No. 08-1328

In The
Supreme Court of the United States

DAVID GREENWELL,

Petitioner,

v.

PAUL PARSLEY,

Respondent.

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

BRIEF IN OPPOSITION

ROBERT T. WATSON
Counsel of Record
CHRIS J. GADANSKY
LANDRUM & SHOUSE, LLP
220 WEST MAIN STREET
SUITE 1900
LOUISVILLE, KENTUCKY 40202
(502) 589-7616

Counsel for Respondent

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

On September 7, 2005, articles appeared in local Kentucky newspapers discussing petitioner David Greenwell's intention to run for the position of Sheriff of Bullitt County, Kentucky. Petitioner, a Bullitt County Deputy Sheriff, met with respondent Paul Parsley, the Bullitt County Sheriff, that day. Respondent confirmed that petitioner was running for the office of Bullitt County Sheriff, a position held by the respondent. Respondent terminated petitioner's at-will employment that day due solely to petitioner's attempt to take respondent's job away from him.

The very narrow question presented by this case is whether the petitioner is entitled to First Amendment protection for announcing his intention to take his boss' job, and whether the respondent is thus entitled to qualified immunity as a matter of law as the petitioner cannot show a violation of clearly established law in this instance.

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STATEMENT

This case presents a very narrow issue that is neither in tension with this Court's decisions, nor creates any conflict among the circuits. Instead of addressing the singular, narrow issue of whether the First Amendment even provides protection for the conduct of an insubordinate, at-will employee announcing his intention to take his boss' position, the petitioner instead argues from a faulty premise completely unsupported by any record evidence. There is not a shred of evidence in this case that petitioner's termination was caused by, or attributable to, political patronage, the exercise of a political belief, affiliation, or association, or the exercise of any free speech right. Moreover, contrary to petitioner's claim, the Sixth Circuit has not granted "public employers unchecked authority to fire any subordinate who decides to seek elected office." (Pet. for Writ, p. 3). That is not what occurred in this case, and that is not what the Sixth Circuit even remotely held. The issue is not as broad or conflicted as petitioner wants this Court to believe. This case does not involve a public employee being terminated due to the exercise of some perceived right to political participation itself, or a termination for the support of a particular candidate or political belief. Rather, this case involves a public employee terminated for announcing his intention to oust his boss.

The petitioner's arguments are unpersuasive. No evidence exists of a political patronage, expression or belief dismissal. Thus, on the narrow issue presented to the Court, there is no "tension" or "conflict" with existing precedent. No free speech analysis need be employed when, as a matter of law, the First

Amendment cannot be used to protect the petitioner from what was a legal and proper public employment dismissal. The Sixth Circuit properly affirmed summary judgment in this matter, and the Petition for Writ of Certiorari should be denied.

A. Factual Background

Petitioner was hired by the respondent as a deputy sheriff in January, 1999. (Greenwell's Depo., p. 24, Apx., p. 35).[1] In that capacity, he performed general patrol duties in Bullitt County, Kentucky. (*Id.*). Immediately prior to his employment by respondent, the petitioner worked as a Bullitt County Deputy Jailer. (*Id.* at p. 25). However, petitioner did not want to work for newly elected Bullitt County Jailer Danny Fackler, so he sought and accepted an appointment by the respondent as deputy sheriff. (*Id.* at p. 27). This dislike of Jailer Fackler did not dissipate. Petitioner filed and ran against Fackler in the 2002 primary election in Bullitt County, losing to Fackler. (*Id.* at p. 28). While respondent discouraged petitioner from running against Jailer Fackler, and told him that he would rather he not do so, petitioner retained his position as a deputy sheriff and did not lose any income during his unsuccessful run for Jailer of Bullitt County. (Parsley Depo., p. 24, Apx., p. 35; Greenwell's Depo., p. 29, Apx., p. 40).

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[1] Please note respondent's hereinafter reference to "R." refers to the district court's record, reference to "Apx." refers to the Joint Appendix filed with the Sixth Circuit Court of Appeals, while reference to "Pet. App." refers to the Appendices as presented in the Petition for Writ of Certiorari as stated therein.

On September 7, 2005, an article appeared on the opinion page of the *Pioneer News* newspaper. In that article, while writing about the upcoming election for Bullitt County Sheriff, columnist Thomas Barr wrote, "Incumbent Paul Parsley is making another run at the office. Republican David Greenwell, who is currently a deputy with Parsley, is also rumored to be making a bid." (Greenwell's Depo., Exhibit 1, Apx., p. 28). That morning, petitioner was summoned to appear in respondent's office. (*Id.* at p. 46, Apx., p. 49). The meeting was taped via a recorder on respondent's desk, and the following conversation between petitioner and respondent occurred:

Sheriff:	See in the paper here where you're tryin' to take my job.
Greenwell:	Oh, I looked for it and I didn't see it. I didn't think it was in there.
Sheriff:	It's in there.
??:	(?) for sure.
	Hmm-hmm.
Sheriff:	That's all I need to know.
Greenwell:	Could I see it, cause I couldn't see it. I wanted to talk to you and I tried but I was told very plainly that you didn't want to talk to me then or ever about anything.
Sheriff:	I haven't, my door's always been open to anybody want to talk to me but. . .,

Greenwell: Uh, you know, I mean and the whole thing, I was honest with you as I can be, the whole thing is, you know I always try to forgive and forget, try to reason out in my own mind why things happen or why the way they are, uh, tremendous amount of things that you don't know about that's went on, a lot of hardships that was put on me, lately, not recently lately but in the recent past and then with the last election and everything, uh, you know how that went, you know what was said.

Sheriff: You put this department in a hell of a shape there trying to run for jailer when you're working for here. You put this department in jeopardy because people think that the sheriff tryin' to take over everything. But that's all I need to know. Go on now. You all wait on outside there for me.

(Transcript of September 7, 2005 Conversation, Apx., p. 27).

Respondent then terminated petitioner's employment as a deputy sheriff, effective September 7, 2005. (Greenwell's Depo., Exhibit 2, Apx., p. 29). Respondent terminated petitioner because "he wanted to take my job away from me." (Parsley Depo., p. 12, Apx., p. 88). For his part, petitioner was concerned that he had made the biggest mistake of his law

enforcement career. (Greenwell's Depo., p. 49, Apx., p. 52).[2]

B. Proceedings Below

On November 16, 2005, petitioner filed the instant lawsuit alleging (1) unlawful patronage dismissal by the respondent in violation of 42 USC § 1983; (2) conspiracy to violate his civil rights in violation of 42 USC § 1985; (3) common law wrongful discharge under Kentucky law; (4) violation of KRS § 15.520; and (5) outrage under Kentucky common law. After discovery closed in this matter, the respondent moved for summary judgment on all of the petitioner's claims based on. (R. 11, Motion for Summary Judgment).[3]

On January 22, 2007, the district court applied the Sixth Circuit's directly on-point decision of *Carver v.*

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[2] Petitioner never was the subject of any discipline or citizen complaints while employed at the Bullitt County Sheriff's Office. (Parsley Depo., p. 11, Apx., p. 87). It is undisputed that petitioner won the Republican primary election for Bullitt County Sheriff on May 16, 2006, and that respondent was defeated in his bid for re-election in the Democratic primary election the same date. Petitioner lost the general election for Bullitt County Sheriff.

[3] In response to summary judgment, the petitioner chose to voluntarily dismiss co-Defendant Mack (Jim) McAuliffe from the action (R. 13, Response to Motion for Summary Judgment, p. 1). The petitioner also conceded and dismissed his claim of conspiracy under 42 U.S.C. §1985. (*Id.*, pp. 1-2). Thus, the remaining claims before the district court were those against the respondent in his individual and official capacity as Sheriff of Bullitt County, Kentucky for an alleged violation of petitioner's First Amendment rights, and state law claims of wrongful discharge, violation of KRS §15.520, and outrage.

Dennis, 104 F.3d 847 (6th Cir. 1997) and granted respondent's summary judgment, stating in no uncertain terms that it could "find no evidence suggesting that Greenwell was dismissed based on his political beliefs, his political affiliations or due to patronage concerns." (Pet. App., p. 20a). Moreover, the district court held petitioner's dismissal was not "based on politics at all" and that petitioner had failed to present "actual evidence he was communicating any particular expression or that Parsley opposed any particular viewpoint." (*Id.* at pp. 20a-21a). Ultimately, the district court ruled that the undisputed record evidence permitted "no escape from the fact" that petitioner, like the plaintiff in *Carver*, was terminated for announcing his intention to take his boss' job. (*Id.* at p. 21a). "Greenwell certainly had a right to run for office. However, the First Amendment does not provide constitutional cover for him to do so against the very person who hired him and supervised him." (*Id.* at p. 22a).

On May 8, 2007, the district court denied petitioner's motion to vacate summary judgment, ruling petitioner could not offer any evidence, absent mere speculation, that his termination was caused by political patronage, affiliation or association. (Pet. App., p. 14a). More to the point, petitioner could not offer any evidence that his termination was caused by the exercise of a free speech right, since seeking to oust one's boss from his position "is an act of insubordination not protected by the First Amendment." (*Id.*). Thus, contrary to petitioner's assertion, because the undisputed record evidence showed petitioner was terminated "solely for seeking his boss' position," the First Amendment was not even implicated in this instance and thus the district court

was not required to apply a free speech balancing test as set out in *Pickering v. Board of Ed.*, 391 U.S. 563 (1968) and its progeny. (*Id.* at pp. 14a-15a).

The petitioner noticed his appeal to the Sixth Circuit, appealing only the dismissal of his federal claims against the respondent under the First and Fourteenth Amendments. On September 2, 2008 the Sixth Circuit affirmed the district court's grant of summary judgment. (Pet. App., pp. 1a-9a). In that opinion, applying *Carver* the Sixth Circuit ruled the sole reason for petitioner's termination was his attempt to take respondent's job. (*Id.* at p. 6a). There was no evidence petitioner was fired for exercising any political speech, or fired for exercising some right to political participation itself. (*Id.*). Rather, and quite simply, this termination was due solely to petitioner's insubordinate conduct seeking to remove and replace his superior. (*Id.*).

This Petition then followed.

REASONS FOR DENYING THE PETITION

The case and legal issues described in the Petition bear little resemblance to the case actually litigated and decided by the courts below. As stated above, the premise of petitioner's arguments in this matter is flawed. Arguing from the false assumption that this is a political participation or patronage case, the petitioner spends a considerable amount of time attempting to convince the Court that the Sixth Circuit's holding creates "tension" with free speech precedent, that this holding will create confusion and division among the circuits on the issue of political

participation, and that as a matter of public policy the holding cannot stand.

Respectfully, the issue is not one of political participation. On the very narrow issue of whether First Amendment protection even extends to the insubordination of a public employee stating his desire to take his boss' job, the district court and Sixth Circuit's rulings are not in "tension" with any of this Court's decisions, no split among the circuits will result, and public policy does not dictate otherwise.

The district court and Sixth Circuit correctly applied the law without wading into unsupported legal issues or entertaining mere speculation. The courts' careful resolution of this narrow issue - performed twice by the district court - does not implicate any circuit split. As it is obvious the district court and Sixth Circuit addressed a narrow, and in many respects, unique issue, petitioner's cited cases are clearly inapplicable. Specifically, as the undisputed evidence shows, petitioner's dismissal was not based on politics at all, nor could petitioner present any evidence he was communicating a particular expression or that the respondent opposed any viewpoint of the petitioner. Quite simply, petitioner could not offer any evidence, absent speculation, that his termination was caused by political patronage, affiliation or association. Contrary to petitioner's oft-repeated criticism, neither court was required to apply any free speech balancing test in this matter since the undisputed record evidence showed petitioner was terminated solely for seeking to oust his superior. The First Amendment has not been implicated in this case. Petitioner's arguments should be disregarded as an

attempt to turn this case into something it clearly is not, and for which there exists no evidence to support.

Finally, even assuming this case does, in fact, address the right to political participation itself, which there is no evidence to support, respondent is still entitled to qualified immunity as a matter of law. Even if petitioner's First Amendment rights were violated, it was not clearly established as of the date of petitioner's termination that dismissal of a public employee for attempting to take his boss' job was constitutionally prohibited. In fact, the law of the circuit as of the date of petitioner's termination dictated that such a dismissal was constitutionally permissible.

I. THE DISTRICT COURT AND SIXTH CIRCUIT'S HOLDINGS ARE NOT IN TENSION OR DIRECTLY CONFLICT WITH THIS COURT'S DECISIONS OR THE DECISIONS OF OTHER CIRCUITS.

A. The Lower Courts Decided This Matter Correctly Based Upon *Carver v. Dennis.*

The substance of petitioner's claims is that the respondent terminated his employment based on "political patronage, political association, and freedom of speech and the press." (R.1, Complaint, ¶ 13, Apx., p. 8). Moreover, the petitioner alleged in his Complaint that he "was never informed of, nor was there any other cause for his dismissal other than his political patronage concerning the 2006 election." (*Id.* at ¶ 12, Apx., p. 8). The proof in this case has proved both of these allegations blatantly false.

First, it is unequivocal that respondent informed petitioner that he was terminating his employment because he announced, and confirmed, that he was running against respondent in the 2006 election. (Greenwell's Depo., Exhibit 2, Apx., p. 29). During the meeting between respondent and petitioner in respondent's office on September 7, 2005, respondent was very specific - he was speaking to petitioner about what he had read in the morning paper, and wanted to confirm whether petitioner intended to run and try to take his job. Petitioner's attempts to otherwise characterize respondent's words or intent are unsupported by the record evidence. As the district court correctly observed, "[t]he evidence is absolutely clear that respondent fired his deputy, petitioner, because the deputy chose to enter a political campaign to oust his boss from office." (Pet. App., p. 22a). In fact, respondent had *five* other employees running for elective office other than Bullitt County Sheriff during the *2006* primary, and *none* suffered any adverse employment action, just like petitioner in 2002. (Parsley Depo., pp. 19-20, Apx., p. 95-96). The difference in this case is that petitioner chose to run for the position held by respondent, for the office of Bullitt County Sheriff.

Nothing in controlling federal First Amendment decisions requires a public officeholder to "nourish the viper in the nest." *Carver v. Dennis*, 104 F.3d at 853. In *Carver*, a deputy county clerk was terminated from employment after announcing her intention to run for the office held by her boss. As in this case, the deputy clerk would not have been fired had she not announced and confirmed her intention to run in the race. The ultimate question for the Sixth Circuit in *Carver* was whether the plaintiff "had a First Amendment right to

run against the incumbent clerk in the next election and still retain her job." *Id.* at p. 849. The *Carver* court examined whether the dismissal was based on political beliefs or affiliations. *Id.* at p. 850. The Sixth Circuit held that a discharge based solely on the fact that the plaintiff was trying to take the job of her employer did not violate any First Amendment rights under the federal constitution. *Id.* at pp. 850-852.

Carver presented a matter of first impression for the Sixth Circuit at the time it was decided. *Id.* at p. 852. The court noted, as in the instant matter, that no other employee was running for the office held by the employer, but that the evidence only showed the plaintiff was fired for trying to take the clerk's job. *Id.* As in *Carver*, petitioner in this case committed an act of insubordination, i.e., declaring his candidacy against respondent. *Id.* at p. 853. No speech issues arise under the circumstances of petitioner's termination that would require this Court to conduct any analysis under other First Amendment jurisprudence, despite petitioner's arguments to the contrary. Quite simply, any such speech, association, or political affiliation arguments are simply the last-ditch efforts of an insubordinate deputy sheriff who realized he had made an error in judgment. For these reasons the Petition should be denied.

B. There Exists No Evidence Petitioner Was Terminated For Exercising Political Speech.

The majority, if not all of the present Petition, concerns itself with analysis of political participation and free speech in the context of the First Amendment. For the reasons set forth herein, this analysis is not

only inapplicable, it is not even triggered by the facts as presented here. The petitioner assumes he was terminated for holding political views different from those of his employer, or that he was denied some perceived right to political participation, but fails to provide any evidence, any testimony, any documentation which would support the same. Respondent respectfully submits that through the course of this matter, including this Petition, petitioner's allegation of discharge based upon his political patronage or association, or exercise of free speech, is false. First, it is undisputed respondent informed the petitioner he was terminating his employment because the petitioner announced, and confirmed, that he was running against respondent in the 2006 election. At no point during their September 7, 2005 meeting, and more importantly at no point during the course of discovery in this action, is there any evidence respondent terminated the petitioner based upon the petitioner's political affiliation or association. Respondent testified he terminated the petitioner because "he wanted to take my job away from me." (Parsley Depo., p. 12, Apx., p. 88). Again, respondent testified he had *five* other employees running for elective office other than Bullitt County Sheriff during the 2006 primary, and *none* suffered any adverse employment action. (*Id.* at pp. 19-20, Apx., pp. 95-96). On the other hand, petitioner can only speculate as to what was in respondent's mind when he made his decision. There is *no* dispute as to what respondent testified concerning the basis for his decision - he wasn't going to pay petitioner to try to take his job from him.

Absent his bald allegations, this case has nothing to do with political patronage or participation, nor is it

even a free speech case, thus there is no "tension" with any of this Court's political speech cases as cited in the Petition. If the petitioner is to convince this Court that this case has anything to do with political speech, it is his burden to do so as the petitioner bears the initial burden of proving that he was discharged because of that political speech. *Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 675 (1996) ("To prevail, [in a First Amendment retaliation action] an employee must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination."); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 80 (1990) (Stevens, J., concurring) (quoting *Illinois State Employees Union, et al. v. Lewis*, 473 F.2d 561, 567 (7th Cir. 1972). *See also Hall v. Tollett*, 128 F.3d 418, 423 (6th Cir. 1997). The record is completely devoid of any evidence that petitioner's dismissal was for any reason other than his desire to run against respondent in the 2006 election, an insubordinate decision of an employee to take his boss' job. As the undisputed facts of this case show, the petitioner's right to run for office, party affiliation, as well as his allegation that such affiliation prompted his dismissal, are nothing short of a red herrings. Dismissal of an employee for insubordination is both proper and reasonable as a matter of law under *Carver*.

Instead of directly addressing this very narrow issue, the petitioner instead attempts to confuse the issue arguing that *Pickering* and its progeny, and the respective free speech balancing tests those cases set out, should have been employed, and that in failing to apply these tests, the district court and Sixth Circuit's holdings stand in "tension" with this Court's free speech precedent. (Pet. for Write, pp. 13-16). This is

incorrect. Yet again, the traditional First Amendment analysis is not applicable to this matter for the simple reason that the First Amendment is not implicated where an at-will public employee is terminated for insubordination and there is no evidence to prove otherwise. Glossing over the issue of insubordination in favor of a full *Pickering* free speech analysis - in a case that has nothing to do with free speech - clearly shows the weakness of petitioner's argument. It must not be forgotten that it is an undisputed fact that the *only* reason respondent terminated the petitioner was because petitioner was attempting to take his job. The district court took note, stating:

> In some cases, the reason for an at-will employee's termination can be a relatively difficult and often disputed issue of fact. Here, the evidence is otherwise. Parsley terminated Greenwell on the same day the Courier-Journal and The Pioneer News published pieces on Greenwell's bid as Republican for Bullitt County Sheriff. The evidence seems clear. Parsley called Greenwell into his office after learning of Greenwell's election bid. (Footnote omitted). Parsley began that meeting by stating: "See in the paper here where you're tryin' to take my job." The whole thrust of that conversation concerned whether Greenwell was in fact running against Parsley for sheriff. In his typed statement, which was presumably written as part of his election campaign and has been submitted as an exhibit with this motion to dismiss, Greenwell further indicates that the sole reason he was fired was because he was trying to take Parsley's job as sheriff:

> On September 7, 2005 while responding to a burglary in or county, I was summoned to the office of the sheriff. The sheriff Paul Parsley called me into his office and placed a copy of the Courier-Journal [sic] newspaper in front of me. Highlighted was an article that contained statements that I had made about my intensions [sic] to run for the office of sheriff and changes that I would like to see for Bullitt County. I was immediately fired! Sheriff Parsley stated to me that *he should not have to pay me to try to take his job*.
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> Parsley further testified that the reason he fired Greenwell was because "he wanted to take my job away from me." Greenwell presents no evidence to counter this stated and obvious reason.

(Pet. App., pp. 13a-14a)(Emphasis added).

In petitioning this Court, the petitioner seems to have forgotten this admission, or at the very least has ignored it, asserting issues and cases that have no application to the present matter.

It should be pointed out that the respondent does not argue the petitioner does not have a right to run for political office. Yet the law does not require respondent to suffer the insubordination of an employee whom he has hired as his deputy while waiting to see if it would not be disruptive. He correctly construed petitioner's actions as insubordinate, and petitioner cannot cite to any

authority for the proposition that respondent, or any elected official, should suffer through an election campaign paying an employee to oust him from office. Rather, as the courts below opined, respondent had every right to oust petitioner and not feed the viper in *his* nest. The right to run for political office is determined by state and federal law, but this right is simply immaterial to the claims set forth in this litigation. As the district court pointed out, petitioner "certainly had a right to run for office. However, the First Amendment does not provide constitutional cover for him to do so against the very person who hired him and supervised him." (Pet. App., p. 22a). The ultimate and narrow question for the district court and Sixth Circuit was whether petitioner's attempt to take his boss' job was protected under the First Amendment via § 1983. *Carver* answered this question directly and succinctly, and thus the Petition should be denied.

C. There Exists No Direct Conflict With Other Circuits.

In further support of his Petition, the petitioner falsely claims that the district court and Sixth Circuit's holdings directly conflict with the decisions of other circuits. (Pet. for Writ, pp. 20-24). Specifically, the petitioner claims that these holdings have "confused" the issue, "leading to results that are unpredictable and at times perverse." (*Id.* at p. 20). Respectfully, and as will be more fully set out below, petitioner has incorrectly applied these circuit decisions in an effort to achieve a desired result, and in some respects, most of petitioner's cases fail to even stand for the proposition for which they are cited.

To begin, and as stated above, petitioner's premise is completely flawed as this case has nothing to do with the free exercise of political speech. Ignoring the central issue, the petitioner cites a number of cases, each highlighting the right to run for political office. (*Id.* at p. 22, fn 10). Yet as explained above, and as the lack of any evidence should indicate, the issue in this case is much narrower, more defined, and in most respects, more unique than the more general perceived right to run for political office. For this reason alone petitioner's cited political speech cases should be disregarded as they are inapplicable to the present matter.

With respect to the issue of whether an insubordinate, at-will employee may be terminated for announcing his intention to take his boss' job, quite simply, no real "split" or "confusion" among the circuits exists here, since a majority of circuits have never dealt with this issue directly. Further, of the circuits petitioner cites as having addressed the very issue, only the Fifth Circuit has denied qualified immunity, but in a clearly distinguishable context.[4] The

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[4] In *Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992), the Fifth Circuit held a sheriff was not entitled to qualified immunity for demoting two deputy sheriffs to jail positions after announcing their candidacy for sheriff. However, contrary to the present matter, the Fifth Circuit noted that the sheriff's lack of any evidence that the demotion was due to insubordination, performance, or harmony concerns, as opposed to an alleged response to a personnel shortage at the jail, was fatal to his claim of qualified immunity. *Id.* at pp. 112-113. It does not appear from the opinion or the parties' briefs that insubordination was ever made an issue in that case. *Id.*; Brief for Appellants, *Click v. Copeland*, 1990 WL 10081065 (5th Cir. Feb. 7, 1990)(No. 90-5624); Brief for Appellees, *Click v. Copeland*, 1991 WL 11249488 (5th

remaining cases are either distinguishable on their face, or in some instances, actually *support* respondent's position.

For instance, petitioner cites *Jantzen v. Hawkins*, 188 F.3d 1247 (10th Cir. 1999) for the proposition that candidacy for office constitutes political speech. (Pet. for Writ, p. 21). *Jantzen* should be more closely examined, however, since the 10th Circuit's holding actually supports respondent's position. In *Jantzen*, a candidate terminated from his position of deputy sheriff after announcing he would run against the incumbent sheriff, as well as deputy sheriffs and a jailer who were terminated after supporting the candidate, brought suit against the incumbent sheriff and board of county supervisors under § 1983 alleging that their terminations violated the First Amendment. *Id.* at pp. 1250-1251. Citing to *Carver* with approval, the 10th Circuit actually *affirmed* summary judgment on behalf of the sheriff dismissing the deputy candidate's First Amendment claim, holding:

> We find no genuine dispute of fact as to whether political affiliation and/or beliefs were substantial or motivating factors in firing Haugland. Haugland alleged and testified that the only reason he was fired was because he was a candidate for sheriff against his own boss. Given that the only factor driving Haugland's termination was his candidacy *qua* candidacy, Haugland has put forth no evidence that he was

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Cir. Apr. 3, 1991)(No. 90-5624). Compared with the present matter, the evidence shows petitioner's termination was due *solely* to his insubordination.

> in any way terminated for "supporting or affiliating with a particular political party.

Id. at pp. 1251-1252. The 10th Circuit reversed summary judgment as to the remaining employees who supported the deputy in his election bid, noting that those employees were entitled to First Amendment protection for their political affiliation and support of the deputy candidate. *Ibid.* Petitioner calls this result "bizarre" (Pet. for Writ, p. 23), but it nonetheless falls squarely in line with *Carver* and this Court's prior decisions. An insubordinate employee seeking to oust his own boss is not protected under the First Amendment, whereas political patronage, assuming it does not fall under a policymaking exception, is protected political speech.[5]

Petitioner next cites *Finkelstein v. Bergna*, 924 F.2d 1449 (9th Cir. 1991) for the proposition that action taken to punish an employee for running against his boss' preferred candidate is unconstitutional. (Pet. for Writ, pp. 21-22). Once again petitioner seems to miss the mark, telling only some of the story in what is an easily distinguishable case. Unlike *Finkelstein*, where the district attorney had decided *not* to run for another term and suspended the employee in retaliation for the employee running against the district attorney's favored candidate, the respondent ran in the next election. Thus, unlike the present matter, at no point was the employee in *Finkelstein* ever competing against his boss for the boss' job. The present matter

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[5] *See generally Connick v. Myers*, 461 U.S. 138 (1983); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

simply has absolutely nothing to do with a superior allegedly retaliating against his subordinate as a result of the subordinate running for office against a *third* party.

The petitioner also cites *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir. 1977) claiming that an employee's interest in seeking office is protected under the First Amendment. (Pet. for Writ, pp. 22-23). Again, this case is distinguishable. In *Newcomb*, the city attorney retaliated against the deputy city attorney for running for Congress, *not* for running against the city attorney in an effort to take his job. Notwithstanding the fact that the 7th Circuit affirmed dismissal based on a policymaking exception, *Newcomb* is a political patronage case, *not* an insubordination case. *Compare Wallace v. Benware*, 67 F.3d 655, 661 (7th Cir. 1995) (an elected county sheriff could, without violating the First Amendment, discharge or demote a deputy that ran against him); *Wilbur v. Mahan*, 3 F.3d 214, 217-219 (7th Cir. 1993) (a sheriff could, without violating the First Amendment, restrict the free speech rights of a deputy who announced candidacy against the sheriff).

Finally, petitioner cites *Murphy v. Cockrell*, 505 F.3d 446 (6th Cir. 2007) as proof that the Sixth Circuit itself is conflicted with its decision in *Carver*, leading to "unpredictable results." (Pet. for Writ, p. 23,, fn 11). *Murphy* is not an "unpredictable result" caused by *Carver*. In fact, the *Murphy* court was sure to point out that *Carver*, like this case, dealt with the narrow issue of whether an employee's candidacy against her own boss was protected, while also noting that the Sixth Circuit, contrary to what petitioner now claims, "had no intention of using the *Carver* case to resolve the

broader question of whether the First Amendment ever provides any protection for an individual's right to run for political office." *Murphy*, *supra* at p. 450 (quoting *Becton v. Thomas*, 48 F. Supp. 2d 747, 756 (W.D. Tenn. 1999)). The Sixth Circuit was faced with a singular, narrow issue in *Murphy*, to answer a "question left unanswered by *Carver:* whether the First Amendment protects a public employee from termination based on that employee's political expressions during her own candidacy." *Id.* at pp. 450-451. The court held such speech was protected, but only after finding that the plaintiff was terminated "*after* a 'spirited' campaign," and that the termination was "due to her political speech *during the course of the campaign*." *Id.* at pp. 448-449 (Emphasis added). To the contrary, respondent terminated the petitioner the moment he learned of the candidacy, not due to any political participation or speech, but solely because the petitioner was attempting to take respondent's job. The narrow issue present in this matter is clearly distinguishable from the narrow issue resolved in *Murphy*.

The Sixth Circuit's decision in *Carver* is limited to a very narrow and unique issue of law that most circuits have not directly addressed. Further, the present matter has nothing to do with the much broader question of political speech, especially in light of the fact there exists no evidence the termination was *caused* by political speech. As no actual or persistent split among the circuits exists, absent petitioner's own subjective views to the contrary, for these reasons and for the reasons set forth above the Petition should be denied.

II. PUBLIC POLICY DOES NOT MANDATE THIS COURT'S REVIEW OF THE LOWER COURTS' RULINGS.

One of petitioner's final arguments is a public policy concern that the district court and Sixth Circuit's rulings will have the effect of adversely impacting Bullitt County's "pool" of potential employees for public office by somehow limiting "the number and quantity of candidates for local elective office." (Pet. for Writ, p. 27). Respectfully, this argument amounts to nothing more than speculation *based* upon speculation. To assume these holdings have, or will have, *any* effect whatsoever on the pool of Bullitt County employees for elective office, without more, is simply meritless. It should be pointed out again that the petitioner ran for office in the both the primary and general election for Bullitt County Sheriff, thus nothing relating to this action, nor the lower courts' rulings, had any "adverse impact" on the political process in Bullitt County. In fact, petitioner *won* the primary. Obviously, at no point were Bullitt County voters denied petitioner's "informed opinions on important public issues." (*Id.* at p. 27). Finally, the idea that Bullitt County's pool of potential candidates will be adversely impacted carries no weight. After all, it was a third party *non*-employee that ultimately won the general election. It would seem Bullitt County's candidate pool is sound, and petitioner's public policy concerns in this regard are unfounded.

III. RESPONDENT IS ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW.

Based upon the foregoing, respondent has not committed any violation of petitioner's constitutional rights. Even assuming this case does, in fact, address the right to political participation itself, which there is no evidence to support, respondent is still entitled to qualified immunity as a matter of law since the petitioner cannot establish such a right was so clearly established that a reasonable official in respondent's position would have known that such conduct violated that right.

Government officials performing discretionary functions are generally entitled to qualified immunity from civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court and the Sixth Circuit have repeatedly recognized that "the right the official is alleged to have violated must be 'clearly established' in a more particularized . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639-640 (1987); *Gazette v. City of Pontiac*, 41 F.3d 1051, 1065 (6th Cir. 1994). While this does not require that the very action in question be previously held to have been unlawful, this does require that "in light of pre-existing law, the unlawfulness must be apparent." *Anderson*, 483 U.S. at pp. 639-640. Additionally, in the Sixth Circuit this standard requires that claims of immunity be analyzed on a fact-specific, case-by-case

basis to determine if a reasonable official in the respondent's position could have believed his conduct to have been unlawful in light of clearly established constitutional law. *Pray v. City of Sandusky*, 49 F.3d 1154, 1158 (6th Cir. 1995).

Thus, to withstand the respondent's entitlement to qualified immunity, petitioner must clear two (2) hurtles: (1) the petitioner must show respondent's conduct violated a constitutional right; and (2) the petitioner must establish that the right violated was clearly established such that a reasonable official in respondent's position would have known that his conduct violated that right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Davis v. Brady*, 143 F.3d 1021, 1024 (6th Cir. 1998).

A. The Petitioner Has Failed to Allege a Violation of a Constitutional Right.

The first step in the qualified immunity analysis is to ask whether the petitioner is able to establish that a constitutional right has been violated. *Saucier*, 533 U.S. at p. 201. As previously explained, absent unsupported accusations and allegations, the undisputed facts show respondent has not committed any violation of petitioner's constitutional rights for terminating his employment based upon insubordination. Accordingly, respondent is entitled to qualified immunity from suit on this allegation under the clear dictates of constitutional law. If no constitutional right has been violated, there is no necessity for further inquiries concerning qualified immunity. *Id.* at p. 200. Therefore, summary judgment was properly granted, and the Petition should be denied.

B. Petitioner Fails to Establish That, Assuming a Constitutional Right Has Been Violated, That it Was Clearly Established Such That a Reasonable Official in Respondent's Position Would Have Known That Such Conduct Violated That Right.

In the alternative, even assuming for purposes of this Petition that this case does, in fact, address the right to political participation itself, respondent is still entitled to qualified immunity as a matter of law. Even if petitioner's First Amendment rights were violated in this regard, it was not clearly established as of the date of petitioner's termination that dismissal of a public employee for attempting to take his boss' job was constitutionally prohibited.

A right is clearly established when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates federal law." *Saucier*, 533 U.S. at p. 202. In order to show that the right violated was clearly established, the Court must look to prior decisions on a fact-by-fact, case-by-case basis. *Pray*, 49 F.3d at p. 1158. At the time of petitioner's termination there were no published decisions from this Court, the Sixth Circuit, or district courts within the Sixth Circuit that would have put respondent on notice that terminating an employee for insubordination after that employee has announced and confirmed his desire to take his employer's position would be unlawful in light of clearly established law. Respondent's reason for terminating the petitioner was because he wanted to take his job. In other words, regardless of whether this termination violated petitioner's right to political participation or political speech, no published case law

existed at that time from this Court, the Sixth Circuit, or district courts within the Sixth Circuit that, under the undisputed facts of this case, such a right was so clearly established that the respondent should have known this termination violated that constitutional right.

In fact, based on *Carver* the law of the Sixth Circuit as of the date of petitioner's termination dictated that such a dismissal *was* constitutionally permissible, and that the petitioner did not have a First Amendment right, clearly established or otherwise, to retain his position upon announcing and confirming his intention to run for his boss' position. As of September 7, 2005, the date of petitioner's termination, it must be concluded that the right allegedly violated was not clearly established at the time of the violation. On this basis respondent is entitled to qualified immunity, and the Petition should therefore be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Robert T. Watson
Chris J. Gadansky
Landrum & Shouse, LLP
220 West Main Street
Suite 1900
Louisville, Kentucky 40202
(502) 589-7616

Counsel for Respondent

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