No. _____

In The
Supreme Court of the United States

JOSEPH R. MULLINS,

Petitioner,

v.

JOSEPH E. CORCORAN and GARY E. JENNISON,

Respondents.

On Petition For Writ Of Certiorari To The Massachusetts Appeals Court

PETITION FOR WRIT OF CERTIORARI

JONATHAN M. ALBANO
Counsel of Record
ANDREW M. BUTTARO
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110
(617) 951-8000
jonathan.albano@morganlewis.com

Counsel for Petitioner

October 24, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The First Amendment right "to petition extends to all departments of the Government," and "[t]he right of access to the courts is . . . but one aspect of the right of petition." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The right does not protect "sham" litigation, or "ostensible petitioning activity that is in fact an attempt to interfere directly with the business relationships of a competitor." *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127, 144 (1961). To be a sham, litigation must be both objectively and subjectively baseless. *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993).

After twelve days of trial and consideration of hundreds of exhibits, a Massachusetts Superior Court judge awarded $17.5 million in damages against Joseph R. Mullins for filing a suit seeking to enjoin majority shareholders of a closely held corporation from pursuing a real-estate project on terms Mullins alleged (and the court later ruled) violated his rights as a minority shareholder. App. 13–14. The damages award was based on the court's findings that the suit had stopped the project from proceeding and had been brought in bad faith by Mullins. In other words, the court treated Mullins's suit as a sham based solely upon its determination of Mullins's subjective intent and without any consideration of whether the suit was objectively baseless. The question presented is:

Whether, under the First Amendment, a court may award damages against a party for the act of filing suit in a commercial dispute without finding that the suit was both objectively and subjectively baseless?

RELATED CASES

- *Mullins v. Corcoran*, No. SUCV201402302, Superior Court of Massachusetts. Judgment entered June 19, 2018.
- *Mullins v. Corcoran*, No. 18-P-1163, Appeals Court of Massachusetts. Judgment entered April 10, 2019.
- *Mullins v. Corcoran*, No. FAR-26786, Supreme Judicial Court of Massachusetts. Judgment entered June 27, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

This litigation had an unremarkable start: shareholders in a closely held corporation disagreed over a real-estate investment and Joseph Mullins sued to enforce his contractual rights. App. 1–5. But it had a remarkable finish: The trial court *sua sponte* awarded $17.5 million in damages based on the theory that Mullins's suit was brought in bad faith. App. 6 n.4; 13–14. The court's finding was based on its assessment of Mullins's subjective motivation, without any consideration of the objective merits of the suit, which required a twelve-day trial and turned in large part on interpreting a contractual provision the trial court held was ambiguous. App. 25–26. The court also reached this conclusion without Mullins's opponents having asserted an abuse-of-process claim or even having pressed a claim Mullins was liable for simply filing his suit.

The trial court's holding (and the appeals court's cursory affirmance) essentially dismissed Mullins's suit as sham litigation. Sham litigation is devoid of constitutional protection under the First Amendment's Petition Clause. But litigation is a sham only if it is both objectively and subjectively baseless. *Prof'l Real Estate Inv'rs*, 508 U.S. at 60. Under this test, a court must first determine that a suit is objectively baseless. Only if it makes that initial finding may it consider a litigant's subjective motivations for filing suit.

The trial court here inverted the test by first considering Mullins's subjective intent and then

disregarding the objective merits of his case altogether. Indeed, had it considered the test's objective prong, the trial court would have been unable to conclude that Mullins's suit was a sham. By skating past that constitutional requirement, however, it reached a draconian conclusion not contemplated by the parties or supported by the law. Thus, what started as a run-of-the-mill business dispute ended as a significant constitutional question.

This Court should grant the petition for certiorari to correct this constitutional error and make clear that courts may not dismiss litigation as a sham without adhering to the requirements of the First Amendment. In doing so, this Court can also clarify the extent to which the *Noerr–Pennington* doctrine—which protects non-sham litigation as petitioning activity—applies to the common-law tort of abuse of process and similar state-law theories of recovery for abusive litigation, an issue that has divided the state and federal courts.

OPINIONS BELOW

The Supreme Judicial Court's order denying review is reported at 127 N.E.3d 266 (table) and reproduced at App. 79. The Appeals Court's opinion is reported at 124 N.E.3d 706 (table) and reproduced at App. 1–12. The Superior Court's judgment is available at 2018 WL 5985275 and is reproduced at App. 13–14.

JURISDICTION

The Appeals Court issued its decision on April 10, 2019. The Supreme Judicial Court denied review on June 27, 2019. Mullins's petition was originally due on September 25, 2019. On September 23, 2019, Justice Breyer granted a thirty-day extension, which made the petition deadline October 25, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution is reproduced at App. 80.

STATEMENT OF THE CASE

A. Mullins and his business partners deadlock over a real-estate project, prompting Mullins to sue

Petitioner Mullins is a real-estate developer who has built and managed residential properties in the Boston area for decades. App. 2. In the 1970s, Mullins partnered with the respondents, Joseph Corcoran and Gary Jennison, to pursue these real-estate investments. *Id*. Their combined company was known as Corcoran, Mullins, Jennison, Inc., or CMJ. *Id*. Corcoran owned 60% of the company, and Mullins and Jennison owned 20% each. *Id*.

In the late 1980s, Mullins decided to strike out on his own. App. 3. Mullins retained a minority ownership interest in CMJ and the three shareholders reached a written agreement to govern their business relationship going forward. *Id*. One of the agreement's key provisions was that CMJ would take on new projects only with the "unanimous consent" of all three shareholders. *Id*. For many years, that clause—and the agreement itself—proved uncontroversial, as CMJ did not take on any new projects.

Decades later, that changed. At the end of 2011, CMJ was considering a new project in Somerville, Massachusetts, known as Cobble Hill. App. 3–4. CMJ planned to convert a retail building on the property into residential apartments. *Id*. Mullins received periodic updates about the project, and in summer 2012, attended a meeting about regulatory approvals. *Id*. For a time, Mullins thought he was on the same page as his partners about the project. But on Christmas Eve in 2013, Mullins received a 262-page packet with some alarming details. App. 51–52, 82–83. Among other things, the majority shareholders dictated that Mullins assign 10% of his interest in the project to Corcoran's son and, contrary to the parties' agreement, called for the corporation to provide a project guaranty. App. 4. Mullins wrote to his partners with his concerns. App. 4–5. Mullins also made clear that he did not consent to the Cobble Hill project in its revised and restructured form. App. 5.

Communications between Mullins and his business partners broke down. App. 5. Yet CMJ's majority

owners forged ahead. Faced with non-responsive partners pushing forward on a project he opposed, in 2014, Mullins sued Corcoran and Jennison for breaching the agreement and their fiduciary duties to him, and sought an injunction against the project proceeding on the terms imposed by the majority shareholders. *Id*.

In response to Mullins's suit, defendants Corcoran and Jennison counter-claimed on the same causes of action: breach of contract and breach of fiduciary duty. *Id*. The counter-claims, however, did not seek recovery based on abuse of process or any other theory of relief based on Mullins filing the lawsuit. Instead, the counter-claims argued that Mullins's conduct violated the parties' agreement and contradicted the partners' customary business practices under that agreement. *Id*. The dispute proceeded to a bench trial. App. 18. The counter-claims also alleged that Mullins acted in bad faith by opposing the dilution of his ownership interest by 10%.

B. After a twelve-day bench trial, the court *sua sponte* found Mullins liable for filing suit

The Massachusetts Superior Court heard evidence for twelve days. App. 18. During those twelve days, it considered over 300 trial exhibits introduced by the parties. *Id*.

At one point during trial, the trial court considered Mullins's claim that the majority shareholders breached their fiduciary duties by alleging in their counter-claims that Mullins was obligated to transfer 10% of his interest in the project to Corcoran's son.

App. 84–85. The court agreed that Mullins was under no such obligation, but dismissed Mullins's claim on the grounds that liability could not be imposed simply for asserting a meritless counter-claim. *Id.* As the court explained, the "assertion of counterclaims in a lawsuit cannot, in and of itself, give rise to legal liability for breach of contract or breach of fiduciary duty, because asserting counterclaims is protected under the Massachusetts common law by what's known as the litigation privilege." *Id.* When the time came, the court did not afford Mullins comparable protection for his litigation claims.

Two days after this ruling, the court heard closing arguments. App. 87–88. Neither Jennison nor Corcoran argued that Mullins was liable for filing suit against them. Instead, they argued that Mullins obstructed the project through his conduct outside of the courtroom, such as by retracting his consent to the project and notifying CMJ's financing broker that he was opposed to the project. *Id.*

Similarly, the parties' proposed findings of fact and rulings of law did not contain any contention that Mullins was liable by virtue of filing suit. As in their closing argument, Corcoran and Jennison argued that Mullins thwarted the Cobble Hill project by telling lenders that the partners were split on the project, as "Mullins knew that no lender would lend into a project that was the subject of a partnership dispute." App. 81. With Mullins alerting lenders to the dispute, "seeking financing for [Cobble Hill] was futile." *Id.* All told, Corcoran and Jennison never argued—not in pleadings,

closing arguments, or proposed findings of fact and rulings of law—that Mullins was liable simply for filing his suit.[1]

Without such an argument, the trial court's findings of fact and rulings of law came as a surprise. On the contractual question, the court ruled that Mullins had consented to the Cobble Hill project in 2012 and that the project's changes did not provide grounds to revoke that consent. App. 29. But in an unexpected turn, the court went straight to Mullins's subjective motivations for filing suit and found that his legal objections to the project were made in bad faith and to stop the project:

> In July of 2014, Mr. Mullins *filed this lawsuit* against Mr. Corcoran and Mr. Jennison *to stop them from going forward* with the Cobble Hill Center project. Mr. Mullins knew when he did so that no one would finance the project so long as one principal is suing the other two.
>
> * * *
>
> I find the same was true in July of 2014, that Mr. Mullins *intended, by filing suit*, to stop the

[1] The closest that Corcoran or Jennison ever came to making such an argument was in Corcoran's opening statement, during which he asserted "Mullins sued to stop the project, making financing impossible and succeeding in his goal of stopping development." Of course, this one aside in twelve-day trial is not tantamount to a claim for abuse of process. And the trial court's later ruling that Corcoran and Jennison's counter-claims were protected by the litigation privilege would all but foreclose such an argument.

> Cobble Hill Center project from going forward and that he succeeded in doing that.
>
> * * *
>
> I find that if Mr. Mullins had not tried to withdraw his consent to the project *and had not then brought a lawsuit to stop the project*, that, in fact, CMJ would have been able to construct the new Cobble Hill Center apartment building as approved by the City, and I find that CMJ would have been able to stabilize it, achieving at least 95 percent residential occupancy, by October of 2016.

App. 63, 68 (emphasis added).

In short, the court—without prompting from the parties—analyzed Mullins's motivations for filing suit and found them subjectively improper. On that basis, and without addressing the objective merits of the suit, it then awarded damages against Mullins of about $17.5 million.

C. The Appeals Court rejected Mullins's right-to-petition argument and the Supreme Judicial Court denied review

Mullins appealed. App. 1. The Appeals Court considered Mullins's argument that he had "legitimate business reasons for revoking his consent and filing his lawsuit." App. 7. The court "acknowledge[d] that Mullins may have had a basis for demanding that Corcoran and Jennison recognize his right to veto a CMJ loan guaranty and a reduction in his interest and, if

they refused, to bring a declaratory judgment action or take some other action to clarify the parties' rights under their agreements." App. 7. The court cautioned, however, that this acknowledgment "does not mean . . . that Mullins had a legitimate business purpose for halting, unilaterally," the Cobble Hill project. *Id*. In other words, the court agreed that Mullins had a legitimate basis to seek judicial relief, including for a declaratory judgment or "some other action," but nevertheless was liable for filing suit to enjoin the majority shareholders' ongoing conduct. App. 8.

On appeal, Mullins also argued that the trial court violated his First Amendment petition rights by finding his suit subjectively baseless. As Mullins observed in briefing, the relevant standard requires a court to first decide whether a suit is objectively baseless. App. 90–93. Only if the court makes that threshold determination may it then consider a party's subjective motivations for filing suit.

The Appeals Court rejected Mullins's argument in a cursory footnote, holding it waived:

> As a preliminary matter, Mullins argues that the judgment against him is based, impermissibly, on his constitutional right to petition the courts. Corcoran and Jennison correctly note that Mullins did not raise this issue below. Mullins contends that the issue was raised below, but he points only to a portion of the judge's directed verdict findings that discuss whether Corcoran's and Jennison's counterclaims based on Mullins's refusal to agree to

> an ownership share for Corcoran's son were based on protected petitioning activity. Mullins does not cite anywhere in the record where he argued that his own lawsuit constituted protected petitioning activity. The argument, therefore, is waived.

App. 6 n.4; *Mullins v. Corcoran*, 124 N.E.3d 706 n.4 (Mass. App. Ct. 2019) (citation omitted).

The Supreme Judicial Court denied review. App. 79; 127 N.E.3d 266 (Mass. 2019).

REASONS FOR GRANTING THE PETITION

This Court should grant Mullins's petition for two reasons.

First, the Massachusetts courts stripped Mullins of his constitutional petition rights without applying the two-part test that requires objective and subjective findings, in that order. *Prof'l Real Estate Inv'rs*, 508 U.S. at 56.

Second, the Massachusetts decisions deepened a conflict between state and federal courts about the extent to which the *Noerr–Pennington* doctrine preempts the common-law tort of abuse of process and similar state-law theories. This case provides an opportunity to clarify this issue and underscore that litigation is constitutionally protected unless it is both objectively and subjectively baseless.

A. The trial court violated Mullins's First Amendment petition rights and the appellate courts ratified that violation

Under well-established Supreme Court precedent, "the right to petition extends to all departments of the Government," and "[t]he right of access to the courts is . . . but one aspect of the right of petition." *California Motor Transp.*, 404 U.S. at 510. This right does not extend, however, to "sham" litigation, or activity "ostensibly directed toward influencing governmental action" that actually "is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." *Noerr*, 365 U.S. at 144.

To be a sham, litigation must be both objectively and subjectively baseless. *Prof'l Real Estate Inv'rs*, 508 U.S. at 60. It "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id*. If, and "[o]nly if[,] challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id*. This subjective inquiry focuses on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id*. at 61 (quoting *Noerr*, 365 U.S. at 144 and *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991) (alteration original)).

The trial court found that Mullins's suit was sham litigation not entitled to First Amendment protection

without ever considering the initial question: Was his suit objectively baseless? Instead, the trial court went right to its own estimation of Mullins's subjective motivations for bringing suit, contradicting this Court's guidance that the objective merits of a suit must be considered first.

Skipping this threshold step was all but dispositive here because the voluminous trial record would have precluded a finding that Mullins's suit was objectively baseless. The trial court heard twelve days of evidence, considered 347 trial exhibits, and found that two of Mullins's objections were valid. There was not, nor could there have been, any finding that the suit was objectively baseless.[2]

---

[2] In addition, an objective assessment of the suit demonstrates that it was based on correct—or at the very least, reasonable—interpretations of the partners' 1987 agreement. The Superior Court agreed with Mullins that reducing his ownership interests in Cobble Hill without his consent (one of the grounds for this lawsuit) would violate the 1987 agreement; it also found that requiring CMJ to provide a corporate guaranty of financing (another basis for the lawsuit) would violate the agreement. App. 25, 51–52. And it ruled that the critical provision of the 1987 agreement concerning the need for unanimous consent to new ventures was ambiguous. App. 25–26. Taking one side of a dispute regarding the interpretation of an ambiguous contract provision is entirely legitimate, and by no means objectively baseless. Indeed, the Appeals Court concluded that Mullins had objective, good-faith reasons to sue, observing that he had the right "to bring a declaratory judgment action or take some other action to clarify the parties' rights under their agreements." App 7. That is essentially what Mullins did when he sued and sought a permanent injunction against his partners' proceeding with the project on the terms they were imposing upon him.

That Mullins ultimately lost on the core contractual question also does not mean that his suit was objectively baseless. As this Court has cautioned, constitutional protections are not limited to "successful petitioning." *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 532 (2002). Because "even unsuccessful but reasonably based suits advance some First Amendment interests," petitioning is protected "whenever it is genuine, not simply when it triumphs." *Id*. (citation omitted). And when assessing the objective merits of a suit, "a court must 'resist the understandable temptation to engage in *post hoc* reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.'" *Prof'l Real Estate Inv'rs*, 508 U.S. at 60 n.5 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421–22 (1978)).

This is why even suits marked by subjective bad intentions have been held protected if they are objectively reasonable. In *BE & K*, for example, this Court held that constitutional principles prevented " '[t]he filing and prosecution of a well-founded lawsuit' from being 'enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by [law].'" 536 U.S. at 526–27 (citation omitted).

The trial court's holding contradicts this Court's unequivocal guidance on First Amendment petition rights and, left uncorrected, threatens to sow considerable damage. The result is particularly worrisome on this record, which shows a lengthy trial evaluating a

complicated commercial dispute. If a court may dismiss a suit leading to a trial of this magnitude as a sham, it is hard to envision a proceeding—no matter how involved or how complex—that would be immune to such a finding.

This Court should take this case to reaffirm that a litigant loses petition rights to file suit only when the litigant's suit is both objectively and subjectively improper.

B. This decision deepens the conflict among courts on the *Noerr–Pennington* doctrine's impact on state-law torts

By misapplying settled law, the trial court stripped Mullins of his constitutional rights. By affirming that misapplication, the Massachusetts appellate courts deepened a conflict between courts of different states and circuits about the extent to which the *Noerr–Pennington* doctrine preempts the common-law tort of abuse of process and similar state-law theories.

The *Noerr–Pennington* doctrine is grounded in the First Amendment's guarantee of "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I.[3] Unless litigation

[3] The *Noerr–Pennington* doctrine arose in the antitrust context as the Court sought to reconcile the Sherman Act with the First Amendment. *See Noerr*, 365 U.S. at 81; *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965). Later, in *California Motor Transport*, the Court recognized that "[t]he right of access to the courts is . . . but one aspect of the right of petition," extending *Noerr–Pennington* to include litigation. 404 U.S. at 510–11.

is both objectively and subjectively baseless, the First Amendment prohibits any sanction for filing suit. *Prof'l Real Estate Inv'rs*, 508 U.S. at 60. "The *Noerr–Pennington* doctrine implements that general principle." *Venetian Casino Resort, L.L.C. v. NLRB*, 793 F.3d 85, 89–90 (D.C. Cir. 2015).

On a collision path with this doctrine are state-law tort theories that impose liability for the act of filing a lawsuit. The best example of this sort of theory is the state-law tort of abuse of process, or "[t]he improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope." *Abuse of process*, Black's Law Dictionary (11th ed. 2019). At common law, the tort of abuse of process provided a cause of action "against private defendants for unjustified harm arising out of the misuse of governmental processes." *Wyatt v. Cole*, 504 U.S. 158, 164 (1992) (citation omitted). "[T]he United States Supreme Court, all fifty states, and the District of Columbia[] recognize the tort of abuse of process or its functional equivalent." Jeffrey J.

Recognizing the constitutional foundation of the doctrine, the Court has long applied *Noerr–Pennington* principles outside the antitrust field. *See*, *e.g.*, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (petition clause protects access to judicial processes in the labor relations context); *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 525 (2002) (similar); *see also We, Inc. v. City of Philadelphia*, 174 F.3d 322, 326–27 (3d Cir. 1999) ("This court, along with other courts, has by analogy extended the *Noerr–Pennington* doctrine to offer protection to citizens' petitioning activities in contexts outside the antitrust area as well.").

Utermohle, *Look What They've Done to My Tort, Ma: The Unfortunate Demise of "Abuse of Process" in Maryland*, 32 Univ. of Balt. L. Rev. 1, 7 (2002) (footnotes omitted).[4]

If the tension between the *Noerr–Pennington* doctrine and these state-law theories is clear, the degree to which the doctrine and these theories intersect is still unsettled. Many circuits have struggled to define the contours of this intersection.

The Ninth Circuit has treaded gingerly in this area, acknowledging "extensive case law on both sides of the question whether the *Noerr–Pennington* doctrine brings first amendment principles to bear on state law tort claims." *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 102 F.3d 1524, 1538 n.15 (9th Cir. 1996) (collecting cases), *rev'd on other grounds sub nom. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). In that circuit, the issue "remains an open question" whose answer "may well depend on state law." *Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 711 F.3d 1136, 1141 n.2 (9th Cir. 2013) (citing *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 102 F.3d at 1538 & n.15); *see also Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471 (7th Cir.

---

[4] In Massachusetts, "[t]o sustain an abuse of process claim, the fact finder must find that process was used 'to accomplish some ulterior purpose for which it was not designed or intended, or which was not the legitimate purpose of the particular process employed.'" *Millennium Equity Holdings, LLC v. Mahlowitz*, 925 N.E.2d 513, 522 (Mass. 2010) (quoting *Quaranto v. Silverman*, 187 N.E.2d 859 (Mass. 1963)).

1982) ("It takes a rather free-wheeling imagination to extrapolate from the *California Motor Transport* opinion a principle that if applied across the board would, as we have suggested, make the tort of abuse of process invalid under the First Amendment; and we decline to do so[.]").

Other courts have been more willing to apply the *Noerr–Pennington* doctrine to state-law torts. For instance, the Second Circuit affirmed a dismissal of a Connecticut common-law and statutory claim because it predicted "that Connecticut would interpret its law to exempt from liability activities excluded . . . by the *Noerr–Pennington* doctrine." *Suburban Restoration Co. v. ACMAT Corp.*, 700 F.2d 98, 99 (2d Cir. 1983). In doing so, the court anticipated "that Connecticut's courts would be guided by the strong suggestions from the federal courts that imposing liability for the act of filing a non-sham lawsuit would present serious constitutional problems, and would construe Connecticut law to avoid those problems." *Id*. at 102. The court concluded "that the activity complained of here—the filing of a single non-sham lawsuit—cannot form the basis of a claim under [Connecticut statutory law] or Connecticut's common law of tortious interference with a business expectancy." *Id*.

Some—but not all—state courts have also applied the *Noerr–Pennington* doctrine to state-law claims (or have suggested it might apply to such claims). *See*, *e.g.*, *Ex Parte Simpson*, 36 So. 3d 15, 21, 26–28 (Ala. 2009) (applying *Noerr–Pennington* to state tort causes of action); *Gunderson v. Univ. of Alaska*, 902 P.2d 323, 324,

326–30 (Alaska 1995) (applying *Noerr–Pennington* to state-law contract claim); *Zeller v. Consolini*, 758 A.2d 376, 378, 380–82 (Conn. App. Ct. 2000) (applying *Noerr–Pennington* to state-law tort claim for tortious interference with a business relationship); *Bond v. Cedar Rapids Television Co.*, 518 N.W.2d 352, 353, 355–56 (Iowa 1994) (applying *Noerr–Pennington* to state tort claim); *Grand Cmtys. Ltd. v. Stepner*, 170 S.W.3d 411, 412 (Ky. Ct. App. 2004) (applying *Noerr–Pennington* to state-law tort claims stemming from zoning decisions); *Arim v. Gen. Motors Corp.*, 520 N.W.2d 695, 699–702 (Mich. Ct. App. 1994) (per curiam) (applying *Noerr–Pennington* to state-law tort claims); *Green Mountain Realty Corp. v. Fifth Estate Tower, LLC*, 13 A.3d 123, 126, 128–31 (N.H. 2010) (applying *Noerr–Pennington* doctrine to claim asserted under New Hampshire's Consumer Protection Act); *Structure Bldg. Corp. v. Abella*, 873 A.2d 601, 602–03 (N.J. Super. Ct. App. Div. 2005) (applying *Noerr–Pennington* to state-law tort claims); *Arts4All Ltd. v. Hancock*, 810 N.Y.S.2d 15 (N.Y. App. Div. 2006) (applying *Noerr–Pennington* to state-law tort claim); *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 753 (R.I. 2004) (noting Rhode Island Supreme Court has adopted the *Noerr–Pennington* test and has applied it to common law torts); *RRR Farms, Ltd. v. Am. Horse Prot. Ass'n, Inc.*, 957 S.W.2d 121, 126–29 (Tex. App. 1997) (applying *Noerr–Pennington* to state-law tort claims); *Titan Am., LLC v. Riverton Inv. Corp.*, 569 S.E.2d 57, 61–62 (Va. 2002) (applying *Noerr–Pennington* to state-law claims for conspiracy and business torts); *but see Fla. Fern Growers Ass'n, Inc. v. Concerned Citizens of Putnam Cty.*, 616 So. 2d

562, 568 (Fla. Dist. Ct. App. 1993) ("We decline to adopt the 'sham' test because we find that the current law in Florida already provides protection for the First Amendment right to petition the government."); *Anchorage Joint Venture v. Anchorage Condominium Ass'n*, 670 P.2d 1249, 1250–51 (Colo. Ct. App. 1983) ("The right of access to the courts seeking redress from actions of a governmental entity . . . [is] distinguished from suits between private parties. . . .").

This case provides a useful vehicle to more clearly delineate the boundary between the *Noerr–Pennington* doctrine and state-law theories imposing liability for filing a lawsuit. At a minimum, the Court could hold that—whatever the precise boundary marks of this intersection—to the extent a state-law theory imposes liability on a litigant for filing suit, that theory must comport with the constitutional requirement of objective and subjective baselessness.

C. Mullins preserved his right-to-petition argument

On appeal, Mullins challenged the trial court's finding that his suit was subjectively improper. But the state appeals court held that his right-to-petition argument was waived.[5] The appeals court was wrong.

---

[5] Although the trial court labelled Mullins's petition argument waived, it is more akin to a forfeiture. "The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous." *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 n.1 (2017). "[F]orfeiture is the failure to make the timely assertion of a right [;] waiver is the

Under basic preservation principles, a party is not expected to defend against hypothetical claims. Here, the issue of whether Mullins was liable for filing suit first arose when the trial court issued from the bench its findings of facts and conclusions of law. The trial court made this finding *sua sponte*. None of the parties' proposed findings of fact and conclusions of law asserted that Mullins was liable for filing suit. And the counter-claimants never alleged abuse of process or a similar tort that would hold Mullins liable simply for filing suit.

Mullins cannot waive an argument that arose only when the trial court announced its ruling. *Cf.* 19 James Wm. Moore et al., *Moore's Federal Practice: Civil* § 205.05 (3d ed. 2019) (noting that "if the district court *sua sponte* raised an issue of law and explicitly resolved the issue on the merits, that ruling is fully reviewable on appeal even though no party raised it below"); *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1328 (10th Cir. 2003) ("We conclude that when the district court *sua sponte* raises and explicitly resolves an issue of law on the merits, the appellant may challenge that ruling on appeal on the ground addressed by the district court even if he failed to raise the issue in district court. In such a case, review on appeal is not for 'plain error,' but is subject to the same standard of appellate review that would be applicable if the appellant had properly raised the issue.").

'intentional relinquishment or abandonment of a known right.' " *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). For consistency with the record, both terms are used above.

The appeals court's waiver holding is particularly misguided in this context because a party's right to access the courts is implicit in a good-faith suit. As noted, a citizen has a constitutional right to access the courts that is tempered only by the carve-out for "sham" litigation. *California Motor Transp.*, 404 U.S. at 510; *Prof'l Real Estate Inv'rs*, 508 U.S. at 60. In both state and federal court, a plaintiff's attorney must certify that the litigation was brought for a proper purpose. Fed. R. Civ. P. 11(b)(1) (attorney's signature attests that suit "is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."); Mass. R. Civ. P. 11(a) ("The signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay.").

In short, by bringing a civil case, a plaintiff is inherently relying on the right to petition. Unless a defendant argues that the suit is a sham or amounts to abuse of process, the plaintiff would have no need to argue what would be essentially a truism. Taken literally, the appellate court's holding would require plaintiffs to always include a boilerplate argument that they are properly exercising their petition rights; if they do not, they risk a fate similar to Mullins. *See* App. 6 n.4 ("Mullins does not cite anywhere in the record where he argued that his own lawsuit constituted protected petitioning activity.").[6]

---

[6] Even if Mullins forfeited this argument, appellate courts may consider issues first raised on appeal if they present purely

Simply put, the appeals court's holding misconstrues waiver principles and imposed a burden on Mullins that does not exist.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

JONATHAN M. ALBANO
Counsel of Record
ANDREW M. BUTTARO
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110
(617) 951-8000
jonathan.albano@morganlewis.com

Counsel for Petitioner

October 24, 2019

---

legal questions and holding the issue forfeited would cause injustice. *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 (D.C. Cir. 1992) (Ginsburg, J.) (unpreserved issues considered in "exceptional circumstances," such as when an "issue is purely one of law . . . and resolution of the issue does not depend on any additional facts not considered by" the trial court); *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1030 (5th Cir. 1982) ("An issue not properly preserved for appeal will generally not be considered unless the issue is a purely legal one and the asserted error is so obvious that the failure to consider it would result in a miscarriage of justice.").