No. 08-1122

IN THE
# Supreme Court of the United States

PAUL MARTIN CLARK AND BLACK CITIZENS FOR JUSTICE, LAW AND ORDER, INC.,

*Petitioners,*

v.

GLADYS ELAINE BLANTON JENKINS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas, Seventh District**

## REPLY BRIEF FOR PETITIONERS

ELIOT D. SHAVIN
LAW OFFICE OF ELIOT SHAVIN
4054 McKinney Avenue, Suite 310
Dallas, Texas 75204
(214) 522-2010

KENT W. STARR
STARR & ASSOCIATES
4245 North Central Expressway, Suite 350
Dallas, Texas 75202
(214) 219-8440

R. TED CRUZ
ALLYSON N. HO
*Counsel of Record*
ALBERT C. LAMBERT
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4200
Houston, Texas 77002
(713) 890-5000

CHARLES CHAD BARUCH
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

*Counsel for Petitioners*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## REPLY BRIEF FOR PETITIONERS

In *McDonald* v. *Smith*, 472 U.S. 479 (1985), this Court held that the right to petition does not afford absolute immunity against libel actions based on statements made in petitions to government officials. *McDonald* rests on fundamental misconceptions about the history and original understanding of the petition right, conflicts with this Court's interpretation of the petition right in other contexts, and chills individual citizens' exercise of the petition right. By failing to preserve the petition right as it existed in 1791, *McDonald* has unjustifiably limited the exercise of a fundamental right of citizenship upon which, as this Court has said, "to a very large extent, the whole concept of representation depends." See *E. R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). The continuing vitality of *McDonald* is thus an issue of substantial importance that this Court should decide.

Respondent does not address, much less refute, petitioners' central argument that *McDonald*'s interpretation of the petition right is irreconcilable with the text, history, and original understanding of the Petition Clause. See Pet. at 10-23, Br. of *Amicus Curiae* Texas Civil Rights Project ("TCRP") at 6-15. Instead, respondent contends that this case is "ill-suited" as a vehicle for reconsidering *McDonald* because the petition at issue does not "fall within the full, most-robust protections of the Petition Clause." Opp. at 17-19. But if a memorandum addressed to a U.S. Congressman and the Civil Rights Division of

the U.S. Department of Justice seeking "attention and immediate action" and demanding an "investigation" (Pet. App. at 41a) into allegations of egregious civil rights abuses does not constitute petitioning activity of the highest order, it is difficult to imagine what would.

Respondent's attempt to justify *McDonald* on policy grounds, Opp. at 15-17, only underscores the need for this Court's review. If the Petition Clause permits citizens to be held liable in tort for petitioning congressional representatives and law enforcement agencies to investigate claims of governmental abuses, then the more serious the allegations in need of investigation, the greater the threat of liability for defamation – and the greater the resulting chilling effect. That serious chilling effect on law enforcement activities, in particular, is itself reason to grant the petition and re-examine *McDonald*.

### A. Respondent Fails To Address, Much Less Refute, Petitioners' Evidence That Review Is Warranted Because *McDonald* Is Inconsistent With The Text, History, And Original Understanding Of The Petition Clause

1. Respondent blithely asserts that the petition right "is as robust and complete today *as it was ever intended to be*." Opp. at 17 (emphasis added). But respondent makes no attempt to address, much less refute, petitioners' evidence that, contrary to *McDonald*, the Petition Clause was originally understood to

provide absolute immunity against libel actions. See Pet. at 11-21.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *District of Columbia* v. *Heller,* 128 S. Ct. 2783, 2821 (2008). Accordingly, this Court often revisits its constitutional holdings, "turn[ing] to the historical background of [a] Clause to understand its meaning," and relying "primarily on legal developments that had occurred prior to the adoption of the * * * Amendment to derive the correct interpretation." *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1035 (2008); *Crawford* v. *Washington*, 541 U.S. 36, 43 (2004) (reconsidering and rejecting the rationale adopted 24 years earlier in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), in light of the "historical background of the [Confrontation] Clause").

Respondent offers nothing to refute petitioners' evidence that *McDonald*'s holding is fundamentally incompatible with the history and original understanding of the Petition Clause. Pet. at 10-23; Br. of *Amicus* TCRP at 6-15. Specifically, there is no indication that the Petition Clause was intended to provide *less* protection in defamation actions than the absolute immunity provided under English law, as *McDonald* wrongly held. Pet. at 15-16, 20-21.

2. Respondent nonetheless insists that review is unwarranted because "lower courts" have "relied upon

[*McDonald*] more than 250 times" since it was decided 24 years ago. Opp. at 8. Given that *McDonald* is the binding precedent of this Court and all lower courts are obligated to follow it, the mere absence of lower-court defiance hardly constitutes a reason not to reconsider *McDonald*.

Similarly, respondent attempts to downplay the substantial scholarly criticism of *McDonald* (Pet. at 21-23) by accusing petitioners of creating a "scholarly consensus" out of "a small handful of selectively culled law review articles." Opp. at 10. That contention is meritless. Respondent's citations of scholarly commentary criticizing this Court's decisions in *Marbury* v. *Madison* and *Brown* v. *Board of Education* (*id.* at 9-10) cannot obscure "[t]he near-unanimous conclusion of the modern commentators, drawing on the rich and important history of the Anglo-American right to petition, * * * that there is more to the Petition[ ] Clause than is generally recognized by the Supreme Court's jurisprudence or by contemporary understandings and practice." Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 799 (1999); see also David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition*, 9 LAW & HIST. REV. 113, 142 (1992) (*McDonald* "has produced a clause in the first amendment curiously devoid of meaning"); Eric Schnapper, *"Libelous" Petitions for Redress of Grievances – Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303, 347 (1989) (*McDonald* "yielded a result almost certainly contrary to the framers' intent concerning the

petition clause"); Norman B. Smith, "*Shall Make No Law Abridging . . . ": An Analysis of the Neglected, But Nearly Absolute, Right of Petition*, 54 U. CIN. L. REV. 1153, 1153 (1986) (*McDonald* "reflects an inadequate understanding of the history and purpose of the right to petition and placed inappropriate limitations on this right"). Respondent's attempt to diminish the force of scholarly criticism of *McDonald* thus falls far short.

### B. The Opposition Brief Only Confirms That Whether The Petition Clause Affords Absolute Immunity Is An Issue Of Substantial Importance Worthy Of This Court's Consideration

Respondent does not dispute that the proper interpretation of the Petition Clause is an issue of substantial importance. Nor does respondent deny that defamation suits against citizens have proliferated in the wake of *McDonald*. See Pet. at 26-28. Instead, highlighting the importance of the issue and its practical consequences, respondent argues on the merits that overruling *McDonald* would improperly "elevate" the petition right and, in so doing, "invite mayhem in connection with, among other things, confirmation hearings and other essential governmental proceedings." Opp. at 11-13. Neither contention has merit, much less provides a reason to deny review.

1. Contrary to respondent's assertions, overruling *McDonald* would not "elevate" the petition

right into a "new and distinct zone." See Opp. at 13. It would simply restore the level of protection afforded the petition right when the Petition Clause was adopted. Respondent expresses concern about the equitable treatment of rights and privileges (*id.* at 11-13), but adhering to their original purpose and design is the best way to ensure that all constitutional privileges receive proper and equitable treatment. By all accounts, the petition right was afforded broader protection when the Petition Clause was adopted than it has been since *McDonald* was decided. Pet. at 10-23.

Respondent appears to argue that restoring the original understanding of the Petition Clause – *i.e.*, that statements in petitions are entitled to absolute immunity from libel actions – would be inimical to the protected status afforded political speech. See Opp. at 11-12. But that is a false dichotomy. Petitioning the government to take action or inquire into a matter *is* quintessential political speech.[1]

Moreover, respondent does not dispute that the petition right was historically antecedent to free

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[1] Respondent insists that even political speech must "yield[ ] to defamation law," citing *Chaplinksy* v. *New Hampshire*, 315 U.S. 568, 572 (1942). Opp. at 12. But *Chaplinsky* involved a breach of the peace, not defamation. To that extent, *Chaplinsky* is entirely consistent with the petition right as it existed in 1791, when several states required that petitions be submitted in an "orderly and peacable [sic] manner." See Smith, *supra*, at 1181-82.

speech rights in the Anglo-American legal tradition. Pet. at 12; Br. of *Amicus* TCRP at 7. The distinct textual guarantees of speech *and* petition in the First Amendment further imply that petitioning interests, while related to free speech, are not identical. See Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 112 (1996). And, because every word in the Constitution "must have its due force, and appropriate meaning," *Wright* v. *United States*, 302 U.S. 583, 588 (1938), the Petition Clause must, at the very least, receive separate analytical treatment.

In addition, respondent ignores that the petition right encompasses not only the expression of political views, but also the promotion of law enforcement. See, *e.g.*, *Forro Precision, Inc.* v. *Int'l Bus. Mach. Corp.*, 673 F.2d 1045, 1060 (9th Cir. 1982) (pre-*McDonald* case holding that even though protecting communications between citizens and law enforcement agencies "do[es] not generally promote the free exchange of ideas, * * * [or] * * * influence policy decisions[,]" the law enforcement value of such communications entitles them to immunity). This case is a perfect example, as the petition at issue requested a government investigation into serious allegations of civil rights abuses and government corruption.

This case is therefore an ideal vehicle for this Court to revisit *McDonald* and assess whether exposing citizen petitions to defamation suits under an "actual malice" standard, which permits liability

based on the mere reporting of false statements with "reckless disregard" for their truth, impermissibly chills petitioning activity, particularly with respect to law enforcement. Although *McDonald*'s departure from the original understanding of the petition right may have been intended to protect public officials from the circulation of false and defamatory information, "the possible harm to society in permitting" some false information to go unpunished in petitions for redress is "outweighed by the possibility that" legitimate protected petitioning activity of others "may be muted * * * " See *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 255 (2002) (holding that a ban on virtual child pornography abridged the freedom to engage in a substantial amount of lawful speech) (quoting *Broadrick* v. *Oklahoma,* 413 U.S. 601, 612 (1973)).

The failure of the actual malice standard to afford adequate protection to citizens who exercise their petition rights is evidenced by the proliferation of lawsuits brought primarily to chill the exercise of those rights, commonly referred to as Strategic Litigation Against Public Participation, or "SLAPP" suits, and the resulting efforts of some states to combat the problem. See, *e.g.*, R.I. GEN. LAWS § 9-33-1 ("there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances"); 735 ILL. COMP. STAT. § 110/5 ("The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these

important constitutional rights."); WASH. REV. CODE § 4.24.500 ("The threat of a civil action for damages can act as a deterrent to citizens who wish to report information to federal, state, or local agencies.").

Indeed, the chilling effect of the actual malice standard is the primary reason this Court has afforded absolute immunity from other forms of civil liability to all *bona fide* petitions under the *Noerr-Pennington* doctrine, see *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-80 (1991), Pet. at 23-25, and why many state courts still reject the actual malice standard on common law grounds in defamation suits. See, *e.g., Craig* v. *Stafford Constr., Inc.*, 856 A.2d 372, 382 (Conn. 2004) (affording absolute immunity to statements made against a police officer during the course of an internal affairs investigation because "if citizen complaints such as those involved in the present case were not absolutely privileged, the possibility of incurring the costs and inconvenience associated with defending a defamation suit might well deter a citizen with a legitimate grievance from filing a complaint") (internal citation and quotation omitted); *Miner* v. *Novotny*, 498 A.2d 269, 275 (Md. 1985) (absolutely protecting complaints concerning police brutality to prevent the chilling of legitimate grievants). Statements made in *bona fide* petitions to government officials deserve no less protection under the Petition Clause.

2. Respondent contends that the *Noerr* standard is inapplicable in defamation suits because it is

predicated upon the petitioner's "subjective belief" in the truth of a statement. Opp. at 15. Not so. "[C]onstitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964) (internal citation and quotations omitted). Under the *Noerr* standard, a petition is a sham and falls outside First Amendment protection only if it is "*objectively* baseless in the sense that no reasonable [petitioner] could realistically expect success on the merits." *Prof'l Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (emphasis added). Thus, in pre-*McDonald* cases, courts afforded *Noerr* immunity to petitions seeking redress for the improper conduct of local police officials because the petitions, like the memorandum in this case (Pet. App. at 7a-8a), were *bona fide* attempts to procure government action – even if further investigation later revealed the claims to be inaccurate. See, *e.g.*, *Sherrard* v. *Hull*, 456 A.2d 59, 67 (Md. App. 1983); *Webb* v. *Fury*, 282 S.E.2d 28, 40 (W. Va. 1981).[2] Respondent does not dispute that under the *Noerr* standard, notwithstanding any

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[2] Respondent asserts that "the truthfulness of a statement or petition is an essential prerequisite to acquiring constitutional protection in the first instance." Opp. at 14. That is incorrect. Respondent posits that a complaint filed in a judicial proceeding is the "paradigmatic petition to the government" (*id.* at 17), but truthfulness has never been a prerequisite for the absolute immunity afforded to such petitions. Pet. App. at 17a-18a.

finding of actual malice, petitioners would be entitled to reversal of the $500,000 judgment against them for a single statement made in a *bone fide* petition that on its face sought "attention and immediate action by Congress and the Justice Department" in the form of an "investigation" into a series of alleged (and egregious) civil rights abuses. See Pet. App. at 41a.

3. Respondent claims that restoring the historical understanding of the petition right to afford absolute immunity from libel actions "would be detrimental to Democratic government." See Opp. at 15-17. If there is an anti-democratic spirit afoot, it results from *McDonald,* which permits the public servant to make defamatory statements that the public served cannot. Pet. at 27.

Not surprisingly, respondent offers no evidence that there has been a "rushing tide" of horrors when and where immunity for petitions has been broader than that afforded by the actual malice standard, *i.e.*, under *Noerr-Pennington*, in formal legislative and judicial proceedings, and before *McDonald*. There are, however, documented instances of chilled speech resulting from SLAPPs. Pet. at 6 & n.4; *id.* at 26-27; *infra*, at 8-9. And numerous courts have observed that subjecting individuals to liability for statements made in petitions to government officials has the potential to chill citizen reports of violations and abuse by local officials – and thus seriously impede law enforcement efforts. *Miner*, 498 A.2d at 275 ("the inconvenience associated with defending a defamation suit might well deter a citizen with a legitimate

grievance from filing a complaint"); *Forro Precision*, 673 F.2d at 1060 ("[I]t would be difficult indeed for law enforcement authorities to discharge their duties if citizens were in any way discouraged from providing information."); *Craig*, 856 A.2d at 382 ("good faith criticism of governmental misconduct might be deterred by concerns about unwarranted litigation").

Contrary to respondent's assertions, the greater threat to representational democracy – not to mention to law enforcement – is posed by the chilling effect on citizen-petitioners created by *McDonald*. See Pet. at 26-28.

### C. Respondent Concedes That The Lower Courts Are Divided On The Important First Amendment Issue Of When Republication May Be Punished

Respondent concedes that the lower courts have applied varying levels of protection to petitions that largely relay or republish allegations. Opp. at 20. And respondent does not dispute the need for this Court's review to resolve the conflict and provide guidance in this important, unresolved area of First Amendment law. Instead, respondent claims that this case is an inappropriate vehicle to resolve the issue because petitioners embellished, rather than merely reported, the statements in the memorandum. *Id.* at 20-21. Respondent is wrong.

Even if the jury disbelieved Mr. Clark's testimony that he simply reported in the memorandum what he

was told, the jury's disbelief of that testimony would not establish actual malice under this Court's jurisprudence. Pet. at 34 & n.7 (citing *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)). Moreover, the uncontroverted evidence at trial, as acknowledged by the court of appeals, was that someone else gave Clark defamatory information about Ms. Jenkins that he relayed in the memorandum. Pet. App. at 40a; see also *id.* at 30a. That conduct would not have constituted actual malice in jurisdictions where defamation liability does not attach to a report of a third party's allegations of misconduct. See, *e.g.*, *Freyd* v. *Whitfield*, 972 F. Supp. 940, 946 n.11 (D. Md. 1997) (acknowledging that neutral descriptions of third-party defamatory allegations are not actionable). But "no consensus exists within the various federal circuits" on the issue, *Locricchio* v. *Evening News Ass'n*, 476 N.W.2d 112, 131 n.33 (Mich. 1991), as respondent concedes. Opp. at 20.

Thus, in addition to serving as an ideal vehicle to reconsider *McDonald*, this case presents an opportunity for this Court to resolve the conflict in the lower courts on the neutral reportage doctrine. Pet. at 31-35.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ELIOT D. SHAVIN
LAW OFFICE OF
ELIOT SHAVIN
4054 McKinney Avenue,
Suite 310
Dallas, Texas 75204
(214) 522-2010

KENT W. STARR
STARR & ASSOCIATES
4245 North Central
Expressway, Suite 350
Dallas, Texas 75202
(214) 219-8440

R. TED CRUZ
ALLYSON N. HO
*Counsel of Record*
ALBERT C. LAMBERT
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street,
Suite 4200
Houston, Texas 77002
(713) 890-5000

CHARLES CHAD BARUCH
THE LAW OFFICE OF
CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

*Counsel for Petitioners*