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

BRIEF OF AMICUS CURIAE TEXAS CIVIL RIGHTS PROJECT IN SUPPORT OF PETITIONERS

James C. Harrington
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741
(512) 474-5073 [phone]
(512) 474-0726 [fax]

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BRIEF OF AMICUS CURIAE TEXAS CIVIL RIGHTS PROJECT IN SUPPORT OF PETITIONERS

The Texas Civil Rights Project ("TCRP") is a non-profit public interest law organization that promotes racial, economic, and social justice, as well as civil liberty under the Bill of Rights of the Texas and United States Constitutions. TCRP, with a membership base of approximately 3,000 Texans, works toward these goals through education, advocacy, and litigation involving civil rights violations.

TCRP has always had a strong interest in ensuring that individuals' civil rights and liberties under the federal constitution are not abridged or modified, whether through legislation, improper enforcement, or judicial action. Protecting the First Amendment rights of people has always been a priority for TCRP, and it has handled significant free speech cases since its inception. This is reflective of the number of First Amendment issues that arise across the State of Texas.

TCRP was founded in 1990, and has tax-exempt status under federal and state laws. It has participated as amicus curiae in other cases before this Court.[1]

SUMMARY OF ARGUMENT

The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." This case presents an opportunity for the Court to revisit its analysis of the right to petition. In the process, the Court can begin to retrieve that right from the constitutional oblivion to

[1] Pursuant to Supreme Court Rule 37(6), amicus curiae states that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution to fund the preparation or submission of this brief.

which it has been consigned and to restore it to a place more in line with its historical meaning and importance in influencing and incubating the rights associated with the American constitutional form of government.

This case involves a defamation claim asserted against a petition to a United States Congressman on an issue of public significance — racial relations in the City of Athens, Texas. Under the law existing at the time of adoption of the First Amendment, and thus incorporated into that Amendment, the right to petition for the redress of grievances was not subject to prosecution for libel or any other cause. However, in 1985, this Court abruptly concluded that the right of petition is "cut from the same cloth" as the other guarantees of the First Amendment, and that there is no sound basis for granting greater constitutional protection to statements in a petition than to other First Amendment expressions. *McDonald v. Smith*, 472 U.S. 479, 482, 485 (1985). Thus, *McDonald* permitted a libel action against a petition if malice was alleged.

Commentators have roundly criticized this conclusion and have shown, in great historical and analytical detail, that the right to petition had a lengthy pedigree and well-established meaning at adoption of the Bill of Rights that was very different from the other rights enumerated in the First Amendment. Included in this well-understood and now well-documented meaning was immunity from prosecution for statements contained in petitions. TCRP urges the Court re-evaluate its decision in *McDonald* in light of this subsequent scholarly evaluation. A critical and seminal constitutional right depends on it.

ARGUMENT

I. THE COURT SHOULD RECONSIDER *MCDONALD* IN LIGHT OF THE SCHOLARLY EVALUATION AND THE HISTORICAL SIGNIFICANCE OF THE PETITION RIGHT.

A. Introduction

There can be little doubt of the historical pedigree of the petition right, which appeared in the Magna Carta in 1215, the 1689 English Bill of Rights, the Declarations of the 1765 Stamp Act Congress and the 1774 First Continental Congress, and the 1776 Declaration of Independence. Because the petition right developed centuries earlier than the other rights set out in the First Amendment, there is no basis for treating it as simply a subset of the other rights. Immunity from prosecution for exercise of the petition right was well-established by the time the First Amendment was enacted. The holding and analysis in *McDonald* do not hold up under scrutiny, and should be reconsidered.

The holding in *McDonald* produces anomalous results. Perhaps most importantly, the petition right is deprived of independent meaning and relegated to being simply a form of speech, rendering an important clause of the First Amendment redundant contrary to all rules of interpretation. Moreover, under *McDonald* only a petitioner would be subject to the chilling effect of prosecution, not a legislator who received the petition, a governmental official who was its subject, or a witness in a trial, if any of them repeated the statements in the petition or made similar statements. In place of the *McDonald* holding, the Court should adopt an approach to the right of petition similar to that employed in the antitrust context, where legitimate petitioning is protected and only "sham" petitions are subject to liability. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

B. Historical Pedigree of the Petition Right

While the rights of speech, press and assembly were relative newcomers when the Bill of Rights was adopted in 1791, the right of petition had a history stretching back over 500 years. The evolution of the petition right is chronicled in great detail in 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 (1986) and Eric Schnapper, *"Libelous" Petitions for Redress of Grievances – Bad Historiography Makes Worse Law*, 74 IOWA L. REV. 303, 312-43 (1989). The petition right saw it origins in the years before 1215, when the Magna Carta granted to British nobility the right "to petition [the king] to have the transgression redressed without delay." Smith, *supra,* at 1155. In the following centuries, the right of petition was extended to commoners. After the Glorious Revolution in England, the King accepted the Declaration of Rights in 1689, which provided that "it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal." *Id.* at 1161-62; *see also San Filippo v. Bongiovanni*, 30 F.3d 424, 443 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995). *McDonald* expressly recognizes the English Bill of Rights as an historical antecedent to the First Amendment petition right. *McDonald*, 472 U.S. at 482. By contrast, the right of speech at the time was viewed as simply freedom from prior restraint, which could be and frequently was punished after the fact as seditious libel. Smith, *supra,* at 1168-69, *citing* Blackstone's *Commentaries.*

Similarly, the right of petition was widely proclaimed in the American colonies. The Stamp Act Congress of 1765 set forth in its Declaration of Rights and Grievances that "it is the right of the British subjects in these colonies to petition the King or either House of Parliament." *Id.* at 1173. Again, *McDonald* recognizes this historical antecedent to the First Amendment petition right. *McDonald*, 472 U.S. at 482. In 1774, the Declaration and

Resolves of the First Continental Congress stated that the colonists "have a right peaceably to assemble, consider their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." *Smith, supra,* at 1173-74. Finally, in 1776 the Declaration of Independence, after recounting a litany of grievances against the King, listed a final, all-encompassing complaint:

> In every stage 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.

Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2192 (1998).

This is not the history of a constitutional appendage, a dead letter, a mere redundancy, simply a particular form of speech. *See San Filippo, supra,* at 442 ("The petition clause of the first amendment was not intended to be a dead letter – or a graceful but redundant appendage of the clauses guaranteeing freedom of speech and press."); 443 ("More to the point, the right to petition has a pedigree independent of – and substantially more ancient – than the freedoms of speech and press."). The right of petition is a vital, independent right of American citizens enshrined in the Bill of Rights, and was well-understood as such when the First Amendment was enacted.

C. Wide Recognition of Immunity for Petitions

A critical part of the petition right at the time it was incorporated into the Bill of Rights was immunity from prosecution for exercise of the right. Like the historical pedigree discussed above, this immunity has been thoroughly documented by scholars in response to the

Court's opinion in *McDonald*. Although *McDonald* dismissed the leading pre-revolutionary immunity precedent, *Lake v. King*, 1 Wms. Saund. 131, 85 Eng. Rep. 137 (K.B. 1680), as "seemingly anomalous," *McDonald*, 472 U.S. at 483 n.4, nothing in the opinion's analysis supports that conclusion. Instead, subsequent historical scholarship demonstrates that the immunity reflected in *Lake* was largely unquestioned when the First Amendment was adopted. *See e.g.* Schnapper, *supra*, at 312-343; Smith, *supra*, at 1181-8; Kara Elizabeth Shea, *Recent Development, San Filippo v. Bongiovanni: The Public Concern Criteria and the Scope of the Modern Petition Right*, 48 VAND. L. REV. 1697, 1702-3 (1995).

Several of the landmark documents discussed above that establish the petition right's historical pedigree expressly recognize the immunity attached to acts of petitioning. For example, the 1689 English Declaration of Rights provided that "it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal." Smith, *supra*, at 1161-2.

Similarly, the 1774 Declaration and Resolves of the First Continental Congress stated that the colonists "have a right peaceably to assemble, consider their grievances, and petition the King; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." Smith, *supra*, at 1173-4. The framers of the First Amendment would certainly have been aware of these historical predecessors when they proposed that amendment for adoption.

Although *McDonald* dismisses *Lake v. King*, the leading precedent on immunity for petitioning activity at the time the First Amendment was enacted, as "seemingly anomalous," *McDonald*, 472 U.S. at 483 n.4, it was not. Aside from the immunity proclaimed in *Lake v. King*, in the 1689 English Declaration of Rights and in the First Continental Congress's 1774 Declaration and Resolves, one of the most famous cases in English constitutional history,

the *Seven Bishops Case*, involved immunity from prosecution for petitioning the king. Schnapper, *supra*, at 313-329; Smith, *supra*, at 1160-2.

In 1688, James II required that a declaration concerning religious freedom be read from the pulpit of all Protestant churches in England. When the Archbishop of Canterbury and six other bishops submitted a petition challenging the declaration, they were arrested and prosecuted for seditious libel. The bishops cited *Lake v. King* in their defense. Schnapper, *supra*, at 320.

Their subsequent acquittal was a cause for celebration throughout England and encouraged the subsequent Glorious Revolution, in which James II was deposed in favor of William of Orange. *Id.* at 313-4. That revolution produced the English Bill of Rights of 1689, discussed previously, which proclaimed that "it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal." Smith, *supra*, at 1161-62.

The justices in the *Seven Bishops Case* squarely rejected the prosecution's contention that a libelous petition is no different than publication of a libelous book, and should be subject to the same penalties. Justice Holloway responded: "[D]on't compare the writing of a book to the making of a petition; for it is the birthright of the subject to petition." Justice Powell agreed that a book and a petition "are no more alike than the most different things you can name." *See* Schnapper, *supra*, at 323.

The subsequent assertion in *McDonald* that the petition and other First Amendment rights are "cut from the same cloth" cannot be reconciled with this seminal English case proclaiming immunity for petitions. The framers of the First Amendment would surely have been aware of the *Seven Bishops Case* and its relationship to the Glorious Revolution and English Bill of Rights.

Petitioners' immunity from prosecution was also widely reported in the legal treatises of the revolutionary

period, which again would have been familiar to the framers. Probably the best-known was Blackstone's *Commentaries*, which recognized that "the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal." *See San Filippo,* 30 F.3d at 443 n.23. Another leading treatise, Hawkins's 1716 *Treatise of the Pleas of the Crown,* cited *Lake v. King* for the conclusion that:

> [N]o false or scandalous matter contained in a petition to a committee of Parliament, or in articles of the Peace exhibited to Justices of Peace, or in any other proceeding in the regular Course of Justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to publick prosecutors ....

Schnapper, *supra*, at 339. Bacon's *New Abridgment of the Law*, printed in 1736-66 and found in many colonial law libraries, cited *Lake* and Hawkins for the conclusion that "it hath been resolved, that no false or scandalous matter contained in (a) a petition to a committee of Parliament, or in (b) articles of the peace exhibited to Justices of the Peace, are libelious." *Id.* at 340-1. Several other late-eighteenth century treatises stated the same rule. *Id.* at 341-3.

In sum, immunity for petitions was widely-recognized in the years preceding adoption of the First Amendment. There can be little doubt that colonists of that era, as English subjects, enjoyed such immunity. The First Amendment did not create the right of petition or its associated immunity, but instead prohibited impairment of the existing right. It is anomalous indeed that the right of Americans to petition the government, as it existed when the First Amendment was adopted, has been significantly impaired by the holding in *McDonald.*

D. The Flawed Analysis of *McDonald*

A key flaw of the *McDonald* opinion was that it cited no pre-ratification precedent for its conclusion that

immunity for petitioning was unsettled when the First Amendment was adopted, but instead relied on *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), an antebellum ruling that likewise identified no pre-ratification precedent for its conclusion. *McDonald*, 472 U.S. at 483-84.

As discussed above, the pre-ratification precedent for immunity for petitions was extensive. *McDonald* does not mention any of that precedent except *Lake v. King*, which squarely held that petitions are immune from prosecution for libel. That holding is dismissed in a footnote as "seemingly anomalous," despite the references to it in the *Seven Bishops Case* and in contemporary treatises , and despite its consistency with the 1689 English Bill of Rights and the First Continental Congress's 1774 Declaration and Resolves.

Unlike *Lake*, *White v. Nicholls*, *supra*, the case relied on for the holding in *McDonald*, truly was anomalous. That case, decided in 1845, likely reflected the antebellum hostility toward abolitionist petitions, which had resulted in the imposition of a "gag rule" on petitions in Congress several years earlier. *See* David C. Frederick, *John Quincy Adams, Slavery, and the Disappearance of the Right to Petition*, 9 LAW & HIST. REV. 113 (1991). *W*

White interpreted the common law right of petition and did not address the First Amendment. It also did not assert that *Lake* was wrongly decided or did not represent the state of the law when the First Amendment was adopted, concluding only that it was inconsistent with "modern adjudications of the courts." Schnapper, *supra*, at 307. As a result, *White* does not provide a clear precedent for the constitutional interpretation in *McDonald*.

Moreover, *White's* holding was premised on the conclusion that defamatory petitions should be subject to the same standard applied to defamatory statements in judicial proceedings, but *White's* application of a malice standard to judicial proceedings was plainly erroneous. *Id.* at 307-9. In fact, just two years before *McDonald*, the

Court dismissed *White's* rejection of immunity for statements in judicial proceedings as "not ... a reliable statement of the common law," noting that even in the mid-nineteenth century *White* was generally regarded as wrongly decided. *Briscoe v. Lahue*, 460 U.S. 325, 332-33 n.12 (1983). As a result, the *McDonald* decision rests on a faulty foundation by relying on *White*, an antebellum decision handed down a half-century after adoption of the First Amendment with analysis recognized as unreliable, instead of examining the understanding of the petition right when the Amendment was adopted.

Much of the analysis of immunity for petitioning has been based on the conclusion that the level of protection should be the same for judicial and non-judicial petitions. Indeed, the right of petition originated before there was a clear distinction between governmental functions, and helped to develop that distinction as certain petitions, based on individual facts, were referred to magistrates for investigation and resolution, while more general, political petitions became the province of an evolving legislature. 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, 22-6 (1993); Shea, *supra*, at 1700-1; Mark, *supra*, at 2166-9.

Several key cases have turned on the principle that petitions should be treated the same whether directed to the judiciary or to other branches of government. The decision in *Lake v. King*, for example, applied the same immunity applicable to judicial proceedings to legislative petitions. Schnapper, *supra*, at 334-36.

Similarly, the opinion in *White v. Nicholls* turned on the mistaken conclusion that since a malice standard applied in judicial proceedings, it should also apply to other petitions. *Id.* at 307-09. *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (concluding that immunity from antitrust liability extends to petitions to all branches of government).

McDonald, however, subverted this consistency by holding for the first time that the protections afforded in a judicial proceeding do not extend to petitions to other branches of government. Schnapper, *supra*, at 344.

The disparate risk of liability for judicial and non-judicial petitions created by *McDonald* creates several unfortunate possibilities. First, a petitioner would be well-advised to take his or her complaint to court rather than to the legislative or executive branches to avoid the risks posed by a defamation suit, whether or not it is meritorious. As a result, pursuit of litigation will be encouraged at the expense of seeking legislative or executive redress.

In addition, the *McDonald* holding allows defamation claims to be a potent weapon for government officials to deter petitions concerning their actions. A defamation claim coupled with an allegation of malice is unlikely to be resolved short of a jury trial. Imagine if southern officials had pursued such lawsuits against civil rights petitions in sympathetic state courts during the 1960's. Similar scenarios are not hard to imagine today. The same rationale that supports immunity in judicial proceedings and other contexts applies to all petitions – exposure to defamation claims poses an intolerable deterrence to exercise of the petition right.

The *McDonald* holding incongruously places the petitioner at significant risk even while other participants in the governmental process are immune from such risk. Schnapper illustrates this imbalance of liability risk in the context of the *McDonald* litigation. Schnapper, *supra*, at 311-12. He points out that McDonald faced liability for criticizing Smith's actions as a state judge and district attorney, although Smith was absolutely immune from liability for statements made in those capacities.

McDonald faced liability for reiterating criticisms of Smith by a federal judge and magistrate, although the judge and magistrate were immune from liability for those criticisms. If the federal officials who received McDonald's

criticisms of Smith had either repeated those criticisms or challenged McDonald's truthfulness, they would have been immune from liability for those statements. Smith's judicial complaint against McDonald, which asserted that McDonald had called him a liar and asserted that, in fact, McDonald's statements were untrue, was immune from liability.

Of all the participants in the process, only McDonald, the petitioner, faced liability for defamation. Clearly, this is not a situation that protects and encourages exercise of the constitutional petition right. Instead, it is a deck stacked against that right, particularly where, as here, the petition was sent only to a governmental official and was subsequently republished several times by individuals with immunity from prosecution.

McDonald creates a situation in which a significant, free-standing right under the First Amendment becomes a redundancy, meaningless verbiage. Far removed from the significance that the petition right assumed in English and colonial history, and that was protected from impairment by the First Amendment, *McDonald* has transformed a petition into simply a form of expression, lacking independent meaning and subject to the same restrictions and responsibilities as any other form of expression.

This result cannot be justified by any principle of statutory interpretation, since the petition clause of the First Amendment must be construed to have meaning rather than being surplussage. Nor can any fair examination of the history and understanding of the petition right at the time of adoption of the First Amendment justify the *McDonald* result. The petition right, and the associated issue of immunity, is ripe for reexamination by the Court.

E. A Better Alternative

One branch of the Court's petition clause jurisprudence – the immunity from antitrust liability established in *Noerr, supra*, and its progeny – is more

consistent with the historical meaning and significance of the petition right than *McDonald*. In *Noerr*, the Court concluded that the Sherman Act cannot be construed to prohibit efforts to persuade the government to take action that may be anticompetitive. *Noerr*, 365 U.S. 127 at 136. The Court noted that "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade such freedoms. *Id.* at 138. The Court further concluded that an intent to harm competitors, *id.* at 139,[2] or even the use of underhanded tactics, *id.* at 140,[3] would not nullify the right to petition the government. The Court identified only one circumstance where an appeal to government would not be immune from antitrust liability:

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, 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 the application of the Sherman Act would be justified.

Id. at 144.

In subsequent cases, the Court expanded its application of the petition right to immunize attempts to influence the government from antitrust liability. In *California Motor Transport Co., supra*, at 510, the Court concluded that the rationale of *Noerr* applies to the approach of citizens or groups to all branches of

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[2] "The right of the people to inform their representatives in government of their desire with respect to the passage or enforcement of laws cannot properly be made to depend on their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors."

[3] Concluding that the railroads' publicity campaign, although it "falls far short of the ethical standards generally approved in this country," does not constitute a violation of the Sherman Act.

government because "[c]ertainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." And in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court explained the rationale of the *Noerr* immunity:

> [I]t is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right "to petition the Government for a redress of grievances," U.S. Const. Amdt. 1, to establish a category of lawful state action [e.g., anticompetitive regulation] that citizens are not permitted to urge.

Id. at 379. The Court also clarified the "sham" exception to *Noerr* immunity:

> A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, [citation omitted], not one who "genuinely seeks to achieve his governmental result, but does so *through improper means*," [citation omitted, emphasis in original].

Id. at 380.

In *San Filippo, supra*, the Third Circuit followed the rationale of *Noerr* in the context of an alleged retaliatory discharge of a public employee for engaging in petitioning activity. After canvassing *Noerr, California Motor Transport*, and related cases, *San Filippo,* 30 F.3d at 435-37, the Court directed:

> On remand, the district court should consider which, if any, of San Filippo's grievances and lawsuits constituted a "petition," and whether any such "petition" was non-sham. The mere act of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee.

Id. at 443.

The Court struggled to reconcile the *Noerr* line of cases with *McDonald*, noting that "the Supreme Court cases we have just canvassed, while long on nuance, do not yield an easily identified single common denominator." *Id.* at 438. Ultimately the Court provided the unsatisfying explanation that "*McDonald* is a case in which the petition clause protects no value that is not protected by the speech clause," *id.* at 439, but rejected a similar conclusion in the context of retaliatory discharge of public employees. After noting the petition right's historical pedigree and concluding that it was not intended to be a constitutional "dead letter," the Court concluded that "[t]here is no persuasive reason for the right of petition to mean less today than it was intended to mean in England three centuries ago." *Id.* at 442-3.

In fact, *McDonald* cannot be reconciled with the treatment of the petition right in *Noerr* and similar cases. While *Noerr* recognizes that constitutionally-protected petitioning activities cannot give rise to liability, *McDonald* permits liability for petitioning. While *Noerr* recognizes immunity without regard to the petitioner's motive or ethics, *McDonald* denies immunity if malice is claimed. While *California Motor Transport* recognizes that the petition right applies consistently to all branches of government, *McDonald* sets up different standards for judicial and non-judicial petitions. These and other aspects of the analysis in *McDonald* are simply inconsistent with the historical meaning of the petition right reflected in pre-ratification material, as well as with the interpretation of the right in *Noerr* and its progeny.

Noerr, San Filippo, and similar cases provide a framework for addressing defamation challenges to petitions that, unlike *McDonald*, gives the petition clause of the First Amendment substance consistent with the framers' intent. That framework avoids incenting litigation by giving petitioners to any branch of government

protection comparable to that granted to protect public officials, litigants, and others from the risk of defamation litigation. In this proceeding, the Court should harmonize its petition jurisprudence by correcting the significant error, and the significant diminution of the constitutional petition right, that results from the *McDonald* decision.

March 31, 2009.

Respectfully submitted,

James C. Harrington
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, Texas 78741
Telephone: (512) 474-5073
Facsimile: (512) 474-0726

ATTORNEY FOR AMICUS CURIAE