

**Team Number 11**

No. \_\_\_ - \_\_\_\_

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**IN THE**  
**Supreme Court of the United States**

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**JOE PUBLIC,**  
**JANE PRIVATE,**

*Petitioners,*

**v.**

**ENTERTAINMENT TABLOID, INC.**  
**RAD INTERNATIONAL GROUP,**

*Respondents.*

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**ON WRIT OF CERTIORARI TO THE**  
**UNITED STATES SUPREME COURT**

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**BRIEF FOR THE PETITIONERS**

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**Team Number 11**  
*Counsel of Record*

March 12, 2013

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**ON WRIT OF CERTIORARI TO THE**  
**SUPREME COURT OF RADNOR**

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**BRIEF FOR THE PETITIONERS**

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**Team Number 11**  
*Counsel of Record*

March 12, 2013

## **QUESTIONS PRESENTED**

1. Whether the Seventh Amendment right to civil jury trials should remain unincorporated against the states through the Fourteenth Amendment.
2. Whether the striking of a cause of action and an order to file an amended complaint without a cause of action violates the First Amendment right to petition the government for redress of grievances.

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**STATEMENT OF JURISDICTION**

The jurisdiction of this Court rests on 28 U.S.C. 1257.

## STATEMENT OF THE CASE

Shortly after the State of Radnor was admitted to the Union as a state, the Radnor Legislature established the right to trial by jury in most civil cases by statute. R. 1. Recently, however, to prevent Radnor from defaulting on its financial obligations, the legislature repealed the civil jury trial statute as part of the Radnor Fiscal Emergency Plan. *Id.* Legislative findings noted that the estimated expenses saved from eliminating jury trials in civil cases were indispensable for the judiciary to operate efficiently and within the new yearly-appropriated budget. *Id.* The Plan was presented to the citizens of Radnor for approval and received a majority of votes in its favor. *Id.*

Joe Public is a well-known actor in Radnor. *Id.* at 2. He recently married Jane Private, a United States citizen who had never received public scrutiny prior to her marriage. *Id.* After their wedding, Gossip Show, the most viewed television show in Radnor, broadcast a segment about the couple. *Id.* at 2. Among other offensive accusations, the broadcast alleged that Joe Public began his relationship with Jane Private when she was a minor, a felony under Radnor law. *Id.* In addition, the broadcast claimed the pair married because Jane Private was two months pregnant. *Id.* 2-3. Based on the broadcast, Joe Public and Jane Private became severely distressed. *Id.* at 3.

On December 2, 2012, Joe Public and Jane Private filed a lawsuit against Entertainment Tabloid, Inc. (ETI) and RAD International Group (RADIG) alleging defamatory and slanderous comments by the Gossip Show segment. Gossip Show is produced by ETI and is aired on a channel owned by RADTV. The lawsuit was filed before the Radnor Circuit Court. *Id.* at 3. Petitioners requested a declaratory judgment and that the burden of proof shift to ETI and RADTV to prove the remarks were true or reasonably investigated before broadcasting. *Id.* at 4.

ETI and RADTV filed a counter-request for declaratory judgment and argued, in part, that Radnor could not eliminate the right to trial by jury in civil cases under the Seventh and Fourteenth Amendments to the Constitution of the United States because it would deny one of the privileges and immunities granted by American citizenship and violate their due process rights. *Id.* They also argued the burden-shifting scheme was contrary to Supreme Court precedent. *Id.*

While the case was still pending before the Radnor Circuit Court, Gossip Show aired another alleged defamatory broadcast, leading Jane Private to suffer additional emotional and physical harm. *Id.* at 5. Joe Public and Jane Private accordingly requested leave from the court to file an amended complaint to include the new causes of action and additional damages, which the court granted. *Id.* They then filed a motion to dismiss the declaratory judgment as to the Respondent's Seventh Amendment civil jury claims. *Id.* After each party submitted briefs as to their position on this issue, the presiding judge ordered the amended complaint stricken from the record, returned the document to Petitioners, and ordered them to re-file without the declaratory judgment request for the burden shifting scheme. *Id.* at 6. In addition, the judge affirmed the abolition of jury trials in civil cases in the Radnor Fiscal Emergency Plan. *Id.*

Petitioners sought timely reconsideration on the issue of burden shifting, arguing the court violated their First Amendment right to petition the government for redress. *Id.* Respondents also sought reconsideration on their Seventh Amendment claim. *Id.* at 7. Without issuing an opinion, the Radnor Circuit Court denied both requests for reconsideration. *Id.* Both parties sought discretionary review from the Radnor Supreme Court. *Id.* Petitioners argued the Radnor Supreme Court should only decide that the Circuit Court was required to hear the arguments in the case, since this was a matter of law properly briefed at that level. In a 5-4 vote,

the Radnor Supreme Court denied both requests for review and affirmed the Circuit Court's decision. *Id.*

## **SUMMARY OF THE ARGUMENT**

I. The Seventh Amendment provision of civil jury trials, unlike certain amendments that have been incorporated through the Fourteenth Amendment, is not implicit to our concept of ordered liberty. Supreme Court precedent holds the Bill of Rights is enforceable only against the federal government. Nevertheless, the Court has followed a selective incorporation approach the last century, holding certain guarantees in the Bill of Rights are applicable against the states through the Fourteenth Amendment Due Process Clause. Amendments are incorporated through this clause only when they are a fundamental right implicit to the United States' concept of ordered liberty. The Seventh Amendment, however, is does not qualify as such a right. First, an overview of the history of the amendment illustrates that the framers of the constitution did not intend the Seventh Amendment to apply in all instances and evidence a general fear of the federal rather than the state judiciary. Case law from the early half of the century also shows the Court's unwillingness to extend incorporation to the Seventh Amendment. Second, the Court's reasoning in more recent cases that certain amendments are incorporated does not apply to the Seventh Amendment. Thus, the respondents are not entitled to a jury trial in state court under the Seventh Amendment.

II. The First Amendment guarantees the right to petition the government for a redress of grievances. This Court has repeatedly recognized that this right encompasses the right of access to the court. The history of the amendment and the Court's jurisprudence demonstrate that this right requires the judiciary to receive and respond to a petition. The right to petition the government for a redress of grievances is not limited to the subject at issue or the subjective

importance. Instead, the petitioner need only meet the requirements that 1) he sought redress, 2) the request for redress was grounded on a grievance, and 3) the petition was directed to the Government. If these requirements are met, the rights embedded in the Petition Clause will extend to a lawsuit, so long as the claims are nonfrivolous. In the instant case, Joe Public and Jane Private have met the requirements by presenting an argument to the court that was, at the very least, colorable; and therefore they may invoke the Petition Clause. The Radnor Circuit Court's disregard towards the Petitioners' amended complaint violated their constitutional right to petition the government for redress. By striking the amended complaint from the record and ordering the petitioners to re-file their amended complaint without the declaratory judgment request for the shifting of the burden of proof under Sections 1 and 5 of Article III of the Radnor Constitution, the Court disregarded the First Amendment rights of petitioners.

## **ARGUMENT**

### **I. THE SEVENTH AMENDMENT RIGHT TO CIVIL JURY TRIALS SHOULD NOT BE INCORPORATED THROUGH THE FOURTEENTH AMENDMENT.**

The Seventh Amendment to the United States Constitution was ratified as part of the Bill of Rights and states, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. The history of this amendment and the Court's jurisprudence in this area show that the Seventh Amendment provision of civil jury trials should remain unincorporated as to the states.

#### **A. Non-Incorporation Is Consistent With The History And Purpose Of The Seventh Amendment And The Court's Older Jurisprudence.**

There are several facets of this Amendment that renders it unclear as to how the Amendment applies in the current judicial system. It is clear, however, that the Seventh Amendment is not applicable in all cases, only those at common law where the value exceeds

twenty dollars. A brief survey of the history of the Seventh Amendment shows it was intended only as a check on the power of federal judges and thus should be limited only to the federal courts. The Court's older precedents further evidence this proposition by showing a reluctance to incorporate the amendment.

The framers of the Constitution intended to preserve the jury trial as it existed in England. There were courts of common law, probate, admiralty, and chancery, but the jury trial existed only in common law court and was still subject to some exceptions. The Federalist No. 83 (Alexander Hamilton). While the jury trial was well recognized in criminal cases since at least the latter half of the seventeenth century, the use of jury trials in civil cases in England varied and followed no particular pattern. The thirteen original states had at least six different patterns of civil practice, including jury trial procedures, indicating they were not following one set model for juries in civil cases. Edith Guild Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289 (1966). Hamilton also discussed the diversity of civil jury trial practice as it existed in the original states. Hamilton, supra.

The arguments of both the Federalists and Antifederalists during the time of ratification of the Constitution also support the conclusion that the Seventh Amendment should not apply to the states, albeit for different reasons. The Antifederalists insisted that a constitutional guarantee of trial by jury in a civil case was a necessity to protect the people from a federal government and unelected federal judiciary that were too far removed from the values and concerns of ordinary citizens. James S. Campbell & Nicholas Le Poidevin, Complex Cases and Jury Trials: A Reply to Professor Arnold, 128 Univ. of Pa. L. Rev. 965, 971 (1980). Their argument for the inclusion of such a guarantee was based on a fear of federal government power rather than states' power. Patrick Henry reasoned that the judicial power created by Article III of the Constitution

could eventually extend to all civil cases, absorbing state judiciaries. The Antifederalists 49-51 (Cecelia M. Kenyon ed. 1966). Henry was concerned solely about the federal judiciary swallowing up state courts, evidencing state courts were not thought to be nearly as powerful as the federal courts. One scholar notes the structure of state courts compared to federal courts at the time, and continuing today, confirms Henry's concern and that the Seventh Amendment was only intended to be applicable to federal courts. Paul Carrington, The Seventh Amendment: Some Bicentennial Reflections, 36 Univ. Chi. Legal Forum 33, 43 (1990).

Thomas Jefferson noted that “permanent” judges can “acquire an esprit de corps” and can wrongly be persuaded by “relationship, by spirit of party, by a devotion to the executive or legislative.” Letter from Thomas Jefferson to James Madison (Mar. 15, 1789) 3 The Writings of Thomas Jefferson (H.A. Washington ed., 1853). Jefferson's concern about permanent judges can be inferred to mean apprehension about federal judges in particular. Article III of the Constitution provides that judges “shall hold their Offices during good Behavior”, which applies only to federal courts and interpreted to mean that judges serve for life. U.S. Const. art. III, § 1. The term “permanent” means continuing or enduring without fundamental or marked change. Judges serving for life—or enduring without fundamental or marked change—were likely considered permanent judges. In comparison, state court judges were, and generally still are, elected or appointed for a certain term.

Another Antifederalist, Senator Richard Henry Lee also noted during the ratification debates that the primary purpose of trial by jury in civil cases was to protect people from judges who are corrupt and aristocratic. 2 Debates in the Several State Conventions of the Adoption of the Federal Constitution 504 (Jonathan Elliot ed. 1836). Federal judges were thought to have the potential to be corrupt and aristocratic since, following Jefferson's line of reasoning, they could

be subject to the devotion of the executive or legislature. In contrast, since judges are generally elected and/or serve for term in state courts, the need for the civil jury is reduced “since the hazards of aristocracy against which the jury protects are absent.” Paul Carrington, The Seventh Amendment: Some Bicentennial Reflections, 36 Univ. Chi. Legal Forum 33, 43 (1990).

The Federalists also believed the federal judiciary would be more powerful than the state courts; although in contrast to the Antifederalists, they were proponents of greater power at the federal level. At the time of the founding, the Federalists claimed state courts were actually inferior to federal courts because federal judges had life tenure and more freedom to operate, thus arguing for broader federal jurisdiction. The Federalist No. 81 (Alexander Hamilton). However, this broad power was not to go completely unchecked; the need for jury trials in criminal cases was apparent.

Some Federalist views were even more direct on the subject of civil jury trials. Alexander Hamilton discussed the need for juries in criminal cases and some civil cases; however, he also noted “I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases...The excellence of the trial by jury in civil cases appears to depend on circumstances foreign to the preservation of liberty.” *Id.* No. 83. While the Federalists and Antifederalists focused on different concerns, both groups recognized that state judges had less power and influence than federal judges under the new Constitution and, accordingly, were nothing to fear. Hamilton’s comments directed at the civil jury trial indicate that at least some Federalists did not believe civil jury trials were necessary to preserve liberty.

In the early 1800s, the Bill of Rights was held only to apply to the federal government. *Barron v. Baltimore*, 32 U.S. 243 (1833). While this proposition applies even today, the

Supreme Court has recognized certain amendments are applicable to the states through the Due Process Clause of the Fourteenth Amendment, known as incorporation of the amendment. The Due Process Clause denies the States the power to “deprive any person of life, liberty, or property without due process of law.” U.S. Const. amend. XIV, § 2. The long road of selective incorporation began in the late 1800s when the Supreme Court incorporated the Takings Clause of the Fifth Amendment and held that some form of just compensation was necessary for property taken by the state authorities. *Chicago, Burlington and Quincy Railroad v. City of Chicago*, 166 U.S. 226 (1897). Since then, the Court has been inclined to follow this approach, holding that certain amendments may be applicable against the states.

In an early case discussing the doctrine of selective incorporation, the Court noted that some personal rights safeguarded by the Bill of Rights from federal government infringement may also be safeguarded against the states. Yet, the Court noted that if an amendment is incorporated it is not because the right happens to be enumerated in the first eight amendments, but because the right by its very nature is included in the conception of due process of law. *Twining v. New Jersey*, 211 U.S. 78 (1908) (overruled on other grounds). In *Minneapolis & St. L.R. Co. v. Bombolis*, the Court held that that the Seventh Amendment applies only to proceedings in the courts of the United States, and does not “in any matter whatever” govern trials in state courts. 36 S. Ct. 595, 596 (1916). In *Curtis v. Loether*, the Court confirmed these earlier statements survived the selective incorporation doctrine when it declined in dicta to extend the right to jury trials as an element of due process applicable to state courts through the Fourteenth Amendment. 415, 189, FN 6 (1974). See also *Melancon v. McKeithen*, 345 F.Supp. 1025 (E.D. La. 1972) (noting that the Supreme Court has never selected the Seventh Amendment

as applicable to trials in state courts). The history of the amendment and the Court's older jurisprudence show that the Seventh Amendment should remain unincorporated.

**B. The Seventh Amendment Should Not Be Incorporated Through The Fourteenth Amendment Since It Is Not “Implicit In The Concept Of Ordered Liberty” Or A Privilege Or Immunity Of United States Citizenship.**

Supreme Court decisions addressing questions of whether a particular amendment in the Bill of Rights should be incorporated against the states show the Seventh Amendment should not be incorporated through the Fourteenth Amendment Due Process Clause or Privileges or Immunities Clause. First, the Court's rationale for selectively incorporating other amendments in the Bill of Rights through the Due Process Clause of the Fourteenth Amendment does not apply to the Seventh Amendment since the right is not “implicit in the concept of ordered liberty.” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Second, the Seventh Amendment should not be incorporated through the Privileges or Immunities Clause of the Fourteenth Amendment since a civil jury trial is not a privilege or immunity of United States citizenship.

**1. The Court's rationale for incorporating other Amendments in the Bill of Rights does not apply to the Seventh Amendment.**

Only a few provisions in the Bill of Rights remain unincorporated today. As the Court noted in one case, the Court has shed any initial reluctance to hold that certain rights guaranteed by the Bill of Rights meet the requirements for protection under the Due Process Clause. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010). The Court has held that an amendment is incorporated through the Due Process Clause of the Fourteenth Amendment if it is a fundamental right. Justice Cardozo, writing for the majority in *Palko v. Connecticut*, concluded that a right should only be incorporated if it is “implicit in the concept of ordered liberty”, 302 U.S. at 325, in other words, “deeply rooted in this Nation's history and tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *see also Thornhill v. Alabama*, 310 U.S.

88 (1940) (holding rights were incorporated because they were essential to a free government). While *Palko* was overturned on other grounds, this approach to selective incorporation has persevered throughout decades and is still used today.

Cases holding that an amendment should be incorporated against the states demonstrate the difference between amendments being incorporated since they are implicit to our concept of ordered liberty, compared to those that are not, including the Seventh Amendment. To determine whether the Bill of Rights should be incorporated under the “ordered liberty” standard, the Court has evaluated the particular right, the protection it affords, and the history of the right. The First Amendment rights to freedom of speech, press, and religion have been incorporated because they are at the foundation of free government by free men and have been characterized by the Court as “fundamental personal rights and liberties.” *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939).

The incorporation of the Fourth Amendment’s protection against unreasonable search and seizure rested on the Court’s conclusion that the security of one’s privacy against arbitrary intrusion by the police—at the core the Fourth Amendment—is basic to a free society and thus implicit in the concept of ordered liberty. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). In the most recent incorporation case, *McDonald v. Chicago*, the Court pointed to the fact it had recently held that individual self-defense is the main component of the Second Amendment right, explaining that it is a basic right that is deeply rooted in the Nation’s history. 130 S. Ct. at 3036 (“We stressed that the right was also valued because the possession of firearms was thought to be essential for self-defense...self-defense was ‘the central component of the right itself.’”).

In comparison to these cases, the Seventh Amendment provision of trial by jury in civil cases cannot be said to be a fundamental right and implicit in the concept of ordered liberty.

Instead, it is a procedural right that has been dispensed in certain cases in equity, admiralty, and cases based on statutory causes of action. *See Melancon v. McKeithen*, 345 F. Supp. 1025, 1048 (E.D. La. 1972). Since the civil jury has not been necessary in many cases since the founding of this country, it is not a central component of attaining a fair trial. Nor is the practice so deeply rooted in this country's history that it warrants incorporation. That each of the thirteen original states prior to ratification had varied procedures of when parties could request a jury trial in a civil case proves this point. *See Henderson, The Background of the Seventh Amendment, supra* at 6.

The Sixth Amendment right to trial by jury in criminal matters has also been incorporated against the states. The Court noted it believed that trial by jury in criminal cases is “fundamental to the American scheme of justice.” *Duncan v. Louisiana*, 391 U.S. 145 (1968). While the Sixth Amendment right to trial by jury in criminal matters is enforceable against the states, it guarantees only the minimum protection. Some argue that criminal trials, where a defendant's liberties and freedom of movement are at stake, are of much greater importance than civil trials, where only property is at stake.

The Court in *Duncan* noted that the fear of unchecked power in the criminal law context caused “insistence upon community participation in the determination of guilt or innocence” at the time of ratification. 391 U.S. at 156. Additionally, the Court remarked that jury trial provisions in the Federal and state constitutions “reflect a fundamental decision about the exercise of power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge.” *Id.* at 156. In civil cases, however, the jury is not making the same type of determination that has the potential to destroy a defendant's liberty. The possibility of a Type I error—that is, when a defendant is found guilty but is actually innocent—can have much larger

repercussions in the criminal case. It is understandable why our Founders would want this determination made by a jury and not one judge in cases tried in both federal and state courts. The property rights at stake in civil cases cannot be said to be substantially similar to the determination of guilt or innocence in a criminal proceeding. The Court in *Duncan* even recognized that the critics of jury trials, arguing that a jury trial has potential for misuse, acknowledged that arguments for criminal jury trials are much stronger. *Id.* at 157.

In *Duncan*, the Court also noted that it had no constitutional concerns about prosecuting petty crimes without extending a right to a jury trial. *Id.* at 158. While not explicitly defining the contours of a petty crime compared to a serious crime, the Court noted that the current state of the federal and state laws indicated it was a crime punishable with no more than a year in prison. *Id.* at 161. By declining to extend the Sixth Amendment right to a criminal jury to all criminal cases, the Court made clear there were instances where a jury trial was not necessary. If a crime that imposes six months in prison can be tried without a jury trial without violating a person's liberty, then a jury trial in civil cases is also not fundamental to our concept of ordered liberty.

Finally, the Court may also choose to consider factors such as the financial burden and uniformity issues that can arise if the Seventh Amendment applies to the states. The Court in *Duncan* noted that a petty offense exception may be warranted under the Sixth Amendment since a rule that trial by jury in all offenses would put burden on states' judicial resources. *See* 391 U.S. at 160 (“[T]he possible consequences to defendants from convictions for petty offenses have been though insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.”).

Regarding the uniformity issues, Justice Stevens, in his dissenting opinion in *McDonald*, noted that by requiring certain provisions of the Bill of Rights to apply uniformly to the states, the federal courts may cause those provisions to become diluted. *McDonald*, 130 S. Ct. at 3095. He reasoned that the majority of States already recognize the right to keep and bear arms in their Constitutions but they vary widely in their regulatory schemes. Thus, if the amendment is incorporated, federal courts will have “little choice but to fix a highly flexible standard of review if they are to avoid leaving federalism and separation of powers-not to mention gun policy-in shambles.” *Id.* at 3095. Here, the same argument applies with force. Most states have a provision in their Constitution or later statutes that provide for a jury trial in civil cases; however, the schemes differ, some offering broad protections, some more narrow. The laws governing private law and civil procedure in states vary in many ways. *See, e.g., Melancon*, 345 F.Supp. at 1025 (“This receptivity to Anglo-American law in the criminal field is not true of private law and civil procedure.”). If a single standard for the civil jury trial protection is implemented, federal courts will be required to reconcile it with the differing interests and practices of the states.

**2. The Seventh Amendment guarantee of a right to a civil jury trial is not a privilege or immunity of United States citizenship.**

Any argument that the Seventh Amendment should be incorporated under the privileges or immunities clause of the Fourteenth Amendment is not persuasive. As discussed above, any amendment the Supreme Court has held is incorporated against the states is through the Due Process Clause. Most recently in *McDonald v. Chicago*, in accordance with this precedent, the plurality of the Court based its ruling that the Second Amendment applies to the states on the Due Process Clause. While the fifth vote in favor of incorporating the Second Amendment relied on the Privileges or Immunities Clause, the remaining Justices refused to disturb the holding of *Slaughter-House Cases* and its progeny. *See McDonald*, 130 S. Ct. at 3030-31 (“For

many decades, the question of rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of the Amendment and not under the Privileges or Immunities Clause.”); *see also Slaughter-House Cases*, 83 U.S. 36 (1873) (narrowly interpreting the Privileges or Immunities Clause). The Court should continue to follow precedent and not consider whether the Seventh Amendment is incorporated against the states under the Privileges or Immunities Clause.

## **II. THE COURTS HAVE A DUTY TO RECEIVE AND RESPOND TO A PETITION FOR REDRESS OF GREIVANCES.**

The Petition Clause of the First Amendment in the Bill of Rights guarantees the right “to petition the Government for a redress of grievances.” U.S. Const. amend. I. The Supreme Court has found this clause applicable in a variety of circumstances, including holding that this right encompasses the right of access to the court. *Bill Johnson’s Restaurants, Inc. v NLRB*, 461 U.S. 731, 741 (1983). History and Court jurisprudence evidence that this right requires both a duty of the judiciary to receive and respond to a petition.

Textually, this right is limited neither by the nature nor by importance of the subject matter of the petition. *See id.* (holding that the Petition Clause applies to libel actions); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1(1964) (rejecting the argument that access to the courts protected by the Petition Clause is limited solely to matters of public concern); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (holding “grievances for redress of which the right to petition was insured...are not solely religious or political causes.”). Rather, to invoke the clause, the petitioner must only meet three requirements: (1) that he sought “redress,” (2) that the request for redress was grounded on a grievance, and (3) that the petition was directed to “the Government.” *Id.* In addition, in the context of lawsuits, for a claim to receive the protections of the Petition Clause, it cannot be frivolous. In the case at hand, the petitioners have met all

three of these requirements necessary to invoke the Petition Clause and their claim to shift the burden of proof to the respondents is, at the very least, colorable. By striking the amended complaint from the record and ordering the Petitioners to re-file their amended complaint without the declaratory judgment request for the shifting of the burden of proof under Sections 1 and 5 of Article III of the Radnor Constitution, the Radnor Circuit Court violated Joe Public and Jane Private’s constitutional right to petition the government for redress.

**A. The Right to Petition Requires A State Court System to Provide A Reasoned Ruling On Any Nonfrivolous Claim.**

“The Petition Clause protects the right of individuals to appeal to courts.” *Borough of Duryea v. Guarnieri*, 131 S.Ct. 2488, 2494 (2011). Historical understanding of the clause evidences that a lawsuit constitutes a petition and if that petition is nonfrivolous it requires a response. In the instant case, Joe Public and Jane Private’s claim to shift the burden to ETI and RADIG qualifies as a lawsuit falling under the protection of the Petition Clause because, at the very least, the claim was colorable.

**1. History**

Supreme Court precedent unequivocally states, “[t]he Petition Clause protects the right of individuals to appeal to courts.” *Guarnieri*, 131 S.Ct. at 2494; *see also BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984); *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). Analysis of the history surrounding the Clause and the Court’s jurisprudence shows not only that a lawsuit constitutes a petition, but also that such a petition requires a response.

The right to petition can trace its origins to the Magna Carta. *Guarnieri*, 131 S.Ct. at 2499. Adopting long-standing English tradition, American colonists, exercising their right to petition the English government, expected the government to both receive and respond to their

petitions. David C. Frederick, John Quincy Adams, Slavery, and the Disappearance of the Right to Petition, 9 L. & Hist. Rev. 113, 115-16 (1991). In fact, it was the King's consistent failure to respond to the colonists' petitions of grievances that served as a significant contributor to the American Revolution. See Declaration of Independence para. 4 (U.S. 1776). Given the colonists' frustrations with the English government, the Framers specifically added the guarantee within the First Amendment that the people have the right to "instruct their Representatives." U.S. Const. amend. I. In addition, Congress's response to petitions in the founding years of the country evidence the Framers' intention that the Petition Clause encompass a duty to respond.

The Supreme Court has interpreted this duty underlying the Petition Clause as an interest in "self-government," giving citizens the right to participate directly in the government by demanding that it consider and respond to their petitions. See *McDonald v. Smith*, 472 U.S. 479, 483 (1985). Although the Supreme Court has held that "the First Amendment does not impose any affirmative obligation on the Government to listen, to respond" to a petition, these cases all dealt with petitions to the Legislative or Executive branches, not the Judicial Branch. See *Smith v. Ark. State Highway Employees, Local 1315*, 441 U.S. 463 (1979). For example, in *Smith*, the controversy involved a unit of the State government in its legislative capacity, the Arkansas State Highway Commission. Similarly, in *Minnesota State Board For Community Colleges v. Knight*, the Court's holding that the First Amendment does not require government policymakers to listen or respond to petitions on public issues, once again applied to a branch that had a legislative function. 465 U.S. 271, 272 (1984).

The fact that Court has never applied such a holding to a case involving lawsuits as petitions to the judicial branch is a fundamental distinction. If a member of the legislative or executive branch fails to respond to a petition, he can still be held accountable to the public for

his actions or inactions through the election process. Specifically, the Court even stated in *Knight*, that “[d]isagreement with public policy and disapproval of officials’ responsiveness...is to be registered principally at the polls.” *Id.* at 285. The judicial branch, however, is unelected and, therefore, is not accountable to the public in the same way as the legislative and executive branches. Thus, unlike in the legislative and executive context, if the government—in its judicial capacity—does not have obligation to respond, the First Amendment’s protection of the right to petition is consequently taken away by eliminating the people’s ability to enforce the rules that hold our society together. Given the purpose, historical understanding, and Court’s jurisprudence, a lawsuit is considered a petition protected by the Petition Clause that requires a response.

## **2. The Petitioners’ Argument Claim to Burden Shifting Is Nonfrivolous**

For a claim not to receive the protection of the Petition Clause it must be “objectively baseless” litigation, “presented for an improper purpose,” frivolous, or lacking evidentiary support. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The Petitioners’ claim to burden shifting is meritorious and, at the very least, is colorable, and thereby demonstrates none of the invalidating characteristics. Thus, by striking the Amended Complaint from the record and ordering the petitioners to re-file their Amended Complaint without the request for the shifting of the burden of proof, the Radnor Circuit Court effectively denied the Petitioners the right to access to the court protected by the Petition Clause.

To determine who bears the burden of proof in defamation cases, the Supreme Court has delineated three situations and the appropriate levels of proof required for each. First, if a plaintiff is a public figure and the speech is of public concern, the plaintiff bears the burden of proving falsity. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). Second, if

the plaintiff is a private figure, but the speech is of public concern, the plaintiff also must bear the burden of proving falsity. *Id.* at 768-69. Third, if the plaintiff is a private figure and the speech is of purely private concern, there is a presumption of falsity, with the defendant bearing the burden of proving the affirmative defense of truth. *See id.* Hence, the question of who bears the burden of proof centers on two issues: was the speech a matter of public concern and was the individual a private figure. These issues are largely intertwined. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (citing *Gertz v. Robert Welch*, 418 U.S. 323, 344-46 (1974)) (noting the weakness of a test to determine the extent of constitutional protection afforded to defamatory falsehoods based on subject-matter classifications and, instead, opting for a test that focused upon the character of the defamation plaintiff).

In *Gertz*, the Court articulated two types of public figures: general purpose public figures who “may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts,” and the more common limited-purpose public figure who “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” 418 U.S. at 351. The determination of these issues is largely based on consideration of the context and facts of each case. For example, the case of *Firestone* bears a close resemblance to the case at hand. There, the Court found that a plaintiff who divorced her husband, a scion of a wealthy industrial family, was not a limited-purpose public figure. 424 U.S. at 454. The Court explained that “[d]issolution of a marriage through judicial proceedings is not the sort of ‘public controversy’ referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public.” *Id.*

In the instant case, it is at least colorable that Jane Private was not a public figure, much like in *Firestone*, and, thus, the broadcast involving her relationship to Joe Public was not a matter of public concern. Although Joe Public was a well-known actor, similar to the husband in *Firestone* who was a prominent member of society, Jane Private did not bear the same public notoriety. Prior to her marriage to Joe Public, Jane Private had never been exposed to public scrutiny. And, comparable to the plaintiff in *Firestone*, she was only thrown into the public eye through her marriage. In addition, although it could be considered a matter of public concern that Joe Public might have committed a felony when he began his relationship with Jane Private, the rest of the broadcast—suggesting that Jane Private was two months pregnant—was a strictly private subject matter. Given that it is arguable that Jane Private was a private figure for defamation purposes and the speech was by in large not of public concern, it is, at the very least, colorable that ETI and RADIG should bear the burden of proving the affirmative defense of truth. Therefore, by summarily denying the Joe Public and Jane Private’s claim without consideration, the court violated their right to petition because they were effectively denied access to the courts to proffer their claim.

**B. The Petition Clause Protects Petitions That Are Not Issues of Public Concern**

Nothing in the text of the Petition Clause indicates that invoking the right is conditioned on the matter being an issue of public concern. *See* U.S. Const. amend I. Rather, the Clause provides for only three requirements: (1) the petitioner sought “redress,” (2) the request for redress was grounded on a grievance, and (3) the petition was directed to “the Government.” *Bill Johnson’s Restaurants*, 461 U.S. at 741. Joe Public and Jane Private’s matter satisfies each of these requirements.

When the Petition Clause was first adopted, “a petition to the legislature was viewed as a fundamental right and served as a means of securing redress of *private* grievances.” Carol Andrews, A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right, 60 Ohio St. L.J. 557, 611 (1999) (emphasis added). Corroborating this understanding, petitions to the first Congress “usually dealt with the satisfaction of a private claim.” Petitions, Memorials and Other Documents Submitted for the Consideration of Congress, May 4, 1789 to December 14, 1795, House Committee on Energy and Commerce 99th Cong., 2d Sess., 1. Specifically, many of the petitions that Congress received and responded to dealt with matters reminiscent of those addressed by colonial assemblies, such as private disputes and petitions for compensation. Gregory Mark, The Vestigial Constitution: The History and Significance of the Right to Petition, 66 Fordham L. Rev. 2163, 2227 (1998).

Historically, the Petition Clause was understood to encompass private, as well as public, matters; thus, supporting the basic function of the clause. The Petition Clause protects the right of an aggrieved individual to remedy his grievance. *See* U.S. Const. amend I. The standard by which this grievance is addressed is not public opinion, but rather justice. Hence, the Court has, in multiple instances, rejected a distinction based on public and private subject matter. *Bill Johnson’s Restaurants*, 461 U.S. at 741 (holding that the Petition Clause applies to libel action); *Brotherhood of Railroad Trainmen*, 377 U.S. at 1 (rejecting the argument that access to the courts protected by the Petition Clause is limited solely to matters of public concern); *Thomas*, 323 U.S. at 530 (holding “grievances for redress of which the right to petition was insured...are not solely religious or political causes).

Although the Court held in *Guarnieri*—the most recent case on the issue—that if a matter is not an issue of public concern as determined by the “public concern” test, it will not be

protected under the Petition Clause, this holding was made in a limited context. 131 S. Ct. at 2501. This ruling is constrained to applying the “public concern” test to retaliation claims brought by public employees. *Id.* The Court’s reasoning for limiting public employee protections under the Petition Clause was based on the view that a public employee petition has the potential to “achieve results that contravene governmental policies or impair the proper performance of governmental functions.” *Id.* at 2495. Thus, because a public employee petition may challenge a governmental policy, which could lead to workplace disruptions, the Court found it necessary for the public employer to have the authority to “restrain employees who use petitions to frustrate progress towards the ends they have been hired to achieve.” *Id.* at 2495-96. In addition, the Court was wary that an “[u]nrestrained application of the Petition Clause in the context of government employment would subject a wide range of government operations to invasive judicial superintendence.” *Id.* at 2496. Emphasizing the narrow holding, the Court even specifically stated that “[o]utside the public employment context, constitutional protection for petitions does not necessarily turn on whether those petitions relate to matters of public concern.” *Id.* at 2498.

The Court’s reasoning in *Guarnieri* does not translate to the instant case. The Joe Public and Jane Private are not public employees; therefore, the underlying reason for the Court’s limitation of the Petition Clause in *Guarnieri* does not apply. The fear of judicial interference with other branches of the government is, likewise, not a concern. Additionally, allowing the Petition Clause to protect the private matters, such as the matter was here, would comport with the historical understanding of the clause as well as the Court’s prior rulings that have not discriminated application of this fundamental right based solely on subject matter. Because the

Petitioners do not fit within *Guarnieri's* narrow holding, the “public concern” test should not be used in the case and the Petition Clause should be extended to the Petitioners’ case.

**C. Assuming Arguendo That The Petition Clause Is Limited to Matters of Public Concern, The Petitioner’s Issue is a Matter of Public Concern.**

Justice Kennedy proffered in *Guarnieri*, “[p]etitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole.” *Id.* at 2498. The Petitioners’ claim that the Sections 1 and 5 of Article III of the Radnor Constitution require heightened protection of privacy rights, thus placing the burden of proof on the defendants, is a matter that is of interest to the community as a whole. “As under the Speech Clause, whether an employee’s petition relates to a matter of public concern will depend on ‘the content, form, and context of [the petition], as revealed by the whole record.’” *Id.* at 2501 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)). Looking at the record as a whole, it is evident that the Joe Public and Jane Private’s matter does not relate to a purely private concern of defamation, but rather is an issue of interpretation of the Radnor Constitution. Unlike in *Guarnieri*, where the petition involved a complaint that related solely to the employee’s own duties, in the present case, the Petitioners are challenging the procedure of the Circuit Court—an issue that is of import to the entire Radnor Community.

**CONCLUSION**

For the forgoing reasons, the judgment of the Radnor Supreme Court should be affirmed for the first issue and reversed and remanded for further proceedings on the second issue.

Respectfully submitted,

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