No. 26-21

IN THE

Supreme Court of the United States

JAMES A. DELANIS,

Petitioner,

v.

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit correctly held a law firm hired as outside counsel by a local government is entitled to assert qualified immunity to the same extent as a lawyer directly employed by a local government.

2. Whether the Sixth Circuit correctly held Petitioner failed to meet his burden to show his "clearly established rights" had been violated when he could not point to any precedent to put a private law firm on notice it would be liable for First Amendment retaliation by firing an employee when the firm's government client threatens to take its business elsewhere if the employee continues to act adversely to the government.

3. In the alternative to the previous issue, whether Petitioner failed to meet his burden to show his "clearly established rights" had been violated when he could not point to any precedent where an attorney–employee has brought a successful First Amendment retaliation claim for being terminated by a law firm after creating and refusing to address a conflict of interest with a firm client.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 19.6, Respondent Baker, Donelson, Bearman, Caldwell & Berkowitz, PC ("Baker Donelson") states there is no parent or publicly held company owning 10% or more of Baker Donelson's stock. Baker Donelson does not have a stock ticker symbol.

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STATEMENT OF THE CASE

This Court has long held "immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis." *Filarsky v. Delia*, 566 U.S. 377, 389 (2012). Petitioner asks this Court to do precisely what *Filarsky* forbids: strip qualified immunity from a law firm serving as outside counsel to a local government solely because of its status as a private entity. Baker, Donelson, Bearman, Caldwell & Berkowitz, PC ("Baker Donelson") terminated Petitioner—one of its attorneys who also chaired the Davidson County Election Commission (the "Commission")—when Petitioner's conduct on the Commission repeatedly conflicted with the interests of the firm's government client, the Metropolitan Government of Nashville and Davidson County ("Metro").

Petitioner sued Baker Donelson as a state actor under 42 U.S.C. § 1983, alleging First Amendment retaliation. The Sixth Circuit reversed the district court's denial of qualified immunity, correctly holding outside counsel engaged by a local government may invoke qualified immunity, and Petitioner pointed to no precedent putting Baker Donelson on notice the First Amendment prohibits a law firm from terminating one of its own attorneys when the attorney acts in conflict with the firm's government client whose demands (from the government client) trigger the termination decision.

This case does not warrant certiorari. The Sixth Circuit expressly confined its holding to the unique factual record before it, stating: "we hold only that, on this record, Baker Donelson is eligible to invoke qualified immunity.

That is all." The court declined to announce any blanket rule, and its analysis turned entirely on Petitioner's own pleaded allegations—the firm served as Metro's outside counsel, acted at Metro's direction, and fired him "pursuant to" an official government policy. Petitioner strategically pleaded those facts in an attempt to shoehorn Baker Donelson into being a "state actor" under § 1983. Those same allegations establish Baker Donelson is entitled to assert qualified immunity, and they foreclose Petitioner's current argument that the firm pursued "purely private ends" in terminating his employment.

I. Factual Background.

A. At all relevant times, Metro was Baker Donelson's client and, by imputation, Petitioner's own client.

Baker Donelson is a law firm with an office in Nashville, Tennessee. (App. F to Pet'r's Br., at App.119a–20a (¶¶ 4, 8).) During all times relevant to this action, Metro was a client of Baker Donelson. (*Id.* at App.124a (¶¶ 26–27).) Under Tennessee's Rules of Professional Conduct, Metro was also the client of every attorney at the firm, including Petitioner, by imputation. *See* Tenn. S.Ct. R. 8, RPC 1.10, cmt. [2].

Baker Donelson formerly employed Petitioner as an attorney. (App.120a (¶¶ 7–8).) While employed by Baker Donelson, Petitioner concurrently served as a state-appointed member of the Commission, which administers elections in Davidson County, Tennessee. (*Id.* at App.120a–21a, 124a (¶¶ 7–9, 22–24).) Petitioner continues to serve on the Commission to this day. (*Id.* at App.124a, 148a (¶¶ 23–24, 121).)

B. Petitioner acted in direct conflict with Metro's interests.

During Petitioner's tenure, the Commission took positions that were, at times, contrary to Metro's interests. (*Id.* at App.122a (¶ 13).) In 2020, Metro approved an increase in property taxes. (*Id.* at App.125a (¶ 32).) In opposition, a group of citizens proposed a referendum to limit Metro's authority to raise taxes by more than five percent without voter approval. (*Id.* at App.126a (¶ 35).) Tasked with determining whether that referendum could be placed on the ballot, the Commission filed a declaratory judgment action against Metro in the Davidson County Chancery Court. (*Id.* at App.127a (¶ 40).) The Chancery Court ruled the referendum was defective and could not proceed. (*Id.* at App.127a–28a (¶ 42).)

Undeterred, a group of citizens proposed a second referendum that would have stifled Metro's ability to raise certain taxes. (*Id.* at App.127a–28a (¶¶ 42–43).) On March 26, 2021, Metro filed a resolution providing if the second referendum were approved and placed on a ballot before the public, additional amendments would also be placed on such ballot. (*Id.* at App.128a–29a (¶ 44).) If one of the amendments was adopted, referenda like the second referendum would be considerably restricted. (*Id.* at App.129a (¶ 45).) On May 10, 2021, the Commission voted to place the second referendum on the ballot. (*Id.* at App.130a (¶ 48).) Petitioner cast the deciding vote. (*See id.* at App.138a, 141a (¶¶ 82, 96).)

In May 2021, Metro filed suit against the Commission in Davidson County Chancery Court, challenging the second referendum's constitutionality. (*Id.* at App.130a–31a (¶¶ 50–52).) Thus, Metro and the Commission became directly adverse parties in active litigation, while Petitioner simultaneously served as a Baker Donelson attorney (and therefore, by imputation, counsel to Metro) and as Chairperson of the Commission directing the litigation against Metro's interests. *See, e.g.*, Letter from James DeLanis to Hon. Chancellor Ellen Hobbs Lyle[1] (Apr. 13, 2021) (filed in *4 Good Gov't v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 21-0300-III (Davidson County Ch. Ct. Apr. 16, 2021) as Ex. A to Pl.'s Expedited Mot. to Continue Hr'g).

On May 25, 2021, John Hicks, a Baker Donelson attorney who served as one of Baker Donelson's General Counsel, emailed Petitioner, advising Petitioner's positions on the Commission were "impact[ing]" Baker Donelson's "representation of Metro." (*Id.* at App.133a (¶ 59).) Hicks and Petitioner met on May 26, 2021, at which time Hicks informed him a conflict of interest existed by virtue of Baker Donelson's representation of Metro and Petitioner's actions on the Commission adverse to Metro. (*Id.* at App.133a–34a (¶¶ 60–63, 65).) According to Petitioner, Hicks also stated Metro and the Metro School Board, "two major clients of the firm," had been threatening to "pull their business" from Baker Donelson because of Petitioner's Commission activities. (*Id.* at App.133a (¶¶ 62–63).) While Petitioner alleges Hicks, at one point, said he had determined no conflict of interest existed (App. A to Pet'r's Br., at App.5a; *see also* App. F to Pet'r's Br., at

1. As reflected in the Davidson County Chancery Court docket, on April 13, 2021, Petitioner sent a letter to Chancellor Lyle of the Davidson County Chancery Court on behalf of the Commission, signing the letter as "Chair, Davidson County Election Commission." He sent the letter on Baker Donelson letterhead.

App.135a (¶ 72)), the conflict did not end. The Commission voted to place the second referendum on the ballot (App. F to Pet'r's Br., at App.130a (¶ 48)), Metro was directly adverse to the Commission in active litigation (*id.* at App. 130a–31a (¶¶ 50–52)), and Petitioner continued to lead the Commission as Chairperson in direct opposition to his own client's interests in that active litigation.

Eventually, the Chancery Court ruled the second referendum was defective and ordered it not to be placed on the ballot. (*Id.* at App.136a (¶ 74).) Two days after that decision, and a day before a Commission meeting at which the Commission planned to discuss whether to appeal that ruling, Hicks and Petitioner spoke by telephone and, according to Petitioner, Hicks "asked" him to abstain and not to vote on the appeal. (*Id.* at App.138a (¶ 82).) In other words, consistent with the ethical standards governing lawyers, Baker Donelson requested Petitioner not to participate in a decision directly adverse to a firm client.

Petitioner refused to commit to that course of action. (*Id.* at App.138a (¶ 83).) Accordingly, before the Commission meeting concerning the potential appeal, Hicks emailed Petitioner and informed him his employment was being terminated. (*Id.* at App.142a (¶ 99).) Hicks stated he had "no choice" but to end Petitioner's employment, emphasizing the conflict Petitioner had created: "[A]s a firm lawyer, Metro Government and the related entities are your clients, as well as the firm's clients." (*Id.* at App.144a (¶¶ 106–08).)

C. The Professional Rules of Conduct required Baker Donelson to address the conflict Petitioner created.

Under the circumstances, Baker Donelson had no choice but to act as it did. Petitioner's ongoing, active adversity to Metro, Baker Donelson's client, violated Rule 1.7, and his refusal to resolve the conflict left Baker Donelson with no option but to terminate him.

Tennessee attorneys, including Petitioner, are governed by the Rules of Professional Conduct (the "Professional Rules"). Rule 1.10 provides a firm of lawyers is essentially one lawyer for purposes of loyalty rules, and each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Tenn. S.Ct. R. 8, RPC 1.10, cmt. [2]. Rule 1.7 prohibits a lawyer from representing a client where a concurrent conflict of interest exists, including where the representation of one client will be "directly adverse to another client" or where "there is a significant risk that the representation of one or more clients will be materially limited by . . . ***a personal interest of the lawyer***." Tenn. S.Ct. R. 8, RPC 1.7 (emphasis added).

Petitioner's own allegations confirm the conflict. He admits Metro was Baker Donelson's client during all relevant times. (App. F to Pet'r's Br., at App.124a (¶ 27).) He admits Metro opposed the referendum at issue. (*See, e.g.*, *id.* at App.130a–31a (¶¶ 49–52).) And he admits he took positions on the Commission adverse to Metro's interests while employed at Baker Donelson. (*Id.* at App.124a, 126a–28a, 130a–31a, 146a (¶¶ 27, 38, 40–43, 48–52, 113).) Indeed, Metro and the Commission engaged in active litigation against one another for multiple months, rendering them directly adverse. (*Id.* at App.127a–28a, 130a (¶¶ 40–43, 50–51).) Petitioner's ***personal interests*** (Rule 1.7(a)(2)) caused a conflict of interest with Metro, Baker Donelson's client, which the firm was required to address to satisfy its own ethical requirements. (*Id.* at App.134a, 144a–45a (¶¶ 65, 108).) In other words, Baker Donelson terminated Petitioner because the conflict he created, if left unaddressed, would have caused both him and Baker Donelson to violate the Rules of Professional Conduct. (*Id.*)[2]

II. Procedural History.

Petitioner filed this action against Baker Donelson, Metro, and an individual Metro councilmember, alleging, among other claims, Baker Donelson violated his First Amendment rights under 42 U.S.C. § 1983 by terminating him in retaliation for his activities on the Commission. (*Id.* at App.150a–54a.) Critically, in an attempt to establish Baker Donelson as a "state actor" subject to § 1983 liability, Petitioner specifically alleged Baker

2. Citing the dissent's characterization of oral argument below, amici curiae rest their argument on the premise Baker Donelson "conceded" it terminated Petitioner "solely for its own private business interests." (Amici Br. at 4, 12 (citing App. A to Pet'r's Br. at 39a (Clay, J., dissenting)).) To be clear, Baker Donelson never made such concession. At oral argument, Baker Donelson's counsel was questioned on whether the firm acted based on ethical or business considerations and stated it could be both, and reaffirmed Baker Donelson terminated Petitioner's employment for ethical reasons. (Oral Argument of Baker Donelson at 41:35–42:32, *DeLanis v. Metro. Gov't of Nashville & Davidson Cnty.* (Nos. 23-5939/5948), https://www.opn.ca6.uscourts.gov/internet/court_audio/audio/10-23-2025%20-%20Thursday/23-5948%20James%20DeLanis%20v%20Metro%20Govt%20of%20Nashville.mp3.

Donelson acted at Metro's direction and "pursuant to" Metro's "demands and requests" and an alleged official government policy he coined the "Anti-Referendum Policy." (*Id.* at App.146a, 163a–64a (¶¶ 114, 165, 170–71).) Petitioner further alleged Baker Donelson's conduct was "so intertwined" with Metro's policy the decision to fire him "should be attributed" to Metro. (*Id.* at App.163a–64a (¶¶ 165, 170–71).)

Baker Donelson moved to dismiss Petitioner's § 1983 claims against it, pointing out, to the extent the firm could be considered a "state actor" based on Petitioner's own allegations, it was entitled to qualified immunity as outside legal counsel to Metro under precedent from this Court and the Sixth Circuit, specifically *Filarsky v. Delia*, 566 U.S. 377 (2012) and *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). (App. C to Pet'r's Br., at App.100a; *see also* Dist.Ct.Dkt. 43 at 1–2 (PageID # 461–62); Dist.Ct.Dkt. 44 at 2 (PageID # 465).) The district court denied Baker Donelson's motion—but failed to address *Filarsky* or *Cullinan*. (App. C to Pet'r's Br., at App.43a–111a.)

After Baker Donelson immediately appealed pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the majority of the Sixth Circuit's merits panel reversed the denial of qualified immunity as to Baker Donelson. (App. A to Pet'r's Br., at App.8a–26a; App. B to Pet'r's Br., at App.42a.) Applying *Filarsky* and *Cullinan*, the panel recognized "[w]hen private attorneys and law firms provide legal services to a government body, they also are eligible for qualified immunity in connection with that work." (App. A to Pet'r's Br., at App.9a (citing *Filarsky*, 566 U.S. at 393–94; *Cullinan*, 128 F.3d at 310).) Furthermore, Judge Sutton reasoned Petitioner's own complaint established

Baker Donelson's eligibility for qualified immunity, as Petitioner's allegations confirmed Baker Donelson "served as outside counsel for Nashville, that Nashville wished to punish [Petitioner]'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." (*Id.* at App.17a–18a.)

Applying the familiar qualified immunity standard, the Sixth Circuit held Petitioner failed to demonstrate Baker Donelson violated his clearly established First Amendment rights. Notably, Petitioner himself acknowledged this case presents "novel factual circumstances." (App. A to Pet'r's Br., at App.25a.) The panel agreed, noting "[t]he allegations against Baker Donelson present a unique situation not addressed by our cases to date," and Baker Donelson "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." (*Id.* at App.24a.) Judge Sutton recognized none of the cases Petitioner cited "involves law firms or companies responding to government threats to their client base," "deals with a for-profit entity responding to client pressure," or "addresses alleged constitutional violations by a private employer." (*Id.* at App.24a–25a.) As the panel concluded, the "unprecedented situation" surrounding Petitioner's allegations prevented Baker Donelson from having fair notice its conduct could give rise to First Amendment retaliation liability. (*Id.* at App.25a.[3])

3. The panel further rejected DeLanis's attempts to invoke *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Sexton v. Cernuto*, 18 F.4th

Having decided the case on these grounds, the Sixth Circuit did not reach the implications of the Rules of Professional Conduct on Petitioner's claims against Baker Donelson.

The Sixth Circuit denied Petitioner's request for rehearing *en banc* (App. E to Pet'r's Br., at App.116a–17a), and Petitioner's request for a *writ of certiorari* followed.

REASONS FOR DENYING THE PETITION

This case does not warrant this Court's review. The Sixth Circuit faithfully applied *Filarsky v. Delia* and its own longstanding precedent in *Cullinan v. Abramson* to hold Baker Donelson, as outside counsel engaged by a local government, was entitled to assert qualified immunity under these allegations, and Petitioner failed to show his clearly established rights were violated.

Ultimately, Petitioner's own allegations defeat him. He specifically pleaded Baker Donelson acted at Metro's direction and pursuant to an official government policy, yet he now contends the firm pursued "purely private ends." These positions are irreconcilable, and Judge Sutton was right to say Petitioner's argument "collides with the words of his complaint." (App. A to Pet'r's Br., at App.15a.) If Baker Donelson is a state actor as alleged, the firm is entitled to a qualified immunity defense.

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177 (6th Cir. 2021), noting that "[t]he facts of both cases far outstrip what DeLanis suffered here" and that "[n]either 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." (App. A to Pet'r's Br., at App.25a–27a.)

No circuit split exists. The handful of decisions Petitioner cites involve materially different facts—private parties with no formal government relationship acting solely for personal ends—and are readily harmonized with the decision below. Moreover, the Sixth Circuit expressly limited its holding to the unique facts of this case, declining to announce any blanket rule.

Contrary to Petitioner's characterization of the Sixth Circuit's decision as undermining *Filarsky*, to reverse here would require this Court to substantially curtail *Filarsky* and depart from its core insight that private parties engaged by the government should be entitled to qualified immunity to the same extent as full-time employees. The petition should be denied.

I. The Sixth Circuit faithfully applied this Court's precedent and correctly granted Baker Donelson qualified immunity.

A. The Sixth Circuit correctly held Baker Donelson is entitled to assert qualified immunity under the circumstances.

Petitioner claims the Sixth Circuit's decision in this case somehow "undermines" this Court's decision in *Filarsky* by reaching ***the exact same conclusion***. *Filarsky* stands for the proposition that private attorneys engaged by local governments are entitled to assert qualified immunity just as if they were employed directly by the government. The Sixth Circuit did nothing more than apply this holding and the reasoning supporting it and allow Baker Donelson to assert qualified immunity. In contrast, Petitioner advocates for a far more limited scope of qualified immunity than this Court contemplated in *Filarsky*.

Starting from the beginning, this Court held private individuals facing Section 1983 claims for "invoking state replevin, garnishment, and attachment statutes" were not entitled to assert qualified immunity in *Wyatt v. Cole*, 504 U.S. 158, 168–69 (1992). Likewise, this Court held private prison guards were not entitled to assert qualified immunity in response to a Section 1983 claim in *Richardson v. McKnight*, 521 U.S. 399, 401–02 (1997). In reaching those conclusions, this Court—consistent with its overall Section 1983 jurisprudence—analyzed whether immunity was available for similarly situated defendants at common law. *See Richardson*, 521 U.S. at 403–07; *Wyatt*, 504 U.S. at 163–67. In *Richardson*, this Court explained, while there was no "general immunity that might have applied to private individuals working for profit" at common law, "the 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." *Richardson*, 521 U.S. at 407 (emphasis in original).

Shortly thereafter, the Sixth Circuit decided *Cullinan v. Abramson*, 128 F.3d 301, 310–11 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). In *Cullinan*, the court held qualified immunity applies to lawyers and law firms serving as outside counsel for a city, finding "[t]he rationales for qualified immunity apply to these lawyers and their firm in about the same way they apply to" attorneys employed directly by the government. *Id.* at 310. In reaching this conclusion, the Sixth Circuit "saw no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel." *Id.* Moreover, the court relied on *Richardson*'s determination that, at common law, immunity existed for private lawyers acting "at the behest of the sovereign." *Id.* (quoting *Richardson*, 521 U.S. at 407).

This Court subsequently considered the same issue in *Filarsky*. In the midst of an ongoing debate on whether private entities could ever assert qualified immunity, the Ninth Circuit explicitly rejected *Cullinan* and found a lawyer could not assert qualified immunity "because he was a private attorney and not a City employee." *Filarsky*, 566 U.S. at 383. This Court reviewed the history of private individuals working on behalf of the public in the legal system—for example, private attorneys acting as prosecutors, attorneys general maintaining private law practices, justices of the peace who did not receive government salaries and were instead paid by the parties before them, privately employed patrol personnel appointed as "special policemen," and private individuals enlisted in the "posse comitatus" by sheriffs. *Id.* at 384–89. With the lines between public service and private employment blurred, "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. Because of this common-law history, this Court determined "immunity under § 1983 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.

This Court also explained how *Filarsky*'s holding was consistent with *Wyatt* and *Richardson*. *Wyatt* presented a far different situation because it concerned "individuals who had no connection to government and pursued purely private ends." *Filarsky*, 566 U.S. at 392. And *Richardson* was a "narrow" decision limited to "the particular circumstances of that case—'a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms.'" *Id.* at 393. Ultimately, this Court found the outside lawyer engaged by a local government should not be any less entitled to qualified immunity than a lawyer employed directly by a city. *See id.* at 393–94.

In a straightforward application of *Filarsky*'s principles, the Sixth Circuit correctly held Baker Donelson was entitled to assert qualified immunity in response to Petitioner's Section 1983 claims. Addressing Petitioner's argument Baker Donelson was not entitled to assert qualified immunity because "the law firm is a private entity," the court explained, following *Cullinan*, *Filarsky* "removed the last vestige of doubt" on this question by explicitly extending qualified immunity to outside attorneys hired by local governments. (App. A to Pet'r's Br., at App.14a.) As Judge Sutton put it, *Filarsky* stands for "the common-sense principle that private actors generally receive the bitter and the sweet in defending constitutional torts." (*Id.*) Simply put, as this Court explicitly held in *Filarsky*, qualified immunity "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 App.15a (quoting *Filarsky*, 566 U.S. at 389).) Baker Donelson's status as outside counsel for Metro does not strip it of the ability to claim qualified immunity under this Court's jurisprudence, and the Sixth Circuit was correct to reach this conclusion.

Petitioner argues the Sixth Circuit erred because Baker Donelson was "pursuing private interests" when it fired him. But Petitioner is wrong on at least two counts.

First, unlike *Wyatt*, this is not a case where Baker Donelson "had no connection to government and pursued purely private ends." *Filarsky*, 566 U.S. at 392. Instead, Baker Donelson was Metro's outside counsel during all relevant periods, and Petitioner specifically alleged the firm acted in concert with Metro and in furtherance of a specific Metro policy regarding preserving tax revenues he termed the "Anti-Referendum Policy." (App. F to Pet'r's Br., at App.124a, 146a, 163a–64a (¶¶ 27, 114, 165, 170–71).) That is a far cry from a case like *Wyatt*, where the defendants have no relationship with the government at all.

Second, as the Sixth Circuit recognized, Petitioner's argument "collides with the words of his complaint." (App. A to Pet'r's Br., at App.15a.) Below, Petitioner contended Baker Donelson did not act "at the behest of the state" because, according to him, "[n]o record-supported facts . . . show that Baker Donelson acted as an agent for the city in firing him." (*Id.*) The Sixth Circuit rejected this argument as inconsistent with Petitioner's own allegations that Baker Donelson "served as the city's outside counsel, took marching orders on firing [him] from city officials, carried out Nashville's policies in the process, and fired him in a way 'attributed' to Nashville." (*Id.* at App.16a.) Petitioner may disagree with the "Anti-Referendum Policy"—but he alleged its existence and claimed Baker Donelson acted pursuant to the governmental policy at Metro's direction.

Reframing his position following the Sixth Circuit's decision, Petitioner now claims Baker Donelson should be barred from claiming qualified immunity because of its "private financial interests," presumably referring to a risk of losing work from Metro. (Pet'r's Br. at 7, 11.) If accepted, however, this argument would swallow *Filarsky* whole. Every private party who receives compensation for working for a government is motivated, at least in part, by private financial interests. What is more, even individuals employed directly by the government can take actions motivated by retaining their salaries—and no one would suggest this is a basis to prohibit them from asserting qualified immunity.

Imagine, for example, a situation where the director of a municipal law department serves at the pleasure of the mayor and fires a subordinate lawyer after receiving pressure from the mayor's office to do so. Whether qualified immunity ultimately barred a subsequent Section 1983 retaliation claim against the director would depend on the specific circumstances and whether a "clearly established" right had been violated. But it is beyond debate that the director would be entitled to assert qualified immunity as a defense. *See, e.g.*, *Lane v. Franks*, 573 U.S. 228, 243–46 (2014) (applying qualified immunity to a First Amendment retaliation claim under Section 1983). That result would not change just because the director chose a course of action based on a concern about being replaced by the mayor. The only difference between the hypothetical and this case is Baker Donelson's status as Metro's outside legal counsel. Under *Filarsky*, that difference is not meaningful.

Petitioner claims the Sixth Circuit has "effectively overrule[d]" *Filarsky*, but the inverse is actually true. To reverse, this Court would be required to overrule *Filarsky*—or, at a minimum, to substantially depart from its reasoning and create a new exception to *Filarsky*'s holding that private lawyers engaged by local governments are entitled to qualified immunity to the same extent as government-employed lawyers.

B. The Sixth Circuit correctly held Baker Donelson did not violate Petitioner's "clearly established" rights.

Petitioner also takes umbrage with the Sixth Circuit's consideration of the particular circumstances of this case in determining Baker Donelson did not violate his "clearly established" rights. The thrust of Petitioner's argument is that the Sixth Circuit should have put on blinders and pretended Baker Donelson was a hypothetical government agency instead of a private law firm facing unique circumstances. The problem is Petitioner's argument ignores this Court's clear guidance on how the "clearly established" analysis must be performed.

Even assuming a constitutional violation occurred, qualified immunity nonetheless bars a Section 1983 claim unless the "right" the defendant violated was "'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). This Court has repeatedly directed lower courts "not to define clearly established law at a high level of generality." *Id.* at 742 (citations omitted). Broad propositions and statements of the law are not enough. *See id.* Instead, "existing precedent must have placed the statutory or constitutional question beyond debate," meaning the "contours" of the right were "sufficiently clear" to notify a "reasonable official" "what he is doing violates that right." *Id.* at 741 (citations omitted).

These principles necessarily require evaluation of the particular facts and circumstances of a case in two distinct, but related, ways. First, while a strictly identical case is not required, "the specific facts at issue"—or, in other words, the particular scenario the defendant faced—must be considered. *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (citing *Mullenix v. Luna*, 577 U.S. 7, 13 (per curiam)). Second, the circumstances of the particular defendant must also be considered because "[a]n officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official ***in the defendant's shoes*** would have understood that he was violating it.'" *Id.* at 105 (emphasis added) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 778–779 (2014)).

Under this standard, the Sixth Circuit correctly framed the "clearly established" inquiry as whether Baker Donelson had "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." (App. A to Pet'r's Br., at App.24a.) The Sixth Circuit's formulation comports with the necessarily circumstance-dependent analysis this Court has long and repeatedly required. The relevant question is whether ***someone in Baker Donelson's shoes*** would have been able to tell, at the time the decisions were made, it was ***beyond debate*** taking employment action against Petitioner under the circumstances at issue would give rise to a valid First Amendment retaliation claim. The Sixth Circuit's approach to that question took account of the particular "contours" of Petitioner's claim without crossing the line by requiring the proverbial "red cow" precedent.

Instead of looking to the actual facts and circumstances at issue here, Petitioner claims the Sixth Circuit should have instead considered whether Baker Donelson could have known it violated Petitioner's rights had the firm been in a materially distinct position. Petitioner's argument fails to acknowledge the particular situation a defendant faces is critically important to the "clearly established" analysis. As a result, when defendants are in materially different positions, one may be sufficiently on notice, and another may not. That is not an inconsistency or a logical fallacy—it is the natural result of the fact-specific standard developed by this Court.

II. Petitioner overstates the potential impact of the Sixth Circuit's decision.

Petitioner claims the Sixth Circuit's decision in this case will have far-reaching impacts because the decision, in Petitioner's estimation, "effectively overrules *Filarsky*" and would result in private parties regularly receiving immunity where public officials would not. (Pet'r's Br. at 16.) As explained above, the Sixth Circuit's decision in no way contradicts or undermines *Filarsky*. Nonetheless, Petitioner's arguments regarding the potential impact of the Sixth Circuit's decision ignore both the unique nature of this case and the explicit limitations the Sixth Circuit placed on its holding.

This case is, in the Sixth Circuit's words, "a unique situation not addressed by our cases to date." (App. A to Pet'r's Br., at App.24a.) In fact, Petitioner has agreed this case presents "novel factual circumstances." (*Id.* at App.25a.) When arguing Baker Donelson had violated his "clearly established rights," Petitioner could not point to even a single decision where a law firm was alleged to have violated Section 1983 by taking employment action against a firm lawyer who had created a conflict—personal, business, professional, ethical, or otherwise—by engaging in activities adverse to the interests of the firm's client. Baker Donelson is also not aware of any such case.

What is more, Petitioner alleges Baker Donelson fired him in response to pressure from the firm's government client when Petitioner, by his own admission, acted directly in conflict with the interests of Baker Donelson's—and, indeed, Petitioner's own—client. (App. F to Pet'r's Br., at App.124a, 134a, 141a, 144a–45a, 163a (¶¶ 27, 65, 96, 107–08, 165).) Again, Baker Donelson is unaware of any similar case. This unique issue is exceedingly unlikely to arise again, especially because the ethical rules governing lawyers prohibit Petitioner's conduct here. Petitioner was a lawyer at Baker Donelson, and Metro was a firm client. Thus, Metro was also Petitioner's client by imputation. *See* Tenn. S.Ct. R. 8, RPC 1.10, cmt. [2]. Accordingly, the ethical rules governing lawyers barred Petitioner from acting directly adverse to Metro's interests. *See* Tenn. S.Ct. R. 8, RPC 1.7. Petitioner's own allegations make clear he engaged in activities adverse to and in conflict with the interests of Metro while still a Baker Donelson attorney. (App. F to Pet'r's Br., at App.124a, 126a–28a, 130a–31a, 146a (¶¶ 27, 38, 40–43, 48–52, 113); Dist.Ct.Dkt. 44, at 3 (PageID # 466).) Fortunately, with these principles in place, circumstances similar to this case are very rare.

Though Petitioner contends the Sixth Circuit's decision will open the floodgates to private parties claiming qualified immunity where they could not previously, the Sixth Circuit's own words show otherwise. The Sixth Circuit specifically declined to make a "blanket rule" and refused to "hold[] that private actors *always* receive qualified immunity." (App. A to Pet'r's Br. at App.17a (emphasis in original).) Instead, the court expressly limited its holding to the particular facts before it and clarified, "[c]onsistent 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***." (*Id.* (emphasis added).)

Because of the unique factual circumstances present in this case, and because the Sixth Circuit specifically limited its decision to these unique facts, the decision in this case will not have the widespread impact Petitioner suggests.

III. The Sixth Circuit's decision does not create a circuit split.

Despite Petitioner's claims the Sixth Circuit's decision in this case "creates a circuit split," examining the cases Petitioner cites demonstrates no actual split between the circuits exists. The Sixth Circuit's decision relies on and applies the principles this Court articulated in *Filarsky* to address what the Sixth Circuit correctly recognized as "a unique situation not addressed by our cases to date." (*Id.* at App.24a.) Petitioner points to only one circuit decision in the fourteen years following *Filarsky* as allegedly inconsistent with the Sixth Circuit's opinion in this case. Even so, no conflict between the decisions actually exists. While the handful of pre-*Filarsky* decisions Petitioner relies on differ from the Sixth Circuit's opinion in their framing—understandably, given they were each decided more than thirty years ago and roughly twenty years before *Filarsky*—their holdings are easily harmonized.

The only post-*Filarsky* decision Petitioner relies on to show the alleged circuit split is the Fourth Circuit's decision in *Gregg v. Ham*, 678 F.3d 333 (4th Cir. 2012). Despite Petitioner's claim to the contrary, *Gregg* is not inconsistent with the Sixth Circuit's decision in this case. In *Gregg*, the Fourth Circuit held a bail bondsman was not entitled to assert qualified immunity because "there is no evidence that bail bondsmen have historically been afforded immunity for their actions." *Id.* at 340. While bail bondsmen may receive "significant aid from state officials," such that they may be acting "under color of state law" for purposes of Section 1983, the bail bondsman in *Gregg* "was not hired by or working on behalf of the government in any capacity." *Id.* at 340 n. 3, 341 n. 6.

For these reasons, *Gregg* is entirely distinguishable from this case. The bail bondsman in *Gregg* was never an agent of the government acting at the request of the government. *See id.* at 337, 340–41. Instead, he operated a private business that happened to intersect with state law enforcement when he sought police assistance for an apprehension. *See id.* at 337–38. By contrast, Petitioner specifically alleged Baker Donelson was retained as Metro's outside legal counsel and acted at the specific request of Metro and "pursuant to" a stated government policy. (App. F to Pet'r's Br., at App.124a, 128a, 146a (¶¶ 27, 44, 113–14).) Moreover, the court in *Gregg*—applying a very truncated analysis—concluded "there is no evidence that bail bondsmen have historically been afforded immunity for their actions." *Gregg*, 678 F.3d at 340. In contrast, in *Filarsky*, this Court already determined there is ample historical basis for applying immunity to lawyers engaged as outside counsel by local governments. *See Filarsky*, 566 U.S. at 384–89. The difference in result between *Gregg* and the Sixth Circuit's ruling in this case is not a product of a conflict over what controlling law is—it is a natural result of applying *Filarsky*'s rationale and the law of qualified immunity to materially different factual circumstances. The two cases are entirely compatible.

Beyond *Gregg*, Petitioner points to a handful of cases decided before *Filarsky* to support an alleged circuit split. Naturally, the reasoning in these decisions does not always strictly follow the formulation in *Filarsky*. Nonetheless, the holdings in these cases can all be squared with the Sixth Circuit's decision in this case.

The First Circuit's decision in *Felix de Santana v. Velez* is distinguishable from this case on essentially the same grounds as in *Gregg*. 956 F.2d 16 (1st Cir. 1992). In *Felix de Santana*, private defendants allegedly conspired with a local prosecutor to bring baseless criminal charges against the plaintiff to remove her from her position at a cooperative organization. *Id.* at 17–18. The defendants were private individuals that had not been hired or officially engaged by the government and were acting solely for their own purposes. *See id.* As in *Gregg*, the defendants in *Felix de Santana* were not acting at the direction of a government entity. Instead, they acted purely on their own initiative in enlisting law enforcement to serve a private grudge. *See id.* There was no allegation of prior formal engagement by any government entity, no contract, and no request from a government official directing the defendants to do anything. The defendants originated the wrongful scheme themselves and merely recruited a prosecutor's cooperation. *See id.*

While Petitioner claims *Felix de Santana* is at odds with the Sixth Circuit's decision in this case, the two opinions are entirely compatible. In *Felix de Santana*, the First Circuit's denial of qualified immunity turned on the ***absence*** of any government mandate or delegation. *See id.* at 19–20. Under the reasoning in the opinion below, the Sixth Circuit majority would almost certainly reach the same result on those facts, as it expressly grounded its decision that Baker Donelson was entitled to assert qualified immunity in Petitioner's own allegations showing the firm "act[ed] at the behest of the state." (App. A to Pet'r's Br., at App.15a–16a.) If Petitioner had pleaded Baker Donelson acted on its own initiative and enlisted Metro assistance to achieve its own ends, the Sixth Circuit may have reached the same result as the First Circuit in *Felix de Santana*. The difference in result between the two cases arises from differences in the facts, not incongruity in the governing legal principles.

The First Circuit's decision in *Rodriques v. Furtado* underscores the lack of a circuit split. 950 F.2d 805 (1st Cir. 1991). *Rodriques* involved private physicians who performed a body-cavity search on the plaintiff pursuant to a search warrant, at the request of police officers investigating a crime. *Id.* at 807–08. The First Circuit granted qualified immunity to the physicians, reasoning they had accepted "the responsibilities of a public official in the public interest" by assisting in the execution of a valid warrant. *Id.* at 815. In reaching that conclusion, the

First Circuit relied on the fact the defendant "did not act on his own initiative" and instead acted at the request of the government. *Id.*

The same is true of Baker Donelson here. As the Sixth Circuit recognized, Petitioner's pleadings claim Baker Donelson acted at Metro's request and direction and "pursuant to" an official government policy. (App. A to Pet'r's Br., at App.16a.) While Petitioner may believe the circumstances of this case are closer to those in *Felix de Santana* than *Rodriques*, his own allegations undermine that argument. Moreover, nothing in the Sixth Circuit's opinion is at odds with the holdings in either *Felix de Santana* or *Rodriques*, and, therefore, no circuit split exists.

In *Burrell v. Board of Trustees of Georgia Military College*, the Eleventh Circuit considered whether a group of bank executives and public officials were entitled to qualified immunity from the plaintiff's claim that they conspired to retaliate against her for publicly criticizing a local state college. 970 F.2d 785, 786–96 (11th Cir. 1992), *abrogated on other grounds by Ziglar v. Abbasi*, 582 U.S. 120 (2017). Ultimately, the court granted qualified immunity to the public officials but did not grant qualified immunity to the private defendants, finding the private defendants were "not alleged simply to have fulfilled their duties under a government contract, or to have assumed under court order the responsibilities of a public official, but [were] alleged to have acted in concert with public officials for the sole purpose of depriving another of her constitutional rights." *Id.* at 796.

It is hard to draw any conclusions from *Burrell*. The Eleventh Circuit decided the case twenty years before *Filarsky*, and its decision was explicitly based on a concern that this Court's pre-*Filarsky* jurisprudence "does not bode well for the continued vitality" of private parties claiming qualified immunity. *Id.* at 795. In *Filarsky,* however, this Court squarely held private parties are, in some circumstances, entitled to assert qualified immunity in response to a Section 1983 claim. *Filarsky*, 566 U.S. at 384–95.

Nonetheless, to the extent *Burrell* remains good law at all, its holding does not conflict with the Sixth Circuit's decision. Unlike Baker Donelson, the private defendants in *Burrell* did not have any formal contract or relationship with the relevant government entities, and there was no allegation the private defendants acted at the direction or behest of government officials or even in response to government pressure. *See Burrell*, 970 F.2d at 790–92. And, in contrast to Petitioner's allegations in this case, the plaintiff in *Burrell* did not claim the private defendants acted pursuant to an official government policy. *See id.* In the ways that matter, *Burrell* is far closer to *Gregg* and *Felix de Santana* than it is to *Filarsky*, *Cullinan*, *Rodriques*, or this case.

Finally, the Seventh Circuit's decision in *Sherman v. Four County Counseling Center* also shows no circuit split exists. 987 F.2d 397 (7th Cir. 1993). At issue in *Sherman* was whether a private mental health facility had qualified immunity when it detained the plaintiff and provided government-directed treatment. *Id.* at 399, 401–10. The Seventh Circuit distinguished between cases where private defendants acting pursuant to a government mandate received qualified immunity and cases where "private parties invok[ing] state law in pursuit of private ends" did not. *Id.* at 405. The court found, under the circumstances, the private mental health facility fit into the first category and was entitled to qualified immunity. *Id.* at 405–06. In addition, the Seventh Circuit reasoned, because a state hospital would be entitled to assert qualified immunity, the private mental health facility acting at the government's direction should be able to as well. *Id.*

The Sixth Circuit's decision is consistent with *Sherman*'s holding. Petitioner has alleged Baker Donelson acted at Metro's request and direction, and he claims his termination was a result of Baker Donelson following an official government policy. (App. F to Pet'r's Br., at App.124a, 128a, 146a (¶¶ 27, 44, 113–14).) What is more, as discussed above, a lawyer employed directly by a local government would be fully entitled to assert qualified immunity in response to a Section 1983 claim for retaliatory discharge. *See Lane*, 573 U.S. at 243–46. Whether the lawyer violated a "clearly established" right would depend on the particular circumstances, but the defense would be available. Under *Sherman*'s reasoning—and *Filarsky*'s—Baker Donelson's status as outside counsel should not change this result.

In sum, the qualified immunity cases Petitioner cites can be grouped into two categories. The first category concerns private parties acting at the direction of the government, pursuant to a government contract, or under an existing relationship with a public entity—what the Sixth Circuit has described as acting "at the behest" of the government. The second category includes, as this Court put it in *Filarsky*, private actors "who had no connection to government and pursued purely private ends," for example, where a private party enlists government assistance for its own purposes or acts in concert with a government agency in an informal, ad hoc capacity. *Filarsky*, 566 U.S. at 392. The Sixth Circuit's decision fits comfortably into this framework based on Petitioner's own allegations that Baker Donelson acted at the request and direction of Metro and pursuant to an official Metro policy. No circuit split exists.

IV. This case is not an appropriate vehicle for review.

Additionally, this Court should deny the Petition because this case is not an appropriate vehicle to review the issues Petitioner has raised.

The issue of whether a private party can assert qualified immunity arises infrequently because private parties are generally not "state actors" subject to liability under Section 1983 in the first instance. In an attempt to clear this initial "state actor" hurdle, Petitioner alleged the very facts the Sixth Circuit correctly found entitled Baker Donelson to assert qualified immunity under *Filarsky* and *Cullinan*. Seeking to prevent Baker Donelson from arguing it was not a state actor at the pleadings stage, Petitioner alleged (A) Metro retained Baker Donelson as outside counsel and remained the firm's client at all relevant times, (B) Metro officials asked Baker Donelson "to aid and assist" Metro's efforts to preserve a tax increase by "influencing" Petitioner, (C) Baker Donelson ultimately fired Petitioner "by and pursuant to" Metro's "demands and requests," and (D) the firm's decision to fire Petitioner was "so intertwined" with Metro's official policy of opposing the citizen tax referendum that the termination "should be attributed" to Metro. (App. F to Pet'r's Br., at App.124a, 132a, 146a, 163a–64a (¶¶ 26–27, 57, 114, 165, 170–71).) In the Sixth Circuit's words, Petitioner's argument Baker Donelson cannot assert qualified immunity "collides with the words of his complaint." (App. A to Pet'r's Br., at App.15a.)

As previously explained, the cases considering whether a private party is entitled to qualified immunity generally fall into two distinct groups. First, there are cases where a private party acts "at the behest" of the government, meaning at the direction of the government, pursuant to a government contract, or under an existing relationship with a public entity. Second, there are cases where a private party enlists government assistance for its own purposes or acts in concert with a government agency in an informal, ad hoc capacity—or as this Court explained in *Filarsky*, private actors "who ha[ve] no connection to government and pursue[] purely private ends." *Filarsky*, 566 U.S. at 392. The first group of private actors are generally entitled to qualified immunity, and the second are not.

While Petitioner urges this Court to accept review to provide further clarification following *Filarsky*, he chose to allege Baker Donelson acted at the direction of Metro and pursuant to a Metro policy—facts that, accepted as true, show Baker Donelson could not have "pursued purely private ends" within the meaning of *Filarsky*. Judge Sutton put it succinctly: "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." (App. A to Pet'r's Br., at App.14a–15a (citing *Filarsky*, 566 U.S. at 389–91).) The very facts Petitioner alleged to make Baker Donelson a state actor for purposes of Section 1983 are the same facts entitling the firm to assert qualified immunity. While this may not be true in every case, it is true under the circumstances here. Either Baker Donelson is entitled to assert qualified immunity, or it is not a state actor at all.[4]

Though Petitioner fails to mention it, this case also presents the particularly fraught embedded issue of whether the First Amendment can trump the professional conduct rules governing lawyers. As explained above, Petitioner pleaded facts showing he violated ethical standards by acting directly adverse to the interests of his own imputed client. *See* Tenn. S.Ct. R. 8, RPC 1.7; Tenn. S.Ct. R. 8, RPC 1.10, cmt. [2]. The facts also show Baker Donelson terminated Petitioner's employment in the face of his refusal to resolve a conflict of interest he created with a client. Baker Donelson extensively briefed this issue before the Sixth Circuit. (6^{th}.Cir.Dkt. 32 at 41–52.)

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4. To be clear, Baker Donelson has not "forfeited" this argument as Petitioner incorrectly claims. Instead, Baker Donelson "assum[ed] it was a state actor" based on Petitioner's allegations in his pleadings, but only for purposes of the motion to dismiss and the subsequent appeal. (App. C to Pet'r's Br. at App.100a; Dist.Ct.Dkt. 43 at 1–2 (PageID # 461–62); Dist.Ct.Dkt. 44 at 2 (PageID # 465).) This is because the very facts Petitioner alleged to paint Baker Donelson as a "state actor" to be able to bring a Section 1983 claim against it in the first instance are the very same allegations showing Baker Donelson is entitled to assert qualified immunity. If Petitioner retreats from those allegations, as he has attempted to do now, then he has no viable Section 1983 claim against Baker Donelson at all.

In short, the First Amendment does not shield attorneys from employment consequences arising out of their failure to abide by ethical rules. *See, e.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455–68 (1978); *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 207–12 (4th Cir. 2019); *In re Reines*, 771 F.3d 1326, 1328–33 (Fed. Cir. 2014); *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 366–77 (5th Cir. 1998); *In re Palmisano*, 70 F.3d 483, 483–88 (7th Cir. 1995).

The Sixth Circuit did not directly address ethical implications and instead found there was no clearly established law providing Baker Donelson with "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." (App. A to Pet'r's Br. at App.24a.) Petitioner urges this Court to reject the Sixth Circuit reasoning on the "clearly established" prong. (Pet'r's Br. at 14–16.) Doing so would not end the inquiry. Instead, the Court would be called upon to decide the embedded issue of whether a law firm in Baker Donelson's position could have known it would face Section 1983 liability for terminating a lawyer who created a conflict of interest in violation of ethical rules. Throughout the proceedings in this case, Petitioner has ***never*** cited any case in which a lawyer has succeeded on a First Amendment retaliation claim based on an adverse employment action following the lawyer creating a conflict of interest—or anything remotely similar.

This case is far from an "excellent vehicle" for review as Petitioner claims. (Pet'r's Br. at 20.) Petitioner's theory for why Baker Donelson is a "state actor" is in severe—and irreconcilable—tension with his theory Baker Donelson cannot assert qualified immunity. Beyond that, the arguments Petitioner raises with regard to the Sixth Circuit's "clearly established" analysis ignore this Court's clear precedent requiring a fact-specific analysis. Ruling in Petitioner's favor would require this Court to (A) take the entirely unprecedented step of deciding a lawyer can bring a First Amendment retaliation claim when terminated after creating a conflict of interest with a firm client in violation of the Rules of Professional Conduct and (B) find—in the absence of any controlling precedent—such a result is "clearly established" and beyond reasonable debate.

CONCLUSION

The petition for a *writ of certiorari* should be denied.

Respectfully submitted,

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