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

RESPONDENT'S BRIEF IN OPPOSITION

SUSAN HAYS
GEISLER HAYS, LLP
2911 Turtle Creek Blvd.,
Ste. 940
Dallas, TX 75219
Tel.: (214) 367-6020

DAVID J. SCHENCK
Counsel of Record
RICHARD D. SALGADO
JONES DAY
2727 North Harwood St.
Dallas, TX 75201-1515
Tel.: (214) 220-3939

Counsel for Respondent

QUESTION PRESENTED

Whether this Court should overrule its own precedent in *McDonald v. Smith*, 472 U.S. 479 (1985), and find that the Petition Clause of the First Amendment provides an absolute privilege to libel where a defamatory statement about another person is communicated, with actual malice, via a "memo" sent outside any formal process, to a government official.

PARTIES TO THE PROCEEDING

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

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATE CASES

TABLE OF AUTHORITIES (continued)

Page(s)

STATE STATUTES

MISCELLANEOUS

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

---

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Deliberate falsity and wanton, reckless disregard for the truth has never enjoyed an elevated constitutional value and merits no special constitutional protection here. Indeed, 24 years ago, this Court confirmed that this fundamental principle

applies to the Petition Clause as well when it held that although "[t]he right to petition is guaranteed, the right to commit libel with impunity is not." *McDonald v. Smith*, 472 U.S. 479, 485 (1985).

Petitioners now ask this Court to throw out that precedent and rule instead that the First Amendment's Petition Clause guarantees an absolute privilege to deliberately say *anything* about *anyone* — regardless of falsity — to *any* public official, without fear of consequence. This interpretation would render public officials defenseless against even the most baseless and outrageous accusations, and open the floodgates to an onslaught of reckless, unsubstantiated rumors and outright lies presented as factual statements from behind an iron curtain of constitutional immunity. That outcome would unnecessarily turn nearly a quarter century of precedent both here and in the lower courts on its head and create unwarranted inconsistency in First Amendment jurisprudence that has been well-established for decades.

The race-relations progress made in rural Texas — where an African-American female can be and is routinely elected to an at-large city council seat — is real. While Petitioners have a right to hold extreme views of race relations, their assertions of their motives and the acts of Ms. Jenkins and her colleagues are still subject to a credibility review by a jury. Given the jury's findings here, this case is in fact quite the opposite of the "ideal vehicle" to revisit the Petition Clause Petitioners claim it to be. The evidence presented to the jury successfully demonstrated that the Petitioners did more than merely report, but very colorfully embellished, then

repeated, the allegations to more than a governmental official.

STATEMENT

On November 20, 2002, Paul Martin Clark attended a City Council meeting in Athens, Texas on behalf of Black Citizens for Justice, Law, and Order, Inc. ("BCJLO"). *See* Pet. Appx. at 4a. There is a history of racial tension between some black citizens of Athens and the city's police department. The ostensible purpose for Mr. Clark's visit was to take notes on citizens' concerns and communicate those concerns to United States Congressman Pete Sessions and the Department of Justice ("DOJ"). *Id.* at 5a. According to Mr. Clark, the City Council meeting lasted less than ten minutes. *Id.* at 41a. Afterward, Mr. Clark convened with a handful of citizens at a private residence to further discuss racial concerns in Athens. *Id.* at 5a.

I. THE DEFENDANTS SUBMIT A MEMORANDUM FILLED WITH OUTRAGEOUS ALLEGATIONS OF MURDER, PROSTITUTION, AND KLAN ACTIVITY.

The day after attending the City Council meeting and the subsequent private meeting, Mr. Clark delivered a Memorandum (the "Clark Memorandum") to Daisy Evella Joe, BCJLO's Chief Executive Officer. *Id.* at 6a. The Memorandum advanced an assortment of shocking, wholly uncorroborated and ultimately untrue accusations against Athens' mayor, city council members, police force, newly hired police chief, and even Congressman Sessions' own office. *Id.* at 42a. The Clark Memorandum brazenly stated as fact that Athens had "recruited a police chief with racist credentials to continue the legacy of unchecked

murder of black citizens in Athens," that "a black man was killed by the Athens police some three weeks ago" without any subsequent investigation, that the Athens police beat a woman who was nine months pregnant, killing her unborn child, and chained her naked to a bed in the county jail, that the Athens police and "the Klan" are "one in the same," and that "[t]he Athens police intimidate, harass and murder black residents on a daily basis." *Id*. at 41a-45. Additionally, the Memorandum suggested that members of Congressman Sessions' staff have ties to the Ku Klux Klan. *Id.*

To be sure, many of the statements contained in the Memorandum could be grounds for libel against many, but this case arises solely out of the allegations in the Memorandum against Athens City Council member Gladys Elaine Blanton Jenkins. Specifically, the Clark Memorandum baldly charged that Ms. Jenkins — the only African-American City Council member, a mother of three, and an ordained minister — "is a convicted felon having served prison time in Texas and California for prostitution and drugs." *Id*. at 42a. Although the Memorandum cited no source for the accusation, it issued a call to action: "No one in the State of Texas can hold elective office who has felony convictions. She must be removed from office immediately." *Id.*[1]

Ms. Joe briefly glanced at the Clark Memorandum before sending it to Congressman Sessions and the DOJ. *Id*. at 6a. At no time while preparing, reviewing, or forwarding the

[1] Under Texas law, convicted felons may not hold public office. TEX. ELEC. CODE § 141.001(a)(4).

Memorandum did Mr. Clark, Ms. Joe, or anyone else at BCJLO investigate or otherwise attempt to verify the serious allegations that it contained. *Id*. Congressman Sessions forwarded the Memorandum to Athens' mayor, who in turn shared it with the city administrator and police chief. *Id*. at 7a-8a. They subsequently met with Ms. Jenkins, who volunteered, albeit with great humiliation, to submit to fingerprinting and investigation by the Athens police and the Texas Rangers to determine whether she had a criminal history. *Id*. at 8a She did not. *Id*. BCJLO later picketed Congressman Sessions' Dallas office for some months, repeating the demand that Jenkins be removed from office based on her nonexistent criminal history. 3 RR 58, 62.

II. ON EVIDENCE CHALLENGING THE PETITIONERS' ACTS AND MOTIVES, MS. JENKINS OBTAINS A FAVORABLE JURY VERDICT OF MALICE.

On February 23, 2003, Ms. Jenkins filed suit against Mr. Clark and BCJLO for defamation and libel. Ms. Jenkins' claims were tried to a jury over two days. Multiple witnesses disputed Clark's characterization of events at the city council meeting and at the private meeting. *See* Pet. Appx. 30a, 34-35a. The jury returned a verdict against Mr. Clark and BCJLO, awarding Ms. Jenkins $300,000 for past and future damages due to mental anguish, injury to character and/or reputation and injury to her standing in the community. *Id*. at 47a. She was also awarded exemplary damages of $100,000 each against BCJLO and Clark, for a total of $500,000. *Id*.

The Texas Court of Appeals for the Seventh District of Texas affirmed in an opinion that turned almost exclusively on state law. The court rejected

Petitioners' argument that the right to petition is somehow distinct — insofar as immunity from libel is concerned — from the rest of the First Amendment, including the freedom of speech. Applying Texas law, the court found "persons who exercise their right to petition do so in the absence of absolute immunity and may be held liable for their communications if the plaintiff is able to make a showing sufficient to satisfy the *New York Times* standard for 'actual malice.'" *Id*. at 14a. In other words, Petitioners were entitled only to qualified immunity. *Id.* The Court of Appeals found that the *Noerr-Pennington* doctrine, which holds that petitioning the government to take anticompetitive action does not violate antitrust laws, has no application in this case. *Id*. at 23a. The Court of Appeals further noted that the Memorandum was not sent to Congressman Sessions or the DOJ as part of a legislative proceeding, but rather in an effort to instigate an investigation. *Id*. at 21a. Thus, even to the extent that petitioning activity is entitled to some privilege, the activity in this case would not be entitled the furthest reaches of that protection.

Additionally, the Court of Appeals recognized that the jury disbelieved Mr. Clark's testimony that he was a mere scrivener who recorded what was said at the meetings, and found that the jury could have inferred that Mr. Clark "made up" or "imagined" the facts underlying his statement related to Ms. Jenkins, or falsely and recklessly reported what he actual heard. *Id*. at 40a. As the Court of Appeals concluded, "At best, Clark repeated in writing a false, scandalous rumor consisting of trumped up felony charges, convictions, and imprisonment in

furtherance of removing Jenkins from office. At worst, Clark made up or imagined the [allegations]. In either instance, . . . Clark acted with 'actual malice' by clear and convincing evidence." *Id.* Petitioners do not and, at this stage, cannot dispute the jury's factual determination.

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 motion for rehearing, which the Texas Supreme Court denied on December 5, 2008.

REASONS FOR DENYING THE PETITION

This Court's controlling precedent in *McDonald* makes abundantly clear that the Petition Clause of the First Amendment does not provide an absolute privilege to engage in libel. But in an effort to convince the Court to now abandon its earlier ruling and unravel the past quarter century of precedent, Petitioners mischaracterize *McDonald* as a wrongly decided aberration that has been the subject of substantial judicial and scholarly criticism. To the contrary, the criticism of the decision is relatively limited and, indeed, no more pronounced than the ordinary and typical criticism incurred by virtually any substantive precedent established by this Court.

More importantly, the *McDonald* decision is consistent with the Court's treatment of the Petition Clause, the Freedom of Speech, and libel law in other contexts, and is the only viable outcome that protects the various competing interests at play in this corner of First Amendment jurisprudence. In all events, this case is hardly the "ideal vehicle" that Petitioners claim it to be for revisiting *McDonald* insofar as the

communication by Mr. Clark and BCJLO was not made in the course of legislative or judicial proceedings and thus occupies only the outer edge of the Petition Clause's protective scope. Likewise, contrary to Petitioners' assertions, this case would not provide a proper opportunity to resolve conflicts regarding the punishment of republication insofar as the jury's findings render that question largely moot.

I. *McDONALD v. SMITH* HAS GONE LARGELY UNCHALLENGED FOR NEARLY A QUARTER CENTURY

In the decades since the Court issued the *McDonald* decision, lower courts have relied upon it more than 250 times. Indeed, the Federal Courts of Appeal have been unwavering in their adherence to the decision, applying it not just for its direct holding that the Petition Clause does not provide absolute privilege against libel, but also for the overarching principle that there is no hierarchy of rights in the First Amendment. In short, *McDonald* has become an interwoven part of the First Amendment jurisprudence of virtually every federal appellate court.[2]

---

[2] *See, e.g.*, *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 587 (6th Cir. 2008) (holding that the rights of speech in the constitution are inseparable); *Cobb v. Pozzi*, 363 F.3d 89, 105 (2d Cir. 2004) (citing *McDonald* for the principle that there is no hierarchy of rights in the First Amendment); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 891 (10th Cir. 2000) (agreeing that the right to petition is not an absolute protection from liability); *Colson v. Grohman*, 174 F.3d 498, 507 (5th Cir. 1999) (confirming that intentional or reckless falsehood "enjoys no First Amendment protection"); *Grigley v. City of Atlanta*, 136 F.3d 752, 755-56 (11th Cir. 1998) (citing *McDonald* to hold that the Petition Clause is not entitled to any greater

While Petitioners suggest that the decision has been roundly criticized in ensuing years, they in fact point to only a small handful of selectively culled law review articles — from which they claim a "scholarly consensus" — and a single concurring opinion by a state court judge. *See* Pet. Br. at 21-23. If the mere existence of scholarly criticism were grounds to revisit and reverse earlier precedents, however, this Court would be busying itself reconsidering hundreds of otherwise settled precedents ranging from *Marbury v. Madison*[3] to *Brown v. Board of*

(continued…)

protection than the Free Speech Clause); *Rendish v. City of Tacoma*, 123 F.3d 1216, 1220-21 (9th Cir. 1997) (citing *McDonald* to state that the right to petition is "cut from the same cloth as the other guarantees of [the First] Amendment"); *San Filippo v. Bongiovanni*, 30 F.3d 424, 437-38 (3d Cir. 1994) (noting *McDonald* to hold that the scope of the right to petition depends on the context in which that right is exercised); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) (holding that right-to-petition claims are also governed by interest-balancing principles and subject to the same constitutional analysis as the right to free speech); *Wright v. DeArmond*, 977 F.2d 339, 346 (7th Cir. 1992) (holding that the right to petition has never been considered an absolute right); *Thorne v. Bailey*, 846 F.2d 241 (4th Cir. 1988) (confirming the Petition Clause does not enjoy a preferred place among First Amendment freedoms); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 640 (8th Cir. 1986) (stating that *McDonald* "clearly underscores the coequal status of the right to petition with other first amendment rights"); *Webster v. Sun Co., Inc.*, 790 F.2d 157, 161-62 (D.C. Cir. 1986) (stating that the constitutional protection of the right to petition does not require states to provide an absolute privilege for all communications with government).

[3] *See, e.g.,* Michael Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1117 (2001)

Education.[4] Similarly, a single criticism of the decision by a concurring judge on a state court is not suitable grounds to revisit this well-established precedent, particularly where as in this case, none of that judge's colleagues joined his criticism. *See J&J Constr. Co. v. Bricklayers & Allied Craftsmen*, 664 N.W.2d 728, 735 (Mich. 2003) (Young, J., concurring). Simply put, none of the "criticism" cited by Petitioners amounts to cause for reconsideration of *McDonald*.

II. *McDONALD* WAS CORRECTLY DECIDED

While Petitioners decry *McDonald* as "inconsistent" with other precedents and attempt to position the right to petition on a pedestal high above

---

(continued…)

(describing *Marbury's* arguments in defense of judicial review as "thoroughly unpersuasive"); David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts*, 1801-1835, 49 U. CHI. L. REV. 646, 651-66 (1982) (concluding that "we are left with no obvious peg on which to hang Marshall's conclusion").

[4] *See, e.g.*, Alfred Avins, *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 38 MISS. L. J. 179, 246 (1967) ("[T]he rule of *Brown v. Board of Education* is not now, nor has it ever been, the supreme law of the land. Rather, it is an unwarranted exercise of non-existent authority which, being illegitimate in its origin, cannot be made legitimate by the lapse of time, nor by compliance, voluntary, purchased, or coerced."); Richard Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990) ("No constitutional theory that implies that *Brown v. Board of Education* . . . was decided incorrectly will receive a fair hearing nowadays, though on a consistent application of originalism it *was* decided incorrectly.").

other core First Amendment rights, the outcome they advocate would in fact run contrary to the most fundamental principles of First Amendment law—namely that "there is no constitutional value in false statements of fact," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) — and would be a detriment to the very speech and petition rights that they purport to embrace and protect.

A. The First Amendment Does Not Protect A Deliberate or Reckless Falsehood, Regardless Of Whether It Constitutes Political Speech Or A Petition To The Government

Petitioners' entire argument is premised on their objection to the Court's conclusion in *McDonald* that "[t]he right to petition is cut from the same cloth as the guarantees of [the First] Amendment." 472 U.S. at 482. According to Petitioners, the right to petition is different: it "was the preeminent right" and is "preferred" and "superior" to the other rights secured in the First Amendment. *See* Pet. Br. at 20, 23. That understanding, however, is directly at odds not only with *McDonald* but with myriad other decisions of this Court, dating back several decades, which identify *political speech* as the preeminent right secured in the First Amendment.

Indeed, this Court has repeatedly held that "[p]olitical speech . . . is at the core of the First Amendment." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 483 (1988); *see also Morse v. Frederick*, 551 U.S. 393 (2007)("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'"); *Virginia v. Black*, 538 U.S. 343, 365 (2003) (same); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S.

377, 422 (1992) ("Core political speech occupies the highest, most protected position"). And, yet, even this right is not absolute. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding ban on campaigning with 100 feet of polling stations on election day); *Schenck v. United States*, 249 U.S. 47, 52-53 (1919) (upholding criminal conviction for circulating pamphlets opposing the draft in World War I).

To be clear, the Court has resisted elevating any one First Amendment right above the others in the manner that Petitioners urge. Nonetheless, to the extent that varying levels of protection exist, it would be absurd to suggest that the right to petition enjoys greater protection than the right to engage in core political speech. *See Fed. Elec. Comm'n v. Wisc. Right to Life*, 551 U.S. 449, __, 127 S.Ct. 2652, 2686 (2007) ("It is perhaps our most important constitutional task to assure freedom of political speech."). Even this most exalted form of speech yields to defamation law. *Chaplinksy v. New Hampshire,* 315 U.S. 568, 572 (1942).

In *Chaplinksy*, the Court held that "[a]lthough honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity." *Id.* Like Petitioners here, the *Chaplinksy* Court looked to history to determine the proper balance between protecting the freedoms found in the First Amendment and guarding against the dissemination of falsehood, but reached a very different conclusion:

> At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant . . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution.

Id. In other words, this Court has long recognized that the harm caused by the communication of knowingly false and defamatory statements—even when done under the auspice of core political speech—is a serious threat to democratic government. Indeed, the facts in this case—in which Mr. Clark and BCJLO knowingly communicated falsehoods as a tool to unseat Ms. Jenkins—are identical to risks contemplated (and carefully avoided) by the Court.

Indeed, none of this should come as a surprise. As Justice Holmes famously observed in *Schenck*, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 249 U.S. at 52. In this case, creating a new and distinct zone of absolute immunity would do little more than invite mayhem in connection with, among other things, confirmation hearings and other essential governmental proceedings.

B. *McDonald* Can Readily Be Reconciled With The *Noerr-Pennington* Doctrine

Petitioners claim that *McDonald* is in "irreconcilable conflict" with the so-called *Noerr-*

Pennington doctrine. *See* Pet. Br. at 23 (citing *E.R.R. Presidents Conf. 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)). That doctrine holds, in effect, that petitioning the government to take anticompetitive action does not violate antitrust laws. *See City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379-80 (1991). In attempting to characterize the doctrine as indicating that the Petition Clause is so robust that it must afford absolute immunity against liability in all contexts, however, Petitioners fail to appreciate that the truthfulness of a statement or petition is an essential prerequisite to acquiring constitutional protection in the first instance. If the statement itself is known to be a lie, there is no constitutional protection to invoke and doctrines Petitioners invoke, such as *Noerr-Pennington,* never come into play.

It is well established in this Court that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); *see also Gertz*, 418 U.S. at 339 ("no constitutional value in false statements"). Indeed, "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected." *Chaplinksy,* 315 U.S. at 572.

The calculated falsehood falls into that class of utterances that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be

derived from them is clearly outweighed by the social interest in order and morality." *Id.* Thus, before the First Amendment guarantees even apply in the first instance to provide a privilege of any sort, the underlying statement/petition must be — as an essential prerequisite — at least subjectively believed to be truthful. Only then, if a communication is not a deliberate or reckless falsehood, does the Petition Clause apply to provide immunity against antitrust laws. Consequently, the "irreconcilable conflict" between *McDonald* and *Noerr-Pennington* that Petitioners assert simply is not a conflict at all.

C. Petitioners' Preferred Interpretation Would Be Detrimental To Democratic Government

Petitioners characterize their argument as protecting the right of ordinary citizens to petition their congressman and other government officials. *See* Pet. Br. at 28. The right to petition one's congressman or other government official is not at issue, however. Rather, this case concerns whether citizens have the constitutional right to lie to their congressman.

If, as Petitioners urge, the Petition Clause affords absolute privilege to every communication made by a citizen to the government, it would eliminate an essential safeguard of public discourse and encourage the use of deliberate and reckless falsehood as a tool to effectuate political change — directly contrary to this Court's earlier admonitions. *See Chaplinksy,* 315 U.S. at 572. Genuine, honest efforts to petition the government for redress would risk being drowned out in the rushing tide of reckless and false communications. Legislators and other officials

would have absolutely no implied filter of subjective *bona fides* in the myriad public communications they receive. Instead, they would be faced with the difficult choice between expending valuable resources to sift through and investigate the increased number of fanciful or knowingly false allegations or simply ignoring constituents' complaints altogether. To be sure, the right to petition does not require the government to review or respond to the petitions it receives. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984) ("Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues."). Thus, by eliminating the only deterrent and thereby increasing the volume of unreliable and defamatory petitions, Petitioners' preferred outcome would actually diminish the value of those petitions altogether.

Additionally, the outcome urged by Petitioners would leave public officials at all levels of government — including many who, like Ms. Jenkins, serve in volunteer or low-paying positions in their local towns and municipalities — vulnerable to any and all accusations levied against them under the guise of petitioning, regardless of merit. Would-be defamers would lack any deterrent and those defamed would lack any concomitant recourse. An absolute privilege would discourage civic involvement for fear of being savaged by extremists of all stripes. This is hardly what the framers intended.

In short, there is no conflict to resolve or error to correct regarding this Court's decision in *McDonald*.

The right of citizens to petition the government is as robust and complete today as it was ever intended to be, affording a qualified privilege to all citizens to petition their government without fear of punishment — subject only to the simple requirement that the citizens not deliberately or recklessly communicate falsehoods when they do so. This limitation, as discussed above, is wholly consistent with the intent of the framers as well as this Court's other precedents.

III. THIS CASE IS ILL-SUITED AS A MEANS TO REVISIT *MCDONALD*

Even if this court were inclined to revisit the *McDonald* decision, this case is simply the wrong vehicle for doing so. Simply put, not all communications to the government are of the same value or substance, and thus do not acquire the same degree of constitutional protection under the Petition Clause. The paradigmatic petition to the government is a complaint. *Cf. McDonald*, 472 U.S. at 484 ("F]iling a complaint in court is a form of petitioning activity."). On the other hand, innumerable other forms of communications of varying degrees of formality exist. Not all communications to all public officials fall within the full, most-robust protections of the Petition Clause. Various lower courts have explored this spectrum of varying protection and indeed, applying Texas common law, the Court of Appeals in this case found that the communications by Mr. Clark and BCJLO did not constitute petitions of the highest degree and are thus entitled to lesser constitutional protection.

Texas has developed substantial case law recognizing two classes of possible privilege for a

communication to the government. *See Hurlburt v. GulfAtlantic Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987). If a communication is made in a legislative, executive, or judicial proceeding, it is afforded absolute privilege. *See Zarate v. Cortinas*, 553 S.W.2d 652, 654 (Tex. Civ. App. – Corpus Christi 1977, no writ); *Koehler v. Dubose*, 200 S.W. 238, 242-43 (Tex. Civ. App. – San Antonio 1918, writ ref'd).[5] This limited guarantee of absolute immunity is "founded absolutely on public policy" and is granted "in the interest of the public welfare." *Koehler*, 200 S.W. at 242. Communications outside this narrow scope, however, are entitled only to a qualified privilege, which is defeated by a showing of actual malice. *See Hurlburt*, 749 S.W.2d at 767-68; *Zarate*, 553 S.W.2d at 655.

The court below held that Petitioners' communication was not made in a legislative, executive, or judicial proceeding. Petitioner addressed his Memorandum to a public official who lacked the subpoena power to conduct a formal investigation or the authority to remove Respondent from office. At most, Congressman Sessions could have informally gathered information and referred matters to the appropriate authorities. Thus, the communication to Congressman Sessions did not warrant absolute privilege under Texas common law.

Similarly, Petitioner's communications to the DOJ's Civil Rights Division were not made in a legislative, executive, or judicial proceeding. By Petitioner's own admission, the communication in

[5] Under Texas jurisprudence, a court of appeals' decision with a "writ refused" designation has the same precedential value as an opinion from the Supreme Court of Texas.

question was intended simply to instigate an investigation rather than assist an ongoing investigation. Therefore, Petitioner's communication to the DOJ also fell outside the scope of the most protected forms of petitioning and was not entitled to an absolute privilege under Texas law.

In addition to underscoring the extent to which the core determinations in this case hinged on state, rather than federal law, the application of Texas law in this case to distinguish communications that enjoy absolute privilege from those that receive a qualified privilege is also consistent with post-*McDonald* developments in the federal courts. *See, e.g., Foraker v. Chaffinch*, 501 F.3d 231, 236 (3d Cir. 2007) (noting that "[p]etitions made through informal channels may occasion a lesser degree of constitutional protection than their formal counterparts"); *San Filippo v. Bongiovanni*, 30 F.3d 424, 439 (3d Cir. 1994) (recognizing that lawsuits and formal grievances, as opposed to mere letters, purport to invoke formal mechanisms for the redress of grievances and as such, are subject to a different standard of analysis); *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990) (holding that when "the 'petition' at issue [is] simply a letter imposing on the government no obligation to respond").

IV. THIS CASE IS NOT A PROPER VEHICLE TO CLARIFY COMMON LAW REGARDING REPUBLICATION

Petitioners also assert that "this case provides an opportunity for the Court to resolve conflicts among the lower courts regarding when republication may be punished." Pet. Br. at 31. Specifically, Petitioners argue that "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." Pet. Br. at 33. The problem with this argument as a basis to grant certiorari in this case, however, is that — according to the jury and the Court of Appeals — Petitioners did not merely "relay allegations" but rather adopted those allegations as their own and even embellished them. Pet. Appx. at 33a-35a.

Petitioners acknowledge that "[m]ost courts do not consider the doctrine applicable to reports that espouse the validity of the allegations themselves." Pet. Br. at 33. And some courts have rejected the doctrine altogether. *Id.* Indeed, Petitioners cannot point to *any court* with a sufficiently broad interpretation of that doctrine to encompass the activities giving rise to liability in this case. As the Court of Appeals noted, "[n]owhere in the Memorandum are the facts or information described as merely the recordation of statements made during meetings of Athens' city government or its concerned citizens." Pet. Appx. at 33a. The Court of Appeals further held:

> Given the gross discrepancies regarding Clark's account of what transpired at the City Council workshop and apparently false allegation and statements contained in his Memorandum, a jury could readily infer that Clark misrepresented facts and states false allegations and opinions in order to attain his predetermined goals. This includes embellishing Burke's allegations related to

> Jenkins to include convictions as well as imprisonment in multiple states.

Id. at 35a.

Simply put, this case — far from "cleanly present[ing] the core question" concerning neutral reportage — does not present that question at all. Indeed, even weeks after circulating the original Memorandum, BCJLO persisted in organizing protests calling for the removal of Ms. Jenkins from the City Council based on the false allegations. As the jury found, this is a case in which the Petitioners far exceeded mere reporting and affirmatively manipulated and misrepresented information to achieve the goal of removing a public official from office.

This Court has already made it clear that in cases such as this one where the "reporter" embellishes or alters what he is reporting or otherwise advances his own position, actual malice exists. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (deliberate alteration is proof of reckless disregard); *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974) (same). This case, therefore, does not actually present the question that Petitioners offer as the final possible basis for this Court's review, but is instead a case that was properly decided by a jury and which does not merit review now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID J. SCHENCK
(Counsel of Record)
RICHARD D. SALGADO
JONES DAY
2727 North Harwood St.
Dallas, TX 75201-1515
Tel: (214) 220-3939

SUSAN HAYS
GEISLER HAYS, LLP
2911 Turtle Creek Blvd.,
Ste. 940
Dallas, TX 75219
Tel.: (214) 367-6020

Counsel for Respondent

May 29, 2009