NO. 20-332

In the Supreme Court of the United States

MAGGY HURCHALLA,

Petitioner,

v.

LAKE POINT PHASE I, LLC
& LAKE POINT PHASE II, LLC,

Respondents.

On Petition for a Writ of Certiorari to the
District Court of Appeal of Florida, Fourth District

BRIEF IN OPPOSITION OF RESPONDENTS LAKE POINT PHASE I, LLC AND LAKE POINT PHASE II, LLC

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QUESTION PRESENTED

Where a person speaks to a government official on a matter of public concern, and a subsequent governmental action regarding that matter harms a third party, whether a tort award against the speaker and in favor of the third party violates the Free Speech or Petition Clause of the First Amendment to the U.S. Constitution when the statement could reasonably be construed as a verifiable and true assertion or an unverifiable opinion, when the speaker genuinely believed the statement, and when there is no evidence that the statement caused the governmental action.

CORPORATE DISCLOSURE STATEMENT

No public company owns 10% or greater of either Respondent, Lake Point Phase I, LLC or Lake Point Phase II, LLC, or their parent company Lake Point Holdings, LLC.

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INTRODUCTION

The complex question presented by Hurchalla's petition bears little resemblance to the procedural or substantive facts of this case. As a result, the Respondent, Lake Point, will need to discuss the omitted facts of the case in greater detail. Those facts demonstrate that Hurchalla, as a former county commissioner, worked secretly behind the scenes to convince sitting county commissioners to breach a contract with Lake Point. She did this, not in a single statement, but in a series of emails, primarily to private email addresses of the commissioners. Some of those emails later went missing, and an expert explained that their absence was not consistent with cleaning up an email box. The critical information that we actually know she fed to the commissioners was false. She either knew it was false or she portrayed it as true to the commissioners with reckless disregard for the truth.

The county that breached its contract because of Hurchalla's interference settled its case with Lake Point for $12 million and a public apology for its "rush to judgment." Hurchalla has fought on, claiming that her tortious interference under Florida law is the equivalent of zealous testimony at a public hearing. But this Court long ago ruled that the right to petition does not include an unqualified right to express harmful falsehoods. *McDonald v. Smith*, 472 U.S. 479, 484 (1985).

The First Amendment should play a role in a tortious interference claim involving a contract between the government and a private party, but it does not protect someone who secretly uses false

information to convince commissioners to breach a contract not terminable at will. The jury in this case simply did not believe Hurchalla's version of these events.

As a practical matter, Hurchalla never requested a jury instruction on the "actual malice" theory she wishes to bring to this Court. Although Hurchalla invited any error by presenting a jury instruction under a different standard, the Florida Fourth District Court of Appeal still obeyed *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 486 (1984), and conducted a full review of the entire record to conclude that Lake Point had presented evidence which it regarded as clear and convincing evidence of "actual malice."

In her petition, Hurchalla misleadingly contends that there is a "minority approach" that was supposedly followed by the Florida appellate court when it conducted its *Bose* review. Hurchalla implies that under *Bose*, a reviewing court does not consider whether a reasonable jury could have found that the statements at issue were false. However, this is not a "minority view" among state courts. There are multiple circuit courts that have engaged in a *Bose* review and considered whether a reasonable jury could have found a statement to be false.

To the extent that Hurchalla is advocating now for the expansion of the *Bose* approach, this case is a uniquely poor vehicle for this purpose, not just given the invited error problem, but also because of the highly unusual facts regarding Hurchalla's surreptitious conduct, which the Florida appellate court explained in its opinion:

> In addition to her January 4, 2013 email, there were emails [Hurchalla] sent to her commissioner friends instructing them in detail on what to do at board meetings to work towards voiding the Interlocal Agreement, signed by her as "Deep Rockpit," as well as references to herself in emails as "Ms. Machiavelli." That evidence, coupled with evidence of her significant influence with a majority of the commissioners and her ability over time to have them assert oppositional positions on a project they knew little-to-nothing about, was sufficient to support an inference of malevolent intent to harm Lake Point.

Hurchalla v. Lake Point Phase I, LLC, 278 So.3d 58, 68 (Fla. 4th DCA 2019).

For these reasons, the petition should be denied.

STATEMENT OF THE CASE

A. Factual and Legal Background

1. The Public Works Project

This case arises from 2,200 acres in Martin County, Florida, (the "PROPERTY"), that are strategically situated at the only location where Lake Okeechobee, the C-44 Canal, and the L-8 canal all converge. As recognized by the South Florida Water Management District, SFWMD, this unique location "lends itself to phosphorous reduction and water treatment and transfer possibilities." (R.6567). SFWMD attempted to purchase the Property in 2008 from an unsuccessful developer, but was unable to secure adequate financing. (R.7856). After the SFWMD's acquisition attempt fell through, Lake Point saw an opportunity to develop the Property in a manner that was both profitable as well as environmentally beneficial. Lake Point would excavate limestone deposits on the Property thereby creating large stormwater management lakes that would then be donated to the SFWMD at no cost. (R.6579-581). Accordingly, Lake Point purchased the property for approximately $50 million. (T.405-407; 1429).

In 2008, Lake Point approached SFWMD with a concept for a public-private partnership to construct a stormwater treatment project on the Property (the "PROJECT"). The Project would create the ability to cleanse dirty water from Lake Okeechobee, like a natural "kidney," and also store water for distribution within the three water basins. (T.411:18-413:10).

Before entering into a contract, SFWMD oversaw an "in depth" due diligence investigation to evaluate the Project's potential benefits. Outside consultants hired by Lake Point and consultants hired by SFWMD performed water modeling and water quality studies. They also prepared geotechnical reports and a feasibility analysis. (T.415:12-416:19; 417:20-418:21) (R.5892-93; 6796-97). After its investigation, SFWMD determined that the Project was "an integral component of the Northern Everglades and Estuaries Protection Program," (R.6575), which protects the Everglades, and concluded that it was good for the environment, water quality, and taxpayers, (R.5894). SFWMD concluded that the Project "has potential for reduction of phosphorous in the range of 2.5 to 6.2 metric tons/year," (R.6750), and would save approximately 37,555 acre/feet of problematic discharges from going into the St. Lucie estuary. (R.5895). Making the Project a reality, however, required the cooperation of the County.

SFWMD's chief engineer shared with the County its studies showing the storage and treatment benefits of the Project. (R.5894, 6567). This engineer would later testify at trial that if someone claimed that there were studies promised that were not provided to the County, that would be false. (R.5893-5894).

In April 2008, the Board of County Commissioners ("BOCC") adopted a resolution supporting SFWMD's intent to sign an agreement with Lake Point to construct the Project, (R.6345-346), and in August 2008, the BOCC unanimously approved the execution of such an agreement. (R.5894; 6567-69).

2. The Acquisition Agreement

On November 21, 2008, Lake Point entered into an Acquisition and Development Agreement with SFWMD (the "ACQUISITION AGREEMENT"). The Acquisition Agreement required Lake Point to donate the Property, in phases, to SFWMD subject to a 20-year reservation of mining rights. (R.6579-581). During the reservation period, Lake Point's excavation of limestone would create the stormwater management lakes that could be used by SFWMD for water storage and conveyance purposes. (R.6579-581).

The Property is divided into two separate parcels known as Phase I and Phase II. Phase I was encumbered by an earlier Martin County Development Order that needed to be vacated under the Acquisition Agreement before the Property could be donated to SFWMD. (R.6591). This encumbrance would later play a role in Martin County's breach of contract.

3. The Interlocal Agreement

On May 28, 2009, Lake Point, SFWMD, and Martin County, executed an Interlocal Agreement, which expressly acknowledged the Project's numerous "water related benefits." (R.6670). The Interlocal Agreement also required that the Development Order be terminated prior to the donation to SFWMD. (R.6680). The County expressly agreed that it would take no action to create any encumbrances on the Property. (R.6678).

Lake Point required permits from both the Florida Department of Environmental Protection ("FDEP") and the Army Corps of Engineers ("Army Corps"). (R.6673). But no additional permit was required from Martin

County because the Project "qualifie[d] as an exempt 'public stormwater project.'" (R.6679). The Interlocal Agreement allowed Lake Point to continue mining in Phase I, and to expand mining activities into Phase II when it received mining permits from FDEP and Army Corps. (R.6679-80).

4. Performing Under the Contracts Between 2009 and 2012

Over the next several years, Lake Point worked diligently to implement the Project—spending significant sums of money in the process. (T.434). Lake Point also obtained the necessary mining permits from FDEP and Army Corps.

Up through the summer of 2012, Martin County staff performed various unannounced inspections of the Property. (T.299). During this time, the County never identified any wrongdoing by Lake Point. (T.299). To the contrary, the County viewed the Project favorably. (T.303). However, as the deputy county administrator confirmed at trial, the County's "attitude towards Lake Point start[ed] to change in September of 2012." (T.303).

5. Fall of 2012: Hurchalla Targets Lake Point

Hurchalla is a former County Commissioner who served two decades, from 1974 to 1994, on the BOCC. Before the County entered into the Interlocal Agreement in 2009, Hurchalla knew of the Project and expressed a few concerns in private, but took no action to block the contract. But after a "very bitter election" in 2012, Hurchalla explained the County had a new, "slower growth" BOCC. (T.1513).

Hurchalla maintained close ties with members of the new BOCC. She was friends with the chairwoman, Commissioner Sarah Heard. (R.5885). She was also friends with Commissioner Anne Scott, (T.1582:11-1583:5), and had persuaded her to run for public office in 2012 (R.5898). She knew the private e-mail addresses of at least four of the five members of this BOCC. (T.1516).

As described in the Florida appellate court's opinion, Hurchalla began expressing her disagreement with the Project in a series of emails sent to these close friends using their private email accounts. Hurchalla began giving explicit instructions in the emails to her commissioner friends as to how to stop the Project with various maneuvers. *Hurchalla*, 278 So.3d at 62.

Specifically, on September 9, 2012, Hurchalla sent a private e-mail to Commissioner Heard claiming that the Project lacked the ability to store water, and that "Martin County allowed [Lake Point] to destroy wetlands." (R.7842). She instructed Commissioner Heard to undermine the Project by sending a message—carefully drafted by Hurchalla—to County staff and officials at SFWMD. (R.7842) (Res.App.19a). Commissioner Heard forwarded this e-mail from her personal account to her official account, removed all indications that Hurchalla had authored the message and then, as instructed, sent Hurchalla's statement, verbatim, to County staff and the executive director of SFWMD. (R.6761).

This e-mail surprised County staff since the destruction of wetlands is a serious issue—especially in Martin County. (T.305). Moreover, the e-mail represented a complete reversal for Commissioner Heard

who previously voted in favor of the Project in 2009. (R.7845, 7861, 7867). County staff responded to this e-mail stating: "No wetland impacts have occurred on this property." (R.6765). County staff referred Commissioner Heard to SFWMD for questions about the storage benefits of the Project. (R.6765). Commissioner Heard then forwarded staff's response to Hurchalla, who refused to accept the representations of County staff about the Project and instead drafted a reply e-mail for Commissioner Heard to send back to County staff. (R.6765).

Lake Point did not know that Hurchalla was communicating with Chairwoman Heard behind the scenes at that time, and did not learn the full extent of Hurchalla's communications with the commissioners using private emails accounts until much later. (T.472-474). These private email account communications were never made part of any required ex-parte communication disclosure by the County prior to the public hearings in 2013. (T.500). The County Administrator testified at trial that he did not know in 2012 and the beginning of 2013, that Hurchalla was communicating behind the scenes with several commissioners about the Project. (T.346).

On January 4, 2013, Hurchalla sent the BOCC an e-mail about Lake Point stating that: (1) the Project "destroys 60 acres of wetlands"; (2) "[n]either the storage nor the treatment benefits have been documented"; and (3) the Project "has been fast tracked and allowed to violate the rules." (R.8056-057). This is the email that the Florida appellate court focused on in its opinion.

Hurchalla also claimed that Lake Point did not qualify as a "Public Works Project" and, therefore, was

not exempt from obtaining County approval to mine the Property. (R.8056-57). In this same e-mail, Hurchalla admitted that she knew County staff "actually looked at the project and inspected the site" and concluded that "[n]o board action [was] necessary." (R.8057). However, Hurchalla defiantly demanded: "SOME Board action is necessary." (R.8057).

During this same period, Hurchalla hosted a meeting in her home—outside of public view—with the executive director of SFWMD, and a member of its governing board. At this meeting, Hurchalla again claimed that "the wetlands on the property had been destroyed." (T.390:12-391:16). Like County staff, however, SFWMD found no wetland damage. (T.1289).

6. Martin County Breaches the Interlocal Agreement

On January 2, 2013, Lake Point formally requested that the County vacate the Development Order and submitted a check as payment. (R.7965; 8049). Martin County cashed the check. Staff advised BOCC of this request. (T.477, 519).

On January 8, 2013, a few days after Hurchalla's last e-mail, Commissioner Heard parroted Hurchalla's claim that "[w]etlands are being destroyed on this Property" at a BOCC meeting. (T.510). Although she had previously referred to Lake Point as "a fine project" and voted to enter into the agreement, Commissioner Heard now described the Project as "environmental treachery." (R.7861, 7867, 7706). At this same BOCC meeting, Commissioner Heard claimed for the first time that Lake Point was improperly mining outside of the Phase I parcel without the required County approvals. (T.508).

Despite presenting these unfounded claims as her own, Commissioner Heard later admitted that she (i) had never visited the Lake Point Property; (ii) agreed that Hurchalla's January 4, 2013 email left the impression that there were no studies documenting the benefits; (iii) did not know where she had obtained the information that Lake Point could not function as a reservoir; (iv) had not seen any modeling studies and had not asked to see any such studies; (v) did not know whether the studies were accurate and never followed up with SFWMD or Lake Point to find out; (vi) was unaware of any facts that Lake Point had destroyed wetlands; and (vii) had never read any of the applicable permits. (R.5875-5881, 5886).

Commissioner Anne Scott stated at the January 8, 2013 BOCC hearing that "it appears that it [the Project] morphed into a mining operation that's threatening the wetlands and the water table and other environmental concerns." (T.511). Like Chairperson Heard, Commissioner Scott would later testify that she had never read any of the studies pertaining to the Project. (R.5900). Similarly, Commissioner Ed Fielding, who supported the institution of code enforcement proceedings against Lake Point, admitted that he had not looked at any of the modeling performed by SFWMD for the Project, and had not reviewed any of the studies concerning the Project's benefits. (R.5869-5870).

Rather than vacate the Development Order at the January 8, 2013 hearing, the BOCC instructed staff "to take no action on [Lake Point's] request." (T.519). The BOCC then suggested that it was "in a position to shut [the Project] down". Commissioner Anne Scott moved to instruct staff to initiate code enforcement

proceedings against Lake Point for illegally mining outside of Phase I. (T.515:16; 517:10-517:19).

As the County Administrator admitted at trial, if the County had vacated the Development Order (as it was required to do), any purported issue regarding Lake Point's right to mine outside of Phase I "would have gone away." (T.349:2-349:6). But by refusing to do so, the County put Lake Point in a Catch-22: SFWMD would not accept the conveyance from Lake Point until the County vacated the encumbering Development Order, (T.1287), while the County refused to vacate it until after Lake Point transferred the Property to SFWMD. (T.349:23-350:6).

7. Hurchalla: DON'T DO IT!

After the January 8th BOCC meeting, Hurchalla sent additional e-mails regarding Lake Point to various County Commissioners at their private e-mail addresses. (R.6785, 8097) (Res.App.17a). These e-mails were sarcastically signed: "Deep Rockpit." (R.6785, 8097) (Res.App.18a). This was consistent with Hurchalla's past references to herself as Ms. Machiavelli, (T.813-814), and her admission that she "gratuitously" attacks business organizations, (T.1583 and R.8062). In the "Deep Rockpit" e-mail, Hurchalla privately instructed individual commissioners on how to respond to Lake Point's attempt to pay monies owed to Martin County under the Interlocal Agreement:

> DON'T DO IT! If you accept the money it can be argued that the Interlocal agreement with SFWMD and the County is in effect. IT IS NOT . . . it does not go into effect until the property is transferred . . . INSTEAD ask staff to bring back an agenda item terminating

> the Interlocal agreement . . . [a]void discussion of other issues. Don't complicate thing . . . Get the contract cancelled."

(R.6785, 8097) (Res.App.17a).

Lake Point had no knowledge of these communications until well after the lawsuit was filed. (T.527). Further, Hurchalla admitted that she destroyed her copies of the "Deep Rockpit" emails after the litigation was filed. (T.527).

Heeding Hurchalla's instructions, BOCC reconvened in January 2013 and "request[ed] staff to bring back a termination document." (R.7872). Obeying Hurchalla's commands, the BOCC never processed Lake Point's request to vacate the Development Order, preventing the transfer of the Property to SFMWD. (T.477:14-477:17).

On February 4, 2013—at the request of the BOCC—County staff began code enforcement proceedings against Lake Point by issuing two Notices of Violation. (T.317:6-317:15). The Notices alleged that Lake Point was: (i) conducting activity "that is not consistent with the approved Development Order" for the former ranchette project; and (ii) mining outside of the Phase I parcel without a County-issued permit. (R.7003, 7009). These Notices breached the Interlocal Agreement provision stating that Lake Point did not need a separate mining permit nor other approvals from Martin County once Lake Point had obtained the FDEP and Army Corps permits. (R.6679). This created a legal cloud over Lake Point's mining operations, raising doubt about whether Lake Point could remain in business. (T.714-715, 752). Lake Point's competitors leveraged

this uncertainty to dissuade customers from ordering Lake Point's rock. (T.772-774; 776).

Hurchalla knew her audience extremely well when she commenced her clandestine efforts in the Fall of 2012 to kill the Project. As Hurchalla characterized the newly elected BOCC in her trial testimony:

> You had two new commissioners who had never seen this project before and had just come into office in November. You had three commissioners who had not seen this project in three years and were trying to understand the new information on it.

(T.1563).

When Hurchalla wrote the commissioners on January 4, 2013 and stated that "[n]either the storage nor the treatment benefits [for the Project] have been documented" (R.8057), she already had reviewed at least one of the studies pertaining to water quality benefits. (T.1535). In fact, she testified at trial and agreed with the studies that the stormwater treatment areas (STAs) on the Project would have removed some phosphorous (T.1535, 1550-51). Hurchalla testified under oath: "I'm not questioning that an STA located there could take some phosphorous out." (T.1551). "I did not question the model at all." (T.1550).

Further, Hurchalla's own expert, Mr. Thomas Conboy, admitted that "[t]he South Florida Water Management District in 2008 had done studies that documented the storage and treatment benefits of the Lake Point project." (T.1184-1185). When asked whether "the studies were documentation of storage and treatment benefits of the Lake Point project?", Mr. Conboy responded with "yes." (T.1186).

Hurchalla also knew how to use the "wetland" word for maximum impact in her private interactions with County Commissioners. She made broad statements in late 2012 to the County and SFWMD to the effect that Lake Point had destroyed all of the wetlands on its property, but also later made more specific claims about the wetland acreage allegedly destroyed by Lake Point, claiming the County had allowed the destruction of 60 acres of wetlands. (R.6786, 7185).

She knew these statements were false or was at least extremely reckless in making the statements because both the qualified County staff and SFWMD told her she was wrong. Indeed, SFWMD concluded that Lake Point "had not destroyed the wetlands"; rather, "they were protecting them." (R.5896). Martin County staff unequivocally confirmed the same and informed Hurchalla in September 2012: "No wetland impacts have occurred on this property." (R.6765).

After receiving these explanations, Hurchalla still continued—in private e-mails to County Commissioners—falsely claiming that Lake Point was destroying wetlands. (R.6786). Thus, Hurchalla either knew her statements about wetlands were false or made them with a reckless disregard for the truth.

After the litigation commenced, Hurchalla deleted key emails about Lake Point that she had sent to her friends on the BOCC during the critical late 2012/early 2013 time frame. Some of these emails have still never seen the light of day, including at least two emails relating to Lake Point that Hurchalla sent to Chairwoman Heard at her private email account in December 2012, just days before the January 4, 2013 email, and the important votes on the Project taken by the BOCC shortly thereafter. The jury heard from

Mr. John Jorgensen, a former NSA computer forensics expert, (T.796:19-796:24), that Hurchalla authored e-mails to BOCC members, which she later deleted during the course of the litigation, and never produced to Lake Point.

Mr. Jorgensen evaluated three e-mails that were sent by Commissioner Heard to County staff in December of 2012, immediately prior to Hurchalla's January 4, 2013 email. (R.7648-61). After an exhaustive review, Mr. Jorgensen was able to conclude that Commissioner Heard was not the original author of these emails; rather—similar to the e-mail that Commissioner Heard passed off as her own—Hurchalla was the original author. (T.806:14-806:25; 812:19-812:24). However, neither Hurchalla nor any other source, produced the original version of these emails, including Hurchalla's prefatory instructions in those emails to Chairwoman Heard. (T.822:21-822:23).

Hurchalla claimed at trial that she periodically cleaned out her mailbox and never intended to destroy evidence. The jury, however, was not required to believe this explanation. Hurchalla's "deletion" was highly selective, with her preserving several emails pertaining to Lake Point from prior years, but deleting those from the key time frame. (T.823). And likewise, Commissioner Heard was unable to produce the original emails from Hurchalla. She claimed that her email account had been "hacked." (R.5891).

B. The Trial in This Case

On February 5, 2013, Lake Point sued the County for breach of the Interlocal Agreement and SFWMD for breach of the Acquisition Agreement. (R.1-14). Lake Point added a claim against Hurchalla for tortious

interference. (R.207). After several years, Lake Point reached settlements with both the County, (R.8110), and SFWMD, (R.8283). The settlement with the County required it to pay $12 Million and the BOCC to issue an apology letter. (T.321:8-321:22).

The tortious interference claim against Hurchalla did not settle. Hurchalla alleged that her statements were privileged because she was speaking to public officials on matters of public concern. (R.548). At trial, the jury heard the evidence of the facts described above.

In her Proposed Jury Instruction No. 10, which Hurchalla titled "First Amendment Privilege", Hurchalla elected to use the Florida common law "express malice" standard, rather than the "actual malice" standard under *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). (Res.App.6a). Further, she stated in her proposed instruction that "express malice" need only be proved by the "greater weight of the evidence". (Res.App.6a). Hurchalla's proposed instruction stated in relevant part as follows:

> If you find that Mrs. Hurchalla made statements to a political authority regarding matters of public concern, then you should decide whether, as Lake Point claims, Mrs. Hurchalla made the statements with express malice.
>
> Express malice exists when someone makes a false statement with the sole purpose of gratifying one's ill will or if the person has hostility and intent to harm the other rather than to advance and protect an interest involving a matter of public concern.

> If the greater weight of the evidence shows that Mrs. Hurchalla had a qualified privilege in communicating with local governmental officials, then your verdict should be for Mrs. Hurchalla on Lake Point's claim of tortious interference with the Interlocal Agreement.

(R.5846-5847) (Res.App.6a-7a).

Hurchalla never asked the trial court to conduct an independent review of the evidence until a post-trial motion. (R.8374). Even then, she did not ask the court to determine whether there was clear and convincing evidence of actual malice under *Sullivan*. Rather, she insisted on "express malice" as the applicable legal standard.

The instructions on the claim for tortious interference with a contract not terminable at will were the Florida standard instructions. *See* FSJI (Civil) 408.5. (R.5817).

As to Hurchalla's First Amendment defense, the jury was ultimately instructed:

> You must render your verdict in favor of Hurchalla on Lake Point's tortious interference claim if you find that Hurchalla used proper methods to attempt to influence Martin County, and that her motive for petitioning Martin County was not primarily to harm Lake Point. However, deliberate misrepresentations of fact are not considered to be a proper method.

(R.5818) (Res.App.11a).

At the charge conference, her counsel remained silent when the trial court asked: "The parties must

prove all claims and defenses by the greater weight of the evidence . . . Any objection to that?" (T.1671:20-1672:9). Accordingly, the jury was instructed that the burden on the First Amendment defense was greater weight of the evidence, as requested by Hurchalla. (R.5817-18).

Because of the expert evidence explaining Hurchalla's deletion of e-mails, and Hurchalla's admissions regarding the same, the jury received Florida's standard failure to maintain evidence instruction:

> If you find that: Hurchalla deleted or otherwise caused various emails between her and Martin County Commissioners to be unavailable . . . and the emails would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to Hurchalla.

See FSJI (Civil) 301.11. (R.5816).

The jury returned a verdict in favor of Lake Point. (R.5863).

Hurchalla's petition discusses an immaterial claim of alleged impropriety by the trial court judge at a settlement conference. These allegations were rejected in a separate appeal to the Florida Fourth District Court of Appeals by order dated May 11, 2018. *Hurchalla v. Lake Point Phase I, LLC*, Case No.: 4D18-0763.

After consultation with her lawyers, Hurchalla decided to meet with the trial judge and her counsel for a "potential settlement conference." The trial judge's offer to assist the parties in settling this

contentious litigation (which the parties were free to reject) is a role expressly authorized by rule. *See* Fla. R. Civ. P. 1.200(a)(10) (trial courts may "pursue the possibilities of settlement" with the parties).

Hurchalla knew the trial court would inform her of the weaknesses of her case and suggest ways to resolve it before the jury did. After the conference, Hurchalla did not file a written motion to disqualify, as she had for the first judge on the case. *See Jackson v. Leon County Elections Canvassing Board*, 214 So.3d 705, 706 (Fla. 1st DCA 2016). This matter has no role in deciding jurisdiction in this case.

C. Appellate Proceedings

After judgment on the jury verdict was entered against Hurchalla, she appealed the judgment to the Florida Fourth District Court of Appeals, which affirmed the judgment.

The Fourth District evaluated Hurchalla's "First Amendment" instruction, and stated:

> Hurchalla's counsel submitted 'Defendant's Proposed Jury Instruction No. 10 First Amendment Privilege,' which actually contained the elements of the common law privilege, rather than the First Amendment privilege. . . . . While she affirmatively requested an instruction discussing express malice, she argues the trial court failed to instruct on actual malice.

Hurchalla, 278 So.3d at 64.

The Fourth District then concluded that Hurchalla invited any error, and waived any argument that Lake Point's claim be decided under *Sullivan*:

> Because defense counsel's submissions and arguments during the charge conference failed to make important distinctions between the two privileges, we determine the trial court's instructions regarding privileged communication and the privilege defense were not reversible error. *See Universal Ins. Co. of N. Am. v. Warfel*, 82 So.3d 47, 65 (Fla. 2012) ("Fundamental error is waived where defense counsel requests an erroneous instruction."); *Goodwin v. State*, 751 So.2d 537, 544 (Fla. 1999) ("If the error is 'invited,' . . . the appellate court will not consider the error a basis for reversal." (footnote omitted)).

Hurchalla, 278 So.3d at 64.

Despite the failure to preserve a right to this heightened review, the Fourth District went on in its opinion voluntarily to analyze the case under *Sullivan* and *Bose* to show that there was no error, even if Hurchalla had preserved this issue. *Hurchalla*, 278 So.2d at 65.

Although the record contains more evidence, the Fourth District focused for illustrative purposes on two statements in Hurchalla's January 4, 2013 email. *Hurchalla*, 278 So.3d at 65. The Fourth District's explanation warrants a full read and it demonstrates a court that fulfilled its obligation to review and evaluate the evidence under *Bose.*

The Florida Supreme Court declined to exercise jurisdiction over the matter without opinion.

REASONS FOR DENYING THE PETITION

I. HURCHALLA DOES NOT SATISFY THE JURISDICTIONAL REQUIREMENT FOR CERTIORARI REVIEW.

This Court likely lacks jurisdiction to consider Hurchalla's petition. "[S]o as to show that the federal question was timely and properly raised and this Court has jurisdiction to review the judgment on a writ of certiorari," Supreme Court Rule 14 mandates that a petition seeking review of a state court judgment include: (1) specification of the stage in the proceedings, "both in the court of first instance and in the appellate courts," when the federal questions sought to be reviewed were raised; (2) the method of raising them and the way in which they were passed on by those courts; and (3) pertinent quotations of specific portions of the record, established by specific reference to the places in the record where the matter appears.

Hurchalla's petition fails to satisfy these requirements. It omits any discussion of the jury instructions she actually proposed in the "court of first instance". Hurchalla's principal contention on appeal is that there was insufficient evidence of "actual malice" introduced at the trial court under a "clear and convincing evidence" standard, to support the jury's verdict in favor of Lake Point on its tortious interference claim.

However, Hurchalla never proposed a jury instruction using an "actual malice" test under a "clear and convincing evidence standard." Instead she proposed an "express malice" test under a "greater weight

of the evidence standard." The Florida appellate court thus concluded that Hurchalla waived any argument that Lake Point's claim be decided under *Sullivan*. *Hurchalla*, 278 So.3d at 64. It is an issue of unpreserved error—"plain error" or "fundamental error"—that is also invited error.

Neither federal courts nor Florida courts generally protect litigants from such invited error. *See, e.g.*, *Sands v. Wagner*, 314 Fed. Appx. 506, 508-09 (3d Cir. 2009) (no plain error on burden of proof instruction where the party's own proposed instruction did not include the burden of proof sought on appeal). "Fundamental error is waived where defense counsel requests an erroneous instruction." *Universal Ins. Co. of N. Am. v. Warfel*, 82 So.3d 47, 65 (Fla. 2012).

Even in criminal cases, where due process issues involve liberty, courts do not review invited plain error. "We have been especially reluctant to reverse for plain error when it is 'invited.'" *United States v. Mangieri*, 694 F.2d 1270, 1280 (D.C. Cir. 1982) (invited error where appellant's proposed instruction differed from position advanced on appeal, even where trial court did not use appellant's instruction). *See also Dennis v. United States*, 341 U.S. 494, 500 n. 2 (1951) ("petitioners themselves requested a charge similar to the one given, and under Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., would appear to be barred from raising this point on appeal").

II. EVEN IF THIS ISSUE HAD NOT BEEN WAIVED IN THE TRIAL COURT, THE FLORIDA FOURTH DISTRICT COURT OF APPEALS CONDUCTED A PROPER INDEPENDENT EXAMINATION OF "ACTUAL MALICE" UNDER *BOSE*. HURCHALLA IS SIMPLY UNSATISFIED WITH THE RESULT.

A. The Falsity of Hurchalla's Statement About Storage and Treatment Benefits

Hurchalla claims that the statement "[n]either the storage nor treatment benefits have been documented" is ambiguous, because to her personally, "documented" meant that something had been proven to her satisfaction. According to her, the existence of published studies documenting the treatment and storage benefits was not enough. Hurchalla then claims that since her interpretation is reasonable, the First Amendment requires that her interpretation be accepted as a matter of law by any court conducting a *Bose* independent review. Lake Point takes these issues in turn.

For her definition of "documented," Hurchalla looks to the definition of "document" from Merriam Webster. Hurchalla contends that "document" can connote to show "factual or substantial support" for a position. Thus, Hurchalla claims that she was communicating to the commissioners that "[n]either the storage nor treatment benefits have been [substantially] or [sufficiently] documented."

To argue this point, Hurchalla has used the third definition of "document" from Merriam Webster. The first two definitions use "document" (as a verb) in the sense that someone off the street would understand the word: "(1) to furnish documentary evidence

of; (2) to furnish with documents." https://www.merriam-webster.com/dictionary/document.

A reasonable jury certainly could have found that the statement "[n]either the storage nor treatment benefits have been documented" was false under either Lake Point or Hurchalla's interpretation of the word "documented." And a reasonable jury could have done so under either a preponderance of the evidence or a clear and convincing evidence standard.[1]

Here, without any factual dispute, the evidence established that written studies on the storage and treatment benefits of the Project were prepared and relied upon by SFWMD and Lake Point, and shared with the County, at the time they entered into the agreements. Hurchalla admitted she knew of the existence of the studies. Hurchalla cannot seriously claim that there was no documentation of the storage and treatment benefits of Lake Point in this "plain language" sense.

Even under Hurchalla's definition of "document" as connoting "substantial" support, there was sufficient evidence that would have allowed a reasonable jury to have found her statement false. Hurchalla admitted at trial that she agreed with the studies she had reviewed that the Project would reduce harmful phosphorus levels in water.

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[1] In *Harte Hanks v. Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n2 (1989), this Court declined to decide whether a plaintiff in a defamation case subject to *Sullivan* must prove "falsity" by clear and convincing evidence.

Nevertheless, Hurchalla contends that it is a minority view for an appellate court to treat a jury's finding of fact that a statement is false as a finding. She claims this is actually a pure question of law that an appellate court must review *de novo*. For this approach, Hurchalla provides a list of state court decisions that allow the jury to determine whether a particular statement was false, implying that unlike these opinions, courts conducting a proper *Bose* review decide for themselves whether a statement is false. However, Hurchalla has ignored federal circuit opinions that conflict with her interpretation.

In *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 189 (2d Cir. 2000), for example, the Second Circuit conducted an independent review under *Bose*. Nevertheless, on the issue of falsity, the Second Circuit reviewed the accusation that "AT&T is reportedly withdrawing its sponsorship of Radyo Pinoy" after having been "shortchanged of its allotted time slot," and concluded that:

> a reasonable juror evaluating the evidence could find—by both a preponderance of the evidence and by clear and convincing proof—that those statements were false.

See also Tavoulareas v. Piro, 817 F.2d 762, 788 (D.C. Cir. 1987) (conducting a *Bose* independent review, and noting a reasonable jury could have concluded the charge that plaintiff "personally urged" "Comnas to accept Peter as a partner in Atlas" was false). So could a reasonable jury in this case have concluded that Hurchalla's statement about documentation was false.

The plain language of "documented" fully supports the decision of the Florida appellate court. However, even if there is more than one possible interpretation of the word "documented," that hardly means that deciding between the interpretations is always a matter for the court on First Amendment grounds. Hurchalla's emails are not statutes or contracts requiring legal interpretation; they were communications to persuade commissioners to void a contract. Under both Florida and federal law, constitutionally, juries decide such questions of fact, and falsity in this context has a factual component.

B. "Context" Does Not Help Hurchalla

Hurchalla contends that as a matter of law, her statement on the lack of documented benefits should be interpreted with regard to an earlier statement in the January 4, 2013 email about how "a study was to follow that documented the benefits. That study has not been provided. There does not appear to be any peer review by the CERP team to verify benefits from the rock-pit." This is not something that can be decided in Hurchalla's favor on a de novo basis.

"Neither the storage nor the treatment benefits have been documented" is a sentence that appears several paragraphs after the language on which Hurchalla now relies to provide "context," and after several different intervening topics are discussed in the email. There is no reason to believe that an ordinary reader who knew essentially nothing about the Project (i.e. Hurchalla's friends on the BOCC in late 2012 and early 2013) would have read the sentence on how "neither the storage nor the treatment benefits have been documented" and interpreted that language

to be a shorthand reference to the purported lack of "peer-reviewed studies" conducted pursuant to a different statutory program, *i.e.* the Central Everglades Restoration Program. In advancing this highly nuanced interpretation, Hurchalla ignores the fact that she knew her audience lacked knowledge about the Project.

Additionally, Hurchalla's other clandestine writings also frame the "context" for the statements in her January 4, 2013 email, including her earlier September 2012 email to Chairwoman Heard that did not reference the need for peer reviewed studies that were part of CERP, but insisted merely that the Lake Point project could not function as a reservoir. *See, e.g.*, *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 177 (2d Cir. 2000) (context includes broader setting of the communication; words must be tested against the understanding of the average reader).

C. Clear and Convincing Evidence of Actual Malice

Under *Sullivan*, "actual knowledge" requires proof that a statement is false or made with reckless regard as to whether it is true or false. Here a reasonable fact finder could conclude that Hurchalla's statement that the benefits had not been "documented" was false. Hurchalla admitted at trial that she had actually reviewed at least one of the studies prior to sending her January 4, 2013 email. She admitted knowledge of the documentation.

Even under Hurchalla's narrow view of "documented" as meaning essentially "substantiated to Hurchalla's satisfaction," she still loses on the actual malice issue based on her own trial testimony. When it conducted its *Bose* review, the Florida appellate

court had before it the portion of Hurchalla's testimony, in which she admitted the studies showed that the Project would reduce phosphorous, a primary purpose of the Project. Hurchalla admitted on the stand: "I'm not questioning that an STA [stormwater treatment area] located there could take some phosphorous out." (T.1551). "I did not question the model at all." (T.1550). Thus, Hurchalla admitted she knew that at least some benefit was substantiated.

Nevertheless, there was more circumstantial evidence of actual malice under a clear and convincing evidence standard. When a court evaluates "actual malice," the inquiry is not resolved as a matter of law in the defendant's favor if the defendant merely denies any intent to mislead. Otherwise, no plaintiff would ever prevail unless it was able to obtain such an admission from the defendant. Rather, in evaluating the subjective state of mind of the speaker, a court must look at the surrounding circumstances and circumstantial evidence. *Brown v. Petrolite Corp.*, 965 F.2d 38, 47 (5th Cir. 1992) ("[A] court or jury may infer actual malice from objective circumstantial evidence, which can override a defendant's protestations of good faith . . . . These facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice."); *Moore v. Vislosky*, 240 F.App'x 457, 468 (3d Cir. 2007) (a reasonable jury is not required to believe the explanation of the defendant). There is abundant circumstantial evidence of actual malice in the record.

1. Clandestine Communications with Ignorant Commissioners

Hurchalla waited several years after the signing of the contract—until she had a majority of her friends on the BOCC—to seek to kill the contract. Hurchalla's knew that the BOCC that swept into power in late 2012 knew essentially nothing about the Lake Point Project, were not familiar with (or had forgotten) the studies conducted before the contract was signed, and were relying on Hurchalla for their information on the treatment and storage benefits of the Project.

2. The Deletion and Destruction of Important Evidence from the Crucial Time Frame of the Statements

Among the circumstantial evidence relevant to a defendant's actual malice is the defendant's destruction of pertinent evidence. *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1135-36 (7th Cir. 1987) (defendant's destruction of evidence relating to the allegedly false statements helped demonstrate actual malice). After the litigation commenced, Hurchalla deleted key emails about Lake Point that she had sent to her friends on the BOCC during the critical late 2012/early 2013 time frame. Some of these emails are still missing, including at least two emails relating to Lake Point that Hurchalla sent to Chairwoman Heard at her private email account in December 2012, just days before the January 4, 2013 email, and the important votes on the Project taken by the BOCC shortly thereafter. Commissioner Heard was likewise unable to produce the original emails from Hurchalla, claiming that her private email account used for public business had been "hacked." (R.5891).

3. Evidence of Intent to Harm Lake Point

Hurchalla's actual malice is also shown by her private e-mails to BOCC members. Hurchalla was not just making claims about the lack of studies so that she could get her friend Chairwoman Heard to blurt out in public hearings that Lake Point was "environmental treachery." Rather, Hurchalla wanted the County to void its agreement with Lake Point. In her "Deep Rockpit" e-mail, for example, Hurchalla expressly instructed individual County Commissioners to avoid discussing other issues and "[g]et the contract cancelled." (R.6784, 8097). This is also circumstantial evidence of actual malice. *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 186 (2d Cir. 2000) (evidence of ill will combined with other circumstantial evidence indicating that the defendant acted with reckless disregard of the truth may support a finding of actual malice).

4. Actual Malice as to the Representations That Lake Point Had Destroyed Wetlands

There was also clear and convincing evidence of actual malice as to Hurchalla's false statements about the destruction of wetlands. Hurchalla at times contended that Lake Point had destroyed all of the wetlands on the Property, and at other times (such as in the January 4, 2013 email), contended that Lake Point had merely destroyed 60 acres of wetlands. However, Hurchalla either knew that wetlands were not, in fact, destroyed or made the statement with reckless disregard as to its falsity. In September 2012, Martin County staff charged with wetlands compliance unequivocally stated in an email that was forwarded on

to Hurchalla by Chairwoman Heard: "No wetland impacts have occurred on this property." (R. 6765).

Hurchalla's claim that Lake Point had destroyed 60 acres of wetlands (supposedly based on her reading of a permit from the U.S. Army Corp of Engineers) was likewise knowingly false or at least extremely reckless. (R.6786, 7185). According to Hurchalla, what she meant is that the Army Corp considered some of the Lake Point property to be "agricultural wetlands." However, this is precisely the type of comment that was designed to confuse Hurchalla's "friends" on the commission that knew nothing about the Project, because all that ever could have relevantly mattered on the wetland issue when it came to decisions by the BOCC is how Lake Point's Property and its wetlands were treated under Florida law. (T. 344). On January 22, 2013, Martin County's growth management director explained in an e-mail, which was forwarded to Hurchalla that same day, that the Army Corps Permit does not allow for the destruction of wetlands. (R.6787). As explained by Lake Point's wetland expert: "[a]gricultural wetlands and wetlands are two different things." (T.899) (emphasis added). Unlike wetlands, which are protected, agricultural wetlands are "farmed area[s]" that are "plowed and planted every year." (T.900).

After receiving this explanation, Hurchalla doubled down anyway—in private e-mails to County Commissioners—falsely claiming that Lake Point was destroying wetlands. (R.6786). If anything, this demonstrates Hurchalla using her own purported expertise on the subject to intentionally mislead the new commissioners.

III. HURCHALLA'S STATEMENTS WERE NOT UNVERIFIABLE OPINION.

In her petition, Hurchalla argues that her statement about the storage and treatment benefits not having been documented may have been non-actionable "opinion." However, the existence of published studies documenting the treatment or storage benefits of the Project is verifiable as a fact in this case. Whether Lake Point destroyed wetlands under the applicable definition known to Hurchalla, and whether she intentionally misled the commissioners by relying on an inapplicable "agricultural wetland" concept that she knew did not apply, are both issues with factual components. At most, Hurchalla's statements are of mixed opinion and fact, requiring jury resolution.

Hurchalla refers to *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) for the apparent proposition that mixed opinions/facts are for the Court, rather than a jury. *Milkovich*, however, harms Hurchalla's position. As this Court stated in *Milkovich*:

> We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding.

497 U.S. at 21. *See also LRX, Inc. v. Horizon Associates Joint Venture ex rel. Horizon-ANF, Inc.*, 842 So.2d

881, 885 (Fla. 4th DCA 2003) (a statement that a person was engaged in the unauthorized practice of law was not a statement of pure opinion, and thus was for the fact finder).

None of the case law cited by Hurchalla would indicate that the statements at issue made by Hurchalla are unverifiable statements of opinion. Rather, Hurchalla is forced to use completely dissimilar case law where the word or phrase was so unclear that no reasonable fact-finder could find it to be verifiably false. *See, e.g., Brokers Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1135 (10th Cir. 2017) ("annuity is the most liquid place a senior citizen could put their money"); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 728, n. 7 (1st Cir. 1992) ("blatantly misleading the public"); *McCabe v. Ratiner*, 814 F.2d 839, 842 (1st Cir. 1987) ("scam").

Finally, if Hurchalla had thought her statements were merely opinion, she would not have insisted in closing that they were "true." (T.1796). *See, e.g.*, *Brown and Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1131 (7th Cir. 1987) ("Opinions can be right or wrong. Not true or false. In closing, Jacobson's [the defendant's] trial counsel recognized this and so do we.").

IV. STATE LAW ISSUES SUCH AS CAUSATION ARE CLASSIC JURY QUESTIONS, AND SHOULD REMAIN AS SUCH.

In her petition, Hurchalla argues that Lake Point failed to prove how Hurchalla's particular statement about the lack of documentation helped contribute to the County's breach of its contract with Lake Point. However, this is a classic state law issue for a jury.

Hurchalla had no right to use knowingly false statements to induce a party, including the county, to void a contract that was not terminable at will. *See Londono v. Turkey Creek, Inc.*, 609 So.2d 14, 18-19 (Fla. 1992) (holding that the First Amendment right to petition one's government does not protect false statements "intentionally and maliciously made . . . to third parties and [ ] local government officials for the purpose of harming [another's] economic interests.")[2]

Here, on the issue of causation, the trial court appropriately used *Florida Standard Jury Instructions in Civil Cases* 408.4 (stating that interference with a contract may be a legal cause of damage "even though it operates in combination" with some other cause). Hurchalla even acknowledged this black letter component of causation law in her own proposed jury instructions. (R.5843) (Res.App.5a).

There certainly was a jury issue on causation, since Hurchalla's false statements on the purported lack of benefits of Lake Point, and on the purported destruction of wetlands, were parroted back by Chairwoman Heard in public meetings where key votes were taken on Lake Point at or about the same time

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[2] Amici, "*Protect the Protest" Task Force, et al.*, argue that the *Noerr-Pennington* doctrine should preclude tortious interference liability in the context of petitions to the government. However, that is simply not the case where the defendant tells knowing falsehoods in connection with petitioning activity. *See, e.g., Whelan v. Abell*, 48 F.3d 1247, 1253 (deliberate falsehoods are entitled to no protection under *Noerr-Pennington*); *McDonald v. Smith*, 472 U.S. 479 (1985) (the right to petition does not include an unqualified right to express damaging falsehoods). The Florida Supreme Court's opinion in *Londono* is wholly consistent with *McDonald* and *Whelan*. And Hurchalla knew she was "petitioning" to void an enforceable contract.

that the County took the steps in breach of its contract with Lake Point. The only thing that a majority of BOCC did read before breaching the Interlocal Agreement were the false statements made by Hurchalla—an influential 20-year veteran of the BOCC—as well as her specific instructions to void the Interlocal Agreement and, until that occurred, avoid taking any steps that would allow Lake Point to claim that the Interlocal Agreement was in place. Except for Hurchalla's behind the scenes interference, the County would not have paid Lake Point $12 Million to settle Lake Point's breach of contract claim against the County and apologized for an "an unjustified and unsupportable rush to judgment" (R.8282). A reasonable jury could infer that Martin County's "unjustified and unsupportable rush to judgment" was directly caused by the specific statements and directions in Hurchalla's private e-mails. *See Atl. Coast Line R. Co. v. Gary*, 57 So.2d 10, 13 (Fla. 1951) ("A jury is at liberty to draw reasonable deductions from the evidence.").

V. THIS CASE IS THE WRONG VEHICLE TO EXTEND *BOSE* BEYOND THE EXAMINATION OF "ACTUAL MALICE" TO OTHER ISSUES THAT ARE TRADITIONALLY FOR A JURY'S DETERMINATION.

Given the pervasive preservation issues at the trial court (including the invited error from Hurchalla on the applicable legal standard and burden of proof), and the Fourth District's express review of all the evidence under *Bose*, this case is not an appropriate vehicle for the Court to elaborate on *Bose*, and how it relates to state-law tortious interference claims.

In her petition, Hurchalla raises the parade of horribles that could occur if this Court does not

accept the case, including how someone may be liable in the future for a false statement made about firearms at a legislative hearing. However, the Florida appellate opinion demonstrates the unique facts of this case and how they are unlikely to be repeated in the future. The face of the opinion notes that Hurchalla—an influential former Martin County, Florida, commissioner, engaged in ghostwriting emails for a sitting commissioner about Lake Point. *Hurchalla*, 278 So.3d at 61-62. Hurchalla used private email accounts of commissioners to encourage Martin County to terminate the Interlocal Agreement and take other actions harming Lake Point. *Id.* The opinion provides examples of Hurchalla's false statements encouraging county commissioners—who were otherwise personally ignorant of the Lake Point project, to take adverse action against Lake Point. *Id.* at 65, 68. Hurchalla acted as a schemer in tandem with sitting elected officials, *id.* at 61-62, not to petition the government for a change in the law in public or private, but to seek to have the government breach its contract with a private entity.

Simply put, there is no reason to believe that the narrow ruling in this unusual Florida appellate decision will "chill expression and political activity."

Respectfully submitted,

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