No. 081122 MAR 5 - 2009

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

PETITION FOR A WRIT OF CERTIORARI

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
JOHN S. EDWARDS, JR.
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana, 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

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether a statement concerning possible corruption by a public official—made solely in a petition for redress of grievances addressed to government authorities empowered to investigate those claims—can support an action for libel, or whether that statement is absolutely privileged under the Petition Clause of the First Amendment.

2. Whether, even if a public figure may bring an action for libel based on a statement made solely in a petition for redress of grievances, the First Amendment nonetheless protects from liability those who merely relay defamatory statements made by others.

3. Whether this Court should overrule *McDonald* v. *Smith*, 472 U.S. 479 (1985).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Paul Martin Clark and Black Citizens for Justice, Law and Order, Inc. Respondent is Gladys Elaine Blanton Jenkins.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Black Citizens for Justice, Law and Order, Inc., has no parent corporation. No publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. ____

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

Petition For A Writ Of Certiorari

Petitioners Paul Martin Clark and Black Citizens for Justice, Law and Order, Inc. (collectively "BCJLO") respectfully submit this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh District of Texas.

Opinions And Orders Below

The Texas Supreme Court's orders refusing discretionary review are unreported. App., *infra*, at 50a, 49a. The opinion of the Court of Appeals for the Seventh District of Texas is reported at 248 S.W.3d 418. *Id.* at 1a-45a. The judgment entered by the Henderson County District Court is unreported. *Id.* at 46a-48a.

Jurisdiction

The Court of Appeals for the Seventh District of Texas filed its opinion on February 22, 2008. The Texas Supreme Court denied a timely petition for discretionary review on September 26, 2008, and denied a timely petition for rehearing on December 5, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Constitutional Provision Involved

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statement Of The Case

This case presents an ideal vehicle for this Court to revisit its ill-founded decision in *McDonald* v. *Smith*, 472 U.S. 479 (1985), which held that the right to petition does not afford absolute immunity against libel actions based on statements made in petitions to government officials. *McDonald* was wrong when it was decided and has rightly been the subject of substantial scholarly criticism. The *McDonald* decision was premised on fundamental misconceptions about the history and original understanding of the petition right, is inconsistent with this Court's interpretation of the right in other contexts, and imposes a serious chilling effect on the ongoing exercise of individual citizens' vital right to petition the government for redress of grievances.

Black Citizens for Justice, Law and Order, Inc., was founded 40 years ago in Dallas, Texas, in response to discrimination against African-American

citizens. App. 2a. BCJLO's initial purpose was to bring citizen complaints against the Dallas police to the attention of the proper authorities. App. 2a. Daisy Evella Joe, BCJLO's Chief Executive Officer, began as a volunteer with the organization in 1982. App. 3a.

Athens, Texas, is a small town of about 11,000 people located approximately 70 miles southeast of Dallas. For years, some members of the African-American community in Athens have accused municipal officials and police officers of racial discrimination. 2 RR 215-16.[1] In 1999, the Civil Rights Division of the U.S. Department of Justice assisted Athens citizens and the Athens Police Department in developing a memorandum agreement concerning police operations. App. 3a. In 2001, certain Athens citizens first contacted Ms. Joe in the hopes that she could persuade Congressman Pete Sessions, with whom she had worked on other discrimination complaints, to investigate their allegations of continuing misconduct by Athens officials. 3 RR 19-21, 39.

In 2002, several Athens citizens asked to meet with the city council to discuss the memorandum agreement. App. 4a. The agreement had expired, and a new police chief was replacing the current chief (and signatory to the agreement). App. 4a. The city council scheduled that discussion for its next pre-meeting workshop. 2 RR 29. The citizens invited Ms. Joe to attend the workshop and hear their complaints. 3 RR 20. Ms. Joe could not attend the workshop, so she sent BCJLO volunteer Paul Martin Clark to take

---

[1] "RR" refers to the reporter's record. "CR" refers to the clerk's record. Citations are to the volume of each record, followed by the page number in that volume.

notes to forward to Congressman Sessions for investigation. App. 5a. Mr. Clark took notes at the workshop and a subsequent citizens meeting. He reduced his notes to a memorandum that he gave to Ms. Joe. After a cursory review, she instructed Mr. Clark to send the memorandum to Congressman Sessions and the Justice Department. 3 RR 23-27.

Mr. Clark's memorandum recounted accusations against Athens officials made by speakers at the meeting and sought "attention and immediate action by Congress and the Justice Department." App. 41a. The memorandum contained the false statement that Gladys Jenkins—the sole African-American member of the city council—"is a convicted felon having served prison time in Texas and California for Prostitution and Drugs."[2] App. 42a. There is no allegation or evidence that BCJLO or Mr. Clark made this statement to anyone other than Congressman Sessions or the Justice Department.

Mr. Clark testified that he simply recounted statements made in the meeting, and neither knew nor considered the truth of those statements, including the allegation about Ms. Jenkins. 1 RR 160, 176 ("The question and thought of veracity never came up. I don't know these people. I was simply asked to take notes."); 3 RR 128-29 ("I don't have any belief or disbelief. I don't know the people. And I'm sorry if the council member is upset. I don't know these people. I'm sorry."). Likewise, Ms. Joe did not know or consider the truth of the allegation. 3 RR 33-34, 40.

---

[2] The memorandum went on to state that "[n]o one in the State of Texas can hold elective office who has felony convictions." App. 6a.

BCJLO never investigated the allegation, because Ms. Joe and Mr. Clark expected Congressman Sessions to do so. 3 RR 41-42, 51. But instead of initiating his own investigation as in the past, Congressman Sessions faxed the memorandum to the Athens mayor—one of the officials about whom the citizens had complained. 3 RR 98. When the mayor received the memorandum, he distributed copies to various city officials including Ms. Jenkins. 2 RR 221. Ms. Jenkins volunteered to be fingerprinted to prove she had never been in prison in Texas, California, or anywhere else. 2 RR 76-77.

Ms. Jenkins filed suit against BCJLO and Mr. Clark for defamation based solely on the false statement in the memorandum that Ms. Jenkins "is a convicted felon having served prison time in Texas and California for Prostitution and Drugs." App. 42a. After Ms. Jenkins rested her case-in-chief, BCJLO moved for a directed verdict, asserting that the statement was protected by the right to petition under both the state and federal constitutions and that Ms. Jenkins failed to present clear and convincing evidence of actual malice. 2 RR 281-83. The trial court denied that motion. 2 RR 284. The jury awarded Ms. Jenkins actual damages of $300,000 jointly and severally, along with exemplary damages of $100,000 against each defendant. App. 47a. BCJLO moved for judgment notwithstanding the verdict, again under both the state and federal constitutions, and on actual malice grounds. 3 CR 306-11. The court denied that motion and rendered judgment in accordance with the jury's verdict. 3 CR 312-13, 324.

The Court of Appeals for the Seventh District of Texas affirmed in a published opinion. App. 1a-45a.

First, the court rejected BCJLO's argument that the right to petition in the state and federal constitutions[3] affords absolute immunity against defamation suits based on statements in good-faith petitions to government officials seeking redress of grievances. App. 12a. Interpreting the right to petition under the Texas Constitution, the court of appeals expressly relied upon and found "persuasive" this Court's opinion in *McDonald*. App. 14a. The court acknowledged that "[a]bsolute privilege attaches to all communications published in the court of judicial proceedings." App. 12a. And the court recognized that under the *Noerr-Pennington* doctrine established by this Court, a similar privilege against antitrust liability attaches to petitioning the government to take anticompetitive action. App. 23a. Nonetheless, the court held that the statement in the memorandum was subject only "to a qualified privilege permitting liability in a defamation action" if the statement was made with actual malice. App. 24a.

Second, the court essentially adopted Ms. Jenkins' view that the memorandum itself was sufficient proof of actual malice. App. 24a. The court recognized that a "public figure may not recover damages for a defamatory falsehood without clear and convincing proof the false statement was made with 'actual malice,' *i.e.*, with knowledge the statement was false or with reckless disregard of whether it was false or

---

[3] BCJLO "recognize[d] that [the state court's] decision with respect to the U.S. Constitution [was] controlled by *McDonald*," but raised the issue whether "defamatory statements made in a petition to the government—even when made with actual malice—[are] absolutely privileged under the Petition Clause[ ] of the * * * United States Constitution" to "preserve" that issue for review in this Court. App. 57a.

not." App. 24a. And the court acknowledged that reckless disregard requires "evidence the defendant made the false publication with a high degree of awareness of probably falsity, or entertained serious doubts as to the truth of his publication." App. 25a. But despite the uncontroverted testimony of both Mr. Clark and Ms. Joe that they never even considered the truth or falsity of the statement, but merely reported what had been said by others, 1 RR 160, the court held that the constitutional requirement of clear and convincing evidence of actual malice had been satisfied.

On June 17, 2008, BCJLO filed a petition for discretionary review in the Texas Supreme Court. On September 26, 2008, that court refused review. BCJLO filed a timely petition for rehearing, which the Texas Supreme Court denied on December 5, 2008.

REASONS FOR GRANTING THE PETITION

This case presents an important First Amendment issue and a straightforward opportunity for this Court to correct a stark anomaly in its First Amendment jurisprudence. *McDonald* v. *Smith* cannot be reconciled with the original understanding of the Petition Clause, or with this Court's vigilant protection of the right of citizens to hold public officials accountable. *McDonald* imposes a serious chilling effect on the right to petition, and subjects that right to civil liability antithetical to a robust democracy. This case is an ideal vehicle, with the question cleanly presented, free of any factual ambiguities or complications.

There is no split of authority on the issue, nor will there ever be. Because *McDonald* is binding Supreme Court precedent, all lower courts are obliged to follow it. *McDonald* has rightly been subjected to substantial

scholarly criticism, but unless and until the Court corrects the error, there will be no way to alter that decision. Thus, there is no value to waiting for a split to develop, because the precedential force of *McDonald* prevents that from ever happening.

McDonald has been widely criticized for its historical inaccuracy, its infidelity to the Founders' vision of the right to petition, and its inconsistency with this Court's treatment of that right in other contexts. The Founders considered the right to petition a critical component of our republican form of government. Just as the Constitution establishes checks and balances between branches of government, the right to petition establishes an important check between the people and government. And the Founders knew well that any interference with the right to petition threatens the ability of the people to check the organized institutions of government. The delineation of a right to petition in the First Amendment—separate from the right to free speech—demonstrates the Founders' intent to protect that right. And historical documents establish that at the time the Founders included the right to petition in the Constitution, the notion of absolute immunity for citizen-petitioners was well established under English and American law.

The practice of exposing citizen-petitioners to libel is a relatively recent phenomenon, and reverses the immunity for petitioners that dates to the 1680s and was well established by the American Revolution. The practical implications of that reversal are great. Citizens with personal knowledge—or even strong suspicion—of government abuses are less likely to report them if doing so can subject them to retaliatory lawsuits for defamation. That concern is partic-

ularly acute in rural and small-town America, where citizens with few resources and limited access to counsel may rely upon petitioning to seek investigation of their complaints. The chilling effect on those citizen-petitioners created by *McDonald* and reinforced by the judgment below is anathema to the Founders' vision for American government.

The Founders intended for citizens to check government, not for the government—through liability imposed by the judicial system—to check citizens. *McDonald* imposes unjustifiable limitations on the exercise of the right to petition that necessarily interfere with its proper role in checking governmental abuse. Given this Court's supremacy, no other tribunal has the power to reconsider *McDonald*—and thus there is not and never can be a split of authority or conflict among the lower courts. Whether the Petition Clause affords citizens absolute immunity against libel is not only of great doctrinal significance, but also of great practical importance. It is an important question of law that should be resolved by this Court.

Even if the constitutional right to petition did not afford absolute immunity to citizens who petition their government, the Court should nonetheless grant the petition, reverse the judgment below, and resolve conflicts among the lower courts regarding if and how speakers may relate allegations made by others without being subject to liability for republishing defamatory statements. That question has arisen repeatedly in the lower courts, which have reached conflicting conclusions. Although the Court has recognized this open—and important—First Amendment question, it has never squarely addressed it. The Court's review is needed to resolve the

conflicts and provide guidance in an important, unresolved area of constitutional law.

I. *MCDONALD'S* UNDERSTANDING OF THE PETITION RIGHT CANNOT BE RECONCILED WITH THE TEXT, HISTORY, AND ORIGINAL UNDERSTANDING OF THE PETITION CLAUSE

The Petition Clause provides that "Congress shall make no law * * * abridging * * * the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I, cl. 6. The petition right is not only "one of 'the most precious of the liberties safeguarded by the Bill of Rights,'" but also "implied by '[t]he very idea of a government, republican in form.'" *BE & K Constr. Co.* v. *N.L.R.B.*, 536 U.S. 516, 524-25 (2002) (quoting *Mine Workers* v. *Ill. Bar Ass'n*, 389 U.S. 217, 222 (1967) and *United States* v. *Cruikshank*, 92 U.S. 542, 552 (1875)). Since the early days of our Nation, citizens have used petitioning to expose, among other things, "[m]aladminstration or corruption among public agents" and "misconduct by local officials." Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 154 (1986); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1156 (1991) (explaining that "part of the purpose and effect of the petitions was to help inform representatives about local conditions"). Under this Court's decision in *McDonald*, citizen-petitioners seeking investigation of possible government corruption are entitled only to qualified immunity from libel actions. But history refutes that crabbed understanding of the petition right. In both England and colonial America, citizen-petitioners were absolutely immune from pri-

vate libel actions—and nothing in the text of the First Amendment, its drafting history, or the views of the Founders suggests any intention of narrowing the scope of that longstanding right.

A. Significant, Persuasive Historical Evidence Establishes That The Petition Clause Was Originally Understood To Provide Absolute Immunity Against Libel Actions

The roots of the Petition Clause run to Magna Carta, which contained the first formal expression of the right to petition. 5 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDER'S CONSTITUTION 187 (1987). From the beginning, the right to petition represented the means by which citizens enforced other rights guaranteed to them, and checked infringements on them by government. In the 300 years following Magna Carta, the petition right became an important and cherished part of English political life. Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2169 (1998); David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition*, 9 LAW & HIST. REV. 113, 115 (1991). Immunity from judicial and executive retaliation for petitioning developed alongside the petition right. Van Vechten Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L.J. 131, 132 n.4 (1910).

1. Petitioners Had Absolute Immunity Against Libel Suits In Pre-1791 England

Historical analysis of the petition right is crucial because, as this Court has explained, rights under the Bill of Rights are preserved as they existed in

1791. See, *e.g.*, *Curtis* v. *Loether*, 415 U.S. 189, 193 (1974); *Markman* v. *Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). History teaches that the right to petition predated other expressive rights, such as freedom of speech and of the press. But the most important historical lesson is that in England after 1702, the right to petition was an absolute right against the government.

English courts resolved the precise question presented in *McDonald*—whether statements made in a petition can support a defamation claim—during the 1680s. In *Lake* v. *King*, 85 Eng. Rep. 137 (K.B. 1668-1669), a citizen was sued for libel after sending a petition to a committee of Parliament in which he accused a public official of extortion. The court held that a libel action could not be based on a petition to a committee with the power to redress the grievance:

> And it was agreed that the exhibiting of the petition to a Committee of Parliament was lawful, and that no action lies for it, although the matter contained in the petition was false and scandalous, because it is in a summary course of justice, and before those who have power to examine, whether it be true or false.

Id. at 139. English courts extended immunity to petitions to the King soon afterward in the *Trial of the Seven Bishops* (1688), 12 A COMPLETE COLLECTION OF STATE TRIALS 183 (T.B. Howell ed., 1816), which established absolute immunity for petitioning in English law. In 1687, James II issued his declaration for Liberty of Conscience providing for freedom of worship and commanding all clergy to read and distribute it in their churches. The Archbishop of Canterbury and six other bishops petitioned the King asking to be excused from that duty. The King responded by

having them arrested and charged with seditious libel. In a landmark enunciation of the broad scope of immunity for petitioning, the bishops were acquitted making clear the principle of immunity from libel for petitioners under English law.

England resolved any lingering doubt about immunity a year later by adopting the Declaration of Rights, providing "[t]hat it is the right of the subjects to petition the king and all commitments and prosecutions for such petitioning are illegal." SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 464 (George Burton Adams & H. Morse Stephens eds., 1927). The Declaration of Rights codified the understanding in England that statements in petitions could not support libel actions. The only restriction that Blackstone, "whose works," the Court has said, "'constituted the preeminent authority on English law for the founding generation,'" *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2798 (2008) (quoting *Alden* v. *Maine*, 527 U.S. 706, 715 (1999)), recognized on "the right of petitioning the king, or either house of parliament" to redress injury was the numerical limitation placed by Parliament on the number of signatures and the number of individuals allowed to present a petition. WILLIAM BLACKSTONE & THOMAS M. COOLEY, COMMENTARIES ON THE LAWS OF ENGLAND 1:77, 92 (1871). Blackstone justified that restriction as a means of avoiding riots or disruptive presentation of petitions. *Ibid.* In his American edition of Blackstone, St. George Tucker took obvious satisfaction in reminding his readers that "[i]n America, there is no such restraint." 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES;

AND OF THE COMMONWEALTH OF VIRGINIA, App. 299-300 (1803).

2. The Petition Right Assumed Even Greater Importance In Colonial America

While some English rights were abandoned or narrowed in the colonies, the petition right was expanded. Petitioning was critical to political life in colonial America. Indeed, unlike other rights such as suffrage, petitioning was not restricted. "Disenfranchised white males, such as prisoners and those without property, as well as women, free blacks, Native Americans, and even slaves, exercised their rights to petition the government for redress of grievances." Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 688-89 (2003) (internal citations omitted). That broad petition right existed alongside significant restrictions on non-petition speech: "Seditious libel laws existed in all of the colonies, and punishment for statements critical of the government was an accepted, lawful practice which continued even after the framing and ratification of the First Amendment." Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 37 (1993).

Yet petitioning—including the right to criticize government officials without fear of reprisal—continued unabated throughout this period. North Carolina, Georgia, Vermont, Rhode Island, Connecticut, Delaware, Maryland, Pennsylvania, Massachusetts, and New Hampshire all guaranteed the petition right in their state constitutions or charters. Frederick, *supra*, at 117 n.18. By the American Revolution, petitioning played a central role in the American con-

cept of self-government. Indeed, the Declaration of Independence marked King George III's infringement of the petition right as tyrannical: "In every state of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people." THE DECLARATION OF INDEPENDENCE para 3 (U.S. 1776).

All this took place during a period when the colonial freedoms of speech and press were undeveloped. As in England, the right of petition developed as the far stronger right. "In both England and the American colonies, citizens could petition government on any subject without fear of punishment, an important protection unmatched by the right of free speech." Frederick, *supra*, at 115-16 (citation omitted). With harsh sedition laws proscribing anti-revolutionary speech, the less-restricted right to petition was frequently the only means by which citizens could communicate criticisms to the government without risking prosecution. Spanbauer, *supra*, at 37-38. In the colonies, as in England, petitioning represented the primary tool by which citizens expressed their grievances to government. Far from being subsumed by free speech, the right to petition both preceded and exceeded free speech rights.

3. The Petition Right Enshrined In The Constitution Was Virtually Absolute

The Constitution as originally drafted did not contain any express protection of the right to petition, and anti-federalists seized on that omission to criticize the document. Wishnie, *supra*, at 694 n.153.

James Madison, who envisioned a petition right separate from free speech rights, set about remedying this deficiency by proposing the following amendment: "The people shall not be restrained . . . from applying to the Legislature by petitions, or remonstrances, for redress of their grievances." 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1026 (1971). Eventually the petition right was placed alongside the rights of speech, press, assembly, and religion to form the First Amendment. 1 ANNALS OF CONG. 451 (Joseph Gales, ed. 1789). In his endorsement of the amendment before the House, Madison called upon the representatives to "expressly declare the great rights of mankind secured under this constitution." *Id.* at 449.

During debates on the Petition Clause, there is no record of anyone challenging the scope of the petition right as practiced in England and the colonies, including the absolute immunity from liability for defamation established in *Lake* and the *Seven Bishops*. "[T]here is absolutely no contemporaneous history suggesting that anyone connected with the framing and approval of the petition clause harbored any objection to or intended any limitation on the right to petition as it had existed under English law prior to the Revolution and as it continued in the several states." Eric Schnapper, *"Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303, 345 (1989).

Once enumerated in the First Amendment, the petition right enjoyed favored status. By the early 1800s, a substantial portion of Congressional energy was devoted to considering citizen petitions. Perhaps no American of the founding era evinces the importance of the petition right better than John Quincy

Adams. In the waning years of his life, Adams fulminated against pro-slavery advocates seeking to limit the right of petition. Adams risked his career and his reputation on an impassioned and sustained defense of the right to petition, which he deemed "essential to the very existence of Government; it is the right of the people over the Government; it is their right, and they may not be deprived of it." JOSEPH WHEELAN, MR. ADAMS'S LAST CRUSADE 161 (2008). When Adams collapsed and died in the House chambers in 1848, two of his very last official actions were the introduction of petitions. *Id.* at 246-48.

Throughout early American history, American courts knew and respected the rule of absolute immunity for petitioners set forth in *Lake* and the *Seven Bishops*. The earliest judicial expression of immunity for petitioning in the United States came in *Harris* v. *Huntington*, 2 Tyl. 129 (Vt. 1802)—a case strikingly similar to this one. In *Harris*, a citizen made false and malicious statements about a public official in a petition to the government. The official sued for libel. Rejecting the libel claim, the court held that petitioning was absolutely privileged:

> An absolute and unqualified indemnity from all responsibility in the petitioner is indispensable, from the right of the petitioning the supreme power for the redress of grievances; for it would be an absurd mockery in a government to hold out this privilege to its subjects and then punish them for the use of it.
>
> And it would be equally destructive of the right, for the Courts of Law to support actions of defamation grounded on such petitions as libelous.

Id. at 139-40. In reaching that conclusion, the court used reasoning equally applicable to this case:

> Petitions for redress of grievances will generally point to officers of the government, who have, or may be supposed to have abused its confidence by mal-administration; and although government should refrain from prosecuting the petitioners criminally, yet it operate as effectual a restraint upon them to expose them to an action for damages at the suit of those whose conduct they have complained to government.

Id. at 140. In particular, the court reasoned that petitioning must be protected by absolute immunity even though it may result in occasional injury to reputation:

> But if this right of petitioning for a redress of grievances should sometimes be perverted to the purpose of defamation, as the right of petitioning with impunity is established both by the common law and our declaration of rights, the abuse of the right must be submitted to in common with other evils in government, as subservient to the public welfare.

Id. at 146. *Harris* demonstrates not only the scope of the petition right in the decades immediately following the Nation's founding, but also that early American courts understood citizen-petitioners to enjoy absolute immunity from suit in the new republic just as in England.

B. *McDonald* Is Fundamentally Inconsistent With The History And Original Understanding Of The Petition Right

Although there is overwhelming historical evidence establishing the intent to continue the tradition of absolute immunity in the founding of the American republic, there is not one shred of evidence to suggest

that the Founders intended to provide *less* immunity for petitioning than their English forebearers provided. *McDonald*'s holding that statements made in a petition can support a claim for defamation if made with actual malice is thus difficult, if not impossible, to square either with the historical record or the original understanding of the petition right.

The facts of *McDonald* are straightforward. After a citizen wrote a letter to President Reagan inveighing against a candidate for U.S. Attorney, the candidate sued for libel. The Court held the Petition Clause did not insulate the citizen from liability under state defamation laws, concluding that the petition right is not absolute and the actual malice standard applies to petitioning. According to *McDonald*, "[t]he right to petition is cut from the same cloth as the other guarantees of [the first] amendment." 472 U.S. at 482. Thus, it remains subject to the same analytical standards as the speech guarantee because "there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions." *Id.* at 485.

In reaching that conclusion, *McDonald* gave scant attention to the evolution and history of the petition right before its incorporation into the First Amendment. The Court relied instead on post-ratification materials—and the opinion cites only six pre-twentieth-century authorities. The sole reference to seventeenth-century libel law is a citation of *Lake*, which held that statements in petitions were absolutely privileged. Taken together, the majority and

concurring opinions contain only two historical references—and even those references are incomplete.[4]

McDonald thus rests on a historical understanding of the petition right that is incomplete at best. Properly comprehended, that history reveals that the petition right evolved in both England and America into a broad right distinct from the rights of speech, press, and assembly. Petitioning encompassed written requests submitted to the executive, legislative, or the judicial branch of government and generally was not curtailed. In contrast, the rights of speech and the press were burdened by seditious libel laws, and the right of assembly was restricted by regulations limiting the number of individuals allowed to meet and discuss petitions and requiring those groups to act in a peaceful, orderly manner. *McDonald*'s analysis of petitioning has it exactly backwards: The right to petition was the preeminent right; its development preceded and fostered the rights of speech, assembly, and the press. Spanbauer, *supra*, at 68-69.

The historical evidence thus leads to one, inescapable conclusion: In 1791, there was a well-established

---

[4] For example, the majority opinion characterizes a parliamentary enactment in "the 1790's" that made public meetings of more than 50 persons illegal if assembled for the purpose of petitioning without a magistrate present as an "attack" on the right to petition. *McDonald*, 472 U.S. at 484 n.5. But the law merely regulated assembly incidental to petitioning, not petitioning itself—and it imposed no penalty or damages upon the content of a petition. 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, 1186-87 (1986). Moreover, the law was enacted in 1795—four years after the year in which the common and constitutional law of England was fixed for purposes of interpreting the Bill of Rights.

common-law rule barring libel actions based on the contents of a petition. That rule had been consistently reiterated in judicial opinions and legal treatises for over a century. By the end of the eighteenth century, not a single commentator or reported decision had questioned the holding of *Lake* in any way. Had McDonald written his letter to President Washington or King George III, Smith's libel action would have been dismissed out of hand.

C. *McDonald* Has Been Widely Criticized By Courts And Commentators

McDonald has been roundly criticized as "incorrectly hold[ing] that the right to petition does not accord the petitioner with an absolute privilege against liability for defamation." 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, 1196-97 (1986) ("[*McDonald*] failed to give adequate consideration to the history, textual development, and draftsmen's intent of the right to petition and to the purposes and interests it serves."); Gary Lawson & Guy Seidman, *Downsizing the Right to Petition*, 93 NW. U. L. REV. 739, 739 (1999) ("The near-unanimous conclusion of the modern commentators * * * is that there is more to the Petitions Clause than is generally recognized by the Supreme Court's jurisprudence or by contemporary understandings and practice."); Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 103 (1996) ("The Petition Clause issue in *McDonald* * * * was given little thoughtful attention by the Court and the resulting decision is seriously flawed."); Spanbauer, *supra*, at 17 ("[C]ontrary to the Court's assertion, the right to

petition was cut from a different cloth than were the rights of speech, press, and assembly. Historically, the right to petition was a distinct right, superior to the other expressive rights."); Schnapper, *supra*, at 347 ("*McDonald* v. *Smith* yielded a result almost certainly contrary to the framers' intent concerning the petition clause.").

The scholarly consensus is clear: *McDonald* "reflects an inadequate understanding of the history and purpose of the right to petition and placed inappropriate limitations on this right." Smith, *supra*, at 1153. Some commentators have even argued that "[b]y treating petitioning as a mere form of expression, subject to the same constitutional standard as speech, the Court semantically wrote the Petition Clause out of the Constitution." Gary, *supra*, at 114; *see also* Frederick, *supra*, at 142 (noting that the *McDonald* Court's assimilation of the petition right into free speech rights "has produced a clause in the first amendment curiously devoid of meaning").

Recently, one state court jurist concluded that "*McDonald* was incorrectly decided" and called upon this Court to "revisit its Petition Clause jurisprudence" in light of the "significant, persuasive historical evidence suggesting that * * * *McDonald* is incompatible with the original understanding of the Petition Clause." *J & J Constr. Co.* v. *Bricklayers & Allied Craftsmen*, 664 N.W.2d 728, 735-36, 752 (Mich. 2003) (Young, J., concurring). In a thorough and thoughtful concurring opinion, Justice Young "[laid] out the historical record supporting a conclusion based on an originalist understanding of the Petition Clause" in the "hope that [the Court] may choose an alternative course to the one suggested by *McDonald*." *Id.* at 736. "Despite what I believe is a

compelling historical and textual case for according the Petition Clause distinctive meaning," Justice Young explained, "by the twentieth century, the federal judiciary had all but relegated the Petition Clause to the status of a step-sibling without independent identity or import apart from the Free Speech Clause and the Free Press Clause of the First Amendment." *Id.* at 751. Because "the history and text of the petition right * * * support an interpretation that the Petition Clause is distinct from its First Amendment siblings and therefore deserves consideration regarding whether distinct treatment in the constitutional law of defamation is warranted under the Petition Clause," Justice Young agreed with the overwhelming view of scholars that "*McDonald* was incorrectly decided."[5] *Id.* at 752.

D. *McDonald* Cannot Be Reconciled With This Court's Interpretation Of The Petition Clause In Other Contexts

McDonald is also in "irreconcilable conflict," Gary, *supra*, at 70, with the Court's cases holding that the petition right insulates certain conduct from the reach of otherwise applicable antitrust laws. *See E. R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657 (1965); *Cal. Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). Paradoxically, "the more protective *Noerr-*

---

[5] Although the Court denied *certiorari* in that case, the petitioner there did not present the issue whether the Petition Clause affords absolute immunity to citizen-petitioners against libel. See *Bricklayers & Allied Craftsmen v. J & J Constr. Co.*, No. 03-667, available at 2003 WL 22574933, at *1 (*petition for cert.* filed Oct. 31, 2003).

Pennington standard has been [used] * * * for commercial (antitrust) cases and the less protective actual malice standard has been applied to cases implicating fundamental political participation." Gary, *supra*, at 70. Yet the *McDonald* Court "bypassed discussion of the *Noerr-Pennington* doctrine" and, in doing so, "ignored its own precedent regarding the importance of the petition right and the perniciousness of retaliatory litigation." *Id.* at 134.

The *Noerr-Pennington* doctrine allows companies to associate for the purpose of influencing the government, even though their association otherwise would violate antitrust laws—and even where their intent in petitioning the government is to eliminate competition. Even then, their activities remain protected by the Petition Clause. In reaching that conclusion, this Court emphasized the critical importance of the free flow of information between citizens and their government: "In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Noerr*, 365 U.S. at 137. This Court did, however, impose one important limitation on the right: Petitioning is not protected when it is "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and application of the Sherman Act would be justified." *Noerr*, 365 U.S. at 144.

This Court further extended petitioning protections in the antitrust context in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), which involved a dispute between two advertising compa-

nies. As newcomer Omni attempted to gain a local foothold, competitor COA successfully lobbied city officials to adopt zoning ordinances that destroyed Omni's ability to compete. Omni sued, claiming that COA's petitioning was a sham designed to interfere directly with Omni's business. A jury awarded Omni damages, but this Court reversed, holding that the case should have been dismissed. Even the dissenters agreed with the majority that the Petition Clause shields efforts "'to influence public officials regardless of intent or purpose.'" *Id.* at 380 (quoting *Pennington*, 381 U.S. at 670).

After *Omni*, the test for protection under the Petition Clause in the antitrust context is clear: Petitioning aimed at procuring government action is protected without regard to other motive or purpose. It is difficult to reconcile that conclusion with *McDonald*'s holding that communications with government officials can give rise to a libel suit—particularly as "the right to petition does more than ensure that government officials are apprised of the opinions held and the facts known by the citizenry. It also promotes the confidence that the government is accessible and answering to the people." Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. CHI. L. REV. 80, 101 (1977). Thus, "the *Noerr-Pennington* sham level of immunity is an appropriate safeguard for the Petition Clause guarantee, regardless of the underlying claim challenging the petition right." Gary, *supra*, at 133.

II. THE CONTINUING VITALITY OF *MCDONALD* IS AN ISSUE OF SUBSTANTIAL IMPORTANCE

The question presented in this case—whether the Petition Clause provides absolute immunity from libel suits—has significant real-world implications. Undoubtedly, the threat of a libel action that will be costly to defend and of uncertain outcome (as with all litigation) can deter citizens from providing information to their elected officials—a result completely at odds with the interests served by the petition right. As this Court has explained:

> A lawsuit no doubt may be used * * * as a powerful instrument of coercion or retaliation. * * * Regardless of how unmeritorious the * * * suit is, the [defendant] will most likely have to retain counsel and incur substantial legal expenses to defend against it. * * * Furthermore, * * * the chilling effect * * * upon a [defendant's] willingness to engage in [constitutionally] protected activity is multiplied when the complaint seeks damages in addition to injunctive relief.

Bill Johnson's Rests., Inc. v. *N.L.R.B.*, 461 U.S. 731, 740-41 (1983) (internal citation omitted). That threat is serious indeed: According to a recent 20-year survey of libel suits involving media defendants, the average initial award was $2,962,525 and the median was $200,000.[6] See also GEORGE PRING & PENELOPE

---

[6] Media Law Resource Center, *Libel Defense Resource Center Releases Findings of New Two-Decade Survey On Trials against Media Defendants*, Feb. 2, 2000, Press Release, *available at* http://www.medialaw.org/Template.cfm?Section=News&Template=/ContentManagement/ContentDisplay.cfm&ContentID=708 (last visited Mar. 5, 2009).

CANAN, SLAPPs: GETTING SUED FOR SPEAKING OUT 1 (1996) ("Americans by the thousands are being sued, simply for exercising one of our most cherished rights: the right to communicate our views to our government officials, to 'speak out' on public issues.").

Moreover, the distinction created by *McDonald* in the treatment of public officials and private citizens only encourages needless litigation. Because statements made in judicial proceedings are entitled to absolute immunity—while those same statements in petitions to the government are not—individuals who believe they have been mistreated (*e.g.*, by an IRS agent or a police officer) must think twice before complaining to the officer's superiors, but have no similar reason to hesitate about taking the matter to court. *McDonald* thus has the perverse effect of "encourag[ing], at times perhaps even compel[ling], grievants with serious but potentially libelous complaints to file lawsuits rather than seek redress from elected officials." Schnapper, *supra*, at 344. That incentive to litigate is the inevitable effect of *McDonald*'s needless distinction between public officials and private citizens—and between petitioning and judicial proceedings.

Had Congressman Sessions taken the floor of the U.S. House of Representatives and repeated the defamatory statement on C-SPAN, he would enjoy an absolute privilege as a legislator against a defamation suit by Ms. Jenkins. See *Doe* v. *McMillan*, 412 U.S. 306 (1973). A Justice Department official who repeated the defamatory statement in a press release likewise would enjoy an absolute privilege as an executive official. See *Barr* v. *Matteo*, 360 U.S. 564 (1959). If the mayor of Athens, Texas, had done the same thing at a city council meeting, he too would

enjoy an absolute privilege as a high-ranking local official. See *City of Cockrell Hill* v. *Johnson*, 48 S.W.3d 887 (Tex. App.—Fort Worth 2001, pet. denied). And if Mr. Clark and Ms. Joe had traveled to Washington, D.C., to make the same statement about Ms. Jenkins during a congressional hearing, they too would have enjoyed an absolute privilege against Ms. Jenkins' libel suit. See *Webster* v. *Sun Co.*, 790 F.2d 157 (D.C. Cir. 1986).

The "absolute immunity" accorded "to the executive, legislative, and judicial participants" in such a controversy is "based in part on a recognition that such risks would impose an intolerable burden on the ability of government officials to speak their minds." Schnapper, *supra*, at 312. The need to maintain open channels of communication between citizens and their government is no less vulnerable to that "intolerable burden"—and no less worthy of constitutional protection. If ordinary citizens are not afforded absolute immunity from libel suits based on petitions to the government, the inevitable consequence will be a particularly severe restraint on the right to petition. Just as allowing a defense of truth "does not mean that only false speech will be deterred," *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964), a mere claim of knowing falsity will subject ordinary citizens—as it has Mr. Clark and Ms. Joe in this case—to the certainty of substantial costs and the risk of enormous damages. The right to petition would be meaningless if ordinary citizens knew they might be required to pay $500,000 or more for the privilege of writing a letter to their Congressman or the Justice Department.

III. ANY ARGUMENT FOR RETAINING *MCDONALD* WOULD BE INSUFFICIENT TO JUSTIFY ITS CONTINUING EXISTENCE

Considerations of *stare decisis* do not justify leaving *McDonald*'s flawed constitutional holding intact. That doctrine—never an "inexorable command" and even less so in constitutional cases—should not operate to insulate *McDonald* from reconsideration. See *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). One state court jurist, acknowledging that the lower courts are constrained to follow *McDonald* in construing the Petition Clause, has nonetheless expressed the "hope" that:

> [The Court] may choose an alternative course to the one suggested by *McDonald* [considering] significant, persuasive historical evidence suggesting that the contemporary understanding of the Petition Clause as announced in *McDonald* is incompatible with the original understanding of the Petition Clause.

J & J Constr. Co., 664 N.W.2d at 735-36 (Young, J., concurring).

By any measure, *McDonald* bears none of the hallmarks of cases like *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that this Court has described as embedded in our "national culture." See *Dickerson* v. *United States*, 530 U.S. 428, 430 (2000). This Court has cited *McDonald* only once in the 23 years since it was decided. *Heller*, 128 S. Ct. at 2790 n.5 (citing *McDonald* for the proposition that the right to petition is "an individual right"). Nor are there any economic or other reliance interests, nor any issues of statutory interpretation, that have led the Court to determine in other contexts that it is more important that the

law "be settled than that it be settled right." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997) (internal citations and quotations omitted). In sum, no consideration of *stare decisis* points toward retaining *McDonald*—and compelling reasons support reconsidering it.

IV. THIS CASE IS AN IDEAL VEHICLE FOR RECONSIDERING *MCDONALD*

This case presents an ideal opportunity for this Court to address the continuing vitality of *McDonald*. Most important, this case squarely presents the issue to the Court. There can be no serious question that the memorandum—which was sent both to Congressman Sessions and the Justice Department—is a "petition" within the meaning of the First Amendment. The memorandum on its face sought "attention and immediate action by Congress and the Justice Department." App. 41a. It sought an "investigation," *ibid.*, which both Congress and the Justice Department could conduct. In sending the memorandum, BCJLO exercised "the right of petition to a duly accredited representative of the United States Government, a right protected by the First Amendment." *Bridges* v. *California*, 314 U.S. 252, 277 (1941). The case was tried to a jury, and the jury found the governmental petition libelous and awarded substantial damages—half a million dollars. BCJLO would necessarily be entitled to reversal if this Court overturned *McDonald* and held that the Petition Clause confers an absolute immunity against libel suits. Finally, no adequate and independent state ground exists for the judgment below that would deprive this Court of jurisdiction.

V. GIVEN THIS COURT'S SUPREMACY, NO SPLIT CAN EVER DEVELOP

There is no split of authority on the issue presented, nor will there ever be. Because *McDonald* is binding Supreme Court precedent, all lower courts are obliged to follow it. *McDonald* has rightly been subjected to substantial scholarly criticism, but unless and until the Court corrects the error, there will be no way to alter that decision. This Court's supremacy means that no other tribunal has the power to reconsider *McDonald*.

Indeed, in the wake of *McDonald*, at least one state that previously had interpreted its own petition clause to afford absolute immunity reversed course and adopted—with little analysis—the contrary view articulated in *McDonald*. See, *e.g.*, *Harris* v. *Adkins*, 432 S.E.2d 549 (W. Va. 1993) ("agree[ing] with the reasoning of *McDonald*" and reversing earlier holding in *Webb* v. *Fury*, 282 S.E.2d 28 (W. Va. 1981), that state petition clause provided absolute immunity). Thus, there is no value to waiting for a split to develop, because the precedential force of *McDonald* prevents that from ever happening.

VI. THIS CASE PROVIDES AN OPPORTUNITY FOR THE COURT TO RESOLVE CONFLICTS AMONG THE LOWER COURTS REGARDING WHEN REPUBLICATION MAY BE PUNISHED

Even if the constitutional right to petition did not afford absolute immunity to citizens who petition their government, the Court should nonetheless grant the petition, reverse the judgment below, and resolve conflicts among the lower courts regarding if and how speakers may relate allegations made by others without being subject to liability for repub-

lishing defamatory statements. That question has arisen repeatedly in the lower courts, which have reached conflicting conclusions. Although the Court has recognized this open—and important—First Amendment question, it has never squarely addressed it. See *Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 660 n.1 (1989) (explaining that petitioner did not raise the "neutral reportage doctrine" as a basis for overturning libel judgment). The Court's review is needed to resolve the conflicts and provide guidance in this important, unresolved area of constitutional law.

In the seminal case of *Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1977), the Second Circuit fashioned a "neutral reportage doctrine" premised on its view of First Amendment dictates. That case involved a newspaper report that quoted allegations made by the Audubon Society that certain scientists were being paid to lie about the effect of DDT on the bird population. Without defining the precise contours of the doctrine, the court suggested that at least when charges are made by a responsible, prominent organization, in the course of a public controversy, against a public figure, and are presented in an accurate and disinterested manner, the charges may be reported with impunity, "regardless of the reporter's private views regarding their validity." *Id.* at 120.

Since *Edwards*, courts have considered whether to recognize a neutral reportage doctrine, and if so, what its contours should be, reaching a variety of conclusions. Some courts have held that the doctrine should be limited to allegations by "responsible" parties. See, *e.g.*, *Martin* v. *Wilson Publ'g Co.*, 497 A.2d

322, 330 (R.I. 1985); *Fogus* v. *Capital Cities Media, Inc.*, 444 N.E.2d 1100, 1102 (Ill. App. Ct. 1982). Some do not. See, *e.g.*, *Price* v. *Viking Penguin, Inc.*, 881 F.2d 1426, 1444-45 (8th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990); *In re United Press Int'l*, 106 B.R. 323, 329 (D.D.C. 1989). Most courts do not consider the doctrine applicable to reports that espouse the validity of the allegations themselves, but at least one court has taken a somewhat different view. See, *e.g.*, *Cianci* v. *New Times Publ'g Co.*, 639 F.2d 54, 68-69 (2d Cir. 1980) (*Edwards*' "constitutional report privilege" does not apply to article that could reasonably be read as espousing or concurring in charges made by others); but see *Price* v. *Viking Penguin, Inc.*, 881 F.2d at 1434 (doctrine immunizes reports of allegations even if speaker espouses the accuser's general position, if the description of the allegations is accurate and disinterested). Some courts have suggested that the doctrine applies only to allegations made in the context of an existing controversy. See, *e.g.*, *Barry* v. *Time, Inc.*, 584 F. Supp. 1110, 1127 (N.D. Cal. 1984) (doctrine applies only if allegations touch those involved in existing controversy and were made by a party to that controversy). Some courts have rejected the doctrine altogether. See, *e.g.*, *Tunney* v. *ABC*, 441 N.E.2d 86 (Ill. App. Ct. 1982); *Postill* v. *Booth Newspapers, Inc.*, 325 N.W.2d 511, 518 (Mich. Ct. App. 1982); *Janklow* v. *Viking Press*, 378 N.W.2d 875, 881 (S.D. 1985).

In the decades since *Edwards*, the lower courts have been unable to fashion a coherent, reliable framework for determining whether and to what extent speakers that merely "report" the allegations of others are immunized by the First Amendment from libel suits. Compare *Global Relief Found., Inc.* v. *N.Y. Times Co.*, 390 F.3d 973 (7th Cir. 2004)

(affirming summary judgment for defendants after determining that the gist of several challenged reports was that the government was investigating the plaintiff charitable foundation, which it believed was funding terrorist activities, and that the reports had accurately described the allegations and investigation), with *Jackson* v. *City of Columbus*, 883 N.E. 2d 1060 (Ohio 2008) (reversing summary judgment for defendants in defamation action against city's public safety director based on statements in report of the director's investigation into police corruption). That confusion has left speakers and audiences not only subject to a patchwork of constitutional rules across different jurisdictions, but also at risk. The Court's guidance is needed to clarify the appropriate constitutional analysis for determining if, and when, a speaker who merely relays allegations made by others may be subjected to liability for defamation.

This case cleanly presents the core question. Here, BCJLO merely reported allegations about public officials to government actors with the authority to investigate those claims. Indeed, Mr. Clark simply relayed what was said at the meeting without ever considering the truth of the statements. As Mr. Clark put it: "The questions and thought of veracity never came up. I don't know these people. *I was simply asked to take notes.*"[7] 1 RR 160 (emphasis added). That evidence not only falls woefully short of satisfying the constitutional requirement of actual malice, but also implicates serious concerns about the

---

[7] Contrary to the court of appeals' view, see App. 1a-2a, absent more, the jury's disbelief of that testimony would not establish actual malice under *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

inadequacy of common law republication rules in accommodating core First Amendment values.

CONCLUSION

For the foregoing reasons, 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
JOHN S. EDWARDS, JR.
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana, 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