part-time work. *Id.* at 389. That's because part-time government work is still *government work*. And so the need for decisive, talented, and focused public servants does not change based on how they are hired.

"These rationales," however, "are not transferable" when public officials coerce a private entity to act outside of any delegated government authority. *See Wyatt*, 504 U.S. at 168. There can be no "unwarranted timidity in [the] performance of public duties" when the private defendant is not exercising a public duty. *Richardson*, 521 U.S. at 409. Nor is there any reason to worry about distracting individuals from "carrying out the work of government" when the defendants were not hired to do the government's work. *Filarsky*, 566 U.S. at 390. And there is no need to attract "talented candidates" to government service when officials use threats and intimidation to bully private parties into action. *Id.* So when a defendant like Baker Donelson acts out of self-preservation, to advance its own financial interest in the face of government threats, any concern for protecting the government's ability to "discharge [its] duties" disappears. *Id.* at 391.

That conclusion aligns with this Court's broader immunity precedent. "[I]mmunities are grounded in 'the nature of the function performed, not the identity of the actor who performed it.'" *Clinton v. Jones*, 520 U.S. 681, 695 (1997) (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). And "the sphere of protected action must be related closely to the immunity's justifying purposes." *Nixon v. Fitzgerald*, 457 U.S. 731, 755 (1982).[1] If a private party is not performing a government function in pursuit of the public good, its conduct falls outside "the sphere of protected action." *Id.*

Private parties pursuing private financial interests are also unlikely to be making the same "split-second judgments" that animate the stated need for

[1] The Sixth Circuit dismissed *Clinton* and similar precedent as having "nothing to offer" in a case about qualified immunity. App.12a. But *Filarsky* itself drew on absolute immunity precedent throughout its analysis—even citing the "common law protections" of both "absolute [and] qualified immunity" in its *third sentence*. *See* 566 U.S. 380, 385–87. That conforms to this Court's long practice of interpreting § 1983 "in harmony with general principles of tort immunities and defenses." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976).

immunity. *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 612 (2015) (quotation omitted). It's not clear that the common-law tradition *Filarsky* relied on even supports extending immunity to defendants "who have time to make calculated choices" before acting unlawfully. *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting the denial of certiorari). But it is clear in such circumstances that fears about timidity or hesitation dissipate dramatically. By applying qualified immunity here, the decision below broadens a doctrine that has already strayed far beyond its roots. *See Baxter*, 590 U.S. at 1013 (Thomas, J., dissenting from the denial of certiorari). It does not just "break[] from this Court's precedent," it moves the law "another step further from the original meaning" of § 1983. *See Garza v. Idaho*, 586 U.S. 232, 258 (2019) (Thomas, J., dissenting).

2. The Sixth Circuit's threshold error in deciding whether qualified immunity applies would alone be worthy of this Court's review. But the lower court's errors did not stop there.

If qualified immunity applies to a private party, it must receive "the same immunity" as a public employee. *Filarsky*, 566 U.S. at 390. Rather than treating Baker Donelson as an ordinary public employee, however, the court granted qualified immunity solely because no precedent clearly established that "a law firm (or private company) violates the First Amendment" when retaliating against an individual in response to the government's threats of financial harm. App.24a. So Baker Donelson received the benefits "enjoyed by" public employees when assessing its eligibility for qualified immunity, *Filarsky*, 566 U.S. at 390, without the consequence that a public employee would face for engaging in the same retaliatory conduct.

It's hard to imagine a decision that more thoroughly upends this Court's immunity precedent. The whole point of *Filarsky* is that private defendants engaged in public service must be treated no differently than "their public employee counterparts." 566 U.S. at 390. Yet the Sixth Circuit granted Baker Donelson the "immunity enjoyed by" a government employee, 566 U.S. at 394, while holding that it cannot reasonably compare the firm's conduct to other government employees. That conclusion eviscerates *Filarsky*'s core and the 200 years of common-law history it drew upon. *See id.* 384–91.

To see the problem more starkly, consider how two cases might turn out under the Sixth Circuit's reasoning. Both cases involve a defendant who supervises several employees, two of whom are Republicans. The defendant learns that his boss, a government official, will not tolerate Republicans working for his agency. The defendant does not care about partisan politics. But to avoid retaliation from his boss, he fires both to preserve his own interests. *See Elrod v. Burns*, 427 U.S. 347, 351 (1976).

Now suppose the only difference between these two cases is that the defendant is a government employee in one, worried about losing his job, but he's a private party in the other, worried about losing his lucrative government contracts. Does that difference matter? Under *Filarsky* (and the common-law tradition it relied on), it should not. *See* 566 U.S. at 393–94. Yet the Sixth Circuit held otherwise, granting qualified immunity based solely on the defendant's status as a private party.

The decision makes it more difficult to hold private defendants liable for conduct that would be plainly unconstitutional if done by a government employee. *See Elrod*, 427 U.S. 347 at 360, 372–73. And it does so, not in spite of, *but because* the defendant showed "no concern regarding the public interest." App.40a (Clay, J., dissenting). That's a long way adrift from a defense historically grounded in "enhancing the public good." *See Filarsky*, 566 U.S. at 392 (quoting *Wyatt*, 504 U.S. at 168).

Fifteen years ago this Court worried that a private contractor working alongside a public employee could "be left holding the bag" despite performing the same public service. *Id.* at 391. The decision below creates the inverse problem. Now public employees can "fac[e] full liability for actions taken in conjunction with [private parties] who enjoy immunity for the same activity." *Id.*

* * *

Left unaddressed by this Court, the decision below effectively overrules *Filarsky* and undermines the precedent that led to its holding. If qualified immunity is to receive such a dramatic expansion, it should be this Court's prerogative to make that change. Whether qualified immunity will shield not just governmental interests, but private pecuniary interests as well, remains a question of exceptional importance warranting this Court's consideration.

II. The decision below creates a circuit split.

The Sixth Circuit's decision conflicts with four other circuits. The First, Fourth, Seventh, and Eleventh Circuits have all denied qualified immunity for private defendants who acted unlawfully to advance their own personal interests.

1. After *Filarsky*, the Fourth Circuit denied qualified immunity to a bail bondsman who "operated in pursuit of his own financial self-interest." *Gregg v. Ham*, 678 F.3d 333, 341 n.6 (4th Cir. 2012). While bail bondsmen may act under color of state law, "they are not entrusted with a public function." *Id.* at 340. And "rather than operating in the interest of public service," the court explained, "the work of a bail bondsman is fueled primarily by a strong profit motive." *Id.* at 341. This "self-interest," coupled with the fact that a bondsman is "not hired by or working on behalf of the government," makes the private defendant ineligible for qualified immunity. *Id.* at 341 & n.6.

2. Other circuits reached a similar conclusion even before *Filarsky*.

The First Circuit has long denied qualified immunity to private parties who acted unlawfully "in the advancement of their own self-interests." *Felix de Santana v. Velez*, 956 F.2d 16, 20 (1st Cir. 1992). In *Felix de Santana*, the court held that qualified immunity did not protect the private defendants who worked with a local prosecutor to bring baseless charges against the plaintiff. *Id.* at 17, 20. The court explained that "[e]xtending immunity to defendants" would "make[] no sense" because "they were not performing any public function or duty." *Id.* at 19. Rather, the defendants participated in the scheme solely for a "private purpose." *Id.*

The court in *Felix de Santana* distinguished its earlier precedent granting qualified immunity to private parties based on this divide over public and private interests. In *Rodriques v. Furtado*, 950 F.2d 805 (1st Cir. 1991), several doctors were "pressed into service by the State" to assist the police in performing body cavity searches. *Id.* at 815. Unlike *Felix de Santana* (or the facts in DeLanis's case), there were no allegations that the physicians were "acting out of self interest in conducting the search." *Id.*

The First Circuit's reasoning in both *Rodriques* and *Felix de Santana* echoed what this Court would say 20 years later in *Filarsky*. The court observed that denying qualified immunity to physicians who had "accepted the responsibilities of a public official in the public interest" would "deter them from assisting in the execution of valid warrants" in the future. 950 F.2d at 815 (citation modified). But that same concern does not exist for private defendants who act unlawfully to advance "their own self-interests." *Felix de Santana*, 956 F.2d at 20.

The Eleventh Circuit has likewise rejected qualified immunity claims by private parties who, for their own benefit, worked with the government to violate someone's rights. *See Burrell v. Bd. of Trustees of Ga. Military College*, 970 F.2d 785, 792, 796 (11th Cir. 1992). In *Burrell*, a private bank fired the plaintiff after her criticism of a government agency caused the bank to lose "around $100,000 in deposits." *Id.* at 791–92. Like the defendants in *Felix de Santana*, the plaintiff alleged that the private defendants "conspired with public officials to deprive Burrell of her constitutional rights." *Id.* at 796. And like the defendants in *Felix de Santana*, the defendants did not do so because of their "duties under a government contract" or an obligation "to assume the responsibilities of a public official in the public interest." *Id.* at 795–96 (citation modified). Rather, the private defendants sought to protect their own financial interests after the plaintiffs' speech cost them significant deposits. And for that reason, they could not "claim the protection of qualified immunity." *Id.* at 796.

Finally, the Seventh Circuit reached a similar conclusion in *Sherman v. Four County Counseling Center*, 987 F.2d 397 (7th Cir. 1993). There, a plaintiff sued "a police officer and a private mental institution involved in [his] emergency involuntary detention." *Id.* at 398. The private party—Four County Counseling Center—"accepted and treated [the plaintiff] pursuant to court order," and "[t]he state directed Four County to give [the plaintiff]" the disputed treatment. *Id.* at 405. No one alleged that Four County "acted to further its own pecuniary or other interests." *Id.* Those circumstances required extending qualified immunity to the private defendant.

Like the pre-*Filarsky* First Circuit decisions, the Seventh Circuit relied on reasoning that this Court would later adopt. It explained that Four County "was fulfilling a public duty"—embodied by both a court order and state statute. *Id.* at 406. It also worried that "private hospitals might well refuse to accept involuntary patients" if doing so could "subject [them] to suit." *Id.* And just as this Court would later do in

Filarsky, the Seventh Circuit highlighted the potential incongruity because "a state hospital that acted precisely as Four County did would be protected by qualified immunity." *Id.* at 405. Yet "[t]hese rationales are not transferable" when the private defendant acts outside of any delegated authority in pursuit of its own personal interests. *Wyatt*, 504 U.S. at 168.

There is no need for further percolation. The questions and concerns raised by private-interest qualified immunity have been sufficiently explored though, as the fact of this petition establishes, not resolved as clearly as this Court may have believed in *Filarsky*.

III. This case is an ideal vehicle for resolving the immunity questions.

The case is an excellent vehicle for resolving the immunity questions at issue because it arises on a concise record in which Baker Donelson has forfeited other potentially complicated arguments.

In this appeal, Baker Donelson has not disputed that it acted under color of state law under § 1983 when it fired DeLanis. App.100a (citing Dist.Ct.Dkt.44). Nor has it disputed that DeLanis's conduct on the commission—how he voted and what he said—was "constitutionally protected speech or activity." *Id.* at 77a. Those concessions give the Court a clean opportunity to address the issues raised about the scope of qualified immunity. And because this appeal reaches the Court on a motion to dismiss, it can resolve those issues without sorting through a complicated factual record.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED NOVEMBER 24, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 23-5939/5948
File Name: 25a0318p.06

Appeal from the United States District Court for the Middle District of Tennessee at Nashville.
No. 3:22-cv-00469—Eli J. Richardson, District Judge.

Argued: October 23, 2025

Decided and Filed: November 24, 2025

Before: SUTTON, Chief Judge; CLAY and GIBBONS, Circuit Judges.

JAMES A. DELANIS,

Plaintiff-Appellee,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY,

Defendant,

ROBERT J. MENDES, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE METRO COUNCIL (23-5939); BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC (23-5948),

Defendants-Appellants.

OPINION

SUTTON, Chief Judge. A Nashville city councilman threatened to withdraw business from a law firm, which served as the city's outside counsel, due to the position one of its attorneys took as the chair of the county election commission on a tax referendum. When the attorney declined the law firm's request that he oppose the referendum, the firm fired him. The attorney sued the council member and the law firm for retaliating against his federal free-speech rights, namely his support of the tax-repeal referendum in his capacity as the county election chair. The district court denied qualified immunity to each defendant in ruling on their motions to dismiss.

The law firm is eligible for qualified immunity in view of the government work it performed. And it did not violate any clearly established law. We know of no case in which the First Amendment prohibited a law firm from firing one of its lawyers when the business interests of the firm, including demands from one of its clients, triggered the firing. We thus reverse that portion of the district court's decision. On the other hand, the council member's alleged actions violated clearly established law, and we affirm the district court's denial of his motion to dismiss.

I.

This case emerges from a debate over taxes in Nashville, Tennessee. The Metropolitan Government of Nashville and Davidson County (Nashville for short) governs the city. Its city council adopted a tax hike in

2020 that would raise property levies by over a third. Some residents opposed the tax increase. A citizen group circulated a petition to amend Nashville's charter by referendum to unwind the heightened property taxes and limit future tax increases. Nashville opposed the referendum because it would repeal the tax increase and tie Nashville's fiscal hands in the future.

The referendum required another government entity, the Davidson County Election Commission, to determine whether to certify the proposal for a vote. Among other responsibilities, the Election Commission ensures that a petition complies with state law before placing it on the ballot. *See* Tenn. Code § 2-5-151(c). James DeLanis held one of the Election Commission's five seats and served as its chair. In addition to his role as chair of the Election Commission, DeLanis worked as an attorney at Baker Donelson, a law firm based in Tennessee.

In handling the petition, the Election Commission asked a Tennessee court for a declaratory judgment over whether it met the criteria to qualify for the ballot. Nashville entered the fray as well, asking the court to prevent the Election Commission from certifying the petition. The Tennessee court concluded that the proposed referendum violated Tennessee law and that the Election Commission did not need to place it on the ballot.

The residents who opposed the tax increase did not give up. They sought to cure the defects identified by the state court and submitted a new petition to the Election Commission. Nashville's city council again opposed the effort. One of its members, Robert Mendes, proposed a resolution to combat the renewed petition. His resolution added a poison pill. If the Election Commission permitted the second tax referendum to go on the ballot, his resolution would add a second election option banning *any* future tax referendums, thus barring Nashville residents from ever overturning a property tax increase.

Mendes's efforts did not deter the Election Commission. It concluded that the new citizen tax referendum resolved its previous concerns and voted to certify it for the July 2021 ballot. That decision spurred another legal maneuver. The next day, the mayor and another Nashville officer asked a state court to prohibit the Election Commission from approving the new citizen tax referendum.

The Election Commission held a public meeting a few days later to discuss the second petition. Mendes spoke and, according to DeLanis's complaint, "berated" the Commission's members for their role in this "sham," accusing them of engaging in "political theater designed to feed . . . the ambitions of a small percentage of the county." R.34 ¶ 53. He concluded by warning the Election Commission that "you might get away with it tonight, but we see you, we see what you're doing and it's not going to stand one way or the other." R.34 ¶ 53. These comments, to DeLanis's eyes and ears, sought to "intimidate" the Election Commission and its members from qualifying the citizen referendum for a vote. R.34 ¶ 54.

At this point, Nashville "officials" reached out to partners at Baker Donelson, the city's outside counsel, to ask for "aid and assist[ance]" in keeping the new citizen tax referendum off the ballot. R.34 ¶ 57. The request extended to "influencing DeLanis as a Commissioner and as the Chair of the [Election] Commission." R.34 ¶ 57. The firm's general counsel, John Hicks, emailed DeLanis that "we need to have a conversation about the current election commission issues and their impact on the firm's representation of [Nashville]." R.34 ¶ 59. Hicks complained to DeLanis about "the mess I have to clean up" due to DeLanis's role on the Election Commission. R.34 ¶ 61. DeLanis's actions, Hicks explained, caused Nashville and its school board—"two major clients of the firm"—to threaten to "pull their business," much to the chagrin of Baker Donelson's partners. R.34 ¶ 62. Hicks also raised potential conflict-of-interest concerns created by DeLanis's roles on the Election Commission and at a law firm representing Nashville.

DeLanis stood his ground. He told Hicks that any attempts to "influence" him or the Election Commission "could be criminal or illegal acts under Tennessee law." R.34 ¶ 68. DeLanis asked Hicks to direct his concerns to Nashville's legal department. Two days after their initial conversation, Hicks told DeLanis that no conflicts in fact existed between DeLanis's role on the Election Commission and his employment with Baker Donelson.

The tax-referendum controversy did not abate. A few weeks later, a Tennessee court sided with Nashville and ruled that the second citizen referendum also suffered from deficiencies that prevented it from appearing on the ballot. The Election Commission scheduled a meeting to decide whether to appeal the ruling. Pleased by the trial court's decision, Nashville officials opposed an appeal. Unspecified city officers or employees asked Baker Donelson to help "ensure" that the Election Commission did not appeal the decision. R.34 ¶ 79. "[O]ne or more" of the subsequent "communications," DeLanis alleges, "were made by, at the direction of or in concert with Mendes." R.34 ¶ 79.

The day before the Election Commission's scheduled meeting, Hicks "asked" DeLanis to abstain from voting on whether to appeal. R.34 ¶ 82. Mendes, that same day, emailed the Election Commission's members and Nashville's city council, "urg[ing]" the Commission not to appeal. R.34 ¶ 86. He "accused" DeLanis of "conducting a pre-baked political circus that was fundamentally anti-democracy." R.34 ¶ 87. He asserted that DeLanis's "intentions" all along were to "push the referendum onto a ballot no matter what." R.34 ¶ 88. The letter also claimed that, "[f]or reasons that seem hyper-partisan," R.34 ¶ 88, DeLanis fired the Election Commission's attorney because he did not provide the counsel DeLanis wanted. Mendes made the letter public and distributed it to media.

Hicks asked to meet DeLanis at the Baker Donelson office on the morning of the meeting: June 25, 2021. DeLanis answered that he would not meet with him without first receiving the meeting's "purpose" in writing because "further discussions" of his "vote at the election commission meeting today" could "put the law firm and its clients in a questionable legal position." R.34 ¶ 98. Hicks responded that DeLanis's time at the firm was coming to an end, leaving him two options: (1) "resigning from the election commission" and staying with the firm for the rest of the fiscal year or (2) "retiring now" from the firm and remaining on the Election Commission. R.34 ¶ 99. When DeLanis asked for more time, Hicks fired DeLanis effective immediately. Hicks told DeLanis he had "no choice," which DeLanis took to mean that Nashville pressured the firm to "retaliate" against him. R.34 ¶¶ 106–07.

DeLanis sued Mendes, Baker Donelson, and Nashville under 42 U.S.C. § 1983 and state law. He brought claims for retaliating against his First Amendment rights, conspiring to deny his freedom of speech, and violating various Tennessee constitutional and statutory provisions.

The defendants moved to dismiss DeLanis's complaint based on qualified immunity. The district court rejected their motions. Of relevance here, the court ruled that Mendes violated clearly established federal free-speech law and that the law firm, as a private entity, could not benefit from qualified immunity. Mendes and Baker Donelson both appeal.

II.

A brief word or two is in order about jurisdiction. We have jurisdiction over a district court's denial of qualified immunity under the collateral order doctrine. *Ashcroft v. Iqbal*, 556 U.S. 662, 671–72, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Qualified immunity shields officers not only from money damages but also from the burdens of litigation and discovery. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). We thus may hear an officer's appeal of a denied motion for qualified immunity, including at the motion-to-dismiss stage. *Iqbal*, 556 U.S. at 672.

DeLanis insists that we may not hear this appeal because Mendes's and Baker Donelson's arguments raise questions of fact under *Johnson v. Jones*, 515 U.S. 304, 307, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). Whatever the parameters of that decision, it applies only to cases that reach summary judgment. "The concerns that animated the decision in *Johnson* are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings." *Iqbal*, 556 U.S. at 674. Because we must credit all well-pleaded facts at the pleading stage, no factual disputes exist and *Johnson* thus is "not triggered." *Myers v. City of Centerville*, 41 F.4th 746, 757 (6th Cir. 2022); *see, e.g.*, *Anders v. Cuevas*, 984 F.3d 1166 (6th Cir. 2021).

III.

As to the merits, we ask whether Mendes and Baker Donelson may benefit from qualified immunity and, if so, whether they violated DeLanis's clearly established free-speech rights.

A.

Qualified immunity protects public officials and those serving the public from "the time, expense and risk of money-damages actions" if they did not violate the claimant's clearly established federal constitutional rights. *Moore v. Oakland County*, 126 F.4th 1163, 1167 (6th Cir. 2025) (quotation omitted). Lawsuits against "individual government officials" in their personal capacities, generally speaking, implicate the defense. *Nugent v. Spectrum Juv. Just. Servs.*, 72 F.4th 135, 143 (6th Cir. 2023) (quotation omitted). When private attorneys and law firms provide legal services to a government body, they also are eligible for qualified immunity in connection with that work. *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997); *see Filarsky v. Delia*, 566 U.S. 377, 393–94, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012). The defense extends to actions taken while "performing discretionary functions" of office. *Crawford-El v. Britton*, 523 U.S. 574, 588, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) (quotation omitted). The defense thus turns on the function of the individual's work, not the individual's job title. So it is that a city official does not receive qualified immunity for private actions taken outside that official's job, while a private lawyer does receive qualified immunity for public actions taken in service of a government client. *See generally Filarsky*, 566 U.S. at 389–94.

Qualified immunity covers these claims against Mendes and Baker Donelson. Mendes served as a Nashville council member and the complaint alleges that he used his government position to violate DeLanis's constitutional rights. *See Moore*, 126 F.4th at 1166–67. Baker Donelson served as outside counsel for the Nashville government, and allegedly fired DeLanis on its behalf. *See Cullinan*, 128 F.3d at 310. Both Mendes and Baker Donelson thus may raise the defense.

In seeking to head off this conclusion, DeLanis argues that his independent requests for a declaratory judgment and an injunction defeat qualified immunity. But this misapprehends how qualified immunity works. The defense, all agree, protects defendants from claims for money damages. *Tolan v. Cotton*, 572 U.S. 650, 654, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) (per curiam). An *additional* request for declaratory and injunctive relief does not suddenly remove the qualified-immunity defense from an *existing* request for money damages. The existence of a money-damages claim suffices by itself to trigger qualified immunity, no matter what other claims for relief the plaintiff raises.

DeLanis adds that neither defendant acted within the scope of their discretionary functions, thereby piercing any qualified-immunity defense. But both defendants carried out "discretionary functions" within the scope of their duties when playing their alleged part in DeLanis's departure from the law firm. *See Poe v. Haydon*, 853 F.2d 418, 423 (6th Cir. 1988). One does not have to look far for evidence of the public functions that each defendant performed. All of it comes from DeLanis's own complaint and the allegations he makes in support of his § 1983 claims.

Start with Mendes. The allegations in the complaint offer one example after another of Mendes's serial public actions in favor of preserving Nashville's property-tax increase. Mendes proposed the city budget that initiated the tax increase. He introduced a poison-pill resolution to deter the Election Commission from qualifying a citizen tax referendum that would have repealed the tax increase. Mendes spoke as a city councilmember to criticize the Election Commission's handling of the tax referendum. He signed a letter as a "[Nashville] Council[] At Large member" that denounced DeLanis's work on the Election Commission. R.34 ¶ 85. All the while, Mendes sat on Nashville's city council, which has authority to support these public functions and authority over the city's decision to retain outside counsel. *See* Metro. Gov. of Nashville & Davidson County Charter § 8.607; Metro. Gov. of Nashville & Davidson County Code of Ordinances § 4.08.080(A) – (C).

Turn to Baker Donelson. Here, too, the complaint tells us all we need to know. Nashville retained Baker Donelson as outside counsel and remained a "client" of the firm "[d]uring all times relevant to" DeLanis's claims. R.34 ¶¶ 26–27. Nashville officials asked Baker Donelson "to aid and assist" its efforts to preserve the tax increase "by influencing DeLanis as a Commissioner." R.34 ¶ 57. Those officials remained "in contact with Baker Donelson" about its work implementing the city's policy of opposing the citizen tax referendum. R.34 ¶ 94. Baker Donelson ultimately fired DeLanis "by and pursuant to" Nashville's "demands and requests." R.34 ¶ 114. That decision was "so intertwined" with Nashville's policy of opposing the citizen tax referendum that DeLanis "attributed" it to Nashville. R.34 ¶¶ 165, 170–71. To the extent the law firm functioned as a state actor subject to First Amendment liability when representing Nashville, as DeLanis alleges, the ability to manage its staff undoubtedly fell within its discretionary powers as well.

DeLanis separately invokes *Clinton v. Jones* to show that qualified immunity does not apply. 520 U.S. 681, 694–95, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997). But that is a case about *absolute* immunity for *presidents*. That precedent has nothing to offer here.

DeLanis separately insists that Mendes and Baker Donelson abused their authority. But this allegation—that the defendants broke the law by firing him—does not remove qualified immunity from the stage. Otherwise, no official could benefit from the defense. Every lawsuit that states a viable claim "alleges a misuse of power, because no state actor has the authority to deprive someone of a federal right." *Lindke v. Freed*, 601 U.S. 187, 200, 144 S. Ct. 756, 218 L. Ed. 2d 121 (2024).

DeLanis claims that qualified immunity does not apply because the defendants knowingly violated the law. But the Supreme Court abandoned a subjective approach to qualified immunity decades ago. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817–18, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Today, DeLanis faces a different, and in truth lighter, burden. All he must show is that Mendes and Baker Donelson violated an objective standard—that they violated "clearly established law." *See id.* at 818.

DeLanis's last bid for removing qualified immunity from the case focuses on Baker Donelson. Noting that the law firm is a private entity, he claims that the defense necessarily does not apply. In doing so, he points to a statement in *Nugent v. Spectrum Juvenile Justice Services* that qualified immunity is "unavailable" in this setting, namely when a private entity performs a government function. 72 F.4th at 144. But *Nugent* involved *Monell* liability. Qualified immunity does not apply in that setting. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *see Owen v. City of Independence*, 445 U.S. 622, 638, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980).

The words "qualified immunity," notably and understandably, never appear in the § 1983 section of *Nugent*. No surprise, then, the decision never explains why a private entity could be sued under § 1983 for performing a public function but could never receive qualified immunity for that public function. The one time the words "qualified immunity" appear is when the opinion "briefly comment[s] on" a few issues that we "remand[ed] for the district court to address . . . in the first instance." *See Nugent*, 72 F.4th at 143. The decision is not a qualified-immunity case and does not purport to be one.

United Pet Supply, Inc. v. City of Chattanooga is of a piece with *Nugent* and does not help DeLanis either. 768 F.3d 464 (6th Cir. 2014). It concerned "the unavailability of qualified immunity as a defense in an official-capacity suit." *Id.* at 484. As with *Monell* claims, official-capacity claims never give rise to a qualified immunity defense. *See Kentucky v. Graham*, 473 U.S. 159, 166–67, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). *United Pet Supply* reaffirmed our cases granting qualified immunity to private entities in individual-capacity lawsuits. 768 F.3d at 484 n.3.

Further alleviating doubt about the point is our earlier holding in *Cullinan v. Abramson*, 128 F.3d at

310. *Cullinan* raised this question: Does the "outside counsel" status of several "lawyers and their firm" make them "ineligible for qualified immunity," notwithstanding their work for the City of Louisville and notwithstanding the reality that the lawsuit arose from their work for the City? *Id.* No, we answered, and permitted the lawyers and law firm to raise the defense. *Id.* The Supreme Court, we reasoned, explained that "the common law '*did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.'" *Id.* (quoting *Richardson v. McKnight*, 521 U.S. 399, 407, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997)). As a result, "[t]he rationales for qualified immunity apply to these lawyers and their firm in about the same way they apply to" traditional government officers. *Id.* We saw "no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel." *Id.*

Since *Cullinan* and *Richardson*, the Supreme Court has removed the last vestige of doubt about whether a private entity is eligible to receive qualified immunity when it handles public functions that might expose it to § 1983 liability. In *Filarsky v. Delia*, the Court reviewed a Ninth Circuit decision that expressly rejected *Cullinan* and that held that private attorneys are not eligible for qualified immunity. 566 U.S. at 382–83. The Supreme Court overruled the Ninth Circuit. It held that qualified immunity applied to a private attorney working for a city even though he was not a "full-time employee." *Id.* at 393–94. In the process, the Court explained the common-sense principle that private actors generally receive the bitter and the sweet in defending constitutional torts. If a private actor is liable to a lawsuit as a state actor, it should also benefit from a state actor's defenses. *Id.* at 389–91. "[I]mmunity . . . should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis." *Id.* at 389. That conclusion flowed from the history of officer immunity. Due to the small size of nineteenth-century governments, states delegated many public functions to private parties who received the same defenses as their public-official counterparts. *Id.* at 385–89.

DeLanis persists that the law firm in *Cullinan* operated as a partnership and that Baker Donelson operates as a Tennessee professional corporation. But he provides no authority for the novelty that *Cullinan* turns on the law firm's legal form as opposed to the government function it performs. We later described the law firm in *Cullinan*, at any rate, as a "corporate" defendant that nonetheless properly received qualified immunity. *United Pet Supply*, 768 F.3d at 484 n.3. Regardless of whether this later characterization listed the entity's form correctly, it confirms that a law firm's form of organization does not by itself defeat qualified immunity. *See id.*

DeLanis argues in the alternative that, even if a private law firm may be eligible for qualified immunity, the immunity attaches only if outside counsel "act[ed] at the behest of the state." *Cooper v. Parrish*, 203 F.3d 937, 952 (6th Cir. 2000). No record-supported facts, DeLanis adds, show that Baker Donelson acted as an agent for the city in firing him. But this argument collides with the words of his complaint. DeLanis premises his free-speech claim against Baker Donelson on its "close relationship" with Nashville and his allegation that it fired him "pursuant to" Nashville's "Anti-Referendum Policy." R.34 ¶¶ 114, 171. Nashville officials first asked Baker Donelson, its outside counsel, to "influenc[e]" DeLanis to side against the citizen tax referendum on the Commission. R.34 ¶ 57. Once that failed, the firm fired him on Nashville's behalf so that his removal "should be attributed to [the city.]" R.34 ¶ 171.

In *Cooper*, in marked contrast, "little—if any—evidence" showed that a private attorney "was acting at the behest of the state" when filing complaints against the nightclubs at issue in that dispute. *Cooper*, 203 F.3d at 952. Not so for Baker Donelson. It served as the city's outside counsel, took marching orders on firing DeLanis from city officials, carried out Nashville's policies in the process, and fired him in a way "attributed" to Nashville. R.34 ¶ 171.

Nor does this conclusion undermine the reasons we have qualified immunity. The Supreme Court tells us why. If qualified immunity protected government employees but not "private" actors "working alongside them" from facing "full liability" for the same activities under § 1983, "any private individual with a choice might think twice before accepting a government assignment." *Filarsky*, 566 U.S. at 391. DeLanis may not claim that Baker Donelson acted on behalf of Nashville when it helps him (in providing a premise for suing it under § 1983) and deny that connection when it hurts him (in denying that qualified immunity applies).

Our colleague dissents solely on this ground, arguing that "the defense of qualified immunity is available only to government officials." Dissent at 19. We respectfully disagree. In no uncertain terms, the Supreme Court held in *Filarksy* that a "private individual[]," even "[t]hough not a public employee," received qualified immunity. *Filarsky*, 566 U.S. at 393–94. That explains why the dissent does not cite any Supreme Court cases for the assertion that private actors may never invoke qualified immunity. *Richardson* does not fill that gap. In that "self-consciously 'narrow[]' decision," in the words of *Filarsky*, "[t]he Court made clear that its holding was not meant to foreclose all claims of immunity by private individuals." *Id.* at 393 (quoting *Richardson*, 521 U.S. at 413.).

Nor are we making the same mistake by creating a blanket rule in the other direction—by holding that private actors *always* receive qualified immunity. Consistent with prior United States Supreme Court and Sixth Circuit rulings, we hold only that, on this record, Baker Donelson is eligible to invoke qualified immunity. That is all. It is DeLanis's allegations in his complaint, notably, that establish this eligibility—that the law firm served as outside counsel for Nashville, that Nashville wished to punish DeLanis's free-speech advocacy for the tax-repeal referendum, that the law firm acceded to the government's request to fire DeLanis, and that the law firm did so "pursuant to" Nashville's request, all of which made it appropriate for the law firm's actions to "be attributed" to Nashville. R.34 ¶¶ 114, 171. This application of existing precedent makes no new law when it comes to eligibility for qualified immunity.

But if that is so, the dissent worries, how could we also conclude that the law firm did not violate clearly established law? That is a different question. The first question is whether a private entity serving a public client may ever be eligible for qualified immunity. It may be, as many cases make clear and as we explain above. The second question is whether the law firm's conduct violated clearly established free-speech guarantees. That is a different inquiry—about the meaning of the underlying constitutional protection—and it is the one to which we now turn.

B.

That Mendes and Baker Donelson are eligible for qualified immunity is one thing. It is a separate matter whether the defense applies to their actions. We must consider whether they violated DeLanis's First Amendment rights and whether they violated clearly established law in doing so. *Moore*, 126 F.4th at 1167. To prove a clearly established violation, the claimant must show that the right's contours were "sufficiently clear that every reasonable official would have understood" that he was violating it. *Reichle v. Howards*, 566 U.S. 658, 664–65, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012) (quotation omitted). DeLanis can do so by identifying a case "with facts similar enough that it squarely governs this one." *Moore*, 126 F.4th at 1167 (quotation omitted). In assessing the defense, we accept the complaint's factual allegations as true and draw all reasonable inferences in DeLanis's favor. *Hudson v. City of Highland Park*, 943 F.3d 792, 798 (6th Cir. 2019).

DeLanis must make three showings to succeed on his First Amendment retaliation claims. *Cunningham v. Blackwell*, 41 F.4th 530, 541 (6th Cir. 2022). He must allege that he engaged in protected speech. *Id.* He must allege that he suffered an "adverse action" that would "dissuade individuals of ordinary firmness from doing what they were doing." *Id.* (quotation omitted). And he must allege a "causal link" between his protected speech and the adverse action. *Id.*

Mendes. Mendes does not deny that DeLanis engaged in protected activity when speaking as chair of the Election Commission. *See* R.72 at 25. The First Amendment, generally speaking, protects public speech, including by officeholders. *See Lindke*, 601 U.S. at 196–97. Because Mendes, and for that matter Baker Donelson, do not deny that DeLanis engaged in protected speech, we need not address the free-speech complications that sometimes arise when an officeholder speaks in his official capacity. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 417–26, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (The First Amendment does not protect public employees speaking "pursuant to their official duties."); *Doe v. Reed*, 561 U.S. 186, 220–23, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (Scalia, J., concurring in the judgment) (finding "no precedent from this Court holding that legislating is protected by the First Amendment"); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125–129, 131 S. Ct. 2343, 180 L. Ed. 2d 150 (2011) ("reject[ing] the notion that the First Amendment confers a right to use governmental mechanics to convey a message").

DeLanis also alleges that he suffered an "adverse action." *See Cunningham*, 41 F.4th at 541 (quotation omitted). When a public official warns a law firm that the city may pull business from it due to the public-office actions of one of its lawyers, that suffices to deter a person "of ordinary firmness" from exercising his First Amendment rights in that office. *See id.* Nor can Mendes fairly deny that DeLanis's firing was a "reasonably foreseeable consequence" of his threats to the firm. *Paige v. Coyner*, 614 F.3d 273, 280 (6th Cir. 2010).

DeLanis also alleges that Mendes took the adverse action "in response to [his] protected activity." *See Stockdale v. Helper*, 979 F.3d 498, 506 (6th Cir. 2020). The complaint alleges that Nashville officials "threaten[ed] to pull business from the firm" and "wanted the firm's assistance to make certain that DeLanis would" not harm their interests in his role on the Election Commission. R.34 ¶ 96. Based on these comments, the complaint alleges, Baker Donelson fired DeLanis. DeLanis connected Mendes to those threats, alleging that the Nashville officials who threatened Baker Donelson "includ[ed]" Mendes. R.34 ¶¶ 95–96. The factual allegations in the complaint permit the plausible inference that Mendes was involved in the threats. Mendes strongly opposed the citizen tax referendum, forcefully rebuked DeLanis for his work on the Commission, and served as a councilmember of a city whose "officials" made the threats. R.34 ¶¶ 79, 95–96.

Mendes's alleged conduct also violated clearly established law. We have left no doubt that causing an employee's firing due to his protected speech violates the First Amendment. *Kubala v. Smith*, 984 F.3d 1132, 1139–40 (6th Cir. 2021). To be "discharge[d]" for speech is a textbook example of an adverse action. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 396 (6th Cir. 1999) (en banc). Mendes had ample notice that pressuring an employer to fire an employee in retaliation for his protected speech ran afoul of the Free Speech Clause. DeLanis, then, tied Mendes's actions to a "specific," *Reichle*, 566 U.S. at 665, adverse action recognized by existing law: causing an employee to be fired due to his speech.

Case law confirms this conclusion. In *Paige v. Coyner*, an accountant drew the ire of a county official by opposing a new highway project. 614 F.3d at 275–76. The official retaliated by calling the accountant's employer and lying about what the accountant had said "with the intent of having [her] fired." *Id.* at 276–77. The official succeeded; the accountant's firm fired her a few days later. *Id.* at 277. We concluded that the accountant had alleged enough in her complaint to proceed to discovery. *Id.* at 280–83. "Losing one's job and accompanying benefits," we explained, "is certainly severe enough to deter a person of ordinary firmness" from speaking freely. *Id.* at 281. DeLanis likewise alleges that Mendes spoke to Baker Donelson's leadership in a way that would foreseeably lead to his removal from the firm and that the firm pushed him out as a result.

Mendes's response that our cases have not dealt with a *public official* fired from his private job in retaliation for his speech does not advance the ball. Our cases plainly established that Mendes could not fire DeLanis for his speech if DeLanis worked for him at the city or if DeLanis worked only for him through a private business. *See Thaddeus-X*, 175 F.3d at 396; *Paige*, 614 F.3d at 281. This case parallels *Paige*. As in that case, DeLanis worked for a private firm, and Mendes caused him to be fired. The reality that DeLanis also served as a public officer does not transform a clearly adverse action into innocent conduct.

Mendes adds that DeLanis did not adequately allege that he threatened Baker Donelson. He points out that DeLanis admits that Baker Donelson never told him who at Nashville made the threats. But DeLanis has done enough at the pleading stage to connect Mendes to the threats against Baker Donelson and his removal from the firm. Based on the statements of Baker Donelson's general counsel, DeLanis alleged that the Nashville "officials" who spoke to Baker Donelson "includ[ed]" Mendes and that other officials acted "at the direction of or in concert with Mendes." R.34 ¶¶ 79, 95–96. That conclusion plausibly follows from the factual allegations in the complaint. Mendes spearheaded an effort to defeat the citizen tax referendum at issue. He "berated" DeLanis at a Commission meeting for orchestrating "pre-baked, political theater." R.34 ¶ 53. He circulated a public letter accusing DeLanis of firing the Commission's counsel for the "hyper-partisan" reason of "push[ing] the referendum onto a ballot no matter what." R.34 ¶ 88. He denounced DeLanis's work as "fundamentally anti-democracy." R.34 ¶ 87. And Mendes served as a councilmember of the city government whose "officials" made the threats. R.34 ¶¶ 79, 95–96. Mendes's frustration with DeLanis and hearty opposition to his conduct on the Commission make it plausible that he was one of the Nashville officials, if not the key Nashville official, who threatened Baker Donelson.

Mendes nonetheless insists that we cannot plausibly draw this inference. Pointing to *Bell Atlantic Corp. v. Twombly*, he notes that an allegation of parallel business conduct in that case did not support an inference that telephone companies conspired to fix prices. 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). But the single-step inference required in today's case looks nothing like the multi-step inferences the plaintiffs sought to string together to allege price-fixing in *Twombly*.

Even if Mendes participated in Nashville's communications with Baker Donelson, he maintains that those discussions did not necessarily involve threats. "What if, for example, Baker Donelson wildly misinterpreted Councilmember Mendes's alleged request for help," Mendes muses, "or simply overreacted and terminated [DeLanis's] employment on its own?" Mendes's Reply Br. 16. That is precisely the kind of question that lends itself to the discovery process. For now, we must credit DeLanis's plausible allegations that Nashville officials, "including" Mendes, told Baker Donelson to change DeLanis's tune while "threatening to pull business from the firm." R.34 ¶¶ 95–96. After discovery, Mendes is free to argue at summary judgment that the firing arose from a misunderstanding.

Baker Donelson. DeLanis, by contrast, has not shown that Baker Donelson violated clearly established law. Whether the law firm's action violated the First Amendment need not detain us. So long as its actions did not violate clearly established law, qualified immunity applies. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

The allegations against Baker Donelson present a unique situation not addressed by our cases to date. Whether Baker Donelson acted honorably or not in firing DeLanis, it did not have clear notice that a law firm (or private company) violates the First Amendment by firing an employee when a government client threatens to take its business elsewhere if the employee continues to act adversely to the government. Baker Donelson, for better or worse, sought to protect its client base, not to punish DeLanis for his speech. As DeLanis acknowledges in his complaint, Baker Donelson's business interests drove its conduct. The firm, in his words, "sought to maintain and increase the client revenue it generated" from Nashville at "all times relevant to the claims." R.34 ¶ 31. We know of no free-speech case that covers this unusual setting, and DeLanis does not identify one himself.

What he does identify are cases that are several material steps removed from this one. *See Paige*, 614 F.3d at 275–76; *MacIntosh v. Clous*, 69 F.4th 309, 315 (6th Cir. 2023); *Anders*, 984 F.3d at 1175; *Zilich v. Longo*, 34 F.3d 359, 365 (6th Cir. 1994). None of them involves law firms or companies responding to government threats to their client base. None of them deals with a for-profit entity responding to client pressure. And none of them addresses alleged constitutional violations by a private employer.

Return to *Paige* to see the distinction. In that case, a public official lied to an employer to punish an employee's speech. *Paige*, 614 F.3d at 275–76. That situation does not tell us what to do when a government client tells a for-profit entity to end an employee's public opposition to a key initiative of that government or run the risk of losing its business. Recall that Baker Donelson, according to the complaint, fired an employee (DeLanis) to protect its business interests with that client and never took a public position on the benefits or not of the tax referendum. That is an unprecedented situation, one we need not resolve today.

Anders v. Cuevas does not change things. In that case, the Michigan State Police removed a towing company from its rotation of contractors because its owner reported that he gave sporting tickets to state troopers. 984 F.3d at 1171–72. Although *Anders* involved a private business, the company was the victim rather than the perpetrator. Opposition to protected speech, moreover, prompted the public official's action. *Anders* does not tell us what to do when a private business does work for the government and seeks to preserve that business and support its client's (the government's) interests.

Zilich v. Longo is further afield. It involved an elected official's actions, not personnel decisions by a private company, and it addressed retaliation against disfavored speech, not a response to client pressure. *See* 34 F.3d at 360–61.

Acknowledging the "novel factual circumstances" of this case, DeLanis's Br. 48, DeLanis invokes *Hope v.*

Pelzer, claiming that the illegality of Baker Donelson's actions was "so obvious" that no case needed to establish it. 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). He likewise invokes *Sexton v. Cernuto*, where we held that a work-release program facilitating sexual assault violated clearly established law "even without materially similar cases." 18 F.4th 177, 182–83, 192–93 (6th Cir. 2021).

Neither case saves DeLanis's claims against Baker Donelson. The facts of both cases far outstrip what DeLanis suffered here. *Hope*, an Eighth Amendment case about handcuffing a prisoner to an outdoor post under the Alabama summer sun for hours on end, is a "rare" outlier. 536 U.S. at 733–34, 741; *Dist. of Columbia v. Wesby*, 583 U.S. 48, 64, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018). And *Sexton* involved egregious sexual misconduct. 18 F.4th at 192–93. Neither case remotely shows that a law firm seeking to protect an existing client must continue to work with an employee whose public actions undermine that client's interests.

We affirm the denial of qualified immunity for Mendes on DeLanis's retaliation claims, reverse the denial of qualified immunity to Baker Donelson, and remand.

DISSENT

CLAY, Circuit Judge, dissenting. The majority's extension of qualified immunity to the law firm in this case, Baker Donelson, marks a significant departure in our longstanding jurisprudence. I therefore respectfully dissent on the issue of whether Baker Donelson is entitled to qualified immunity.

We have long recognized that the defense of qualified immunity is available only to government officials and only where those government officials are sued in their individual capacities. *Scott v. Clay Cnty., Tenn.*, 205 F.3d 867, 879 (6th Cir. 2000) ("[T]he doctrine of qualified immunity safeguards only certain *natural person* defendants in their individual capacities."); *Benison v. Ross*, 765 F.3d 649, 665 (6th Cir. 2014) (citation omitted) ("Qualified immunity is a personal defense that applies only to government officials in their individual capacities."); *Ermold v. Davis*, 936 F.3d 429, 436 (6th Cir. 2019) ("Qualified immunity protects government officials from lawsuits against them in their *individual* capacities.") (citing *McCloud v. Testa*, 97 F.3d 1536, 1539 n.1 (6th Cir. 1996) (holding that "qualified immunity applies only to an official's liability in his individual capacity)); *United Pet Supply, Inc. v. City of Chattanooga, Tenn.*, 768 F.3d 464, 484 (6th Cir. 2014) ("We have always understood qualified immunity to be a defense available only to individual government officials sued in their personal capacity.").

This Court also re-affirmed this rule in *Nugent v. Spectrum Juvenile Justice Services*, 72 F.4th 135 (6th Cir. 2023), wherein this Court "briefly comment[ed]" that the private entity plaintiff "invoked qualified immunity, but that defense 'is available only to individual government officials sued in their personal capacity.'" *Id.* at 143 (quoting *United Pet Supply, Inc.*, 768 F.3d at 484). The majority avoids this caselaw by remarking that the Court mentions qualified immunity only when briefly commenting on the issue, and the decision "is not a qualified-immunity case." Majority Op. at 9. But a published decision need not discuss an issue at length, nor resolve an issue in the first instance, to recognize a governing standard in an area of law. The majority recognizes this notion, as it still relies on *Nugent* in their rule statement on qualified immunity. *See id.* at 6. In any event, we need not rely on *Nugent* to illustrate that this Circuit has consistently recognized that "[q]ualified immunity is a personal defense that applies only to government officials in their individual capacities." *See, e.g.*, *Benison*, 765 F.3d at 665.

Following our longstanding rule that qualified immunity is available only to individual government officials, we have consistently held that the defense is not available to public entities or governmental bodies. *Marsh v. Arn*, 937 F.2d 1056, 1071 (6th Cir. 1991) ("[W]e recognize that the doctrine of qualified immunity extends its protection only to individuals and not to state or for that matter local government."); *Everson v. Leis*, 556 F.3d 484, 501 n.7 (6th Cir. 2009) ("As qualified immunity protects a public official in his individual capacity from civil damages, such immunity is unavailable to the public entity itself."); *Smith v. Leis*, 407 F. App'x 918, 928 (6th Cir. 2011) ("A government entity cannot claim any personal immunities, such as . . . qualified immunity."); *Harrill v. Blount Cnty., Tenn.*, 55 F.3d 1123, 1126 (6th Cir. 1995) ("Qualified immunity is not available to municipal governments."); *see Hidden Village, LLC v. City of Lakewood, Ohio*, 734 F.3d 519, 523 (6th Cir. 2013) ("Lakewood is not eligible for qualified immunity because it is a city, not an individual.").

In deciding whether to extend qualified immunity in a given case, the Supreme Court has instructed us to consider "the special policy concerns involved in suing government officials," and explained that the defense protects "the government's ability to perform its traditional functions." *Wyatt v. Cole*, 504 U.S. 158, 167, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992) (citations omitted). The "special policy concerns" that mandate qualified immunity include preserving their "ability to serve the public good," ensuring "that talented candidates were not deterred" from entering public service because of the threat of a damages suit, and preventing "the distraction of officials from their governmental duties." *Id.* (citations omitted). In other words, qualified immunity "acts to safeguard government, and thereby protect the public at large, not to benefit its agents." *Id.* at 168. Thus, in *Wyatt*, the Supreme Court declined to extend qualified immunity to private defendants because, unlike school board members, police officers, or presidential aides, "private parties hold no office requiring them to exercise discretion," nor "are they principally concerned with enhancing the public good," so the "rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167–68.

Following that Supreme Court precedent, we have thus recognized that the defense of qualified immunity is generally unavailable to private parties. *Derfiny v. Pontiac Osteopathic Hospital*, 106 F. App'x 929, 937 (6th Cir. 2004) ("[S]ince qualified immunity is reserved for state actors, private litigants are generally not eligible to receive qualified immunity . . . ."); *Stack v. Killian*, 96 F.3d 159, 163 (6th Cir. 1996) ("Qualified immunity is generally not available to private parties."). Even where a private entity is "acting in a governmental capacity," we have recognized that qualified immunity is unavailable to that private entity. *United Pet Supply, Inc.*, 768 F.3d at 484.

For example, in *Richardson v. McKnight*, the Supreme Court held that a privately run, for-profit prison that contracted with the state to provide services could not assert qualified immunity in a lawsuit involving that work on behalf of the state. 521 U.S. 399, 412, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997). In holding that the private defendants were not entitled to qualified immunity, the Court emphasized that qualified immunity is not appropriate where "a private firm, systematically organized to assume a major lengthy administrative task . . . with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms." *Id.* at 413.

Under this governing case law, Baker Donelson is not entitled to qualified immunity. Baker Donelson is a law firm, not a "*natural person* defendant," *Scott*, 205 F.3d at 879, or a "government[] official," *Benison*, 765 F.3d at 665. Rather, Baker Donelson is a private party for which "[q]ualified immunity is generally not available." *Stack*, 96 F.3d at 163; *Derfiny*, 106 F. App'x at 937. Similar to the "private firm" in *Richardson*, Baker Donelson is private law firm that, in representing its government client, Nashville, is "systematically organized to assume . . . [legal] task[s]" and undertakes those tasks "for profit and potentially in competition with other firms." *Richardson*, 521 U.S. at 413. Even if Baker Donelson's representation of a government client qualifies the firm as "acting in a governmental capacity," the law firm is still a "private entity" that cannot assert qualified immunity. *United Pet Supply, Inc.*, 768 F.3d at 484.

The majority contends that qualified immunity extends to not only public officials, but also anyone serving the public from the time, expense, and risk of money-damages actions if they did not violate the claimant's clearly established federal constitutional rights. Majority Op. at 6. To support this proposition, the majority cites *Moore v. Oakland County*, wherein we stated, "Qualified immunity spares *officers* from the time, expense and risk of money-damages actions unless they violate clearly established constitutional rights." 126 F.4th 1163, 1167 (6th Cir. 2025) (emphasis added) (citation and quotation removed). We further stated that, to overcome the defense, a plaintiff must show that "the *officers*" violated a clearly established constitutional right. *Id.* (emphasis added). *Moore*, therefore, provides no support for the majority's contention that any party besides a public officer or official can assert qualified immunity.

The majority creates a new legal rule, never before held by the Supreme Court or this Circuit: "When private attorneys and law firms provide legal services to a government body, they also are eligible for qualified immunity in connection with that work." Majority Op. at 6. The majority cites *Filarsky v. Delia*, 566 U.S. 377, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012) and *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997) in support of this statement. But neither *Filarsky* nor *Cullinan* support such a broad holding or the extension of qualified immunity to Baker Donelson in this case.

In *Filarsky*, the city hired a private attorney to assist in an official investigation into the plaintiff's potential wrongdoing. 566 U.S. at 380–81. Based on actions that took place in the investigation, the plaintiff brought a § 1983 action against the private attorney, in addition to the city and other defendants. *Id.* at 382. The Supreme Court held that "there is no dispute that qualified immunity is available for the sort of investigative activities at issue." *Id.* at 384 (citation omitted). The Court reasoned that the "common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Id.* at 387. The Court distinguished the case from *Wyatt* because, "[u]nlike the [private] defendants in *Wyatt*, who were using the mechanisms of government to achieve their own ends, individuals working for the government in the pursuit of government objectives are 'principally concerned with enhancing the public good.'" *Id.* at 392 (quoting *Wyatt*, 504 U.S. at 168). The Court also distinguished the case from *Richardson* because none of the particular circumstances of that case—"a private firm, systematically organized to assume a major lengthy administrative task . . . with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms"—were present. *Id.* at 393 (quoting *Richardson*, 521 U.S. at 413). The Court thus extended qualified immunity to the private attorney. *Id.* at 394. Justice Sotomayor stated in concurrence: "I add only that it does not follow that *every* private individual who works for the government in some capacity necessarily may claim qualified immunity when sued under 42 U.S.C. § 1983. Such individuals must satisfy our usual test for conferring immunity. As the Court explains, that test looks to the general principles of tort immunities and defenses applicable at common law, and the reasons we have afforded protection from suit under § 1983." *Id.* at 397 (citations and quotations omitted) (citation modified).

Filarsky does not support extending qualified immunity to Baker Donelson in this case. The events "at issue" in this case involve Plaintiff's employment and termination at his own law firm, not any particular investigative or legal work that Baker Donelson carried out in coordination with the government. *See Filarsky*, 566 U.S. at 384. At oral argument, Baker Donelson stated that its only motivation for terminating Plaintiff's employment was its own business interests. Under the facts of this case, Baker Donelson functioned neither as a "public servant[]" nor a "private individual[]" that is "engaged in public service" or "carrying out government responsibilities." *See id.* at 387. Although the Court found *Wyatt* and *Richardson* distinguishable in *Filarsky*, those cases are not distinguishable here. Like the defendants in *Wyatt*, Baker Donelson used its representation of the government to achieve its own ends and was not "principally concerned with enhancing the public good." *See* 504 U.S. at 168. As already stated, like the defendants in *Richardson*, Baker Donelson is "a private firm" that, in representing its government client, Nashville, is "systematically organized to assume . . . [legal] task[s]" and undertakes those tasks "for profit and potentially in competition with other firms." 521 U.S. at 413. Thus, *Filarsky*'s extension of qualified immunity to a single attorney in a lawsuit involving actions taken in the course of an investigation with the government does not support an extension of qualified immunity to an entire law firm in this lawsuit involving the alleged wrongful termination of its own employee.

Nor does *Cullinan* support an extension of qualified immunity to Baker Donelson in this case. In *Cullinan*, the plaintiffs brought claims under RICO and § 1983 for wrongful use of civil proceedings, abuse of process, and other related issues against city government actors based on actions that took place during the plaintiffs' prior litigation against the city. 128 F.3d at 305–07. The plaintiffs also named a law firm as a defendant because that law firm had represented the city in the course of the prior litigation and had filed the initial lawsuit on behalf of the city. *Id.* at 306, 310. In considering whether the law firm was entitled to assert qualified immunity, this Court acknowledged that "private litigants are not eligible for immunity from suit under § 1983 . . . in most factual contexts." *Id.* at 310 (citing *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988)). Given the factual circumstances of the case, however, this Court held that in filing a lawsuit on behalf of the city and acting "[a]s attorneys for the city" in the prior litigation that gave rise to the plaintiff's claims, the law firm was acting at "the behest of the sovereign," and therefore this Court saw "no good reason" to find city government actors eligible for qualified immunity and not the law firm. *Id.* at 310 (quoting *Richardson*, 521 U.S. at 407).

It is true that, under *Cullinan*, Baker Donelson may act at "the behest of the sovereign" in filing a lawsuit on behalf of their government client or otherwise carrying out legal work for their government client. *See id.* But Baker Donelson does not perform a public function in managing internal, human-resources affairs at the law firm, such as making employment decisions. The government may have been a client of the firm, and Baker Donelson may have considered that client relationship in choosing to fire Plaintiff. But Baker Donelson does not perform a public duty or act "at the behest of the sovereign" by firing Plaintiff, especially since Baker Donelson's sole motivation for Plaintiff's termination was its own private business interests. *See id.* Again, this lawsuit does not arise out of any particular legal work that Baker Donelson carried out on behalf of the government, as in *Cullinan*. This lawsuit arises out of an employment relationship between an attorney and his own law firm, and *Cullinan* does not empower the extension of qualified immunity to a law firm in a case involving its internal employment decision that was motivated by its own business interests.

Since *Filarsky* and *Cullinan*, we have held that "when a private party—including a private person working for the government part-time, *Filarsky v. Delia*, 566 U.S. 377, 393–94, 132 S. Ct. 1657, 182 L. Ed. 2d 662 (2012)—seeks qualified immunity from a § 1983 suit, we determine whether (1) there was a firmly rooted history of immunity for similarly situated parties at common law; and (2) whether granting immunity would be consistent with the history and purpose of § 1983." *McCullum v. Tepe*, 693 F.3d 696, 700 (6th Cir. 2012). Justice Sotomayor clarified in *Filarsky* that individual private parties must still "satisfy our usual test for conferring immunity" in a given case. 566 U.S. at 397 (Sotomayor, J., concurring). In extending qualified immunity to Baker Donelson, however, the majority has not carried out this required analysis as it relates to Baker Donelson and the circumstances of this case. And although the majority purports to confine its decision to the facts of this case, the majority creates confusion for future cases in broadly stating that "[w]hen private attorneys and law firms provide legal services to a government body," they are "eligible for qualified immunity in connection with that work." Majority Op. at 6.

Nor would the required analysis compel an extension of qualified immunity to Baker Donelson in this case, let alone all private attorneys and law firms representing the government, as the majority opinion indicates. Just because a court departed from our longstanding jurisprudence in extending qualified immunity to a specific attorney in *Filarsky* and a specific law firm in *Cullinan* does not mean that Baker Donelson is now entitled to the defense or that all private attorneys and law firms are. For example, in *Cooper v. Parrish*, we held that an attorney was not entitled to qualified immunity in a lawsuit involving the attorney's legal work with state prosecutors because "the circumstances . . . do not implicate the policy concerns that underlie the qualified immunity doctrine." 203 F.3d 937, 953 (6th Cir. 2000). We reasoned that the attorney "was not acting at the behest of the state when he participated in" the legal work with the government and "was not performing any unique government functions when he allegedly engaged in the unconstitutional conduct at issue in this case." *Id.*

at 953. Similarly here, in firing Plaintiff solely because of its own business motivations as a for-profit private law firm, Baker Donelson did not perform any governmental objective, duty, or function for which the public interest would support extending qualified immunity. Allowing this wrongful termination lawsuit to proceed against Baker Donelson would not implicate any of the concerns that mandate qualified immunity for government officials, such as preserving their "ability to serve the public good," ensuring "that talented candidates were not deterred" from entering public service because of the threat of a damages suit, and preventing "the distraction of officials from their governmental duties." *Wyatt*, 504 U.S. at 167. And shielding Baker Donelson from liability for a decision that the law firm made based on its own private business interests does not "act to safeguard the government" or "protect the public at large." *Id.* at 168.

The majority instead emphasizes that the following allegations in Delanis' complaint establish Baker Donelson's eligibility for qualified immunity: Baker Donelson served as counsel for the government, the government wished to punish DeLanis' speech, the government demanded and requested that the Baker Donelson fire DeLanis, and Baker Donelson fired DeLanis pursuant to these demands and requests from the government. *See* Majority Op. at 12 (citing Compl., R. 34, ¶¶ 114, 171). But merely following the government's demand or request does not justify the extension of qualified immunity to a law firm, even where the government is a client of the firm. Although DeLanis' allegations indicate that Baker Donelson "was motivated" by the government's request, Compl., R. 34, ¶ 114, Baker Donelson retained its own agency, separate from the government, in terminating DeLanis' employment; with regard to firing its own employee at the law firm, Baker Donelson made its own decision and did so solely for its own private business interests, as conceded by Baker Donelson at oral argument. In this case featuring a law firm's private business decision to fire its own employee, Baker Donelson is not eligible for qualified immunity.

In concluding that Baker Donelson may assert qualified immunity, the majority contends that Baker Donelson was performing a public function in firing Plaintiff, Majority Op. at 7, but in concluding that Baker Donelson did not violate a clearly established right, the majority emphasizes that Baker Donelson's business interests drove its conduct and Baker Donelson sought merely to maintain and increase the client revenue that it generated at all times relevant to these claims, *id.* at 16–17. Both cannot be true. Rather, Baker Donelson's focus on its own business interests illustrates that the firm did not carry out a public function during the relevant times of this case. In protecting its client base, allowing its business interests to drive its conduct, and seeking to maintain and increase the client revenue it generated—all facts recognized by the majority—Baker Donelson cannot be said to have worked "in the pursuit of government objectives" or be "principally concerned with enhancing the public good." *See Filarsky*, 566 U.S.

at 392. In the events at issue in this case, Baker Donelson neither functioned in a public capacity nor demonstrated any concern regarding the public interest that would warrant extending qualified immunity to the law firm.

For these reasons, I would affirm the district court's denial of qualified immunity to Baker Donelson. Although there may be a circumstance where a private actor is entitled to qualified immunity, this case is not one. Accordingly, I respectfully dissent.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED NOVEMBER 24, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 23-5939/5948

JAMES A. DELANIS,

Plaintiff-Appellee,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY,

Defendant,

ROBERT J. MENDES, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE METRO COUNCIL (23-5939); BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC (23-5948),

Defendants-Appellants.

Before: SUTTON, Chief Judge; CLAY and GIBBONS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of qualified immunity for Robert J. Mendes on James A. DeLanis's retaliation claims is AFFIRMED. IT IS FURTHER ORDERED that the district court's denial of qualified immunity for Baker, Donelson, Bearman, Caldwell & Berkowitz, PC is REVERSED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens, Clerk
Kelly L. Stephens, Clerk

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, FILED OCTOBER 6, 2023

IN THE UNITED STATES
DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:22-cv-00469
JUDGE RICHARDSON

JAMES A. DELANIS,

Plaintiff,

v.

METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY, *et al.*,

Defendants.

Filed October 6, 2023

MEMORANDUM OPINION

Pending before the Court is the joint motion of Defendant Metropolitan Government of Nashville and Davidson County ("Metro") and Defendant Robert J. Mendes ("Mendes") (collectively, "Metro Defendants") to dismiss the amended complaint in part under Federal

Rule of Civil Procedure 12(b)(6).[1] (Doc. No. 39). The motion is accompanied by a supporting memorandum. (Doc. No. 40). Plaintiff filed a response (Doc. No. 47), and Metro Defendants filed a reply (Doc. No. 53).

Defendant Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. ("Baker") also has filed a motion to dismiss the amended complaint in part pursuant to Rule 12(b)(6), and this motion is likewise accompanied by a supporting memorandum.[2] (Doc. Nos. 43, 44). Baker's motion to dismiss adopts and incorporates the arguments set forth in Metro Defendants' motion to dismiss (Doc. No. 44), and it additionally asserts that Baker is entitled to qualified immunity. (*Id.*). Plaintiff filed a response (Doc. No. 48), and Baker filed a reply (Doc. No. 56).

For the reasons set forth below, Metro Defendants' motion to dismiss at Doc. No. 39 will be granted in part and denied in part, and Baker's motion to dismiss at Doc. No. 43 will be granted in part and denied in part.

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1. Metro Defendants moved to dismiss all counts in the amended complaint as pled against them but appropriately do not move to dismiss the counts pled solely against Baker. The Court therefore treats Metro Defendants' motion to dismiss as requesting dismissal of the amended complaint only in part.

2. Although Baker's motion ostensibly suggests that it seeks dismissal of the amended complaint in its entirety, the motion does not address Count V (retaliatory discharge in violation of Tennessee Code Annotated § 50-1-304 alleged against Baker) or Count VI (injurious falsehood and interference with business opportunity alleged against Baker). The Court therefore treats the motion as a motion to dismiss the amended complaint in part.

FACTS[3] AND PROCEDURAL HISTORY

As the below (alleged) facts reflect, this case is about the alleged abuse of power intended to unlawfully influence the vote of an appointed state official.

1. THE PARTIES[4]

During the relevant time periods, Plaintiff was employed as an attorney by Baker, a national law firm with an office in Nashville, Tennessee. (Doc. No. 34 at 3). During these time periods, Plaintiff was a member, and the Chair, of the Davidson County (Tennessee) Election Commission ("Commission"). (*Id.* at 3–5). Pursuant to Tennessee Code Annotated § 2-12-101, the Commission comprises five members, each of whom is appointed by the State of Tennessee Election Commission. (*Id.* at 5). Commission members are state (not local) officials, with duties set forth by Tennessee law related to the administration of elections in Davidson County, Tennessee. (*Id.* at 4).

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3. Because the instant motion seeks dismissal under Federal Rule of Civil Procedure 12(b)(6), the Court takes the facts alleged in the amended complaint (Doc. No. 34) as true. For the reasons discussed further below, this applies even to facts alleged based on "information and belief." At times (but not always) herein, the Court refers to these facts as (merely) alleged, as occasional reminders to the reader that the Court is not pronouncing these facts as the established facts.

4. The amended complaint uses the present tense to state many of these facts (in particular the ones about various public officials and offices at issue), but when it does so the clear implication is that these facts were also true in the past, in particular at the time of the events alleged in the amended complaint.

During the relevant time periods, Metro—a municipality organized under Tennessee state law—was a client of Baker. (*Id.* at 6). And during the relevant times periods, Metro's chief executive officer was its mayor, who was John Cooper, and its chief legislative body was the Metro Council. And finally, Mendes was a member of the Metro Council during the relevant time periods.

2. ADOPTION OF THE 34-PERCENT PROPERTY TAX INCREASE AND THE FIRST TAX REFERENDUM

On June 12, 2020, the Council for the Metropolitan Government of Nashville and Davidson County ("Metro Council") adopted a 34-percent property tax increase ("Tax Increase"). (Doc. No. 34 at 6). Mendes proposed the budget in which the Tax Increase was included. (*Id.*). Following the adoption of the Tax Increase, a group of citizens in Davidson County proposed a referendum ("First Tax Referendum") to limit the authority of the Metro Council to raise taxes by more than 5 percent without voter approval. (*Id.* at 7). The Commission had the duty of determining whether the First Tax Referendum met the legal requirements to be placed on the ballot for a public vote. (*Id.*). Given that the First Tax Referendum would have limited Metro Council's authority to increase the property tax by 34 percent, Metro Council was fervently opposed to the First Tax Referendum.[5] (*Id.*).

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5. It is not clear from the amended complaint why the First Tax Referendum would have a retroactive effect on the 34-percent tax increase. Nonetheless, this ambiguity is not material to the Court's analysis on the instant motions.

In early October of 2020, the Commission filed an action in the Chancery Court of Davidson County requesting a declaratory judgment as to whether the First Tax Referendum should be placed on the ballot for public vote. (*Id.* at 7–8). The Chancery Court then ruled that the First Tax Referendum should not be placed on the ballot. (*Id.* at 8). Upon receiving this ruling, a group of citizens began a campaign to have a second referendum placed on the ballot ("Second Tax Referendum")—this time attempting to avoid the problems identified by the Chancery Court in its ruling regarding the First Tax Referendum. (*Id.*).

3. SECOND TAX REFERENDUM, AND JOHN HICKS'S MAY 25, 2021, EMAIL TO PLAINTIFF

On March 26, 2021, several months after the Chancery Court issued its ruling on the First Tax Referendum, Mendes filed Resolution 2021-837 ("Resolution") in his capacity as a Metro Council member. (*Id.* at 8–9). The Resolution stated that additional amendments to the Charter of the Metropolitan Government of Nashville and Davidson County, Tennessee would be placed on the ballot *if* (and only if) the Second Tax Referendum were to be placed on the ballot. (*Id.*). The potential charter amendments described in the Resolution, were they to be placed on the ballot and adopted, would serve to ban public referendums on property tax levies. (*See id.* at 9). The adoption of any such charter amendments would stymie the efforts of citizens to vote on a referendum regarding Metro Council's authority to raise taxes.[6] Soon after Mendes proposed the Resolution, the Commission voted to place the Second Tax Referendum on the ballot.[7] (*Id.* at 10).

On May 13, 2021, the Commission held a public meeting on the Second Tax Referendum (then set to go to a vote in July). (*Id.* at 10). At the meeting, Mendes, speaking in his capacity as a Metro Council member, remarked that

> As the only county-wide elected person in the room, I want to say clearly that's what's been going on at the last couple of meetings, what you guys are doing is pre-baked, political theater designed to feed apparently the ambitions of a small percentage of the county. . . . Y'all know it's a sham and I'm here to tell you guys, you might get away with it tonight, but we see you, we see what you're doing and it's not going to stand one way or the other. . . . We see what's going on and you shouldn't do it.

6. This fact is not expressly set forth in the amended complaint, but it is easily inferable from what is in the amended complaint.

7. Though the amended complaint does not specifically state that Plaintiff voted in favor of placing the Second Tax Referendum on the ballot, the Court infers from facts alleged in the amended complaint that Plaintiff did so vote in favor of the referendum. Herein, where the Court notes that the "Commission" voted in a particular way, the Court likewise infers that the "Commission's" vote is reflective of the individual vote of Plaintiff as a member of the Commission.

(*Id.* at 10–11). On May 25, 2021, the week following the public meeting, John Hicks ("Hicks"), a principal of Baker as well as Baker's general counsel, emailed Plaintiff saying, "we need to have a conversation about the current election commission issues and their impact on the firm's representation of Metro." (*Id.* at 12). Hicks and Plaintiff then met the next day in the Baker offices. (*Id.*). During the meeting, Hicks told Plaintiff that other principals and shareholders of Baker were upset because Metro City Council and the Metro School Board[8] were threatening to pull their business from the firm because of Plaintiff's activity on the Commission. (*Id.*). In response, Plaintiff told Hicks that Hicks's attempts to influence the Commission and Plaintiff could be criminal or illegal under Tennessee law. (*Id.* at 13).

4. APPEAL OF THE CHANCERY COURT'S RULING ON THE SECOND TAX REFERENDUM, AND TERMINATION OF PLAINTIFF'S EMPLOYMENT WITH BAKER

In late June 2021, following litigation regarding the Second Tax Referendum, the Davidson County Chancery

8. There is a slight discrepancy in the amended complaint as to what entity was the client of Baker during the relevant time periods. The amended complaint states that Metro was the client, whereas other parts of the amended complaint indicate that Baker viewed "Metro City Council" and the "Metro School Board" as distinct clients. Based on the amended complaint as a whole, it is reasonable to infer that Metro (which would encompass Metro City Council and Metro School Board) was a client of Baker's, regardless of whether attorneys at Baker treated or referred to the sub-divisions of Metro as individual clients.

Court ruled that the Second Tax Referendum was defective and should not be placed on the ballot. (*Id.* at 14). The Commission then scheduled a public meeting for June 25, 2021 to vote on whether to appeal the Chancery Court ruling. (*Id.*). The day before the meeting, Hicks emailed Plaintiff requesting that Plaintiff call him. (*Id.* at 15). During the phone call, Hicks asked Plaintiff not to vote to appeal the ruling on the Second Tax Referendum. (*Id.*). Plaintiff refused to tell Hicks what his vote would be, at which point Hicks said that he wanted to meet with Plaintiff the following morning (the day of the vote). (*Id.* at 16).

Hicks was not the only person who was busy the day before the vote. On June 24, 2021, Mendes sent a letter ("Mendes Letter") to the entire Commission and Metro Council. (*Id.* at 16). The Mendes Letter explicitly called out Plaintiff for his decisions relating to the various tax referendums:

> I do not need to tell any of you how pre-baked the Commission's process was. You lived through it. I believe that you already know that Chair DeLanis's intentions from the start were to push the referendum onto a ballot no matter what. I believe you know that instead of letting unbiased legal advice dictate the conclusion, Chair DeLanis's preferred conclusion dictated what the legal advice was going to be. . . For reasons that seem hyper-partisan, Chair DeLanis didn't like the answers he was getting from Bill Koch, Bob Cooper, or Chancellor Lyle. So Chair DeLanis decided instead to have the

> Commission fire Bill Koch and get the answers he wanted from Jim Blumstein[.]

(*Id.* at 16).[9] Per their phone call the day prior, Hicks and Plaintiff were set to meet the morning of the vote. That

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9. Jim Blumstein is a professor at Vanderbilt Law School. (Doc. No. 34 at 9). The amended complaint mentions Professor Blumstein in three other places, but any particular relationship of his to the matters at issue herein is unspecified and is immaterial for present purposes.

The Court takes judicial notice of the fact that Bob Cooper, not to be confused with Mayor Cooper (to whom he is unrelated), had served as the Attorney General and Reporter for the State of Tennessee from 2006 to 2014 and was at the time in question in the private practice of law. The amended complaint does not mention Bob Cooper anywhere else; thus, any particular relationship of relationship of his to the matters at issue herein is unspecified and is immaterial for present purposes.

The Court takes judicial notice that Bill Koch is a former justice of the Tennessee Supreme Court, and the amended complaint implies that he served as legal counsel for the Commission before being fired for reasons the amended complaint does not address other than to state that such firing was not dictated by Plaintiff. (Doc. No. 34 at 17). The amended complaint does not otherwise mention Bill Koch, and any particular relationship of his to the matters at issue herein is unspecified in the amended complaint and is immaterial for present purposes.

Finally, the Court takes judicial notice of the fact that Davidson Chancellor Ellen Lyle is the judicial official who ruled that the First Tax Referendum should not be placed on the ballot. The amended complaint does not otherwise mention Chancellor Lyle except in this single quotation, and any particular relationship of hers (beyond the ramifications of her decision regarding the First Tax Referendum) to the matters at issue herein is unspecified in the amended complaint and is immaterial for present purposes.

morning, Hicks emailed Plaintiff, "be in the office by 8 or 8:15 at the latest . . . We should talk as early as we can after that." (*Id.* at 18). Apparently concerned about the subject matter of the meeting, Plaintiff responded in part:

> Dear John, Please inform me in writing of the purpose of the meeting. If this meeting is to speak to me again about my vote at the election commission meeting today, I am not comfortable with that. As I have expressed to you before, further discussions of that nature may put the law firm and its clients in a questionable legal position.

(*Id.* at 18). Approximately an hour after sending this email, Hicks emailed Plaintiff to notify Plaintiff that Plaintiff's employment with Baker was going to be terminated. (*Id.* at 18). Hicks gave Plaintiff a choice on how to proceed: work the balance of the fiscal year *and* resign from the Commission or leave Baker immediately. (*Id.* at 18–19).

Three days after Plaintiff was notified that he was going to be terminated, Hicks directed Plaintiff to meet with him at 9:00 A.M. on June 28, 2021. (*Id.* at 19). Early that morning, Plaintiff emailed Hicks, copying the senior management of Baker:

> You have told me several times now that two firm clients (Metro Nashville and the Metro School Board) have been pressuring you, and the firm, to take action against me because of my role on the Election Commission. In my

> opinion, that implicates serious legal and ethical issues. I should not have to consider those issues is [*sic*] a rushed fashion without the opportunity to consult counsel. Why don't we postpone all this until sometime after the upcoming fourth of July holiday?

(*Id.*). Contrary to Plaintiff's requests, Hicks refused to postpone the meeting until after July 4, 2021 and did not allow Plaintiff to bring an attorney with him to the meeting. (*Id.*). Hicks sent an email to DeLanis at 4:06 PM on June 28, 2021, in which he stated: "The meeting will occur at 8:00 tomorrow. You are still employed by the firm, so please come in to discuss that employment with me, your practice group chair and the office managing shareholder. If you have counsel, he or she is not invited to attend and would not be if the meeting occurred at any other time." (*Id.*).

Hicks and Plaintiff then met on June 29, 2021. (*Id.*). During the meeting, Hicks terminated Plaintiff's employment and gave him until July 2, 2021 (three days hence) to leave the firm. (*Id.* at 19–20). During the meeting, Hicks stated that had "no choice" but to terminate Plaintiff's employment. (*Id.*). Following the meeting, Hicks emailed Plaintiff stating the following

> Please remember that, as a firm lawyer, Metro Government and the related entities are your clients, as well as the firm's clients. None of us can discuss or comment to third parties on any

> communications the firm may have had with any of our clients. To do otherwise would be an ethical violation.

(*Id.* at 20).

On July 2, 2021, the day that Plaintiff was slated to leave Baker, but prior to the termination becoming public, Tennessee State Senator Ferrell Haile met with Mayor John Cooper. (*Id.* at 21). During the meeting, Senator Haile expressed his concerns to Mayor Cooper that a private employer of an election commissioner had been pressured by Metro on how to vote on the appeal of the Chancery Court's ruling. (*Id.*). Although Mayor Cooper told Senator Haile that Plaintiff's termination of employment had not come from the mayor's office, the mayor did not otherwise appear concerned about the issues raised by Senator Haile. (*Id.* at 21–22).[10] A few days later, on July 7, 2021, Plaintiff spoke with a member of Baker's Board of Directors ("Baker Board Member"), with whom he had been in touch a few months prior. (*Id.*). The Baker Board Member told Plaintiff that the Baker Board Member had told Hicks that Hicks could not tell an employee how to vote on an issue pending before a board or commission. (*Id.* at 22).

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10. The amended complaint does not specifically allege that Mayor Cooper was involved in the decision to terminate Plaintiff, and the Court does not find that what is alleged in the amended complaint is sufficient to support an inference that Mayor Cooper was involved.

5. PLAINTIFF FILES THE INSTANT ACTION

On June 22, 2022, Plaintiff filed the instant action. (Doc. No. 1). Several months later, Plaintiff filed an amended complaint (Doc. No. 34), which is now the operative complaint in this action. The amended complaint names as Defendants Metro, Mendes in his individual capacity and official capacity, and Baker (collectively, "Defendants"). (*Id.*). The amended complaint contains six counts:

- Count I: Violation of the Plaintiff's First Amendment (as incorporated through the Fourteenth Amendment) rights of free speech and freedom of association and due process rights and equal protection rights under the Fourteenth Amendment alleged against Metro and Mendes in his individual capacity and official capacity.

- Count II: Violation of Plaintiff's First Amendment (as incorporated through the Fourteenth Amendment) rights of free speech and freedom of association and due process rights and equal protection rights under the Fourteenth Amendment, and violation of Tennessee Code Annotated §§ 39-14-112, 2-19-202 alleged against Metro and Mendes in his individual capacity and official capacity

- Count III: Joint Action and Civil Conspiracy to violate Plaintiff's constitutional rights alleged against Metro, Mendes in his individual capacity and official capacity, and Baker

- Count IV: Violation of Plaintiff's First Amendment (as made applicable to the States via the Fourteenth Amendment) rights of free speech and freedom of association and Plaintiff's due process rights under the Fourteenth Amendment alleged against Baker as a state actor

- Count V: Retaliatory discharge in violation of Tennessee Code Annotated § 50-1-304 alleged against Baker

- Count VI: Injurious falsehood and interference with business opportunity alleged against Baker

(*Id.* at 34–38). In light of these allegations, Plaintiff requests temporary and permanent injunctions against Metro, Mendes, and Baker (though Plaintiff has not filed a motion for a preliminary injunction or temporary restraining order, as would be necessary to obtain preliminary relief). (*Id.* at 38). He also requests an award of compensatory damages of at $1,000,000, as well as punitive damages. (*Id.*). Finally, Plaintiff requests attorneys' fees and costs as permitted by law. (*Id.*).

On October 6, 2022, Metro and Mendes filed a joint motion to dismiss (Doc. No. 39), accompanied by a supporting memorandum (Doc. No. 40), seeking dismissal in part the amended complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Baker also filed a motion to dismiss (Doc. No. 43), accompanied by a supporting memorandum (Doc. No. 44), seeking dismissal in part of the amended complaint in part under Rule 12(b)(6). Responses and replies have been filed with respect to each of these respective motions, which are ripe for decision.

DISCUSSION

The instant motions to dismiss raise several arguments as to why dismissal of the amended complaint in part is warranted under Rule 12(b)(6). The Court addresses each argument in turn. In broad strokes, the memorandum opinion proceeds as follows. First, the Court addresses Plaintiff's First Amendment-retaliation claim as pled against Metro, Mendes in his official capacity, and Mendes in his individual capacity. The Court also determines whether Mendes is entitled to qualified immunity as to the First Amendment-retaliation claim pled against him in his individual capacity. The Court next turns to whether the amended complaint states a First Amendment-retaliation claim against Baker.

The Court then addresses whether the amended complaint states a claim for a violation of Plaintiff's rights under the Due Process Clause (meaning, here, of the Fourteenth Amendment) and whether Plaintiff has stated a claim for civil conspiracy. Finally, the Court briefly addresses the state-law claims contained in Counts V and VI, which no Defendant has moved to dismiss.

1. FIRST AMENDMENT-RETALIATION CLAIM AGAINST METRO, MENDES, AND BAKER

The amended complaint sets forth a First Amendment-retaliation claim against Metro, Mendes in his individual capacity and official capacity, and Baker.[11] Specifically, the amended complaint alleges that Plaintiff was retaliated against in violation of the First Amendment for exercising his First Amendment rights of free speech and freedom of association. Defendants have all moved to dismiss the First Amendment-retaliation claim pled against them respectively. The Court addresses the arguments of Defendants in turn below.

A. Facts Pled Based on "Information and Belief"

Before addressing the merits of the Defendants' motions to dismiss, the Court must first resolve a dispute as to what facts contained in the amended complaint can be treated as true. Metro Defendants argue[12] that facts

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11. This claim is variously alleged against the various Defendants across Counts I, II, III and IV. Counts I and II assert liability only as to Metro and Mendes; Baker's liability is asserted only via Counts III and IV. Notably, Counts III and IV respectively assert separate theories for rendering Baker, presumptively a private party rather than a state actor, liable for a violation of the First Amendment. Herein, although treating the claim as a single claim in certain respects, the Court also includes Defendant-specific analyses regarding the extent to which Plaintiff has plausibly alleged that particular Defendants are liable on such claim.

12. Although Baker incorporates the arguments of Metro Defendants in its motion to dismiss, for the sake of conciseness the Court will refer to arguments that are substantively discussed only in Metro Defendants' motion as argued by Metro Defendants. However, where a discussion of an argument made only by Metro Defendants (and incorporated by Baker) applies to all Defendants,

alleged in the amended complaint based on "information and belief" are not well-pled, and the Court should not take such facts as true in resolving the instant Motion. (Doc. No. 40 at 19).[13] The Court disagrees.

The Court does not dispute that facts based *on sheer speculation* are not well-pled. But the Sixth Circuit has said that pleading facts on "information and belief" may be permissible where a plaintiff "may lack personal knowledge" and therefore must "rely on information furnished by others." *Starkey v. JPMorgan Chase Bank, NA*, 573 F. App'x 444, 447–48 (6th Cir. 2014). As *Starkey* explained, even while holding that the particular plaintiff had made allegations "on information and belief that was improper under the particular circumstances at issue, sometimes pleading on information and belief is proper:[14]

> It is true that pleading on information and belief may be permissible in certain circumstances.

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then the discussion applies to both Metro Defendants' motion to dismiss and Baker's motion to dismiss.

13. The Court does not begrudge Metro Defendants for making this argument, especially given that some of the most concerning allegations contained in the amended complaint are alleged based on "information and belief."

14. Interestingly, the problem with those allegations actually was not they that were too speculative, but rather, to the contrary, that they were especially *non-speculative*. That is, they were within the personal knowledge of the plaintiffs and thus were not in fact based on mere "information and belief." *See Starkey*, 573 F. App'x at 447–48.

> For example, sometimes a plaintiff may lack personal knowledge of a fact, but have "sufficient data to justify interposing an allegation on the subject" or be required to "rely on information furnished by others."

Id. at 447–48 (6th Cir. 2014) (quoting Wright & Miller, 5 *Fed. Prac. & Proc. Civ.* § 1224 (3d ed. 2012)). *Starkey* itself is not precedential, but the Court has no doubt that it accurately states the law in this regard. As the Second Circuit put it, "allegations may be based on information and belief when facts are peculiarly within the opposing party's knowledge." *Boykin v. KeyCorp* 521 F.3d 202, 215 (2d Cir.2008).[15] One district court in the Second Circuit has suggested, and the undersigned agrees, that authority for allowing allegations "on information and belief" is provided by Rule 11(b)(3), which "states that '[b] y presenting to the court a pleading, written motion, or other paper-whether by signing, filing, submitting, or later advocating it-an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support or, *if specifically so identified*, will likely have evidentiary support after a reasonable opportunity for

15. By the undersigned's count, allegations are made in the amended complaint "on information and belief" twenty-five times, and in each case the alleged facts indeed likely would be peculiarly within the knowledge of one or more of the Defendants. And in ten of those instances, Plaintiff identities statements of Hicks (of which Plaintiff had personal knowledge) as the "information" supporting his belief.

further investigation or discovery.' (emphasis added)." *Lovell v. GEICO Gen. Ins. Co.*, No. 12-CV-00546 A M, 2013 U.S. Dist. LEXIS 185908, 2013 WL 7871497, at *9 (W.D.N.Y. Mar. 29, 2013), *report and recommendation adopted in part*, No. 12-CV-546-A, 2014 U.S. Dist. LEXIS 30880, 2014 WL 917303 (W.D.N.Y. Mar. 10, 2014). As another opinion in this same district court put it, "[t]he phrase 'specifically so identified' refers to allegations 'upon information and belief'". *Bellavia v. Orleans Cnty.*, No. 1:22-CV-842-JLS-JJM, 2023 U.S. Dist. LEXIS 13082, 2023 WL 2587681, at *2 (W.D.N.Y. Jan. 25, 2023) (citing 2 Matthew Bender, Moore's Federal Practice, § 8.04[4] (3d ed. 2022)), *report and recommendation adopted*, No. 22-CV-842 (JLS)(JJM), 2023 U.S. Dist. LEXIS 47647, 2023 WL 2586267 (W.D.N.Y. Mar. 21, 2023). As the undersigned would summarize it, under certain circumstances, factual allegations in a complaint may be made on information and belief (even without using the longer terminology set forth in Rule 11(b)(3)), albeit with the caveat that the signer of the complaint (counsel or a pro se plaintiff) is certifying compliance with Rule 11(b)(3) when making factual allegations on information and belief.

As the undersigned sees it, there may well be relevant (alleged) facts of which the plaintiff lacks firsthand knowledge but has good reason to believe are true (exist). Often, the plaintiff's good reason to believe that facts exist is the plaintiff's firsthand knowledge of those facts. Other times, however, the plaintiff's good reason is *information furnished by other persons* on which it is reasonable for the plaintiff to rely; under these circumstances, as *Starkey* put it, the plaintiff will have "sufficient data to justify interposing an allegation on the subject." 573 F. App'x at 448. Where such circumstances exist, factual allegations may be made on "information and belief." Alternatively, even absent such circumstances, under certain conditions allegations may be made of alleged facts that would be peculiarly within the knowledge of one or more opposing parties.

The undersigned would summarize the relevant principles in the following way. A fact of which a plaintiff lacks personal knowledge nevertheless *in some situations* can be well-pleaded even if alleged only on "information and belief." Those situations include when the "belief" is reasonable based on the "information," meaning facts known personally to the plaintiff or facts suggested (directly or by inference) by information from others upon which it is reasonable to rely. The alleging of a fact based on *this* kind of belief is *not* mere speculation, but rather one based on—in particular, the kind of (firsthand and secondhand) information on which the plaintiff properly may rely for purposes of pleading claims. These situations also include when the alleged fact would be peculiarly within the knowledge of one or more opposing parties, although the undersigned must add that he will countenance this alternative only where the allegation (even if not supported as per the first alternative identified immediately above) is not inconsistent with the other alleged facts and not facially implausible. The undersigned's approach here is entirely consistent with the approach of the Second Circuit, except that the undersigned has taken pains to announce a pro-defendant limitation on the propriety as accepted alleged facts on information and belief on the specific ground that the alleged fact would be peculiarly within the knowledge of one or more defendants. *See Arista Recs., LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) ("The *Twombly* plausibility standard, which applies to all civil actions, does not prevent a plaintiff from pleading facts alleged *upon information and belief* where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible.") (emphasis added).

Asserting contrary principles, Metro Defendant misrepresents *16630 Southfield Ltd. P'ship v. Flagstar Bank*, 727 F.3d 502 (6th Cir. 2013)). According to Metro Defendants, "[t]he Sixth Circuit held in 16630 Southfield Limited that by alleging facts 'upon information and belief,' a plaintiff has 'merely alleged their 'belief,' which fails to satisfy *Iqbal*." (Doc. No. 40 at 19) (quoting *16630 Southfield Ltd. P'ship v. Flagstar Bank*, 727 F.3d at 506). Notably, by characterizing the Sixth Circuit's statement as referring to what "a" plaintiff—a clear connotation that the reference is to any and all plaintiffs generally—and not what *the* plaintiff in that case had done, and by omitting a reference to anything case-specific about the Sixth Circuit's holding, Metro suggests incorrectly that the Sixth Circuit there was announcing a (precedential) rule generally applicable to all cases. In fact, the Sixth Circuit was merely stating that the particular allegations made on information and belief particular plaintiff in that case were improper.

And as for the general rule that Metro suggests was announced in *16630 Southfield Ltd. P'ship*, it is a very consequential one: that if facts are alleged based "[up]on information and belief," that "fails to satisfy *Iqbal*." (Doc. No. 40 at 19). That is of course, tantamount to suggesting that under *Iqbal* (and *Twombly*), allegations of fact based "on information and belief" have no proper place in complaints filed in federal civil cases. But as discussed above, this is simply not the law as the undersigned sees it, Setting aside the misleading citation of *16630 Southfield Ltd. P'ship*, Metro Defendants cite no authority to support the existence of such a rule, and cases (including cases, albeit non-precedential ones thus far as far as the undersigned can tell, from this circuit) consistently reject it. *E.g., GlobalTranz Enters. Inc. v. Shipper's Choice Glob. LLC*, No. CV-16-04038-PHX-ROS, 2017 U.S. Dist. LEXIS 234215, 2017 WL 11609546, at *3 (D. Ariz. Feb. 23, 2017) ("[D]istrict courts have squarely rejected the argument that the *Twombly/Iqbal* standard does not allow pleading matters on information and belief. One court noted: 'Even after *Iqbal* and *Twombly*, numerous courts have held that facts may be pleaded on information and belief—especially where, as here, the underlying evidence is peculiarly within the defendant's possession.'") (quoting *GCIU-EMployer Ret. Fund v. Quad/Graphics, Inc.*, No. 216CV00100ODWAFMX, 2016 U.S. Dist. LEXIS 69396, 2016 WL 3027336, at *3 (C.D. Cal. May 26, 2016); *Modern Holdings v. Corning Inc.*, 2015 U.S. Dist. LEXIS 41134 at *12, 2015 WL 1481457 (E.D. Ky. 2015) ("While pleading on information and belief cannot insulate a plaintiff at the 12(b)(6) stage, *Iqbal* did not render pleading on information entirely ineffectual.")

The undersigned has found a few cases stating that "conclusory allegations" based on information and belief are not cognizable under *Iqbal* and *Twombly*. *E.g., Menzel v. Scholastic, Inc.*, No. 17-CV-05499-EMC, 2018 U.S. Dist. LEXIS 44833, 2018 WL 1400386, at *2 (N.D. Cal. Mar. 19, 2018). But that is merely an application of the general rule of *Iqbal* and *Twombly* that conclusory allegations are not cognizable; non-conclusory factual allegations based on information and belief *are* proper under *Iqbal* and *Twombly*. *See id.* ("The Ninth Circuit has held that the *Iqbal/Twombly* plausibility standard does not prevent a plaintiff from pleading facts alleged upon information and belief. But while facts may be alleged upon information and belief, that does not mean that conclusory allegations are permitted. A conclusory allegation based on information and belief remains insufficient under *Iqbal/Twombly*.") (citation omitted).

The undersigned's approach reflects this: to be properly alleged based on "information and belief," facts must be non-conclusory, i.e., (a) inferable from information (i) of which Plaintiff has personal knowledge or (ii) of which Plaintiff has knowledge and on which he can reasonably rely, or (b) indicated directly (rather than by inference) from information of which Plaintiff has knowledge and on which he can reasonably rely. *Floyd v. Buffalo Trace Distillery Inc.*, No. 320CV00073GFVTEBA, 2021 U.S. Dist. LEXIS 54540, 2021 WL 1113143, at *2 (E.D. Ky. Mar. 23, 2021) ("Under limited circumstances, a claim may be rendered plausible if a plaintiff pleads its "information and belief" with supporting facts.").

As for the facts alleged in the amended complaint challenged by Metro Defendants on the grounds that they were pled merely on "information and belief," as suggested in a footnote above, they are the kinds of facts that would be peculiarly within the knowledge of one or more Defendants and not of Plaintiff. For example, Metro Defendants seek to make hay out of the fact that the amended complaint alleges only on information and belief that there were Metro officials (including Mendes, but otherwise unnamed) that allegedly attempted to influence Baker's actions by threatening to pull business from the firm. (Doc. No. 40 at 19). These key alleged facts (that there were some persons, and the identity of the specific persons and whether Mendes was one of them) are plainly ones of which two or more Defendants, but not Plaintiffs, would have firsthand knowledge. The Court therefore finds it appropriate to treat this allegation as true, despite it being pled on "information and belief."

The Court likewise treats as true allegations in the amended complaint pled on "information and belief." It does so because each factual allegation satisfies either or both of the alternative bases for properly pleading an allegation based on information and belief.

Because Baker incorporates this argument of Metro Defendants (without providing any further basis to reject Plaintiff's allegations made on information and belief), the Court likewise treats the other allegations pled on "information and belief" as true for the purposes of resolving Baker's motion. With these findings in mind, the Court now turns to whether Plaintiff has stated a First Amendment-retaliation claim against Metro, Mendes in his official and individual capacities, and Baker.

B. The Amended Complaint Does Not State a Claim Against Metro or Against Mendes in His Official Capacity

In the amended complaint, Plaintiff seeks to hold Metro and Mendes, in his official capacity, liable for various alleged constitutional violations. (Doc. No. 34). Because the claim against Mendes in his official capacity is "essentially a claim against [Metro]" and is based on the same set of facts as the claim against Metro, the same analysis governs the claim as pled against Metro and Mendes in his official capacity. *See Peatross v. City of Memphis*, 818 F.3d 233, 241 (6th Cir. 2016).

To plead a § 1983 claim against a municipality, a litigant must do more than what is required to plead a claim against an individual (typically an official in his or her individual capacity). To succeed on a municipal liability claim, Plaintiff must demonstrate both: "(1) the deprivation of a constitutional right, and (2) [that the municipal entity] is responsible for that violation." *See Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006). Regarding the bases for finding a municipality liable, The Sixth Circuit has explained with respect to § 1983 claims pled against a municipality,

> [t]o establish municipal liability under *Monell v. Department of Social Services*, a plaintiff has four ways to show that a municipality had a "policy or custom" that caused the violation of his rights. The plaintiff can prove: "(1) the existence of an illegal official policy or legislative

> enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013).

Barrow v. City of Hillview, Ky., 775 F. App'x 801, 814–15 (6th Cir. 2019). But there is another way to establish municipal liability. Perhaps this way—though it involves the *taking or causing* of actions rather than the "ratif[ication]" (after-the-fact) of actions—is properly considered encompassed within option (2), i.e., as a kind (or slight variation of) a ratification of illegal actions by an official with "final decision making authority." As the Sixth Circuit has explained, "a municipality may be held liable under § 1983 for a rights violation when either the municipality had an unlawful policy or practice that caused the rights violation, or a municipal 'policymaker' directly caused the rights violation." *Jorg v. City of Cincinnati*, 145 F. App'x 143, 146 (6th Cir. 2005) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)).

Metro Defendants argue that the amended complaint fails to state a § 1983 claim against them. (Doc. No. 40 at 34). In their view, the amended complaint neither alleges the existence of an illegal official policy nor that an official with final decision-making authority ratified illegal actions.[161716] (*Id.*). In his response, Plaintiff appears to pursue only the argument that an official with final decision-making authority ratified (or, under the alternative embraced by *Jorg*, caused) the First Amendment violation," relying on *Paige v. Coyner*, 614 F.3d 273 (6th Cir. 2010). (Doc. No. 47 at 44–45).

The amended complaint is devoid of facts plausibly suggesting that anyone responsible for causing the First Amendment violation was exercising policymaking authority bestowed by Metro. The Court keeps in mind that the violation at issue is the *adverse action* visited upon Plaintiff for exercising his First Amendment rights, meaning Metro's action (either directly by way of conspiracy[17] or indirectly by applying pressure to Baker) resulting in Plaintiff's' termination for refusing to buckle to pressure regarding the upcoming vote.[18] So the

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16. Reasonably enough, Metro Defendants did not address whether the amended complaint sets forth a basis for municipal liability based on the third and fourth options for such liability as described in *Barrow*. The amended complaint does not suggest, and Plaintiff does not otherwise contend, that Plaintiff's allegations against Metro Defendants rest on the third or fourth grounds.

17. The mention here of conspiracy is not intended as a comment on the applicability, if any, of *Monell*'s requirements when a municipality's liability under § 1983 is pursued via a theory of civil-conspiracy liability. *See infra note* 24.

18. Notably, the violation is not creating or aggressively pursuing an Anti-Tax Referendum Policy or putting pressure on Plaintiff to change his vote. To the extent that any party has characterized such conduct as constituting an adverse action

theory has to be that (i) at least one person (associated with Metro) communicated with Baker in a manner that resulted in Baker terminating Plaintiff; and (ii) in so doing, such person was exercising "authority [under state or local law] to establish municipal policy with respect to the action ordered," and such authority is "final." *Pembaur*, 475 U.S. at 481.

"The Sixth Circuit has held that municipal liability may only be imposed [based on the theory that that an official with final decision making authority ratified illegal actions] where the city official was 'acting in a policymaking capacity' at the time the alleged constitutional violation occurred and whose conduct could be characterized as 'exercising a power to set policy.'" *Stone v. City of Grand Junction*, 765 F. Supp. 2d 1060, 1074 (W.D. Tenn. 2011) (quoting *Wooten v. Logan*, 92 Fed. Appx. 143, 146–47 (6th Cir. 2004)). The Sixth Circuit in *Jorg* explained in detail what makes a person a policymaker for the purposes of municipal liability:

> Whether a municipal official is a policymaker depends on the conduct in question; the same official may be a policymaker in some situations but not in others. *Pembaur*, 475 U.S. at 483, 106 S. Ct. 1292. "[N]ot every decision by municipal officers automatically subjects the municipality to § 1983 liability." *Id.* at 481, 106 S. Ct. 1292. Otherwise, the municipal liability standard

against Plaintiff, the Court does not find that it rises to the level of an adverse action under the standards applicable to public officials.

> would be nothing more than a *respondeat superior* standard—a move which has been expressly forbidden by the Supreme Court. *Id.* Accordingly, an official is a "policymaker" only when state or local law *vests* in him the "authority to establish municipal policy with respect to the action ordered," and such authority is "final." *Id. See also Feliciano v. City of Cleveland*, 988 F.2d 649, 655 (6th Cir. 1993). "[T]he word 'policy' generally implies a course of action consciously chosen from among various alternatives." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S. Ct. 2427, 85 L.Ed.2d 791 (1985). Thus, in order for a particular decision by a municipal official to be a "policy" decision, state or local law must give the official the authority to choose from various alternatives when making that particular decision.

Jorg, 45 F. App'x at 146–147.

The allegations in the amended complaint—even considering those made only on information and belief—are devoid of any factual matter to plausibly suggest that any such policymaker was responsible for Plaintiff's termination. Even accepting Plaintiff's argument that the Anti-Tax Referendum Policy is a "policy" as contemplated under the municipal liability case law, Plaintiff failed to identify a policymaker upon whom to center his claim. However, the Anti-Referendum Policy actually is not the relevant policy; the policy at issue is the "policy" of communicating with Baker in such a way as to pressure

Baker into terminating Plaintiff's employment. To begin with, the amended complaint is ambiguous as to who such a person may have been. It does not squarely allege that Mendes was such a final policymaker, even if it does suggest that Mendes was someone who (actual under color of law if not actual legal authority) contributed to causing Plaintiff's firing and supported the Anti-Referendum Policy. But supporting a policy and setting that policy are not equivalent. And the Court does not deem it plausible that a single member of Metro's City Council (which, the Court judicially notices, included thirty-nine other members) had such authority or even would have been cloaked with such authority; there is no reason whatsoever that a decision of this kind—to get an employee of a private employer fired in pursuit of Metro's political goals—would have been actually or even ostensibly outsourced to a single council member, let alone outsourced in a manner that reflected that Mendes's decision to do this was *final*.

The amended complaint leaves open the possibility that some unnamed person (other than Mendes) was a final policymaker in this regard. It is sheer speculation to say that in contacting Baker to cause the termination of Plaintiff, such caller amounted to a final policymaker without knowing who this person was, what his or her association with (or position at) Metro was, what authority he or she may actually or even ostensibly had based on the or association or position or anything else. Even if this background information was deemed to be a fact particularly within Defendants' knowledge so as to render it *potentially* appropriate to be pled on information and belief, in the Court's view it is ultimate not appropriately pled on information and belief because it implausible that state or local law gave the caller "the authority to choose from various alternatives when making that particular decision," inasmuch as the Court has been provided no reason (i) to believe that state or local law would give *anyone* the authority to choose between pressuring a private employer to fire its employee and not pressuring a private employer to fire its employee; or (ii) to believe that if there is such a person, it was the person who actually contacted Baker to get Plaintiff terminated; or, relatedly, (iii) that the caller was a final decision-maker with respect to the decision to cause Baker to terminate Plaintiff, rather than merely someone of *some influence* at Metro.

The Court therefore agrees that Plaintiff has failed to state a claim of municipal liability for First Amendment retaliation against Metro and Mendes in his official capacity. Plaintiff's First Amendment-retaliation claim against Metro and Mendes in his official capacity will be dismissed.[19]

The Court now turns to whether the amended complaint states a claim of First Amendment retaliation against Mendes in his individual capacity.

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19. In light of this finding, Court need not address Metro Defendants' argument that Mendes is entitled to legislative immunity as to the claims pled against him in his official capacity or that the official-capacity claim against Mendes should be dismissed at this early juncture as redundant of the claim against Metro.

C. The Amended Complaint States a Claim for First Amendment Retaliation against Mendes in his Individual Capacity

i. Applicable Test

Before the Court can determine whether Plaintiff has stated a First Amendment-retaliation claim, the Court must first determine what test applies when the conduct prompting the alleged retaliation was undertaken by an appointed official. Generally, to state a claim for First Amendment retaliation, a plaintiff must plead that

> (1) he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; [and] (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by his protected conduct.

Gillis v. Miller, 845 F.3d 677, 683 (6th Cir. 2017).

Metro Defendants argue that the Court should eschew the above-stated three-prong test and should instead take the approach adopted by some out-of-circuit district courts. (Doc. No. 40 at 17–18). Specifically, Metro Defendants urge the Court to follow the rule set forth in *King v. City of New York*, 20-CV-8283, 581 F. Supp. 3d 559, 2022 WL 138009, at *6 (S.D.N.Y. 2022), which requires an elected official pursuing a First Amendment-retaliation claim to demonstrate that the retaliation "strip[ped] them of their office, or their fundamental ability to function in that office." *King* is distinguishable from the present case, however, because there the plaintiff was an elected rather than an appointed official like Plaintiff. Whether this distinction is sufficiently material by itself to disregard *King* in the present case is something the Court need not decide, however. More to the point, contrary to Metro Defendants' suggestion, the Court need not turn to out-of-circuit cases specific to *elected* officials to determine the applicable test for Plaintiff's claim when the Sixth Circuit has analyzed First Amendment claims similar to the one at issue in the instant motions. These cases also involve elected officials, but the Sixth Circuit characterized them as "public officials," making their reasoning applicable to both public and elected officials alike. Accordingly, the Court need not adopt a facially narrower test from out-of-circuit when it can instead rely on Sixth Circuit precedent.

As far as the Court is aware, the Sixth Circuit has on three occasions confronted First Amendment-retaliation claims of public officials for conduct perpetuated at least in part by other public officials. *See Zilich v. Longo*, 34 F.3d 359 (6th Cir. 1994); *Mattox v. City of Forest Park*, 183 F.3d 515 (6th Cir. 1999); *Perkins v. Township of Clayton*, 411 F. App'x 810 (6th Cir. 2011).[20] In each of these cases,

20. Although these cases all were on appeal from a ruling on summary judgment, the Court finds no reason to stray from the test applied by the Sixth Circuit in these cases. Indeed, the procedural posture of the cases did not affect the test that the Sixth Circuit employed, and the test is perfectly adaptable to the motion-to-dismiss context.

the plaintiff-elected official claimed that he or she was subject to adverse actions in response to his or her conduct undertaken as an elected official.

In *Mattox* and *Perkins*, respectively, the Sixth Circuit applied the three-prong test set forth above to determine whether the First Amendment-retaliation claim of the plaintiff, in each case an elected official, could survive summary judgment. In applying the three-prong test in these cases, however, the Sixth Circuit departed slightly from the traditional standards applied to First Amendment-retaliation claims of private individuals. As will be explained in greater detail below, the Sixth Circuit's reasoning focused on the second prong of the test. As to the second prong, the Sixth Circuit emphasized that the test is context-specific and explained that "public officials may need to have a thicker skin than the ordinary citizen when it comes to attacks on their views." *Mattox*, 183 F.3d at 522.

In light of the Sixth Circuit's approach to First Amendment-retaliation claims of public officials, the Court is satisfied that the three-prong test applies to Plaintiff's First Amendment-retaliation claim and that, contrary to Metro Defendants' assertion, it need not resort to out-of-circuit cases to find the applicable standard. As done so by the Sixth Circuit, the Court will focus on the second prong given that Plaintiff's conduct against which he was allegedly retaliated was undertaken in his capacity as an elected official.

As for the Sixth Circuit's analysis in *Zilich*, although the court did not provide a clear framework for its analysis (*i.e.*, such as the three-prong test), nothing in the court's analysis contradicts its approaches taken in *Mattox* and *Perkins*. Furthermore, as will be explained in detail below, in *Zilich*, the Sixth Circuit focused on issues similar to those upon which it focused in *Mattox* and *Perkins*, despite not using the neatly delineated prongs that were employed in the other two cases. Therefore, by following the analytical framework provided in *Mattox* and *Perkins*, the Court is not taking an approach that conflicts with the Sixth Circuit's analysis in *Zilich*.

As for the issues in dispute under the three-prong test in this case, Metro Defendants appear to agree that the amended complaint alleges that Plaintiff was engaged in constitutionally protected speech or activity when he sought to cast his vote as an elected official. Metro Defendants also appear to agree that *if* the amended complaint alleges an adverse action sufficient to meet the second prong, that the third prong (causation) would also be met. So with respect to the three-pronged test, Metro Defendants put all of their metaphorical eggs in one metaphorical basket, relying exclusively on the argument that the second prong is not satisfied because the amended complaint fails to alleged that Plaintiff was subjected to an adverse action that would deter a person (or more accurately, an elected official) of ordinary firmness from continuing to engage in that conduct (*i.e.*, casting his vote). And because Baker does not make any arguments as to the three-prongs beyond what is offered by Metro Defendants, Baker has also put all of its eggs in that same single basket. Therefore, the Court addresses only the second-prong of the three-prong test.

ii. Relevant Sixth Circuit Case law: Zilich, Mattox and Perkins

Zilich, Perkins, and *Mattox* established important guideposts for what the Sixth Circuit considers an action sufficiently "adverse" for purposes of the second prong of a First Amendment-retaliation brought by a public official. The Court therefore provides a discussion of these cases here.

In *Zilich*, the earliest of the three cases, the plaintiff was a former outspoken member of the city council. *See Zilich*, 34 F.3d at 360–361. During his term, the plaintiff spoke out against the town mayor on a variety of local issues. *See id.* But his willingness to clash with the mayor came at a cost; during his term, the plaintiff's "home was vandalized, his tires were slashed, his car windows were shot out and he and his wife received anonymous phone calls threatening bodily harm." *See id.* In addition to these attacks, there was evidence that during meetings with the mayor and his staff, there was talk of "slapping [the plaintiff] around, hiring someone to break his legs, cutting him because he was a bleeder, and tearing his throat out." *Id.* At 361 (internal quotation marks omitted). In the face of these attacks and threats, the plaintiff did not run for reelection. *Id.* The plaintiff filed suit against the mayor and other officials, claiming that the attacks and threats made against him were unconstitutionally retaliatory under the First Amendment. *Id.* at 360. The district court denied the defendants' motion for summary judgment on this issue, and the Sixth Circuit affirmed[21] *Id.* at 360, 365.

In agreeing with the district court, the Sixth Circuit found that the defendants were not entitled to qualified immunity. *Id.* at 364. The Sixth Circuit found that the plaintiff's First Amendment right of free speech was "clearly established" because it was "well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional . . . ." *Id.* at 365. The Sixth Circuit went on to explain that "[n]o reasonable official could possibly believe that it is constitutionally permissible to retaliate against a political opponent with physical threats, harassment[,] and vandalism." *Id.* Given that the defendants had not met their burden for their summary judgment motion, the Sixth Circuit affirmed the district court's denial of summary judgment in favor of the defendants. *Id.*

Notably, the plaintiff had raised another First Amendment-retaliation claim that the court did not assess on qualified immunity because the claim failed substantively to state a violation of the plaintiff's First Amendment rights. After his term, the new council had passed a resolution and an ordinance saying he had been unqualified to hold his prior office and that his salary from that time could be collected. *Id.* at 361–62. The plaintiff

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21. The Sixth Circuit in *Zilich* did reverse in part the district court's ruling on the defendants' motion for summary judgment based on an additional First Amendment-retaliation claim, discussed below, as well as on a different issue that the Court does not find necessary to discuss.

claimed that these actions were taken in the same plan "to threaten him and to ruin his political career." *Id.* at 362. The court disagreed, saying, "A legislative body does not violate the First Amendment when some members cast their votes in opposition to other members out of political spite or for partisan, political or ideological reasons." *Id.* at 363. Such actions, the court explained, happen "every day," and "[the court] may not invalidate such legislative action based on the allegedly improper motives of legislators." *Id.* The court emphasized that investigations into public officials and resolutions on their conduct occur frequently, often purely out of partisanship, and may themselves be protected speech.

When the court analyzed qualified immunity and denied summary judgment for the claims related to the plaintiff's personal threats and harassment, the court implicitly recognized a distinction between these two First Amendment circumstances. While "The First Amendment is not an instrument designed to outlaw partisan voting or petty political bickering through the adoption of legislative resolutions," *id.*, "[t]he alleged threats of physical violence *outside the legislative arena* by some defendants in response to plaintiff's opposition during his term in office present a different question because '[r]etaliation by public officials against the exercise of First Amendment rights is itself a violation of the First Amendment,'" *id.* at 364 (emphasis added) (some original alterations) (citations omitted).

Five years after the Sixth Circuit decided *Zilich*, the court was once against faced with a district court's summary judgment ruling on an elected official's First Amendment-retaliation claim. Presenting facts considerably less striking than those in *Zilich, Mattox v. City of Forest Park* involved an elected member of the local city council, Brenda Mattox (who was one of several plaintiffs in the case). 183 F.3d 515 (6th Cir. 1999). Mattox served as the chair of the Public Safety Committee, which oversaw the police and fire departments. *See id.* at 517–18. Mattox received concerns from several firefighters, which she then passed along to the city council. *See id.* In response, the city opened an investigation into the concerns. *See id.* A report on the investigation was assembled, but the report contained negative comments about Mattox. *See id.* The police department created a video overview of the report, which played on local television several times before the 1993 city council election. *See id.*

Mattox filed a First Amendment-retaliation claim, alleging that the negative comments were made in retaliation for informing the city council about the concerns. *See id.* In reviewing the district court's grant of summary judgment to defendant, the Sixth Circuit applied the three-prong test for First Amendment-retaliation claims. *See id.* at 520. As explained by the Sixth Circuit, the

> three elements of a retaliation claim are (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of

> ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

Id. (internal quotation marks omitted). As to whether the district court's summary judgment ruling on Mattox's claim was correct, the Sixth Circuit focused its analysis on the second prong of the three-prong test. The Sixth Circuit explained that its precedent treats discharging or transferring a plaintiff out of that person's job as a "serious adverse action[]." *See id.* at 521. In contrast to these "serious adverse actions," however, Mattox had merely alleged reputational damage. *See id.* According to the Sixth Circuit, although in some cases "humiliation" may be grounds for a First Amendment-retaliation claim, "[a]s an elected official, Mattox voluntarily placed herself open to criticism of her actions and views on political matters." *Id.* at 522. In light of her voluntary exposure to the public eye, and although the negative comments about her may have been "inappropriate and unfortunate," these comments were not the "type of adverse action against which the First Amendment protects. [being subjected to these comments was] not equivalent to being fired by a government employer for expressing protected views .... Public officials may need to have thicker skin than the ordinary citizen when it comes to attacks on their views." *See id.* The Sixth Circuit therefore found that the alleged adverse actions taken against Mattox were not of the type that would "chill a person [or elected official] of ordinary firmness from continuing to engage in the [protected activity]." *Id.* at 520. As suggested by the Sixth Circuit's analysis, elected officials may have to clear a higher bar under the second prong than a private citizen, given that they voluntarily place themselves in the public eye—and thereby voluntarily expose themselves to public comment and criticism.

Finally, more than a decade after the Sixth Circuit decided *Zilich* and *Mattox*, the Sixth Circuit affirmed the district court's summary judgment ruling to defendant in *Perkins v. Township of Clayton*. 411 F. App'x 810 (6th Cir. 2011). The facts of *Perkins* share several similarities with those of *Mattox*, and the Sixth Circuit relied heavily in *Perkins* on its prior reasoning in *Mattox*. The plaintiff in *Perkins* was a former elected treasurer of Clayton County Township. *See id.* The tensions between the plaintiff and other Township officials began when the plaintiff discovered that the Township's elected clerk was receiving discounted cellular telephone plans through the Township. *See id.* at 811–812. The plaintiff brought the issue to the attention of the Township auditors and supervisor, but no action was taken. *See id.* With no response from the other Township officials, the plaintiff turned to the press, which in turn published a series of stories on the conduct raised by the plaintiff. *See id.* at 812. Allegedly in response to the plaintiff's engagement with the press, the Township took a series of purportedly retaliatory actions. *See id.* For example, the Township voted to hold a censure hearing and filed a complaint for mandamus against the plaintiff in the Michigan state court. *See id.* The plaintiff then filed an action in federal court, alleging First Amendment retaliation. The district court granted summary judgment to the defendant (a Township official) on the grounds that the defendant was entitled to qualified immunity because no constitutional violation had occurred. *See id.* at 813.

Consistent with its approach in *Mattox*, the Sixth Circuit used the three-prong test to analyze the plaintiff's First Amendment-retaliation claim. *See id.* at 814. The Sixth Circuit focused its analysis on the second prong, as the first was not in dispute and the third ultimately did not need to be reached. As the Sixth Circuit explained, "harassment necessary to rise to a level sufficient to deter an individual is not extreme." *See id.* (internal quotation marks omitted). Echoing its decision in *Mattox*, the Sixth Circuit went on to explain that "[t]he objective inquiry into whether the actions taken against an individual rise to the level of an adverse action is highly dependent on context, and [] [the Sixth Circuit] ha[s] repeatedly noted that 'prisoners might have to endure more than public employees, who in turn might have to endure more than the average citizen.'" *Id.* (quoting *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 724 (6th Cir. 2010).

Turning to the plaintiff's claim, the Sixth Circuit found that the actions taken against the plaintiff were no more adverse than those taken against the plaintiff in *Mattox*, and therefore were insufficient to defeat the defendant's motion for summary judgment. *See id.* at 815. As the Sixth Circuit explained, "[l]ike Mattox, Perkins attempted to discharge her duties and was met with opposition. Through the censure hearing, mandamus action, and contempt proceedings, Perkins' colleagues took action that undermined her credibility and fitness for the job, and she ultimately did not run for office again."

Id. Although the Sixth Circuit acknowledged that the actions taken against the plaintiff were "unquestionably unpleasant," the "district court correctly determined that none would dissuade a public official of ordinary firmness from exercising his or her First Amendment rights." *Id.*

With this legal landscape in mind, the Court now turns to Plaintiff's First Amendment-retaliation claim.

iii. Analysis

The Court uses the Sixth Circuit's views regarding the respective conduct in *Zilich, Perkins*, and *Mattox* as guideposts in determining whether the allegations contained in the amended complaint would "chill" an ordinary elected official's First Amendment activities. The Court admits that the conduct in none of those cases is nearly a perfect match to the conduct to which Plaintiff (allegedly) was subjected in this case. Ultimately, however, the Court finds that the actions suffered by Plaintiff are more similar to those suffered by the plaintiff in *Zilich* than those suffered by the plaintiffs in *Perkins* and *Mattox* respectively.

The crux of the amended complaint is that Mendes, in addition to other unnamed Metro officials, complained to Baker about how Plaintiff would vote as a member of the Commission (*i.e.*, in favor of appealing the Chancery Court's ruling on the Second Tax Referendum), and that these officials threatened to pull Metro's business from Baker if Baker did not take action against Plaintiff. (Doc. No. 34). As a result of pressure received by Metro, Hicks called Plaintiff and asked him not to vote in favor of the appeal. (*Id.* at 15). Just a few days after that phone call, Plaintiff emailed Hicks saying "[y]ou have told me several times now that two firm clients (Metro Nashville and the Metro School Board) have been pressuring you, and the firm, to take action against me because of my role on the Election Commission." (*Id.* at 19). Soon after Plaintiff sent that email, Plaintiff was notified that his employment with Baker would be terminated. (*Id.*). Prior to the termination of Plaintiff's employment becoming public, Senator Haile told Mayor Cooper that he was concerned that Metro had pressured the private employer of a Commission member into influencing how that member would vote on the appeal. (*Id.* at 21).

Taken as true for the purposes of Metro Defendants' motion to dismiss, these (alleged) facts plausibly suggest that Mendes and unnamed Metro officials attempted to influence Plaintiff to vote against the appeal. Metro did so by providing Baker with an apparent ultimatum: successfully influence Plaintiff's vote on the Commission or else lose important business. Baker, through Hicks, then repeatedly attempted to influence Plaintiff, imposing increasing pressure until ultimately it was clear that Plaintiff nevertheless would not commit to vote against the appeal. Unable to fulfill Metro's wishes by fostering a change in Plaintiff's upcoming vote, Baker then turned to the second-best option for the firm: terminating Plaintiff.

The Court is satisfied that Metro's (alleged) imposition of pressure on Baker to influence Plaintiff's vote coupled with the termination of Plaintiff's employment are "adverse actions" that would "chill a person [or elected official] of ordinary firmness," at least insofar as is required to overcome a motion to dismiss. True, Plaintiff (very fortunately) did not suffer the same degree of threats and attacks as the plaintiff in *Zilich*. The plaintiff in *Zilich* was subjected to numerous violent attacks against his property and threats of violence against himself and his wife, whereas Plaintiff in this case allegedly was subjected to non-violent actions. But like the plaintiff in *Zilich*, Plaintiff was subjected to serious consequences for their First Amendment activity that went beyond what an elected official (even one with the metaphorical thick skin required for a public official) reasonably would endure before being deterred from exercising his or her First Amendment rights. Indeed, like the adverse actions in *Zilich*, the adverse actions taken against Plaintiff were seemingly designed to cause harm to him in his personal capacity (*i.e.*, his employment with a private employer) rather than in his official capacity. Termination of Plaintiff's private employment could have severe negative consequences for Plaintiff's personal life and be precisely the kind of thing that would deter a public official of ordinary firmness from exercising his or her First Amendment rights.[22]

The Court's conclusion is bolstered by the Sixth Circuit's analysis in *Mattox* as to the type of conduct constituting a "serious adverse action" under the First Amendment. In *Mattox*, the Sixth Circuit explained that

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22. The Court need not harp on the negative consequences that interference with employment can have on an individual's personal life.

under its precedent in an analogous First Amendment context,[23] "firing," "dismissal," "transfer," "discharge," or "suspension" have constituted "serious adverse actions." *See* 183 F.3d at 521. Here, after Plaintiff allegedly rebuffed numerous attempts by his private employer (as prompted by Metro) to change Plaintiff's vote as a public official, he was fired by that employer.

On the other side of the metaphorical coin, the Court is satisfied that the adverse action taken against Plaintiff goes far beyond what the plaintiffs in *Mattox* and *Perkins* were subjected to respectively. As the Sixth Circuit recognized in *Mattox* and *Perkins*, although the adverse actions were undoubtedly unpleasant for the respective plaintiffs, they were the type of actions that public officials are generally expected to tolerate, much like the First Amendment-retaliation claim in *Zilich* that did not survive summary judgment. Importantly, the actions taken in *Mattox, Perkins*, and the failed *Zilich* claim were not facially designed to meddle in the private affairs of the plaintiffs. For example, in *Perkins*, the Township decided to hold a censure hearing and filed a complaint for mandamus against the plaintiff in federal court. *See* 411 F. App'x at 812. In *Mattox*, the report that was ultimately compiled contained criticisms of the plaintiff, and these criticisms were later aired on television. *See* 183 F.3d at 517–18. In *Zilich*, the resolution attacked his right to have held office. *See* 34 F.3d at 361, 363. These actions, however

23. Specifically, the Sixth Circuit explained that its precedent has treated "firing" etc. as "serious adverse actions" in the evaluating the First Amendment rights of public employees. *See Mattox*, 183 F.3d at 521.

unfortunate, were ultimately targeted at harming the respective plaintiffs in their capacity as elected officials. In stark contrast to the actions taken in those cases, the adverse actions taken against Plaintiff here naturally affect his personal life and do so likely in a very significant way. In urging that the out-of-circuit *King* rule applies, Metro Defendants argue that Plaintiff has not alleged an adverse action because Plaintiff continued to serve and vote as a public official (Doc. No. 40 at 18). Despite cursorily citing in their briefing to this circuit's case law, Metro Defendants miss the point of that case law[24]:

24. Indeed, the Court does not know whether Metro Defendants were recklessly misleading or were themselves confused about the case law when discussing the state of the Sixth Circuit's case law. (Doc. No. 40 at 16). They cite *King* for the rule that "elected officials enjoy no First Amendment protection from retaliation for political speech unless that retaliation strips them of their office, or their fundamental ability to function in that office."(*Id.*). But the facts of *King* and the Second Circuit cases upon which it relies (and to which Metro Defendants cite) were about interference with or removal from their *public* office or *public* employment. That is not the case here, where Plaintiff was terminated from *private* employment. Perhaps Metro Defendants have misunderstood the adverse action at issue as interfering with Plaintiff's vote, when in fact it is interfering with his private employment to the point of causing termination. Further, in applying its rule, the court in *King* said that "acts of legislative investigation and advocacy [] fail to implicate the First Amendment," 581 F. Supp.3d at 571, in an analysis similar, albeit not identical to that of *Zilich*. And the *King* decision acknowledges upfront that the "foundational principles [that] are at odds" in that case include legislators' policy views on one hand and avoiding "judicial entanglement in 'politically motivated conduct committed *within the confines of the legislatures and best left within the legislative sphere*'" on the other. *Id.* at 569 (emphasis added) (quoting *Camacho v. Brandon*, 317 F.3d 153, 161 (2d Cir. 2003)). The adverse action

Plaintiff may have continued in his role, but at what cost? What makes an adverse action retaliatory in violation of the First Amendment is that the public official, if he did not give up his office or his voting integrity, objectively should not have been expected to endure the adverse action. So, the actionability of the adverse action here is not dependent on whether Plaintiff kept his office (and his ability to vote and vote in accordance with his conscience).

Further, Metro Defendants are correct that "the First Amendment does not insulate a political official, such as DeLanis, from politicking and opposing viewpoints," (*id.* at 23 n.10 (citing *Mattox*, 183 F.3d at 522)), but they have missed that the adverse action at issue is not

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at issue here—causing the termination of private employment—is squarely outside the legislative sphere and is nothing like the "acts of legislative investigation and advocacy" that were among the adverse actions in *King*.

It is therefore unclear what Metro Defendants think the Sixth Circuit has not considered. Given that they cite to *Mattox* and *Zilich* in their brief, they know that the Sixth Circuit *has* considered the First Amendment protection of elected officials and how it relates to political actions. Insofar as the Sixth Circuit has not considered the termination of a public official, *King* held that the *actionable* retaliatory acts were those that suspended him, rescinded his committee membership, and expelled him from counsel; in stripping him of his office, in accordance with the rule Metro Defendants cite, these actions are more akin to termination than to the legislative actions that did not succeed as bases for the First Amendment-retaliation claim. And insofar as the Sixth Circuit has not considered the termination of a public official from private employment, neither have the courts Metro Defendants cite.

mere "politicking," (Doc. No. 40 at 23 n.10), or "political bickering," (*id.* at 30 (citing *Mattox*, 183 F.3d at 522; *Zilich*, 34 F.3d at 363); *see also* Doc. No. 40 at 36 (citing *Mattox*, 183 F.3d at 522)), but rather causing the termination of a public official from their *private* employment.[25] The undersigned is unwilling to equate the two. The Court therefore finds that the amended complaint includes allegations, which the Court must take as true, that go beyond what a public official is expected to be able to endure in exercising his or her First Amendment rights. The Court must next address whether Mendes is nonetheless entitled to qualified immunity.

D. Mendes (in his Individual Capacity) is Not Entitled to Qualified Immunity

Metro Defendants argue that Mendes[26] is entitled to qualified immunity on Plaintiff's First Amendment-

25. Insofar as Metro Defendants allege that Plaintiff has not established causation, the Court is satisfied that Plaintiff has alleged both factual and proximate cause. Among other alleged facts, Plaintiff alleged that Baker "had no reason to terminate DeLanis . . . [i]ts choice to do so was," in part, "in submission to the pressure it was receiving from Metro." (Doc. No. 34 at 22). Additionally, Plaintiff has alleged that Metro's calls to Baker were in the nature of threats, indicating that Metro knew Baker "would not want to jeopardize its working relationship with [Metro Defendants." *Paige*, 614 F.3d at 282. As such, a jury could find Plaintiff's termination a reasonably foreseeable consequence if Metro Defendants' goal was to have Plaintiff fired. *See id.*

26. Metro plainly is not entitled to qualified immunity, because "qualified immunity is unavailable in § 1983 claims against a municipality." *Moldowan v. City of Warren*, 578 F.3d 351, 392 (6th Cir. 2009).

retaliation claim.[27] (Doc. No. 40 at 29). According to Metro Defendants, even if the Court were to conclude that Plaintiff had pled a violation of his constitutional rights, there is no clearly established law that would have put Mendes on notice that his actions violated the First Amendment.[28] (*Id.*).

The defense of qualified immunity properly can be asserted under Fed. R. Civ. P. 12(b)(6). *See, e.g., Peatross v. City of Memphis*, 818 F.3d 233, 240 (6th Cir. 2016) ("Although a motion pursuant to Rule 12(b)(6) invites an inquiry into the legal sufficiency of the complaint, not an analysis of potential defenses to the claims set forth therein, dismissal nevertheless is appropriate when the defendant is entitled to a meritorious affirmative

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27. Because the Court finds below that Plaintiff's Due Process and Equal Protection claims should be dismissed, it need not address whether Mendes would be entitled to qualified immunity for these claims.

28. The scope of Metro Defendants' qualified-immunity argument is unclear. Metro Defendants suggest that Mendes is entitled to qualified immunity based on what he "actually" is alleged to have done, rather than the allegations asserted on "information and belief." (Doc. No. 40 at 30). A reasonable reading of Metro Defendants' argument is that Metro Defendants do *not* argue in favor of qualified immunity for actions that are pled based on "information and belief." In this sense, it may not be necessary for the Court to determine whether Mendes is entitled to qualified immunity based on such conduct. In an abundance of caution, however, the Court will address whether Mendes is entitled to qualified immunity for all of the factual allegations against him insofar as they support Plaintiff's First Amendment-retaliation claim.

defense such as qualified immunity.").[29] nevertheless, such dismissal actually is rarely appropriate, as the Sixth Circuit explained recently (in an unpublished opinion, but one relying exclusively on published opinions):

> Although a defendant's "entitle[ment] to qualified immunity is a threshold question to be resolved at the earliest possible point, that point is usually summary judgment and not dismissal under Rule 12." *Wesley v. Campbell*, 779 F.3d 421, 433–34 (6th Cir. 2015) (alteration in original) (quotation marks and citations omitted). "The reasoning for our general preference is straightforward: 'Absent any factual development beyond the allegations in a complaint, a court cannot fairly tell whether a case is "obvious" or "squarely governed" by precedent, which prevents us from determining whether the facts of this case parallel a prior decision or not' for purposes of determining whether a right is clearly established." *Guertin*

29. But in noting that the defense of qualified immunity is prone to rejection when asserted as a 12(b)(6) motion, the Sixth Circuit makes clear that the defense indeed can be asserted in that manner. And the Supreme Court has indicated that the defense of qualified immunity ideally would be recognized, if valid, early indeed—before discovery even starts. *See Pearson v. Callahan*, 555 U.S. 223, 231–32, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) ("[W]e have made clear that the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that '"insubstantial claims" against government officials [will] be resolved prior to discovery.'" (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

> *v. State*, 912 F.3d 907, 917 (6th Cir. 2019) (quoting *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring)). Therefore, it is generally inappropriate for a district court to grant a 12(c) motion based on qualified immunity. *Wesley*, 779 F.3d at 433; *see also Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016).

Kilnapp v. City of Cleveland, No. 22-4059, 2023 U.S. App. LEXIS 18620, 2023 WL 4678994, at *3 (6th Cir. July 21, 2023)

To survive the motion to dismiss on qualified-immunity grounds, the plaintiff must allege facts that "plausibly mak[e] out a claim that the defendant's conduct violated a constitutional right that was clearly established [by] law at the time, such that a reasonable [official] would have known that his conduct violated that right." *Johnson v. Moseley*, 790 F.3d 649, 653 (6th Cir. 2015). Therefore, in analyzing the issue of qualified immunity, the "first step is to determine if the facts alleged make out a violation of a constitutional right. The second is to ask if the right at issue was 'clearly established' when the event occurred such that a reasonable officer would have known that his conduct violated it." *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013) (citing *Pearson v. Callahan*, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)). Although these two steps may be addressed in either order, both steps must be answered in the affirmative for the plaintiff's claim to proceed. *Id.* (citing *Pearson*, 555 U.S. at 236).

Because the Court has determined that Plaintiff has stated a claim for a violation of Plaintiff's First Amendment rights, the Court need only address here whether the law was clearly established such as to have put a reasonable official on notice that the actions taken against Plaintiff were unconstitutional. Plaintiff has the burden of demonstrating that the law was clearly established at the time of the challenged conduct. *See Hughes v. City of North Olmsted*, 93 F.3d 238, 241 (6th Cir. 1996). The inquiry into whether a right was clearly established must be conducted "in light of the specific context of the case." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . [and] in the light of preexisting law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *see also Edwards v. Williams*, 170 F. Supp. 2d 727, 735 (E.D. Ky. 2001) (explaining that a plaintiff must show "that any officials in the defendants' positions, measured objectively, would have clearly understood that they were under an affirmative duty to refrain from the conduct."). The Sixth Circuit has instructed that "[w]hen determining whether a constitutional right is clearly established, [district courts should] look first to decisions of the Supreme Court, then to [Sixth Circuit] decisions and those of other courts within the circuit, and then to decisions of other Courts of Appeal." *Andrews v. Hickman Cnty.*, 700 F.3d 845, 853 (6th Cir. 2012) (citing *Masters v. Crouch*, 872 F.2d 1248, 1251–52 (6th Cir. 1989)). While it is not necessary for there to be a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. *See Mullenix v. Luna*, 136 S. Ct. 305, 308, 577 U.S. 7, 193 L. Ed. 2d 255 (2015); *Pike v. Hester*, 891 F.3d 1131, 1141 (9th Cir. 2018) (explaining that the "clearly established" prong does not require an "exact factual match").

The alleged events underlying Plaintiff's First Amendment-retaliation claim occurred between June 2020 and June 2021. The Court therefore limits its review of the relevant case law to cases decided prior to June 2020. As discussed in detail above, the Sixth Circuit's treatment of First Amendment retaliation claims when the relevant First Amendment activity was undertaken in a person's capacity as an elected official differs from treatment of such claims when the First Amendment activity was undertaken in a person's private capacity. The Court therefore agrees with Metro Defendants that in undertaking the "clearly established" analysis, the Court should consider only First Amendment-retaliation cases involving plaintiffs allegedly subject to retaliation for First Amendment activity undertaken in his or her capacity as a public official.

As noted above, a constitutional right is clearly established if (and only if) a "reasonable official would understand that what he is doing violates that right . . . [and the violation is apparent] in the light of preexisting law." *Anderson*, 483 U.S. at 640. Here, the Court's discussion above of the Sixth Circuit's decisions in *Zilich, Perkins*, and *Mattox* is relevant. In *Zilich*, the Sixth Circuit made clear that threats of physical violence and attacks on personal property are the type of adverse actions that would chill a reasonable elected official's First Amendment activity. *See Zilich*, 34 F.3d at 360–61. In denying qualified immunity, the Sixth Circuit explained that "[n]o reasonable official could possibly believe that it is constitutionally permissible to retaliate against a political opponent with physical threats, harassment[,] and vandalism." *Id.* at 364–65. True, in *Mattox* and *Perkins*, the Sixth Circuit found that the adverse actions taken against the respective elected officials were not sufficiently adverse to violate the First Amendment. *See Mattox*, 183 F.3d at 522; *Perkins*, 411 F. App'x at 815. However, in distinguishing the facts in *Mattox* from situations in which an action *would* be sufficiently adverse as to violate the First Amendment, the Sixth Circuit noted that the actions taken against Mattox were "not equivalent to being fired by a government employer for expressing protected views." *Mattox*, 183 F.3d at 522. In doing so. the Sixth Circuit suggested that termination of employment in retaliation for exercising a First Amendment right would violate the First Amendment.

The amended complaint alleges, and the Court takes as true, that Mendes leveraged Metro's status as a client with Baker to attempt to influence Plaintiff's vote on the Commission, *i.e.*, chill his exercise of his First Amendment rights. The Court recognizes that the underlying facts supporting the allegation that Mendes (among others) was behind such alleged attempts is not overwhelming. But the alleged facts easily support the factual allegation that *someone* at Metro (*not* to say a final policymaker at Metro) was behind such an attempt. (*See, e.g.*, Doc. No.

34 at 19 (alleging that DeLanis emailed to Hicks, "You have told me several times now that two firm clients (Metro Nashville and the Metro School Board) have been pressuring you, and the firm, to take action against me because of my role on the Election Commission.")). And the amended complaint contains sufficient factual allegations of Mendes' strong feelings about what the vote should be and Mendes's disdain for Plaintiff—to render at least minimally plausible the notion that Mendes was (at least one person) behind the alleged attempt.

Although Mendes' actions do not rise to the level of the threats and attacks at issue in *Zilich*, the Court is satisfied that the law at the time of Mendes' actions would have put a reasonable official on notice that his or her conduct was violative of Plaintiff's First Amendment rights. At the very least it is plausible that this is the case, and thus this case does not present the exception where dismissal on qualified-immunity grounds is appropriate under Rule 12(b)(6). Therefore, in light of the Sixth Circuit's decisions in *Zilich, Mattox*, and *Perkins*, the Court finds it plausible that at the time that the conduct in the amended complaint took place, it was clearly established through Sixth Circuit precedent that terminating a public official's private employment in retaliation for how they chose to vote in their public role violates the First Amendment.[30] Plaintiff has therefore met his burden in demonstrating the "clearly established" prong of qualified immunity; it

30. Again, the Court need not decide at this time whether the underlying theory of liability for termination is that Mendes was the actor that directly caused the termination or that he conspired with Baker to cause the termination, or both.

follows that Mendes is not entitled to qualified immunity. Metro Defendants' motion to dismiss will therefore be denied insofar as it requests dismissal of Plaintiff's First Amendment-retaliation claim as pled against Mendes in his individual capacity.

E. The Amended Complaint States a Claim for First Amendment Retaliation Against Baker

Section 1983 applies only to individuals acting under the color of state law. *See McNeese v. Vandercook*, 1999 U.S. App. LEXIS 3405, 1999 WL 133266, at *1–2 (6th Cir. Feb. 25, 1999). "A person acts under color of state law when he exercises power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* (internal quotation marks omitted). Individuals acting under the color of state law are often referred to as "state actors." A private entity typically cannot be held liable under § 1983, because it does not act under the color of state law, and therefore is not considered a "state actor." As the Sixth Circuit has explained, however,

> [A] private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function, *see, e.g., Jackson* [*v. Metro. Edison Co.*], 419 U.S. at 352–354, 95 S. Ct. 449 [(1974)]; (ii) when the government compels the private entity to take a particular action, *see, e.g., Blum v. Yaretsky*, 457

> U.S. 991, 1004–1005, 102 S. Ct. 2777, 73 L.Ed.2d 534 (1982); or (iii) when the government acts jointly with the private entity, *see, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941–942, 102 S. Ct. 2744, 73 L.Ed.2d 482 (1982).

Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928, 204 L. Ed. 2d 405 (2019). Baker does not argue that the amended complaint should be dismissed because it was not a state actor. (Doc. No. 44). Instead, it argues that, assuming it *was* a state actor, it is nonetheless entitled to qualified immunity on the same grounds for which Mendes is purportedly entitled to qualified immunity. (*Id.* at 2–3). Because Baker provides no argument as to why it was not a state actor when it undertook the actions set forth in the amended complaint, the Court need not to address at this juncture whether Baker was in fact a state actor.

And in any event, qualified immunity is not available to Baker, because Baker is an entity rather than an individual. The "[qualified-immunity] defense is available only to individual government officials sued in their personal capacity. Just as the defense is unavailable to the public entity itself, it is unavailable to a private entity acting in a governmental capacity." *Nugent v. Spectrum Juv. Just. Servs.*, 72 F.4th 135, 143–44 (6th Cir. 2023) (citations and internal quotation marks omitted).

Alternatively, because the Court has already found that Mendes is not entitled to qualified immunity, it would be satisfied that Baker is likewise not entitled to qualified immunity even if qualified immunity were potentially available to a private entity. "For the reasons the Court concluded qualified immunity was inappropriate for the individual defendant[ ], it also concludes qualified immunity is inappropriate for [the private-entity defendant, Baker]." *United Pet Supply, Inc. v. City of Chattanooga*, 921 F. Supp. 2d 835, 860 (E.D. Tenn. 2013). Baker's motion to dismiss (Doc. No. 43) will therefore be denied as to Plaintiff's First Amendment-retaliation claim.

2. DUE PROCESS CLAIM

Metro Defendants argue that the amended complaint fails to state a claim of a violation of either substantive or procedural due process.[31] (Doc. No. 40 at 24). The amended complaint alleges that Plaintiff had a right to "due process under the law. . . to serve on a commission. . . to effectively fulfill his oath of office. . . [and] to consider and vote on matters coming before the Commission without illegal or inappropriate influence or duress. . . ." (Doc. No. 34 at 26).

Upon its review of the amended complaint, the Court notes that the amended complaint does not expressly indicate whether Plaintiff seeks to pursue a procedural due process claim, a substantive due process claim, or both. As the undersigned put it decades ago, "a substantive due

31. Metro Defendants also argue that the amended complaint fails to state a claim under the Equal Protection Clause. (Doc. No. 40 at 24). Plaintiff does not respond to Metro Defendants' argument on this issue. Plaintiff has therefore conceded any opposition to Metro Defendants' argument on this point. Plaintiff's claims of violations of the Equal Protection Clause in Counts I and II of the amended complaint will therefore be dismissed.

process violation occurs when the government deprives a person of a protectable interest . . . under unconstitutional criteria." Eli J. Richardson, *Eliminating Double-Talk from the Law of Double Jeopardy*, 22 Fla. St. U. L. Rev. 119, 163 (1994). By contrast, "[t]he idea behind procedural due process—including in the context of a state-created liberty interest—is that the interest cannot be taken away arbitrarily. Instead, a state-created liberty interest can be taken away, if at all, only pursuant to procedures reasonably geared (under the circumstances) to obtaining an *accurate* determination as to whether, under applicable criteria, it should be taken away." *See Memphis A. Phillip Randolph Inst. v. Hargett*, 482 F. Supp. 3d 673, 683 (M.D.T.N. 2020).

In his response to Metro Defendants' motion to dismiss, Plaintiff provides grounds (without stating them in the alternative) for both a substantive due process claim and a procedural due process claim.[32] (Doc. No. 47 at 25–28). It is the Court's view, however, that substantive due process and procedural due process are not merely alternative theories on which to sustain a single due process claim. Instead, they are *distinct* claims. Therefore, if Plaintiff wished to assert a due process claim, he should have pled the claim such as to clearly indicate whether it was a procedural or substantive due process claim, and then provided argument in response

32. In particular, Plaintiff's assertion of a substantive due process claim is set forth at Parts (V)(A)–(B) of his brief in opposition to Metro Defendants' motion to dismiss, and Plaintiff's assertion of a claim of procedural due process is set forth at Part V(C) of that response.

to the instant motions consistent with the claim pled. By failing to do so, Plaintiff has put Metro Defendants in the unfair position of ostensibly having to defend against two different claims (procedural due process and substantive due process) without *either* of these claims being clearly pled in the amended complaint.

"Under Fed. R. Civ. P. 8(a)(2), plaintiff is required to provide a 'short and plain statement of the claim showing that the pleader is entitled to relief.' Fed. R. Civ. P. 8(a)(2). The complaint must put the defendant on notice as to the plaintiff's claim and its grounds, but the complaint need not contain all of the particularities of the claim." *Salatin v. Trans Healthcare of Ohio, Inc.*, 170 F. Supp. 2d 775, 781 (N.D. Ohio 2001) (citing *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976)). As explained above, the amended complaint does not put Metro Defendants on notice of whether Plaintiff seeks to bring a substantive or procedural due process claim. And Plaintiff's attempt to provide a substantive due-process argument *and* a procedural due-process argument in support of the single due process claim pled in the amended complaint affirms the Court's view. Because Plaintiff's due process claim fails to put Metro Defendants on notice of the claim against them, the Court agrees with Metro Defendants that the claim should be dismissed. Plaintiff, however, may seek leave to file an amended complaint, should he wish to pursue a due process claim. To the extent that the amended complaint pleads a due process claim against Baker (which appears to be the case), this claim is likewise dismissed with leave to amend.

3. CIVIL CONSPIRACY CLAIM AGAINST METRO, MENDES IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, AND BAKER

Count III of the amended complaint contains a claim of civil conspiracy under Section 1983 against Metro, Mendes in his official and individual capacities, and Baker for allegedly conspiring to violate Plaintiff's constitutional rights. (Doc. No. 34 at 38). Metro Defendants seek dismissal of the civil conspiracy claim pled against them. (Doc. No. 40).

"A § 1983 civil conspiracy claim requires (1) a single plan existed, (2) [defendants] shared in the general conspiratorial objective to deprive [plaintiffs] of [their] constitutional . . . rights, and (3) an overt act was committed in furtherance of the conspiracy that caused injury to [plaintiffs]." *Siefert v. Hamilton Cnty.*, 951 F.3d 753, 767–68 (6th Cir. 2020) (internal quotation marks omitted). But this begs the question of what is meant here by a § 1983 civil conspiracy *claim*. What is *not* meant is a *separate cause of action*. As is very well established, "a Section 1983 civil conspiracy by itself does not constitute a separate cause of action." *Quezergue v. Gunn*, No. 3:22-CV-00092, 2022 U.S. Dist. LEXIS 74682, 2022 WL 1217237, at *4 (M.D. Tenn. Apr. 25, 2022). Instead, "a claim for civil conspiracy under § 1983 exists only where the plaintiff has established a separate and actionable constitutional injury." *Rapp v. Dutcher*, 557 F. App'x 444, 450 (6th Cir. 2014). Or, to put it only slightly more explicitly, a Section 1983 civil conspiracy claim exists only when there is a separate and actionable constitutional violation that injures the plaintiff. *See Wiley v. Oberlin Police Dep't*, 330 F. App'x 524, 530 (6th Cir. 2009).

To illustrate what this all actually means, the Court will contrast this federal (Section 1983) civil law principle with federal criminal law. Under certain circumstances, participation in a conspiracy (to commit a particular underlying federal crime) *standing alone* is actionable under federal criminal law—i.e., is grounds for federal criminal liability irrespective of any whether the underlying crime that was object of the conspiracy was committed, irrespective of whether any actions at all were actually undertaken towards committing that crime, and irrespective of whether anyone (or society as a whole) was injured as a result of the conspiracy or the underlying crimes that was its object.[33] By contrast, participation in a conspiracy to violate Section 1983 by itself is not grounds for civil liability.

In short, a § 1983 civil conspiracy "claim" is not a separate cause of action, which is to say that a theory of civil conspiracy does not serve to supporta separate cause of action. The question, then, is what exactly a claim of civil conspiracy *does* serve to do. This Court provided an answer many years ago, and it remains the correct answer:

> the doctrine of civil conspiracy may be used in a [Section] 1983 case to extend liability for a

33. This is true, for example, of a conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846 and of a conspiracy to commit so-called Hobbs Act robbery in violation of 18 U.S.C. § 1951.

> deprivation of constitutional rights to persons other than the actual wrongdoer. In such a case, the conspiracy standing alone does not give rise to liability; rather it is the injury to the plaintiff caused by specific overt acts that is actionable.

Croushorn v. Bd. of Trs. of Univ. of Tenn., 518 F. Supp. 9, 43 (M.D. Tenn. 1980) (citations omitted). The idea in the context of a Section 1983 civil-conspiracy claim is the same as the one described by the undersigned in connection with a claim of civil conspiracy under Tennessee law: properly conceived, a "claim of civil conspiracy not as the assertion of a separate cause of action, but rather as an assertion that each of the Defendants should be held liable based on the alleged tortious conduct of the alleged co-conspirators." *JRS Partners, GP v. Leech Tishman Fuscaldo & Lampl, LLC*, 615 F. Supp. 3d 750, 781 (M.D. Tenn. 2022).

The upshot of all of this, although courts typically do not seem to put it exactly this way in adjudicating motions to dismiss a "claim" of civil conspiracy, is that there actually is *no cause of action* for civil conspiracy that even could be dismissed. The only thing that could be dismissed is the *theory* that each of the Defendants is liable, as a co-conspirator of both of its respective co-Defendants, for any Section 1983 violations committed by the other Defendants. Based on courts' consistent past practice, the Court is satisfied that dismissal of a conspiracy theory of liability is a kind of relief properly awardable on a motion to dismiss under certain circumstances, and Plaintiff does not appear to dispute that. The present question is whether such circumstances exist in the present case.

To summarize, Plaintiff's "claim" of Section 1983 civil conspiracy is actually a theory for extending liability under Section 1983 to Defendants (even if they themselves did not take actions that are properly deemed violations of Section 1983) who participated in a conspiracy with a Defendant who did take actions that violated Section 1983. To the extent that the amended complaint does not adequately allege that a particular Defendant violated Section 1983, the theory is simply inapplicable because there is no liability to extend to other Defendants. As noted above, the amended complaint does not adequately state a claim against Metro or against Mendes in his official capacity, and so the claim of civil conspiracy is simply inapplicable to any such claim. The Court need not purport to "dismiss" the claim of civil conspiracy to the extent that it is based on the alleged Section 1983 liability of Metro or Mendes in his official capacity; it is more accurate to say simply that the claim is inapplicable, and cannot be used to extend such liability (to Baker or to Mendes in his official capacity), because such liability has not been adequately alleged.

However, as noted above, the amended complaint *does* adequately allege Section 1983 claims against Baker and against Mendes in his individual capacity. The questions, then, are: (i) whether the amended complaint plausibly alleges that Baker's co-Defendants conspired with Baker to commit Baker's alleged violation of Section 1983; and (ii) whether the amended complaint plausibly alleges that Mendes's co-Defendant's conspired with Mendes's to commit Mendes's alleged violation of Section 1983.

In their briefing, Defendants do not address these issues at all. Instead, they argue only that Plaintiff has not adequately pled an underlying Section 1983 violation as is necessary to support a claim of conspiracy.[34] The Court takes this argument to heart; as noted above, to the extent that this is true (as it is with respect to the claims against Metro and against Mendes in his official capacity), Plaintiff's conspiracy theory will go nowhere. But Defendants have not even attempted to explain why, to the extent the Court finds that Plaintiff has adequately pled an underlying Section 1983 violation (as it has with respect to Baker and to Mendes in his official capacity), Plaintiff's allegations do not adequately support a civil conspiracy theory to extend liability on either such claim to the respective two co-Defendants. Thus, the civil conspiracy theory will not be dismissed with respect to the two surviving underlying Section 1983 claims (i.e., the claim of First Amendment retaliation against Mendes and the claim of First Amendment retaliation against Baker).[35]

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34. Notably, the Court does not perceive that Defendants have argued that the requirements of *Monell* apply to a civil-conspiracy theory of liability for a municipality under § 1983. That is, they do not argue that in order to sustain a civil-conspiracy theory of liability against a municipality, a plaintiff must show that the act of conspiracy (i.e., entering into an agreement to commit a § 1983 violation with someone who is primarily liable for the § 1983 violation) was the result of a policy or custom of the municipality. Therefore, the Court has not considered whether the amended complaint should be dismissed based on an alleged failure to plausibly allege factual matter to support such a showing.

35. To reiterate, as for the underlying Section 1983 claims that do not survive (namely, those against Metro and against

4. STATE LAW CLAIMS CONTAINED IN COUNT II

Metro Defendants argue that Plaintiff has failed to state claims under Tennessee Code §§ 39-14-112 and 2-19-202. (Doc. No. 40 at 27). In his response, Plaintiff clarifies that he did not intend to plead violations of these state laws. (Doc. No. 47 at 29). Rather than seeking to plead violations of these state laws, Plaintiff explains that he included the argument that Metro Defendants' conduct violated these state laws in the amended complaint to bolster his assertion that Metro Defendants' conduct was not a legitimate exercise of governmental power—which, in his view, support his § 1983 claims.[36] In any case, given that Plaintiff has indicated that he does not seek to pursue state law claims, the Court need not address whether he could in fact do so.

5. STATE LAW CLAIMS CONTAINED IN COUNTS V AND VI

Counts V and VI plead multiple state-law torts against Baker. Baker has not moved to dismiss these claims, and therefore they remain pending.

Mendes in his official capacity), *dismissal* of the conspiracy theory as such is unnecessary because it is simply inapplicable to such claims.

36. Plaintiff's allegations are not specific enough to conclude that Mendes violated a specific law, and therefore a First Amendment-retaliation claim could not stand on these claims alone. Because he nevertheless plausibly alleged a First Amendment-retaliation claim based on other alleged facts, he can, of course, bolster or change his theory of liability as new facts arise in the course of litigation.

CONCLUSION

For the reasons (and to the extent) set forth herein, Metro Defendants' motion to dismiss at Doc. No. 39 will be granted in part and denied in part, and Baker's motion to dismiss at Doc. No. 43 will be granted in part and denied in part.

Specifically, Metro Defendants' motion to dismiss (a) will be granted in that (i) all claims against Metro and Mendes in his official capacity will be dismissed, provided that Metro and Mendez in his official capacity[37] will remain potentially liable on the theory of civil conspiracy for any First Amendment retaliation for which Baker or Mendes in his individual capacity is liable; and (ii) Plaintiff's claims of due process and equal protection violations will be dismissed; and (b) otherwise will be denied (including that, as just noted, Metro and Mendes will remain potentially liable on the theory of civil conspiracy for any First Amendment retaliation for which Baker or Mendes in his individual capacity is liable).

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37. The Court is aware that the parties (reasonably enough) dispute whether it would be premature to dismiss any claims (or, in this case, *theories*) against Mendes in his official capacity as duplicative of the claims (or theories) against Metro. As the Court discerns no possible prejudice from declining to dismiss Mendes in his official capacity at this time, it will decline to do so, without prejudice to Metro Defendants prerogative to re-raise this possibility at any time upon a showing of good cause (including actual prejudice to Metro Defendants any continued deferral of the issue).

Baker's motion to dismiss (a) will be granted in that Plaintiff's claims of due process and equal protection violations will be dismissed; and (b) otherwise will be denied (including that Baker will remain potentially liable on the theory of civil conspiracy for any First Amendment retaliation for which Mendes in his individual capacity is liable).

A corresponding order will be entered separately.

/s/ Eli Richardson
ELI RICHARDSON
UNITED STATES
DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION, FILED OCTOBER 6, 2023

IN THE UNITED STATES
DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:22-cv-00469

JAMES A. DELANIS,

Plaintiff,

v.

METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY, *et al.*,

Defendants.

Filed October 6, 2023

ORDER

Pending before the Court is the motion to dismiss filed jointly by Defendant Metropolitan Government of Nashville and Davidson County ("Metro") and Defendant Robert J. Mendes (Doc. No. 39, "Metro Defendants' motion to dismiss"), the motion to dismiss filed by Defendant Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

(Doc. No. 43, “Baker’s motion to dismiss”), Plaintiff’s motion for review of the magistrate judge’s order staying discovery pending the undersigned’s determination of the two aforementioned motions to dismiss (Doc. No. 57, “motion for review”), Plaintiff’s motion to submit supplemental authority (Doc. No. 62), and Plaintiff’s second motion to submit supplemental authority (Doc. No. 66).

For the reasons (and to the extent) set forth in the accompanying memorandum opinion, Metro Defendants’ motion to dismiss (Doc. No. 39) is **GRANTED IN PART AND DENIED IN PART**, and Baker’s motion to dismiss (Doc. No. 43) is **GRANTED IN PART AND DENIED IN PART**.

Specifically, Metro Defendants’ motion to dismiss (a) is granted in that (i) all claims against Metro and Mendes in his official capacity will be dismissed, provided that Metro and Mendez in his official capacity[1] will remain potentially liable on the theory of civil

1. The Court is aware that the parties (reasonably enough) dispute whether it would be premature to dismiss any claims (or, in this case, *theories*) against Mendes in his official capacity as duplicative of the claims (or theories) against Metro. As noted in the accompanying memorandum opinion, the Court declines to order dismissal of those official-capacity claims, but this declination is without prejudice to Metro Defendants’ prerogative to re-raise this possibility at any time upon a showing of good cause (including actual prejudice to Metro Defendants from any continued deferral of the issue).

conspiracy for any First Amendment retaliation for which Baker or Mendes in his individual capacity is liable; and (ii) Plaintiff's claims of due process and equal protection violations are dismissed; and (b) otherwise is denied (including that, as just noted, Metro and Mendes will remain potentially liable on the theory of civil conspiracy for any First Amendment retaliation for which Baker or Mendes in his individual capacity is liable).

Baker's motion to dismiss (a) is granted in that Plaintiff's claims of due process and equal protection violations will be dismissed; and (b) otherwise is denied (including that Baker will remain potentially liable on the theory of civil conspiracy for any First Amendment retaliation for which Mendes in his individual capacity is liable).

As the motions to dismiss have been decided, Plaintiff's motion for review (Doc. No. 57) is **DENIED** as moot. Plaintiff's two motions to supplement (Doc. Nos. 62 and 66) are **GRANTED IN PART AND DENIED IN PART**; more specifically, they are denied in part insofar as they sought to supplement the motion for review, which the Court has found to be moot, and they are granted in part insofar as the Court considered the new authority identified therein in making its decision(s) on the two motions to dismiss.

IT IS SO ORDERED.

/s/ Eli Richardson
ELI RICHARDSON
UNITED STATES
DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JANUARY 30, 2026

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5948

JAMES A. DELANIS,

Plaintiff-Appellee,

v.

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC,

Defendants-Appellants.

Filed January 30, 2026

ORDER

BEFORE: SUTTON, Chief Judge; CLAY and GIBBONS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX F — FIRST AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, FILED SEPTEMBER 11, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
Jury Demand

Civil No: 3:22-cv-00469

JAMES A. DELANIS,

Plaintiff,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, ROBERT J. MENDES, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE METRO COUNCIL, AND BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC,

Defendants.

Judge Eli J. Richardson
Magistrate Jeffrey S. Frensley

FIRST AMENDED COMPLAINT

Plaintiff James A. DeLanis files this first amended complaint as a matter of course pursuant to Federal

Rule of Civil Procedure 15(a)(1)(B). Plaintiff brings the following causes of action against the Defendants Metropolitan Government of Nashville and Davidson County, Robert J. Mendes, individually and in his capacity as a member of the Metro Council, and Baker, Donelson, Bearman, Caldwell & Berkowitz, PC.

THE PARTIES

1. Plaintiff James A. DeLanis is a natural person and a citizen of the United States and the State of Tennessee. He resides in Davidson County, Tennessee.

2. The Metropolitan Government of Nashville and Davidson County ("Metro") is a municipality in Tennessee existing in Davidson County, Tennessee. It is organized and existing under the laws of the State of Tennessee. Its chief executive officer is the Mayor John Cooper. Its chief legislative body is the Metro Council.

3. Robert J. Mendes is a member of the Council for the Metropolitan Government of Nashville and Davidson County. His office address is 150 3rd Avenue South, Suite 1100, Nashville, Tennessee 37201. Mendes is a member of the legislative branch of Metro. Mendes does not hold any other elected, appointed or retained office as an official, officer or agent of Metro.

4. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC ("Baker Donelson" or the "firm") is a Tennessee professional corporation. It maintains an office in Davidson County, Tennessee. The registered agent for

service of process is Sam Blair, Jr., who has a registered address with the Tennessee Secretary of State of 165 Madison Avenue, Memphis, Tennessee 38103-2723.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, and otherwise. This action arises under 42 U.S.C. § 1983 as well other federal and state laws. This Court has supplemental jurisdiction under 28 U.S. Code § 1367 over the state law claims because they arise from the same core set of facts and circumstances as the violations of federal law.

6. Venue lies in this Court pursuant to 28 U.S.C. § 1391 because the events giving rise to this claim occurred in this district.

STATEMENT OF FACTS

7. DeLanis is an attorney licensed to practice in Tennessee. He has practiced law in Tennessee since 1978 and has been licensed to practice law in Tennessee since 1978.

8. DeLanis was employed as an attorney by Baker Donelson, or a predecessor law firm, since 1981, and was so employed at all times relevant to the claims set forth herein.

9. In addition to his employment as an attorney with Baker Donelson, the State of Tennessee, acting through the State of Tennessee Election Commission, in 2012 appointed DeLanis to serve as a member of the Davidson County Election Commission (the "Commission"). See Tennessee Code Annotated § 2-12-101.

10. Before accepting that appointment by the State, DeLanis obtained Baker Donelson's unqualified approval to accept the appointment to serve on that state commission. Baker Donelson encouraged DeLanis, and other of its attorneys, to be engaged in public service activities like service on the Commission.

11. Before DeLanis accepted the appointment to the Commission, Baker Donelson set up a formal file in its client data base and its conflicts system for DeLanis' work on the Commission. That system is set up to prevent the firm from accepting clients that would create conflicts with existing files and matters. Periodically, DeLanis, and the other lawyers with the firm, filled out questionnaires as requested by Baker Donelson that disclosed to Baker Donelson the positions held by its lawyers on boards, governing bodies of companies, and agencies like the Commission. DeLanis completed these disclosure forms as requested and continued to disclose his position on the Commission to Baker Donelson. Because of the public nature of the Commission, DeLanis' position on the Commission was well known to Baker Donelson management.

12. The fact that the Commission, by its nature, was required to take public positions that, at times, were contrary to the wishes, and perceived interests, of Metro as a governing body, and representatives of Metro, was well known to Baker Donelson and its management.

13. The fact that the Commission, by its nature, was required to take public positions that, at times, were contrary to the wishes, and perceived interests, of Metro as a governing body, and representatives of Metro, was well known to Metro as well as it mayor, council members and other policy makers.

14. From time to time, DeLanis consulted with John Hicks, who in addition to being a principal of Baker Donelson also served as its "general counsel." The discussions between DeLanis and Hicks included, but was not limited to, issues that were or might come before the Commission and the ethical issues that might be raised by those issues.

15. At no time before the circumstances and events that led to the filing of this action, did Baker Donelson or Hicks ever indicate in any way to DeLanis that his position on the Commission presented, or might present, a conflict with his employment at Baker Donelson,or a potential conflict with any client of the firm, or that it might be grounds for employment termination or discipline by Baker Donelson of DeLanis.

16. At no time did Metro or any Metro officials ever indicate in any way to DeLanis that his position on the

Commission presented, or might present, a conflict with Metro's use of Baker Donelson as a law firm representing Metro, the Metro School Board or any other affiliates of Metro.

17. DeLanis, as an appointed member of the Commission, was a state official with duties set forth by Tennessee law in connection with the administration of elections in Davidson County, Tennessee.

18. The Commission is regulated by the State of Tennessee Election Commission. By state statute, the Commission's expenses are funded primarily by Metro, but it also is funded partially by the State of Tennessee. Its structure is designed by state statutes with checks and balances so that, assuming proper respect for the law, the Commission operates independently from Metro in its regulation of elections in Davidson County.

19. By state law, the Commission is comprised of 5 members, all of whom are appointed by the State of Tennessee Election Commission. Tennessee Code Annotated § 2-12-101.

20. By state law, the Commission is to be independent from the control of Metro, and its Commissioners, including DeLanis, are to be independent from the control of Metro.

21. By state law, the Commission and its commissioners are not employees, agents or officials of Metro. By state law, the Commission and its commissioners are not subject to any control, oversight or authority of

Metro. However, by state law, Metro is responsible for the operating budget of the Commission and, accordingly, the commissioners receive monthly payments from Metro for their service as a state official.

22. DeLanis was appointed to the Commission in 2012, and every 2 years thereafter.

23. DeLanis was elected as Chair of the Commission by his fellow Commissioners in 2016, 2017, 2018, 2019, 2021 and 2022.

24. DeLanis was the Chair of the Commission during the events pertinent to the causes of action set forth in the Complaint.

25. During DeLanis' service on the Commission, Baker Donelson honored and commended him for his public service, including his service on the Commission. Baker Donelson included a reference to DeLanis' service on the Commission in its website. By its words and actions, Baker Donelson encouraged DeLanis' service on the Commission.

26. On information and belief, Metro became a Baker Donelson client after DeLanis was appointed to the Commission.

27. During all times relevant to the claims in this action, Metro was a client of Baker Donelson.

28. Until the events that led to the filing of this action, Baker Donelson never informed DeLanis that Metro or any of its affiliated agencies and entities had become Baker Donelson clients.

29. Neither Metro nor any of its officials, it affiliated agencies or entities, informed DeLanis that Metro or any of its affiliated agencies and entities had become Baker Donelson clients.

30. Neither Metro nor any of its officials, it affiliated agencies or entities, informed DeLanis that his service on the Commission and his employment by Baker Donelson created an actual or perceived conflict of interest.

31. During all times relevant to the claims in this action, Baker Donelson sought to maintain and increase the client revenue it generated, or could generate in the future, from Metro, and entities related officially and unofficially to Metro.

32. In June 2020, Metro Council members adopted a 34% property tax rate increase (the "34% Tax Increase") on a vote of 32-8. The budget which included the 34% Tax Increase was proposed by Mendes, who was the chair of the Council's Budget Committee.

33. The 34% Tax Increase was the first property tax increase in Metro since 2012 and the largest in the history of Metro.

34. The 34% Tax Increase was enacted by Metro Council during a time of business losses, job losses and Metro, state and federal government ordered limits on businesses and travel related to COVID-19.

35. In 2020, a group of citizens initiated a petition to place an issue on the ballot in Davidson County, via a referendum vote of the people, concerning the 34% Tax Increase which Metro had enacted. The proposed referendum, among other provisions, would limit the authority of Metro to raise tax rates by more than 5% without voter approval ("Tax Referendum").

36. This 34% Tax Increase, which was the subject of the citizen initiated referendum petition, was a matter of great public interest.

37. The effort by members of the public to obtain enough signatures on a petition for a public referendum on the 34% Tax Increase was strenuously opposed by Metro and its public officials including the Mayor, the Metro director of finance, and members of the Metro Council, including Mendes.

38. Metro's opposition to a public referendum that would have the effect of rolling back the 34% Tax Increase and/or in any way limiting Metro's authority to impose future tax increases was the official policy adopted by Metro and its officials (the "Metro Anti-Referendum Policy"). This policy directed Metro's actions and the expenditure of enormous sums of money and effort to keep the petition and Tax Referendum from ever reaching

a public vote. This policy included opposition not only to the efforts to roll back the 34% Tax Increase but to any efforts to limit Metro's ability to prospectively raise taxes.

39. Although the Tax Referendum was submitted to the Commission, the Commission's involvement did not include advocating for or against the merits of the referendum's proposal. The Commission's involvement was limited to determining whether the legal requirements for a referendum had been met and, if so, to schedule the matter for a public vote.

40. On October 9, 2020, the Commission filed a chancery court action in Davidson County because of disputes over whether the 2020 petition regarding the 34% Tax Increase should be placed on the ballot as a public referendum. See, e.g., *Davidson County Election Commission v. The Metropolitan Government of Nashville and Davidson County,* Davidson Chancery No: 20-2012-III. This action was consolidated with *4 Good Government, et al., v. The Davidson County Election Commission, et al.,* Davidson Chancery No: 20-2010-III.

41. Based on the Metro Anti-Referendum Policy, Metro and its public officials filed pleadings in the two consolidated lawsuits. Metro's policy objective was to prevent a public referendum on the 34% Tax Increase and to do so through litigation if necessary.

42. After the chancery court issued a ruling in 2020 that the referendum should not be scheduled for a vote, members of the public attempted to address the problems

identified by the chancery court in its rulings relative to the first petition and started a second petition effort to obtain a public referendum in 2021 to reverse Metro's 34% Tax Increase and impose future limits on Metro's ability to raise taxes.

43. The continued efforts in late 2020 and 2021 on a petition drive for a proposed Tax Referendum led to more litigation in Davidson County Chancery Court involving claims by and against Metro and the Commission. See, procedural history in *Metropolitan Government of Nashville and Davidson Cnty. v. Davidson Cnty. Election Commission*, 2022 WL 880477 at p.1 (Tenn. App., 2022) ("This case concerns the decision of the Davidson County Election Commission ("the Commission") to hold a referendum election on July 27, 2021, with respect to a petition to amend the Charter of the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro Charter" or "Charter") sponsored by the group 4 Good Government ("4GG"). A previous petition sponsored by 4GG was declared deficient in a 2020 decision by the Davidson County Chancery Court.").

44. On March 26, 2021, Mendes, as a member of the Metro Council, filed Resolution 2021-837 with the Metro Council. This Resolution, with 2 amendments, proposed that additional charter amendments which were offered by Mendes also be placed on the ballot in 2021, but only if the matters contained in the Tax Referendum were placed on the ballot. The Metro Council enacted Resolution 2021-837 on April 20, 2021. The actions of Mendes and other Metro Council members were undertaken and enacted as

an official policy of Metro pursuant to and expanding the Metro Anti-Referendum Policy.

45. In Amendment 2 to Resolution 2021-837, which was offered by Mendes, Mendes made clear in the "ballot summary" of the proposed Metro ballot measure that one objective of the Metro proposed charter amendment was to forever preclude any public referendum on property tax levies or the reversion of property tax levies except to the extent "required" or "specifically authorized" by state law. Amendment 2 states, in relevant part,

> I hereby move to amend Resolution No. RS2021-837 by amending the ballot summary for the proposed amendment to the Metropolitan Charter as follows:
>
> This amendment provides that the Metropolitan Government's exercise of power pertaining to government-owned property, and the Council's authority to set property tax levies, are subject to a public referendum only as required by state law, and that any automatic reversion of the property tax levy shall be as specifically authorized by state law. ***

46. At the time of the proposed Metro ballot measure there was no such requirement under state law. This language appeared to be designed to confuse voters about the consequences of their vote on the Metro ballot measure.

47. In April of 2021, the Commission engaged, by unanimous vote, election lawyer and Vanderbilt law Professor James Blumstein, along with the law firm Bradley Arant, to represent it in connection with the public's efforts to obtain a second petition to have a public referendum on the 34% Tax Increase.

48. The Commission voted on May 10, 2021, taking into consideration and following the advice of its attorneys, to place the Tax Referendum on the Davidson County ballot in July 2021.

49. Consistent with the Metro Anti-Referendum Policy, Metro opposed and continued to oppose the efforts to place the Tax Referendum on the ballot for a vote by the citizens of Davidson County.

50. On May 11, 2021, Metro, Mayor John Cooper, and the Metro Finance Director, Kevin Crumbo, filed a petition for writ of certiorari and writ of mandamus in a Davidson County Chancery Court. See, *Metropolitan Government of Nashville and Davidson County, et al., v. Davidson County Election Commission*, Davidson County Chancery No: 21-0433-IV (the "2021 Tax Referendum Case").

51. In the 2021 Tax Referendum Case, Metro asserted that there were deficiencies with the proposed charter amendments and in the petition which barred the Tax Referendum from being placed on the ballot.

52. The litigation between Metro and the Davidson County Election Commission included the issue of whether the Commission properly voted to place the Tax Referendum on the ballot.

53. On May 13, 2021, the Commission was conducting an open public meeting which included issues relating to the Tax Referendum. During that meeting, Mendes, identifying himself as a Metro Councilman, berated the Commission over issues related to the Tax Referendum. In his remarks, Mendes made it clear that he was speaking as a Metro Councilman in his official capacity. He challenged the independence of the Commission and its lawful authority to regulate the election process if its decisions varied from the directives of Metro government. In his statements he said:

> As the only county-wide elected person in the room, I want to say clearly that's what's been going on at the last couple of meetings, what you guys are doing is pre-baked, political theater designed to feed apparently the ambitions of a small percentage of the county.... Y'all know it's a sham and I'm here to tell you guys, you might get away with it tonight, but we see you, we see what you're doing and it's not going to stand one way or the other.... We see what's going on and you shouldn't do it.

54. The statements by Mendes were made intentionally, with the intent to intimidate the Commission and individual Commissioners from putting the Tax

Referendum on the ballot. Mendes statements were made based on and consistent with the Metro Anti-Referendum Policy.

55. Shortly after making his May 13, 2021 statements, Mendes inquired into the Commission's ability to retain its own lawyers as it is expressly authorized to do under Tennessee law. Mendes' inquiries were reflected in a May 25, 2021 email. These inquiries by Mendes were made in furtherance of and consistent with the Metro Anti-Referendum Policy.

56. The assertions by Mendes in his May 25, 2021, communication were made intentionally, with intent to discourage the Commission and individual Commissioners from putting the Tax Referendum on the ballot and were made based on and in furtherance of the Metro Anti-Referendum Policy.

57. Based on the information set forth herein, including the statements and actions of Hicks, at some point prior to or on May 25, 2021, officials with Metro who were involved with the Metro Anti-Referendum Policy contacted one or more principals at Baker Donelson and communicated to Baker Donelson that Metro wanted Baker Donelson to aid and assist Metro in its efforts to keep the Tax Referendum off of the ballot by influencing DeLanis as a Commissioner and as the Chair of the Commission.

58. The communications between Metro and Baker Donelson, or persons acting for their respective interests,

were made intentionally, with intent to discourage specifically DeLanis, as the Commission chairperson, from taking action to put the Tax Referendum on the ballot, and were made based on and furtherance of the Metro Anti-Referendum Policy.

59. On May 25, 2021, John Hicks, acting for Baker Donelson, sent an email to DeLanis using his Baker Donelson email in which he stated, "we need to have a conversation about the current election commission issues and their impact on the firm's representation of Metro".

60. At Hicks' direction, DeLanis met with him in the Baker Donelson offices on the morning of May 26, 2021, at approximately 8:45 AM.

61. During that meeting, Hicks made it clear that he was acting on behalf of Baker Donelson and with its authority. During the May 26, 2021 meeting, Hicks berated DeLanis about "the mess I have to clean up," referring to DeLanis' position on the Commission and the Commission's involvement with the Tax Referendum.

62. During the meeting on May 26, 2021, Hicks stated that other partners and/or shareholders in Baker Donelson were upset because two major clients of the firm were threatening to pull their business from the firm because of DeLanis' activities and/or votes on the Commission.

63. Hicks identified those two firm clients as Metro and the Metro School Board.

64. Although Hicks identified the clients as Metro and the Metro School Board, neither Hicks nor any other member of Baker Donelson revealed to DeLanis which individuals at or acting on behalf of the Metro clients had communicated to the firm that Metro was considering pulling its business from the firm because of DeLanis' service and/or votes on the Commission. Hicks and/or other members of the firm knew who the Metro officials were who communicated the threat of pulling business from the firm and concealed or withheld that information from DeLanis.

65. Hicks, at first, stated that there could be a conflict of interest between DeLanis' position on the Commission and Baker Donelson's representation of Metro and its affiliated entities.

66. Hicks did not at that time and has at no time thereafter indicated to DeLanis that Baker Donelson represented Metro in any matter or context that was related to the tax referendum, whether the tax referendum met the legal requirements for being scheduled for a public vote, or any of the Commission's duties relative to the tax referendum.

67. DeLanis, as an employee of Baker Donelson, has never been involved in any matter in which Metro or the Metro School Board was a client of the firm.

68. During the May 26, 2021, meeting between DeLanis and Hicks, DeLanis stated to Hicks that attempts to influence the decisions of the Commission or

him as a commissioner could be criminal or illegal acts under Tennessee law. DeLanis also suggested that Hicks speak with the Metro Legal Department about the topics that Hicks was raising with DeLanis.

69. On May 26, 2021, Hicks told DeLanis that he should stop using his firm email address for any matters concerning the Commission (the "Email Directive"). This was the first notice to DeLanis that there was some issue with using his Baker Donelson email address in connection with Commission business.

70. DeLanis then contacted a member of the Baker Donelson Board of Directors by telephone regarding the statements that had been made to him by Hicks, including his concerns that Hicks was trying to pressure him as a state official and/or to force DeLanis out of the firm.

71. On May 27, 2021, the Baker Donelson board member contacted DeLanis and told him that he had spoken with Hicks, that Hicks did not want DeLanis to either resign from the Commission or the firm, and that DeLanis should continue to work with Hicks on the matter.

72. On May 28, 2021, Hicks informed DeLanis that Hicks had determined that there was no conflict of interest between DeLanis' work on the Commission and his work for Baker Donelson. Hicks assured DeLanis that he need not be concerned about that issue and that Hicks would work this out with the firm's clients.

73. Hicks' statement that there was no conflict and that he would work the matter out with the clients further confirmed to DeLanis that Hicks knew who the individuals at Metro were who were threatening to pull business from the firm.

74. On June 22, 2021, the Davidson County Chancery Court, in the 2021 Tax Referendum Case, held that the petition for the Tax Referendum was defective and that the referendum should not be placed on the ballot.

75. The trial court's June 22, 2021, ruling was favorable to Metro, the Mayor, its finance director and members of the Council, including Mendes, who were implementing and/or pursuing the Metro Anti-Referendum Policy.

76. Metro, acting through its officers, agents, employees and officials, opposed any efforts by the Commission to appeal the trial court's June 22, 2021, ruling. Such a plan by Metro was based upon and consistent with the Metro Anti-Referendum Policy.

77. The Commission scheduled a public meeting to be held on Friday, June 25, 2021, for the Commission to consider and to vote on whether to appeal the court's June 22, 2021 ruling in the 2021 Tax Referendum Case.

78. A successful appeal by the Commission of the June 22, 2021, ruling would be adverse to Metro's Anti-Referendum Policy.

79. On information and belief based in part on the statements by Hicks, before and after the Commission's actions on June 25, 2021, Metro, acting through its officers, agents, employees and officials, including officials who have authority over such matters as the Metro Anti-Referendum Policy, communicated to Baker Donelson that they wanted it to assist Metro in its efforts to keep the Tax Referendum off of the ballot and to ensure that the Commission did not vote in favor of appealing the June 22, 2021 order. On information and belief based in part on the statements by Hicks and in consideration of Mendes open advocacy in favor of the 34% Tax Increase and his open opposition to the Tax Referendum ever coming to a vote, one or more of those communications between Metro and Baker Donelson, were made by, at the direction of or in concert with Mendes.

80. The communications between Metro and Baker Donelson were made intentionally, with intent to coerce, intimidate and influence DeLanis, as a commissioner and as the Commission chairperson, from taking action to appeal the trial court's June 22, 2021, ruling and/or to otherwise put the Tax Referendum on the ballot.

81. The communications between Metro and Baker Donelson were not made in the presence of, nor did they include, DeLanis as a participant. This exclusion was a knowing and intentional choice by the individuals for Metro and Baker Donelson who were involved in those communications.

82. On June 24, 2021, Hicks emailed DeLanis and requested that DeLanis call Hicks. When DeLanis called Hicks, Hicks "asked" DeLanis, as a Commission member, not to vote on the appeal of the decision on the Tax Referendum. By his statements during that telephone conversation, Hicks was aware that the Commission was to vote on that appeal the next day and that, if DeLanis did not vote, the appeal would be rejected due to a deadlock on the Commission. In other words, Hicks was aware that he was requesting DeLanis to act or omit to act in order to assure that the Commission would not have a majority vote to approve or authorize an appeal of the June 22, 2021, trial court order.

83. When DeLanis would not give Hicks an answer on how he would vote on the appeal, or what other action he would take, Hicks told DeLanis to think it over and that he wanted to meet with DeLanis the next morning, before the planned Commission meeting.

84. Also on June 24, 2021, Mendes sent a letter (the "June 24 Mendes Letter") by email to the entire Commission, and Metro Council, and upon information belief, distributed that letter so that it would be given wide coverage and dissemination by the media and otherwise. Mendes was acting as an official and councilman of Metro and was also acting in furtherance of the Metro Anti-Referendum Policy.

85. The June 24 Mendes Letter was on official Metro Council letterhead and Mendes signed that letter as "Metro Council, At Large member."

86. In his letter, Mendes urged the Commission not to appeal the Chancery Court June 22, 2021, ruling which had blocked, for a second time, the Tax Referendum from being placed on a public ballot.

87. In his letter, Mendes accused DeLanis, as the chairman of the Davidson County Election Commission, of "conducting a pre-baked political circus that was fundamentally anti-democracy."

88. In his letter, Mendes attacked DeLanis:

> I do not need to tell any of you how pre-baked the Commission's process was. You lived through it. I believe that you already know that Chair DeLanis's intentions from the start were to push the referendum onto a ballot no matter what. I believe you know that instead of letting unbiased legal advice dictate the conclusion, Chair DeLanis's preferred conclusion dictated what the legal advice was going to be.

In addition, in his letter, Mendes stated:

> For reasons that seem hyper-partisan, Chair DeLanis didn't like the answers he was getting from Bill Koch, Bob Cooper, or Chancellor Lyle. So Chair DeLanis decided instead to have the Commission fire Bill Koch and get the answers he wanted from Jim Blumstein,

89. Mendes thus asserted in his letter that DeLanis dictated to the Commission that it fire Bill Koch as its attorney. That statement was false; Mendes had no basis to believe that statement was true; and Mendes was aware that the statement was false.

90. Mendes made that false statement knowingly, maliciously, and/or with reckless disregard for its truth or falsity.

91. Mendes also stated, in effect, that DeLanis determined in advance what legal advice Professor Blumstein would give to the Commission concerning the Tax Referendum and then dictated to the Commission that it hire Professor Blumstein in order to achieve a DeLanis' orchestrated, pre-ordained politically partisan result.

92. That statement and that allegation was false; Mendes had no basis to believe that statement was true; and Mendes was aware that the statement was false. Mendes made that false statement knowingly, maliciously and/or with reckless disregard for its truth or falsity.

93. The communications and statements by Mendes on June 24, 2021, were pursuant to and in furtherance of the Metro Anti-Referendum Policy.

94. On information and belief, based in part on the statements by Hicks, Metro officials had been in contact with Baker Donelson regarding the Metro Anti-Referendum Policy, including specifically the Commission's potential appeal of the June 22, 2021, ruling.

95. On information and belief, based in part on the statements by Hicks that Metro and the Metro School Board was threatening to pull business from the firm and other statements and actions by Hicks, Metro officials, including but not limited to Mendes, communicated to Baker Donelson that Metro wanted to ensure the Commission did not vote to appeal the chancery court ruling that, absent an appeal, blocked the taxpayer petition for the Tax Referendum from a public vote.

96. On information and belief, based in part on the statements by Hicks that Metro and the Metro School Board were threatening to pull business from the firm and other statements and actions by Hicks, Metro officials, including but not limited to Mendes, communicated to Baker Donelson that Metro wanted, and that it wanted the firm's assistance to make certain that DeLanis would vote against the appeal or that he would abstain from the vote, and/or that he would resign from the Commission -- which latter 2 alternatives would leave only 4 voting members on the Commission and would result in an anticipated deadlocked 2-2 vote. This would have blocked an appeal and thereby would have blocked the Tax Referendum from being placed on the ballot for a public vote.

97. On the morning on June 25, 2021, Hicks, using his Baker Donelson email, sent an email at 7:02:46 AM directing DeLanis to "be in the office by 8 or 8:15 at the latest" and stating that "We should talk as early as we can after that."

98. In response, DeLanis sent an email using his Baker Donelson email, to Hicks on June 25, 2021, at 7:43 AM in which he stated, in part:

> Dear John, Please inform me in writing of the purpose of the meeting. If this meeting is to speak to me again about my vote at the election commission meeting today, I am not comfortable with that. As I have expressed to you before, further discussions of that nature may put the law firm and its clients in a questionable legal position.

99. Hicks sent an email on June 25, 2021, at 9:07 AM to DeLanis. In that email, Hicks claimed that the decision by the firm expressed in the email had been made at least prior to the date that the chancery court's opinion was issued on June 22, 2021. Hicks told DeLanis that the firm was terminating him and that he had two choices which were "working the balance of the fiscal year with the firm and resigning from the election commission or retiring now and continuing your service on the election commission."

100. After a series of emails between DeLanis and Hicks, which Hicks copied to senior Baker Donelson management, on June 27, 2021, Hicks directed DeLanis to meet with him at the firm on Monday morning, June 28, 2021, at 9:00 AM.

101. On Monday morning, June 28, 2021, at 7:12 AM DeLanis sent an email to Hicks, in which he stated, in pertinent part:

> You have told me several times now that two firm clients (Metro Nashville and the Metro School Board) have been pressuring you, and the firm, to take action against me because of my role on the Election Commission. In my opinion, that implicates serious legal and ethical issues. I should not have to consider those issues is a rushed fashion without the opportunity to consult counsel. Why don't we postpone all this until sometime after the upcoming fourth of July holiday?

102. Hicks' emails during this period of time were being copied to Baker Donelson senior management. DeLanis' emails, which he sent in response, were sent "reply to all" so that Baker Donelson senior management should receive them as well.

103. Hicks refused to postpone the meeting for more than one day. Hicks refused to allow DeLanis to have an attorney at the meeting.

104. Hicks sent an email to DeLanis at 4:06 PM on June 28, 2021, in which he stated: "The meeting will occur at 8:00 tomorrow. You are still employed by the firm, so please come in to discuss that employment with me, your practice group chair and the office managing shareholder.

If you have counsel, he or she is not invited to attend and would not be if the meeting occurred at any other time."

105. At Hicks' directive, DeLanis attended that meeting on Tuesday, June 29, 2021. Hicks denied DeLanis' request to have a lawyer represent him at that meeting as his personal counsel. Hicks terminated DeLanis as a Baker Donelson employee at that time and gave him given until Friday, July 2, 2021, to clean out his office at the firm.

106. At the time when Hicks terminated DeLanis, Hicks stated to DeLanis that he had "no choice" but to terminate DeLanis even though DeLanis tried to discuss alternatives to termination, particularly because of his involvement as a Baker Donelson employee in several pending matters which were in litigation.

107. In the context in which it was made, DeLanis reasonably understood Hicks' "no choice" statement regarding his termination to be another reference to the pressure that had been put on the firm by Metro to retaliate against DeLanis for his actions on the Commission regarding the Tax Referendum and appeal.

108. In an email dated June 29, 2021, at 10:03 AM, from Hicks to DeLanis, and which Hicks copied to other members of Baker Donelson senior management, Hicks claimed that the identities of those who tried to influence DeLanis' vote on the Commission, was privileged attorney client information:

> Please remember that, as a firm lawyer, Metro Government and the related entities are your clients, as well as the firm's clients. None of us can discuss or comment to third parties on any communications the firm may have had with any of our clients. To do otherwise would be an ethical violation.

109. Baker Donelson, through Hicks, therefore made a claim of a legal ethical privilege, and by a threat of ethical complaint, demanded that DeLanis remain silent about the potentially illegal and criminal behavior of Metro, its representatives, and Baker Donelson.

110. Despite being admonished by DeLanis that he had not retired and that Baker Donelson had no authority to state that he had retired, Baker Donelson told one or more news media outlets that DeLanis had retired from the firm.

111. The assertion that DeLanis had retired was false. Baker Donelson had no factual basis to make that assertion. Baker Donelson and Hicks knew that assertion was false.

112. The termination of DeLanis by Baker Donelson was inconsistent with the firm's typical policies and procedures regarding the continued employment of senior counsel, such as DeLanis, particularly when such counsel had ongoing client matters, including pending litigation. Before terminating DeLanis, Baker Donelson made no

effort to determine the termination's effect on any ongoing client matters.

113. Baker Donelson terminated DeLanis in retaliation for his actions related to the acts of the Commission and his involvement in those acts, including but not limited to the Commission vote to appeal the June 22, 2021, trial court ruling.

114. Baker Donelson's termination of DeLanis was motivated, on information and belief based in part on the statements by Hicks, by and pursuant to the demands and requests made by Metro and its affiliates pursuant to the Metro Anti-Referendum Policy.

115. Prior to his termination and at the time of his termination by the firm, DeLanis discussed with Mark Goins, the State Election Coordinator, and also with Tennessee State Senator Ferrell Haile the pressure that he was receiving as a state official on the Commission, in order to coerce him, intimidate him and influence his vote.

116. Senator Haile had a meeting with Mayor Cooper on July 2, 2021, which was prior to the time that DeLanis' termination had become public. In that meeting, Senator Haile expressed his concerns that the private employer of an election commissioner, a state official, had been pressured by Metro concerning how he would address and vote on the tax referendum and that the employer had fired him because of his actions as a state official. During that meeting, by his statements and manners, Mayor Cooper did not appear to be shocked, surprised

or concerned by those events. While he denied that the termination had come “from his office”, he did not deny that Metro had been involved and he did not appear concerned that Senator Haile had stated that Metro had pressured the employer, a law firm, to take adverse action against an election commissioner. Mayor Cooper stated that private employers could fire anyone for any reason and that the employer may have had many reasons to fire DeLanis. He also stated that Mendes may have been too emotional and vocal in his involvement with the issues. Mayor Cooper reaffirmed that Metro’s objective was to prevent the referendum vote on the property tax increase and bemoaned the possibility that the voters might vote to reverse it.

117. On or about July 7, 2021, DeLanis spoke again with the member of the firm’s Board of Directors. During that call, the board member stated that before DeLanis was terminated he had had another conversation with Hicks in which he told Hicks that the firm could not tell an employee how to vote on an issue that was pending before a board or commission.

118. Baker Donelson had no reason to terminate DeLanis as an employee based on his service to the firm, his job performance, his reputation, his credentials, his case load, or otherwise. Its choice to do so was in submission to the pressure it was receiving from Metro and to retaliate against DeLanis because he would not accede to its demands relative to his acts as a Commission member involving the Tax Referendum and the appeal of the trial court ruling.

119. During all times pertinent to this case, Hicks acted as a member of Baker Donelson senior management and not as a lawyer representing Baker Donelson.

120. During all times pertinent to this case, Baker Donelson was not representing Metro or any Metro official, employee or agent relative to the matters pending before the Commission, nor matters related to the state court litigation in 2020 or 2021 pertaining to whether the Tax Referendum should be scheduled for a vote. None of the communications between Baker Donelson and Metro pertaining to the issues in this action are subject to the attorney-client or any other privilege.

121. DeLanis continues to serve on the Commission in 2022.

122. Metro and Mendes continued to pursue and enforce the Metro Anti-Referendum Policy in 2022. For example, the Metro Council adopted a proposed charter amendment, Resolution RS2022-1475, on May 5, 2022, in furtherance of that policy. That resolution would prohibit any citizen petition or referendum effort from being placed on any future ballot to amend the Metro Charter unless "the substance of the proposed amendment is not subject to a referendum under state law or this Charter." Thus, in the absence of a state law which expressly authorizes by citizen petition a public referendum to reduce, limit or regulate the local taxing authority of a local government, no such citizen initiated petition would be allowed in the future if the proposed Metro charter amendment is adopted. By this and other provisions of the May 5, 2021

charter amendment, the voters effectively lost the ability to put a referendum on the ballot for a vote of the people without either the approval of Metro or a change in state law.

123. The Metro Anti-Referendum Policy limited and chilled the First Amendment rights of DeLanis and others citizens of Nashville. It also infringed and restricted the constitutionally protected right under the First Amendment and otherwise regarding the natural rights of citizens to seek to alter, amend or abolish an existing federal, state or local government under the "Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness", See, Declaration of Independence, see also, Tennessee Constitution, Article I, § 1 ("That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.")

124. The acts and failures to act by Baker Donelson, Metro, their affiliates, and/or representatives, potentially violated numerous criminal laws of the State of Tennessee and the United Stated of America, including without limitation, one or more of the following: Tenn. Code Ann. § 39-14-112, *et seq.* (Extortion), Tenn. Code Ann. § 39-16-102, *et seq.* (Bribery Of A Public Servant), Tenn.

Code Ann.§ 39-16-105 (Buying And Selling Of Office), Tenn. Code Ann. §2-19-103 (Interference With Another's Duties Or Rights), Tenn. Code. Ann. § 2-19-125 (Bribing Election Officials), Tenn. Code. Ann. § 2-18-115 (Violence Or Intimidation To Prevent Voting), Tenn. Code. Ann. § 2-19-134 (Coercing Or Directing Employees To Vote For Measure, Party Or Person), Tenn., Code. Ann. § 2-19-202 (Interference with Election or Nomination), Tenn. Code. § 39-12-101 (Attempts), Tenn. Code Ann. § 39-12-102 (Solicitation), Tenn. Code Ann. § 39-12-103 (Conspiracy), Tenn. Code. Ann. § 39-11-402 (Aiding and Abetting, and Facilitating a Felony), Tenn. Code Ann. § 39-11-404 et. seq. (Corporate Liability), and 42 U.S.C. § 242 (Deprivation of Rights Under Color of Law).

125. As a consequence of suffering adverse employment consequences, including termination, by the actions of the Defendants, DeLanis has continued to represent some of the clients that he was representing as an employee of the firm, but that representation has been as a sole proprietor with increased costs, expenses and time investments and without the support or resources normally available as an employee of the firm or even of an employee who retires in good standing, but agrees to stay involved to conclude pending matters.

COUNT I
U.S. CONST., AMENDS. I AND XIV, 42 U.S.C. § 1983

126. DeLanis as a citizen has a right protected by the First and Fourteenth Amendments to the United States constitution to engage in free speech and free

association. Similarly, the individual rights of freedom of speech and the freedom of association also are protected constitutionally and as part of the public policy of the state of Tennessee. See, Tennessee Constitution Article I, §§ 19, 23.

127. The right of free speech includes the right to express opinions on matter of public interest or debate.

128. The rights of free speech and freedom of association include the right to accept appointments to serve on state boards and commissions and, if so appointed, to express public opinions on matters that come before those bodies. See, e.g., *Murphy v. Cockrell*, 505 F.3d 446, 451 (6th Cir. 2007) r'hrg denied (2007)

129. The rights of free speech and freedom of association include the right to accept appointments to serve on state boards and commissions and, if so appointed, to vote publicly on matters that come before those bodies. See, e.g., *Murphy v. Cockrell*, 505 F.3d 446, 451 (6th Cir. 2007) r'hrg denied (2007)

130. The rights of free speech and freedom of association include the right to be free from retaliation and/or adverse employment action taken by government entities, government officials and private employers (when acting as state actors or when acting under circumstances where the conduct is entwined or entangled with a government entity).

131. The rights to express public opinion and to vote on matters as a member of a public board or commission are rights that are protected under both federal and state law.

132. The right to due process under the law includes the right of DeLanis, as an appointed state official, to serve on a commission having both administrative and quasi-judicial functions, to effectively fulfill his oath of office, to consider and vote on matters coming before the Commission without illegal or inappropriate influence or duress in violation of the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983, and otherwise under the United States Constitution and/or federal law.

133. The law was clearly established prior to the events described herein that a government entity and government officials are prohibited from pursuing, directly or indirectly through a private employer, adverse employment action against an individual, who is not an employee of the government entity itself, when such adverse action is to illegally or unconstitutionally attempt to influence or retaliate against the individual for public statements on a matter of public and/or political interest or any other exercise of a constitutionally protected right. Said prohibition would apply to threatening or attempting to threaten the private employment of an individual who serves as an official for a different governmental entity (other than for the government entity engaging in the unconstitutional activities) when that individual engages in conduct in the lawful performance of the duties of such

office relating to a matter of public interest or political significance. See, e.g., *Board of Cnty. Com'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 116 S.Ct. 2342, 2345, 518 U.S. 668, 669 (U.S. 1996); *Long v. City of Coopertown*, 801 F.Supp.2d 674, 683 (M.D. Tenn., 2011); *Paige v. Coyner*, 614 F.3d 273 (6th Cir. 2010); *Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531 (6th Cir. 2012).

134. Metro and its affiliates, acting through the public officials and Mendes, implemented the Metro Anti-Referendum Policy to oppose the efforts to place the Tax Referendum on the ballot which policy included efforts by Metro to oppose and discourage the Commission and its Commissioners, who were state officials, from voting to appeal the June 22, 2021, trial court ruling and which policy also included proposed ballot issues written by Mendes and enacted by the Metro Council that would forever prohibit public referendum on certain tax issues unless authorized by state law.

135. Metro has insisted that Mendes' actions as set forth in this action were done within the scope of his official capacity with Metro. In the alternative, since Mendes' and Metro's actions were ultra vires, outside the law and outside the proper scope of a public official, Mendes is sued in this action not only in his official capacity but also in an individual capacity acting under the color of law.

136. Metro and its affiliates acting through its public officials (who were concealed from and who remain presently unknown to DeLanis) but who, on information and belief based on the statements of Hicks, include

Mendes, violated his rights by attempting to intimidate or coerce him, by publicly threatening Commission members and/or by placing his private employment at risk, in order to cause him to either vote against efforts to place the public referendum on the ballot or to take other action to increase the probability that the Commission would not vote to appeal the June 22, 2021 trial court decision.

137. To the extent Mendes was involved, directly or indirectly, in pressuring the law firm for the purpose of intimidating, influencing or coercing DeLanis by causing or threating adverse employment action, such involvement by Mendes did not constitute steps by him in the legislative process, were not acts by him which were legislative in substance and nature, and were acts which did not bear any indicators of traditional legislative activity.

138. The First Amendment to the United States Constitution, applies against Metro and Mendes, by operation of the Fourteenth Amendment.

139. DeLanis has been damaged in violation of 42 U.S.C. § 1983.

140. DeLanis is entitled to declaratory, temporary and permanent injunctive relief against Metro, its affiliates, their officials, and Mendes to prohibit them from intimidating, harassing, coercing or retaliating against him in violation of the First and Fourteenth Amendments individually, and/or in his capacity as an appointed public official.

**COUNT II
U.S. CONST., AMENDS. I AND XIV, 42 U.S.C. § 1983
AND VIOLATION OF STATE LAW**

141. Tennessee Code Annotated § 39-14-112 makes it a crime in Tennessee for anyone to extort another. The statute provides, in pertinent part:

> § 39-14-112. Extortion
>
> (a) A person commits extortion who uses coercion upon another person with the intent to:
>
> (1) Obtain property, services, any advantage or immunity;
>
> (2) *Restrict unlawfully another's freedom of action*; or

(emphasis added)

142. Tennessee Code Annotated § 39-11-106(a)(4) defines the term "coercion" as "a threat, however communicated, to: ... (E) ... cause a public servant to take or withhold action;"

143. Tennessee Code Annotated § 2-19-202 makes it unlawful for any public official to use their office to attempt to intimidate, coerce or command another public official to vote for or against any measure:

> § 2-19-202. Interference with election or nomination
>
> (a) It *is unlawful for any public officer or employee to use such person's official position,*

> *authority or influence to* interfere with an election or nomination for office or *directly or indirectly attempt to intimidate, coerce or command any other officer or employee to vote for or against any measure,* party or person, or knowingly receive or pay assessments of any kind or character for political purposes or for election expenses from any other officer or employee.
>
> (b) *It is the intent of this section to prohibit any political intimidation or coercion of any public officer or employee.*

(emphasis added)

144. Metro and its affiliates acting through public officials, who are presently unknown to DeLanis but who, on information and belief based in part on the statements by Hicks, include Mendes, violated DeLanis' rights as protected by the First and Fourteenth Amendments, which are consistent with the public policy protections set up under Tennessee Code Annotated § 39-14-112, by attempting to unlawfully coerce him, as a public servant, to take or withhold action, as detailed herein, relative to the Tax Referendum and/or the Commission vote on whether to appeal the June 22, 2021 trial court decision.

145. Metro and its affiliates acting through public officials, who are presently unknown to DeLanis but who, on information and belief based in part on the statements by Hicks, include Mendes, violated DeLanis' rights as protected by the First and Fourteenth Amendments,

which are consistent with the public policy protections set up under Tennessee Code Annotated § 2-19- 202, by attempting to intimidate or coerce him, by publicly threatening Commission members and/or by placing his private employment at risk, in order to cause him to vote against placing the public referendum on the ballot or to take other action to increase the probability that the Commission would not vote to appeal the June 22, 2021 trial court decision.

146. In light of Tennessee Code Annotated § 39-11-112, Tennessee Code Annotated § 2-19-202, and similar state statutes, no local government official in Tennessee could act, nor believe that they could act, within the scope of their official duties by using such person's official position, authority or influence to directly or indirectly attempt to intimidate, coerce or command any other officer or employee, including DeLanis, to vote for or against any measure. Engaging in conduct in violation of these code sections would be conduct not only unauthorized by law, but prohibited by law, and therefore would be beyond the person's lawful duties even if the entity or individual engaged in the conduct with the apparent capacity or apparent authority of a local government official.

147. Metro and its affiliates acting through public officials, who are presently unknown to DeLanis but who, on information and belief based in part on the statements by Hicks, include Mendes, violated his rights protected by the First and Fourteenth Amendments by attempting to intimidate or coerce him, by directly or indirectly seeking to illegally intimidate or coerce him in violation of the

Equal Protection clause of the Fourteenth Amendment to force him to vote against or abstain from voting on placing the public referendum on the ballot.

148. Metro has insisted that Mendes' actions as set forth in this action were done within the scope of his official capacity with Metro. In the alternative, since Mendes' and Metro's actions were ultra vires, outside the law and outside the proper scope of a public official, Mendes is sued in this action not only in his official capacity but also in an individual capacity acting under the color of law.

149. DeLanis has been damaged in violation of 42 U.S.C. § 1983.

150. DeLanis is entitled to declaratory, temporary and permanent injunctive relief against Metro, its affiliates, their officials, and Mendes to prohibit them from intimidating, harassing, coercing or retaliating against him in violation of the First and Fourteenth Amendments individually, and/or in his capacity as an appointed public official.

COUNT III
JOINT ACTION / CIVIL CONSPIRACY TO VIOLATE CONSTITUTIONALLY PROTECTED RIGHTS

151. Defendants Metro, its affiliates, acting through Metro public officials, Baker Donelson and, on information and belief as set forth herein, Mendes, and perhaps others affiliated with Metro who are presently unknown, acted in an unlawful conspiracy and/or in cooperation with each

other to conspire to injure DeLanis by infringing upon his civil rights as established and protected by the First and Fourteenth Amendments. See, *Memphis, Tennessee Area Local, American Postal Workers Union, AFL-CIO v. City of Memphis*, 361 F.3d 898, 905 (6th Cir. 2004).

152. Metro, its affiliates, Baker Donelson and, on information and belief as set forth herein, Mendes, and perhaps others affiliated with Metro who are presently unknown, acted in agreement to coerce, intimidate or otherwise illegally pressure DeLanis in order to wrongfully influence his speech, his vote and/or his conduct as a state official serving on a Commission having jurisdiction over one or more issues opposed by Metro.

153. Metro and its affiliates, Baker Donelson and, on information and belief, Mendes, and perhaps others affiliated with Metro who are presently unknown, shared in the objective that it was in their mutual best interests, particularly in light of the financial and attorney-client relationship that existed between Metro and Baker Donelson, to deprive DeLanis of constitutionally protected rights and state law protections in order to achieve their mutual goal of ensuring that the Commission did not appeal the chancery court decision and otherwise did not move forward to put the citizen petition initiated referendum on the ballot.

154. Metro and its affiliates, Baker Donelson and, on information and belief, Mendes, and perhaps others affiliated with Metro who are presently unknown, undertook specific overt acts by coercing, threatening, and

intimidating DeLanis, including threats of termination of employment, should he not act in accordance with the objectives and agreement that Metro, its affiliates, Baker Donelson and, on information and belief, Mendes, and perhaps others affiliated with Metro who are presently unknown, had reached related to the Anti-Referendum Policy.

155. At all times material, Baker Donelson was acting through its board members, officers, agents, servants, and employees, and specifically through Hicks.

156. At all times material, Metro and its affiliates were acting through their officials, employees, and agents, and, on information and belief, specifically through, but not limited to, Mendes, and perhaps others affiliated with Metro who are presently unknown.

157. Baker Donelson's acts and failures to act as alleged in this complaint were done with the specific intent of pressuring DeLanis to act or refrain from acting as Metro, its affiliates, Baker Donelson and, on information and belief, Mendes, and perhaps others affiliated with Metro who are presently unknown, jointly desired with respect to the Tax Referendum and the Metro Anti-Referendum Policy.

158. Baker Donelson's acts and failures to act as alleged in this complaint were done in willful participation, cooperation and/or conspiracy with Metro, its affiliates, and Mendes, and perhaps others affiliated with Metro who are presently unknown, and thus under color of state law.

159. Baker Donelson, acting under pressure from Metro, its affiliates, and, on information and belief, Mendes, and perhaps others affiliated with Metro who are presently unknown, in light of its business relationship with Metro and its affiliates, which it viewed as important clients, acted knowingly and intentionally to threaten, pressure, intimidate and coerce DeLanis, as an employee of the firm but who was known by it to also be acting in the capacity as an appointed state official, to vote, abstain from voting, or resign from the Commission in order to a) cause the Commission not to appeal a chancery court ruling and/or b) to take other action that was intended by Metro, its affiliates, Baker Donelson and, on information and belief, Mendes to ensure that a citizen initiated referendum be precluded from a public vote.

160. Baker Donelson, acting under pressure from Metro, its affiliates, and, Mendes, and perhaps others affiliated with Metro who are presently unknown, in light of its business relationship with Metro and its affiliates acted knowingly and intentionally to retaliate against DeLanis by wrongfully terminating his employment with the firm and further misrepresenting to the public that he had "retired" when DeLanis, as a state official, refused to act in accordance with the goals of Metro's Anti-Referendum Policy.

161. Metro, its affiliates, Baker Donelson and, on information and belief, Mendes, and perhaps others affiliated with Metro who are presently unknown, acted intentionally or with reckless disregard for the constitutional rights of DeLanis as an appointed state

official, which rights were protected by the First and Fourteenth Amendments to the Constitution of the United States, as well as by one or more state laws.

162. As a direct and proximate result of the wrongful conduct of Metro, its affiliates, Baker Donelson and, on information and belief, Mendes, and perhaps others affiliated with Metro who are presently unknown, as alleged above, DeLanis was wrongfully terminated from his private employment.

163. Metro, its affiliates, and, on information and belief, Mendes, and perhaps others affiliated with Metro who are presently unknown, intended that Baker Donelson take adverse employment action against DeLanis in order to intimidate him to act or refrain from acting as desired; to retaliate against him when he refused to submit to the demands to block the appeal; and/or it was reasonably foreseeable to Metro, its affiliates, Mendes, and perhaps others affiliated with Metro who are presently unknown, that Baker Donelson would do so in light of Metro's client status with Baker Donelson.

164. The acts of Metro, its affiliates, Baker Donelson and, on information and belief, Mendes, and perhaps others affiliated with Metro who are presently unknown, deprived DeLanis of his right to be free from the use of excessive or illegal intimidation or coercion and otherwise deprived him of due process of law in violation of the rights, privileges, and immunities guaranteed to him under the First and Fourteenth Amendments to the Constitution of the United States.

165. Baker Donelson's actions in concert with Metro, its affiliates, Mendes, and perhaps others affiliated with Metro who are presently unknown, were so intertwined with the Metro Anti-Referendum Policy such that Baker Donelson's conduct was undertaken under color of law.

166. Metro has insisted that Mendes' actions as set forth in this action were done within the scope of his official capacity with Metro. In the alternative, since Mendes' and Metro's actions were ultra vires, outside the law and outside the proper scope of a public official, Mendes is sued in this action not only in his official capacity but also in an individual capacity acting under the color of law.

167. To the extent Mendes was involved, directly or indirectly, in pressuring the law firm for the purpose of intimidating, influence or coercing DeLanis by causing or threating adverse employment action, such involvement by Mendes were not steps by him in the legislative process, were not acts by him which were legislative in substance, and were acts which did not bear any indicators of traditional legislative activity.

168. DeLanis has been damaged in violation of 42 U.S.C. § 1983.

169. DeLanis is entitled to declaratory, temporary and permanent injunctive relief against Metro, its affiliates, their officials, Mendes and Baker Donelson to prohibit them from intimidating, harassing, coercing or retaliating against him in violation of the First and Fourteenth Amendments individually, and/or in his capacity as an appointed public official.

COUNT IV
BAKER DONELSON OPERATING AS A STATE ACTOR TO VIOLATE CONSTITUTIONALLY PROTECTED RIGHTS

170. Baker Donelson engaged in its conduct, as alleged herein, directed toward DeLanis in circumstances that render it a state actor under the "state compulsion test" which exists when a government actor, either overtly or covertly, takes action so that the choice of action is really that of the government entity. There exists a sufficiently close relationship between the Metro and Baker Donelson so that the action taken may be attributed to Metro. See, *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992).

171. Baker Donelson engaged in its conduct directed toward DeLanis, in circumstances that render it a state actor, since there was a close entanglement and/or relationship involving Metro, its affiliates, and Baker Donelson such that the law firm's intimidation, coercion and retaliation against DeLanis, which was undertaken pursuant to the Metro Anti-Referendum Policy, should be attributed to Metro. See, *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992).

172. DeLanis has been damaged in violation of 42 U.S.C. § 1983.

173. DeLanis is entitled to declaratory, temporary and permanent injunctive relief against Metro, its affiliates, their officials, Mendes and Baker Donelson to prohibit them from intimidating, harassing, coercing

or retaliating against him in violation of the First and Fourteenth Amendments individually, and/or in his capacity as an appointed public official.

COUNT V
RETALIATORY DISCHARGE

174. Tennessee Code Annotated § 50-1-304 provides that an employee shall have a cause of action against an employer to the extent that the employer retaliates against the employee under circumstances set forth in the statute.

175. The operative facts of this claim arise from the same facts as alleged in the preceding counts.

176. At all times in question, DeLanis was an employee of Baker Donelson.

177. Baker Donelson was prohibited from discharging or terminating DeLanis as an employee for refusing to participate in, or for refusing to remain silent about, illegal activities.

178. Baker Donelson, in coordination with and to appease Metro and its affiliates, as clients of the firm, and Mendes, an outspoken Metro official, and perhaps others affiliated with Metro who are presently unknown, pressured DeLanis to not vote on whether to appeal the trial court's ruling regarding the Tax Referendum, to cause the Commission, if it did vote, to have a tie vote on the appeal issue and/or not to appeal. When DeLanis refused to submit to the pressure being exerted on him,

Baker Donelson wrongfully retaliated against him by firing and making false statements about him.

179. Baker Donelson's motivation in terminating DeLanis as an employee included the fact that he had stated to Hicks that attempting to intimidate a state official, such as a Commissioner, in connection with official Commission business, may be an illegal and/or criminal act under Tennessee law, and that he was unwilling to comply with or submit to such intimidation.

180. Baker Donelson terminated DeLanis for refusing to take action, or failing to take action, as a Commission member which would ensure that the Tax Referendum did not go on the ballot and that the Commission did not appeal from the trial court's June 22, 2021, ruling. By refusing, DeLanis refused to participate in illegal activities.

181. As a result of being wrongfully terminated by Baker Donelson, DeLanis has been damaged which damage includes, but is not limited to, past and future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

182. As a result of being wrongfully terminated by Baker Donelson, DeLanis is entitled to recover his attorney's fees and costs pursuant to Tennessee Code Annotated § 50-1-304.

COUNT VI
INJURIOUS FALSEHOOD AND INTERFERENCE WITH BUSINESS OPPORTUNITY

183. The operative facts of this claim arise from the same facts as alleged in the preceding counts.

184. At all times in question, DeLanis was an employee of Baker Donelson.

185. Baker Donelson terminated DeLanis as an employee.

186. Baker Donelson's termination of DeLanis as an employee and its public comments about that termination violated existing policies, procedures and practices of the firm which historically did not result in adverse action directed towards a senior member and former equity partner of the firm even if such individual was transitioning voluntarily to full retirement.

187. Baker Donelson, on one or more occasions, made false statements of fact in which it claimed that DeLanis "retired." Baker Donelson knew that the statement was false or, at a minimum, operated with reckless disregard for the fact that the statement was false.

188. Baker Donelson's false statement that DeLanis had retired was made not only to conceal the firm's termination of DeLanis but to further conceal the illegal, improper and corrupt basis for that termination.

189. Baker Donelson's false statement that DeLanis had retired was made with the knowledge and intent that it would cause DeLanis harm and impairment in trying to obtain a lateral move to another law firm, in trying to maintain a practice as a sole proprietor and in any efforts to keep existing and/or develop new business after his termination.

190. DeLanis has been damaged by the false assertion by Baker Donelson that he had retired.

191. DeLanis' damage includes, but is not limited to, past and future pecuniary losses, the costs and expenses of refuting the false statement that he had retired, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

PRAYER FOR RELIEF

Plaintiffs request judgment be entered in their favor and against Defendants as follows:

1. An order temporarily and permanently enjoining Metro, its affiliates, their officials, officers, agents, servants, employees, and all persons in concert or participation with them, including but not limited to Mendes, and Baker Donelson, from seeking to illegally or unlawfully coerce or intimidate DeLanis in his capacity as a state official serving on the Commission or in any other official state or federal capacity.

2. An award of compensatory damages in an amount to be determined at trial but not less than $1,000,000.

3. An award of punitive damages in an amount to be determined at trial.

4. Attorney fees and costs pursuant to 42 U.S.C. § 1988 and as may otherwise permitted by law.

5. Pre and post judgment interest to the extent allowed.

6. Any other declaratory relief to which DeLanis may be entitled.

7. Costs of suit.

8. A trial by jury.

9. Any other further relief as the Court deems just and appropriate.

Respectfully submitted:

<u>\s\ John I. Harris III</u>
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