

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PERKINS COIE LLP,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE, et al.,

Defendants.

CIVIL NO. 1:25-cv-00716-BAH

**BRIEF OF RICH MAY, P.C. AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

Frank N. Gaeta (BBO #561388)
RICH MAY, P.C.
176 Federal Street
Boston, MA 02110
(617) 556-3800
fgaeta@richmaylaw.com

*Pro hac vice admission pending
Counsel for Rich May, P.C.*

Of Counsel

Carolyn Elefant (D.C. Bar No. 425433)
LAW OFFICES OF CAROLYN ELEFANT
7315 Wisconsin Avenue
Bethesda, MD 20814
(202) 297-6100
carolyn@carolynelefant.com

CORPORATE DISCLOSURE STATEMENT

Rich May, P.C. is a professional corporation whose stock is owned by its individual attorney shareholders, and not by any corporation.

TABLE OF CONTENTS

Corporate Disclosure Statement.....	2
Table of Contents.....	2
Table of Authorities.....	3
Statement of Interest.....	4
Summary.....	4
Argument.....	4
I. The Right to Hire Counsel of One's Choosing is Guaranteed by the Constitution.....	4
II. The Right to Hire Counsel Necessarily Requires an Independent Bar Free from Outside Interference.....	6
Conclusion.....	9

TABLE OF AUTHORITIES

Cases

<i>BE & K Const. Co. v. N.L.R.B.</i> , 536 U.S. 516, 517 (2002).....	5
<i>Cal. Motor Transp. Co. v. Trucking Unlimited</i> , 404 U.S. 508, 510 (1972).....	5
<i>Gray v. New England Tel. & Tel. Co.</i> , 792 F.2d 251, 257 (1st Cir. 1986).....	6
<i>Legal Servs. Corp. v. Velazquez</i> , 531 U.S. 533, 546 (2001).....	7
<i>Texas Catastrophe Prop. Ins. Ass’n v. Morales</i> , 975 F.2d 1178, 1181 (5th Cir. 1992).....	6
<i>TransUnion v. Ramirez</i> , 594 U.S. 413 (2021).....	5

Other Authorities

David Fisher & Dan Adams, <i>John Adams under Fire: The Founding Father's Fight for Justice in the Boston Massacre Murder Trial</i> 33 (2020).....	8
<i>The Federalist</i> No. 78 (Terence Ball ed., 2003).....	9
James Podgers, <i>Turning Point Justice Kennedy: Rule of Law Is Under Attack</i> , ABA J., October 2006.....	5
Robert A. Stein, WHAT EXACTLY IS THE RULE OF LAW? 57 Hous. L. Rev. 185 (Fall 2019).....	4
Sandra Day O’Connor, <i>Vindicating the Rule of Law: The Role of the Judiciary</i> 2 Chinese J. Int’l L. 1, 2 (2003).....	6
<i>WJP Rule of Law Index</i> (2021).....	7

STATEMENT OF INTEREST

The *amicus curiae* is a mid-sized law firm based in Boston, Massachusetts with attorneys across the political spectrum. Regardless of our various, and at times opposing, political views, we all agree on the importance of the rule of law and submit this brief in its support.

SUMMARY

We submit this brief to make the following points. The rule of law in the American constitutional order relies upon an adversary system for adjudicating disputes. The right to select counsel of one's own choice is an indispensable part of that system. This constitutional order cannot survive if the availability of independent counsel is threatened, including if any executive official may punish a lawyer or law firm for vigorously representing a client or cause that the official disagrees with.

ARGUMENT

I. THE RIGHT TO HIRE COUNSEL OF ONE'S CHOOSING IS GUARANTEED BY THE CONSTITUTION

"The essence of the rule of law, originally attributed to Aristotle, is a 'government by laws and not by men.'" Robert A. Stein, WHAT EXACTLY IS THE RULE OF LAW?, 57 Hous. L. Rev. 185 (Fall 2019), *quoting* F.A. Hayek, *The Constitution of Liberty* 164, 456 n.1 (1960). Former Supreme Court Justice Anthony Kennedy, in a keynote speech to the American Bar Association in 2006, identified three essential characteristics that define what the rule of law means:

First, he said, the law should be binding on government and all its officials as a way of preventing corruption and abuse of power.

Second, the law must respect the dignity, quality and rights of every person, and all people should have the right to participate in government "as a way of determining our own destiny. The rule of law must be coupled with the right to improve human existence."

And third, every person should have the right to know what the laws are and be able to invoke them without fear of retribution.

James Podgers, *Turning Point Justice Kennedy: Rule of Law Is Under Attack*, ABA J., October 2006, at 63.

The rule of law is central to our democracy, our society, and our way of life. It ensures that all individuals, institutions, and entities, including the government, are treated fairly and are held accountable under the same laws. This prevents arbitrary actions and guarantees fundamental rights such as freedom of speech, fair trials, and protection against abuse. Lawyers play a vital role in upholding the rule of law by ensuring justice, maintaining legal integrity, and protecting democratic principles.

The rule of law relies upon a separation of powers between the executive, legislative and judicial branches of the federal government. The latter branch consists of federal courts which have jurisdiction to adjudicate “cases or controversies.” As the Supreme Court has many times made clear, the essence of a “case or controversy” that federal courts are to adjudicate is the presence of adverse parties genuinely contesting issues of law and fact. *See, e.g., TransUnion v. Ramirez*, 594 U.S. 413 (2021).

The First Amendment enshrines the right of every person in the United States to “petition for redress of grievances” which is commonly recognized as “one of the most precious liberties safeguarded by the Bill of Rights.” *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 517 (2002). This right may be exercised, among other means, by bringing cases and controversies before the courts. *See, e.g., Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“[T]he right to petition extends to all departments of the Government. The right of access to the courts is...but one aspect of the right of petition.”).

The right to petition a court, and the existence of a case or controversy to be the subject of a petition, assumes that a petitioner may seek to exercise rights or privileges that the government is reluctant to provide. The petitioner may thus face the daunting task of making a convincing case to a skeptical or sometimes hostile official. In these circumstances in particular, it is critical that the petitioner have the opportunity to access qualified counsel of their choosing.

The existence of our adversarial system of justice thus necessarily presupposes a civil litigant's right to hire counsel to represent them before the courts. Thus while there is no right to have counsel appointed at the expense of the state in a civil proceeding, "a civil litigant does have a constitutional right, deriving from due process, to retain hired counsel in a civil case." *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986). The right to counsel in civil matters "includes the right to choose the lawyer who will provide that representation." *Texas Catastrophe Prop. Ins. Ass'n v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992).

II. THE RIGHT TO HIRE COUNSEL NECESSARILY REQUIRES AN INDEPENDENT BAR FREE FROM OUTSIDE INTERFERENCE

The right to representation would be hollow if an opposing litigant could forbid a party from selecting counsel who is willing and able to undertake the representation, and in whom the party has confidence. A lawyer acts as a fiduciary for the client and undertakes special obligations to advance the client's interests. This aspect of our legal system rests on the principle that the client is free to select a willing lawyer who in turn will be trusted and expected to serve faithfully, effectively, and zealously in this role of trust and confidence.

In light of these principles, the role of an independent bar and judiciary are constitutional imperatives. Former Supreme Court Justice Sandra Day O'Connor observed that the rule of law requires an independent judiciary as its "foundation." Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 Chinese J. Int'l L. 1, 2 (2003). This means that the judicial

branch must be able to operate independently from the executive and legislative branches of government. *Id.* at 2-3.

The World Justice Project (“WJP”) is a “independent, multidisciplinary organization working to create knowledge, build awareness, and stimulate action to advance the rule of law worldwide.” *About Us*, World Justice Project (<https://worldjusticeproject.org/about-us>). It publishes an index measuring the rule of law across different countries and jurisdictions, based on the experiences and perceptions of the public and legal practitioners and experts worldwide. Among the four universal principles of the rule of law identified by the WJP is the principle of an independent bar:

Justice is delivered timely by competent, ethical, and *independent representatives* and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.

WJP Rule of Law Index at 14 (2021) (<https://worldjusticeproject.org/sites/default/files/documents/Index-2021.pdf>) (emphasis added).

The Supreme Court has recognized as much. It has held that the government may not threaten the ideal of an independent bar by, for example, prohibiting lawyers from pursuing claims or making arguments of which the government disapproves. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001). The courts cannot perform their constitutional function if lawyers face political restrictions on arguments and theories that the government “finds unacceptable but which by their nature are within the province of the courts to consider.” *Ibid.*

In *LSC v. Velazquez*, the Supreme Court explained that governmental restrictions on attorneys “advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys.” 531 U.S. at 544-545. Such government

constraints conflict with the guiding principle of *Marbury v. Madison* that it is the province of the courts to say what the law is:

Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy. *Marbury v. Madison*, 1 Cranch 137, 177 (1803) (“It is emphatically the province and the duty of the judicial department to say what the law is”). An informed, independent judiciary presumes an informed, *independent* bar.

531 U.S. at 545 (emphasis added). In short, any action that undermines the proper functioning of the adversary system through independent counsel is antithetical to the rule of law and fundamentally anti-constitutional.

It is essential to the functioning of the legal system under our constitutional order that lawyers be able to represent clients in advancing positions with which the adverse party disagrees—otherwise there could be no “case or controversy” for the courts to resolve. Even where, perhaps especially where, a client’s position is widely unpopular, the client still has the right to advance it through effective and diligent representation by counsel. Thus, various law firms and organizations take professional pride in having represented unpopular or demonized groups despite the contrary personal beliefs of the lawyers undertaking the representation. Included in this history is John Adams’ decision to represent the British soldiers charged with murder of American protestors in the Boston Massacre of 1770. Consistent with current rules of professional conduct, “Adams made sure to profess no sympathy for the accused officer, making it clear that he was not so much defending the man as defending the law.” David Fisher & Dan Adams, *John Adams under Fire: The Founding Father's Fight for Justice in the Boston Massacre Murder Trial* 33 (2020). History has rightfully lauded lawyers such as these for zealously seeking to protect the rights of their clients, not from any personal loyalty to the clients but from an understanding that the rule of law requires all people to have access to effective advocacy.

To permit government influence over parties' access to counsel would set a dangerous precedent. It would compromise the integrity of our legal system and the security of all those participating in it—irrespective of what side of the political spectrum they may presently occupy. As Alexander Hamilton wrote in support of approval of the U.S. Constitution, describing the importance of judicial independence: “no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today.” *The Federalist No. 78*, at 382 (Terence Ball ed., 2003).

CONCLUSION

Plaintiff's Motion for Summary Judgment should be granted.

Respectfully submitted,
Rich May, P.C.
By its counsel,

/s/ Frank N. Gaeta
Frank N. Gaeta (BBO #561388)
RICH MAY, P.C.
176 Federal Street
Boston, MA 02110
(617) 556-3800
fgaeta@richmaylaw.com
Pro hac vice admission pending

Of Counsel

/s/ Carolyn Elefant
Carolyn Elefant (D.C. Bar No. 425433)
LAW OFFICES OF CAROLYN ELEFANT
7315 Wisconsin Avenue
Bethesda, MD 20814
(202) 297-6100
carolyn@carolynelefant.com