

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

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Baker Donelson makes a compelling argument for denying certiorari—in another, hypothetical case, with a different record. But “this dispute comes to [the Court] on a motion to dismiss,” which means this Court “cannot look beyond the pleadings.” *Stanley v. City of Sanford*, 606 U.S. 46, 63 (2025). And Baker Donelson’s opposition brief does more than look beyond the pleadings—it contradicts them every step of the way.

The upside is that Baker Donelson inadvertently shows why the petition is a perfect vehicle to resolve the questions presented. It does not matter, for example, that the firm now claims (at 6) that it fired DeLanis because he created a conflict of interest—the complaint alleges that the firm *disclaimed* any conflict, *see* App.122a–23a (¶¶15–16), 135a (¶72), a fact that the Sixth Circuit acknowledged, *see* App.5a. And it does not matter that the firm now suggests (at 15–16) that the city hired it to work on the referendum issue—the complaint alleges the opposite. *See id.* at 148a (¶120). So while Baker Donelson would be free to raise these issues on remand, they have nothing to do with whether the firm is entitled to qualified immunity at the pleading stage of this case.

All the more reason to grant this petition. The scope of qualified immunity for private parties under § 1983 is an important issue that this Court has repeatedly weighed in on before. And the specific questions here are squarely presented in a way that might not be true at a later stage or in another case. The Court should grant certiorari.

I. The Sixth Circuit upended this Court’s precedent.

Everyone agrees that “private attorneys engaged by local governments are entitled to assert qualified immunity just as if they were employed directly by the government.” BIO 11. Yet the decision below cuts against that rule in two ways. It applied qualified immunity to Baker Donelson even though the firm acted outside the scope of any government engagement. And it treated Baker Donelson differently than other government employees when deciding that the firm did not violate DeLanis’s clearly established rights.

1. Baker Donelson dismisses the first problem with misdirection. It contends that the Sixth Circuit’s decision was a “straightforward application of [*Filarsky v. Delia*, 566 U.S. 377 (2012)]” because the firm was Nashville’s “outside counsel during all relevant periods” in which it “acted in concert with [the city].” *Id.* at 14–15. But notice the sleight of hand: The fact that Baker Donelson worked as the city’s outside counsel does not mean that *everything* it did “in concert with [the city]” was part of that engagement. And DeLanis alleges that Nashville never retained Baker Donelson for any work related to the referendum. App.148 (¶120). So applying qualified immunity here means extending *Filarsky* to cover outside counsel even when they act beyond the scope of their official duties.

This is why the decision below is so problematic. Like Baker Donelson, the Sixth Circuit relied on the fact that Nashville “retained Baker Doneslon as outside counsel . . . [d]uring all times relevant to DeLanis’s claims” to conclude that everything the firm did

at Nashville’s request fell within the scope of its engagement. App.11a (citation modified). But qualified immunity does not extend that far for even full-time government employees, who must show that the unlawful action fell within the scope of their duties. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). The Sixth Circuit upended this basic framework by extending qualified immunity to private parties hired by the government regardless of the scope of their engagement.

Nor is there any merit to Baker Donelson’s claim that DeLanis has “[r]efram[ed]” his position from below by focusing on the firm pursuing its own private interests. BIO 15–16. DeLanis has consistently claimed that Baker Donelson acted outside of any official duties when it fired him to protect its “revenue” from unrelated city matters unrelated to the referendum. App. 125a, 132a–33a, 148a.

That’s also why Baker Donelson’s analogy to a government employee who is worried about losing his job fails. *See* BIO 16. Unlike a government supervisor, not all personnel decisions that Baker Donelson makes fall within the scope of the governmental duties that Nashville hired the firm to perform. When the government retains parties to perform a public function, they only receive qualified immunity when acting pursuant to that job. *Filarsky*, 566 U.S. at 393–94. Not everything that Baker Doneslon does to make the city happy becomes part of the firm’s official duties as a government contractor.

The Sixth Circuit’s contrary conclusion expands qualified immunity’s protection to cover private parties acting in their self-interest outside the scope of

any government engagement. It upends *Filarsky* and the centuries of common-law precedent that came before.

2. Baker Donelson’s defense of the Sixth Circuit’s holding under prong two of the qualified immunity test is even more perplexing. After insisting that its financial interest is no different than that of any other government supervisor who is pressured to fire an employee, *id.* at 16, the firm goes on to claim that its status as a private law firm means it is in a “materially different position[]” than a government employee who acted the same way. BIO 19.

How can that be? If private parties receive “the same immunity enjoyed by their public counterparts,” *Filarsky*, 566 U.S. at 390, the firm’s status as a private party must be immaterial. Otherwise, the immunity would not be “the same.”

Even still, this inconsistency is not the real problem. This Court has extended qualified immunity to private parties only when doing so “enhanc[es] the public good.” *See Filarsky*, 566 U.S. at 392 (quoting *Wyatt v. Cole*, 504 U.S. 158, 168 (1992)). Yet by drawing the distinction that the Sixth Circuit did here, a private party who acts pursuant to its own interest rather than the public good benefits from a greater claim to immunity than its public employee counterpart. And “[t]his approach is particularly damaging because courts will always be able to point to the profit motive of private individuals retained by the government as a unique factor not present in the clearly established law governing public officials.” IJ Amicus Br. at 23.

This is also why Baker Donelson errs when it claims that the Sixth Circuit’s decision will somehow be limited to its unique facts. BIO 20. The only thing that’s “unique” here is the defendant is a private party who acted unlawfully to protect its financial interests. App.24. Because that was materially significant under the second prong of the qualified-immunity test, every private defendant in the Sixth Circuit who acts unlawfully to protect its business relationship with the government will receive the same protection. If it’s not clearly established for Baker Donelson, it’s not clearly established for anyone else.¹

II. No other circuit has extended *Filarsky* in this way.

Baker Donelson tries to harmonize the Sixth Circuit’s decision with those from other courts—but to no avail. The problem is the same one discussed above: Baker Donelson relies on the false premise that Nashville hired it to work on the referendum issue. But DeLanis alleges that Nashville never retained Baker Donelson for any matters related to the referendum or DeLanis’s work on the commission. *See* Pet.5; App.148a. That fact is unassailable on a motion to dismiss, and it alone negates Baker Donelson’s primary basis for downplaying the circuit split.

Consider *Gregg v. Ham*, 678 F.3d 333 (4th Cir. 2012), the Fourth Circuit case holding that bail

¹ Baker Donelson tries to smuggle its conflict-of-interest argument here as well. BIO 20. But as explained above, DeLanis alleges that the firm disclaimed any conflict of interest, App.122a–23a (¶¶15–16), 135a (¶72), which the Sixth Circuit and the city itself both acknowledged, *see* App.5a; Dist.Ct.Dkt.40 at 8.

bondsmen are not entitled to qualified immunity. *Id.* 340–41 & n.6. Baker Donelson dismisses *Gregg* because the court there concluded that bail bondsmen were not historically afforded immunity, while *Filarsky* already held that the same is not true for outside counsel. BIO 23. But the Fourth Circuit also relied on the fact that the defendant in *Gregg* was not operating pursuant to a government contract when acting unlawfully. *Gregg*, 678 F.3d at 341 n.6. That is true here as well. App.148a; *see also Felix de Santana v. Velez*, 956 F.2d 16, 20 (1st Cir. 1992) (explaining that “[e]xtending immunity to defendants” would “make[] no sense” because “they were not performing any public function”).

Baker Donelson likewise misses the significance of *Burrell v. Board of Trustees of Georgia Military College*, 970 F.2d 785 (11th Cir. 1992), claiming that it’s distinguishable because it involved “no allegation [that] the private defendants acted at the direction or behest of government officials or even in response to government pressure.” BIO 26. That is immaterial. What *Burrell* establishes is that qualified immunity is unavailable to private parties who conspire with the government outside of their official duties to protect their own financial interests. *Burrell*, 970 F.2d at 795–96. That personal, financial interest, which the Eleventh Circuit held is disqualifying for qualified immunity, is what the Sixth Circuit held *entitles* Baker Donelson to immunity.

Baker Donelson also questions whether *Burrell* remains good law because the court there—several decades before *Filarsky*—doubted whether qualified immunity would continue applying to private parties at all. But Baker Donelson does not explain what part of

Burrell is wrong or even inconsistent with *Filarsky*. For good reason: The Eleventh Circuit’s pre-*Filarsky* decision, which limited qualified immunity to private parties operating pursuant to a government contract or court order, matches the rationale this Court adopted two decades later. *See Filarsky*, 533 U.S. at 392–94. That the Eleventh Circuit got the issue right before this Court weighed in is hardly a reason to question it today.

Finally, Baker Donelson’s attempt to harmonize the Sixth Circuit’s decision with *Sherman v. Four County Counseling Center*, 987 F.2d 397 (7th Cir. 1993), only further illustrates the problem. As Baker Donelson correctly explains, the Seventh Circuit held that qualified immunity protected a private hospital that treated individuals pursuant to a “government mandate.” BIO at 26–27. But the “government mandate” in *Sherman* was a court order. 987 F.2d at 405–06. Here, by contrast, there was no court order or even a contract—just a threat to pull unrelated business and cause Baker Donelson financial harm. Those two categories are not the same—particularly in light of *Filarsky*’s later focus on the scope of a private party’s public duty.

The Sixth Circuit’s decision below breaks entirely new ground by extending qualified immunity to cover acts taken outside of any government contract or mandate, so long as the private party has an existing *but unrelated* contractual relationship with the public agency. Baker Donelson cannot identify any other circuit to have extended qualified immunity in a similar way. And its only basis for distinguishing the other contrary decisions is to ignore the complaint’s controlling allegations, and invent an alternative universe in

which Nashville hired the firm for a purpose that could support its qualified immunity theory.

III. Baker Donelson’s vehicle problems are imagined.

Baker Donelson makes several arguments as to why this petition is a bad vehicle for resolving the immunity questions—but each argument only reinforces the opposite conclusion.

The firm first contends that this case is a bad vehicle because whether private parties can assert qualified immunity is an issue that “arises infrequently.” BIO 28. Even if that’s true, it counsels in favor of granting the petition because it is an important matter that the Court may not get an opportunity to address again soon. *See, e.g., Nat’l Republican Senatorial Comm. v. FEC*, No. 24-621, Pet. at 33 (Dec. 4, 2024), *cert. granted* 145 S. Ct. 2843 (2025) (explaining that the “Court is unlikely to encounter another vehicle anytime soon”).

Likewise, Baker Donelson argues that this case “presents the particularly fraught embedded issue of whether the First Amendment can trump the professional conduct rules governing lawyers.” BIO 30. While that might be true for this *case*, it’s not true for this *petition*. As DeLanis has explained, the complaint alleges that Baker Donelson disclaimed any conflict of interest and fired him instead to protect its revenue with the city from unrelated matters. *See supra* at 2–3. And because this petition reaches the Court on a motion to dismiss, it “cannot look beyond the pleadings.” *Stanley*, 606 U.S. at 63. That likely explains why the Sixth Circuit did not address this issue, despite Baker Donelson’s urging. And it also makes this

petition an even better vehicle for resolving the immunity question because it can do so while avoiding “fraught” issues like this, BIO 30, that may come up later. *See, e.g., Mallory v. Norfolk S. Ry.*, 600 U.S. 122, 150 (2023) (Alito, J., concurring) (voting to resolve a personal jurisdiction issue against the defendant while explaining that the defendant is free to pursue other dispositive defenses on remand).

Finally, Baker Donelson contends that DeLanis’s “theory for why Baker Donelson is a ‘state actor’ is in severe—and irreconcilable—tension with his theory that Baker Donelson cannot assert qualified immunity.” BIO 31–32. But any tension is imaginary. Contrary to Baker Donelson’s claim, DeLanis does not allege that the firm is liable under § 1983 because it acted as the government’s agent and outside counsel. Rather, he alleges that the city intimidated the firm into firing DeLanis by threatening it with financial harm. App. 134a, 164a. No case has extended qualified immunity to a private party in such circumstances.

Even still, Baker Donelson has never disputed whether it qualifies for state action under § 1983, so any “tension” is immaterial. Rather, it is one more potentially complicated issue that this Court need not consider to resolve the immunity questions presented. That is, in fact, what this Court already did in *Richardson v. McKnight*, 521 U.S. 399 (1997), when it held that the private defendants there were not entitled to qualified immunity without “address[ing] whether the defendants are liable under § 1983.” *Id.* at 413. The Court there resolved the immunity question and sent the case back to “the District Court to determine whether . . . defendants

actually acted ‘under color of state law.’” *Id.* The Court can do the same here.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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