

No. 19-548

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**In the Supreme Court of the United States**

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JOSEPH R. MULLINS, PETITIONER

*v.*

JOSEPH E. CORCORAN, ET AL., RESPONDENTS

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***ON PETITION FOR A WRIT OF CERTIORARI  
TO THE MASSACHUSETTS  
SUPREME JUDICIAL COURT***

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**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## **RESPONSE TO QUESTION PRESENTED**

Petitioner Joseph R. Mullins (“Mullins”) claims the question presented by this case is whether the First Amendment allows a court to award damages against a party for the act of filing a lawsuit in a commercial dispute without finding that the lawsuit was both objectively and subjectively baseless. This case does not present the issue, for three independent reasons.

First, the issue was waived by Mullins’ failure to raise it below. Second, contrary to Mullins’ repeated assertion, he was not found liable “for simply filing his [law]suit.” Pet. 1, 7. Mullins was found liable for breach of contract and breach of fiduciary duty for engaging in numerous bad faith actions to stop a real estate development project to which he had contractually consented. Third, the state courts’ findings of fact and rulings of law established that Mullins lacked both a subjective and objective basis to file his lawsuit.

The decisions below were therefore consistent with this Court’s “sham” litigation cases and present no error to correct or constitutional issue to review.

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## **OPINIONS BELOW**

The order of the Massachusetts Supreme Judicial Court (Pet. App. 79) denying review is reported at 127 N.E.3d 266 (tbl.). The opinion of the Massachusetts Court of Appeals (Pet. App. 1-12) is reported at 124 N.E.3d 706 (tbl.). The judgment of the Massachusetts Superior Court (Pet. App. 13-14) is available at 2018 WL 5985275.

## **JURISDICTION**

The judgment of the Massachusetts Court of Appeals was entered on April 10, 2019. The Massachusetts Supreme Judicial Court denied review on June 27, 2019. The petition for a writ of certiorari was filed on September 23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## **INTRODUCTION**

The petition for a writ of certiorari is premised on a mischaracterization of the lawsuit and damages award, which did not impose liability on petitioner Joseph R. Mullins (“Mullins”) based on protected petitioning activity. Rather, Mullins was found liable in Massachusetts state court for breaching his contractual and fiduciary duties by engaging in numerous and repeated bad faith actions to stop a real estate transaction to which he had contractually consented.

Mullins, moreover, did not preserve the First Amendment issue raised in the petition and therefore waived it, as the Massachusetts Appeals Court correctly found. No reason exists for this Court’s review where Mullins was unable to “cite anywhere in the record where he argued that his own lawsuit constituted protected petitioning activity.” Pet. App. 6 n.4.

Mullins’ current argument that he could not have waived the issue in the trial court is itself waived because he failed to make that argument to the Massachusetts Appeals Court.

Moreover, the findings and rulings of the Massachusetts Superior and Appeals Courts established that Mullins’ bad faith lawsuit had no objective or subjective basis and thus was not protected petitioning activity. The decisions below were fully consistent with this Court’s “sham” litigation cases and with Massachusetts law governing wrongful lawsuits. This case therefore presents no error and no conflict with the *Noerr-Pennington* doctrine. The petition accordingly should be denied.

## STATEMENT OF THE CASE

### A. Statement of Facts<sup>1</sup>

The petition misstates and omits facts found by the Massachusetts Superior Court (the “Superior Court”) concerning Mullins’ wrongful conduct before and after he filed his complaint. The petition also misstates the basis of Mullins’ bad faith lawsuit.

This case involves three business partners—Joseph E. Corcoran (“Corcoran”), Gary A. Jennison (“Jennison”), and Mullins—who were in the real estate development business together since the 1970s acting through their company Corcoran, Mullins, Jennison, Inc. (“CMJ”). CMJ was managed by a three-

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<sup>1</sup> This statement consists of facts found by the Massachusetts Superior Court, supplemented with several record facts. On appeal, Mullins did not challenge any of the Superior Court’s findings as clearly erroneous. Cites to the Petition Appendix are designated “Pet. App. [page number].”

member board of directors, consisting of the three principals (or their designees). Pet. App. 2.

CMJ had an established business practice for new real estate development ventures. The process involved three distinct phases. First, CMJ would identify a property and conduct feasibility studies. Second, CMJ would decide whether to seek entitlements from the city for a particular development. Third, if entitlements were obtained, CMJ would implement the entitlements by constructing the project and putting it into operation. Pet. App. 27-28. In CMJ's history, each time that the principals decided to seek entitlements for a development, CMJ always proceeded to build the development if the entitlements were obtained. *Id.* at 28.

This case involves CMJ's Cobble Hill Center development project (the "Project") in the City of Somerville, Massachusetts (the "City"). By the end of 2011, the Project was at the end of the first phase of development. The Project director had completed feasibility studies and was recommending that CMJ "proceed forward with a plan to build 167 [rental] units in a six-story wood-framed structure over a podium." Pet. App. 37-41.<sup>2</sup> CMJ provided detailed reports on the Project to Mullins. *Id.* at 38-43. At a CMJ meeting in July 2012, Mullins received a detailed presentation recommending that CMJ proceed with and seek entitlements for the Project. *Id.* at 43-44. The Superior Court found that, after the presentation, Mullins gave

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<sup>2</sup> The Project had been under consideration since 2003, in earnest since 2009, Pet. App. 36-37, and did not begin only in 2011 as the petition implies (Pet. 4).

his consent for CMJ to enter into the new venture at the Cobble Hill Center site, to seek entitlements for a roughly 167 unit residential apartment building at that site, and to construct the Project if the City issued the necessary approvals. *Id.* at 44–45.

Mullins’ consent to the Project was needed because the parties’ 1987 Agreement provided that CMJ would not “enter into any new ventures without the unanimous consent” of the three principals. The Superior Court found that this provision meant that the CMJ partners must decide whether to consent to the project after the feasibility analysis was completed and before seeking entitlements. That consent would mean that the partners committed to proceed with and build the project if entitlements were obtained. Pet. App. 25–29.

The Superior Court rejected as irrational (*i.e.*, as not within the spectrum of reasonable interpretations of the contract) Mullins’ argument through counsel at trial that consent required knowledge of all material facts concerning a project’s long-term financing. This made no rational business sense because such facts could not be known until construction was complete or nearly complete, after CMJ had already incurred the cost to build and develop the new venture. Pet. App. 29–30.

Relying on Mullins’ consent, CMJ sought and obtained the necessary entitlements for the Project, and, over the next eighteen months, Mullins received regular updates on the zoning and regulatory progress and discussed the Project in detail at CMJ’s quarterly meetings. Pet. App. 45–48, 56–58.

Once the Project approvals were obtained, in December 2013, the Project director prepared a detailed status report. Among other things the report proposed giving the Project director a ten percent ownership interest in Cobble Hill Center, which would reduce Mullins' and Jennison's interests to eighteen percent each and Corcoran's interest to fifty-four percent. Pet. App. 4. Subsequently, CMJ proposed that CMJ serve as corporate guarantor of the Cobble Hill Center construction loan. Docket No. 21, at 438, *Mullins v. Corcoran*, No. 2018-P-1163 (Mass. App. Ct. Sept. 24, 2018) ("Dkt."). Mullins objected to these proposals and neither was implemented. Pet. App. 51–52, 59–60; Dkt. 23, at 120; Dkt. 15, at 469 (Tr. 1814–15 (Dupee)).

The petition claims that, after receiving the detailed December 2013 status report, Mullins wrote to his partners and "made clear he did not consent to the Cobble Hill Center project in its revised and restructured form." Pet. 4. Mullins did indeed write to his partners saying he did not consent to the Project, but it was not because of any supposed revision or restructuring. On February 28, 2014, Mullins sent a letter to CMJ asserting, among other things, that (a) he had never consented to the Project, (b) he had never been provided with "any detailed information concerning the project," (c) he had received no information at all about the Project between the July 17, 2012 meeting and his receipt of the December 2013 status report, (d) the last time the Project had been discussed in any meeting with him or his staff was in July 2012, and (e) the Project was too risky. Pet. App. 55–59.

The Superior Court found that Mullins was not acting in good faith when he sent this letter purporting to withdraw his consent because he knew these assertions, among others in the letter, were false. Pet. App. 55–59.

CMJ moved forward with steps to begin construction by notifying the tenants of the existing retail center that their leases were terminating. Pet. App. 62. Contrary to the petition (at 3–5), there was no genuine “deadlock” at that point; Corcoran and Jennison had obtained Mullins’ consent and were entitled to proceed. Pet. App. 69.

In July 2014, Mullins filed this lawsuit against Corcoran and Jennison to stop them from going forward with the Project. He knew and intended that merely filing suit would prevent Project financing (as he had recently prevented a U.S. Housing and Urban Development (“HUD”) refinancing of another CMJ project by falsely telling HUD that unanimous consent of CMJ’s three principals was required). Pet. App. 63.

The petition misstates that Mullins’ complaint was based on “revised and restructured” terms “imposed by the majority shareholders.” Pet. 4–5. Instead, the complaint was based on the same assertions advanced in Mullins’ February 28, 2014 letter that the Superior Court found Mullins had made in bad faith because he knew they were false. Specifically, the complaint falsely alleged that, before December 2013, Mullins had been only “generally aware that CMJ ha[d] explored over the past several years the possibility of potential development” at Cobble

Hill Center, that he had “never consented to any particular new venture of CMJ or particular development activity,” and that he was first informed only in December 2013 of the “proposed” apartment building. Dkt. 22, at 33, 41, 45.

Respondents Corcoran and Jennison counterclaimed against Mullins, asserting that Mullins breached his contractual obligations and fiduciary duties by interfering with the development of the Cobble Hill Center Project after he had already consented to it. Pet. App. 5.

In 2015, Corcoran and Jennison made a proposal to build and lease the Project and then buy Mullins’ interest at fair market value when sixty percent occupancy was achieved. The Superior Court found that Mullins rejected their proposal in bad faith. Though Mullins was then willing to build, lease and sell at sixty percent occupancy to a third party, he refused to accept essentially the same terms from Corcoran and Jennison. Pet. App. 66–67. CMJ’s entitlements from the City to proceed with the Project lapsed in 2016 because, the Superior Court found, “Mr. Mullins remained steadfast in his refusal to allow the project to move forward on the terms that he had agreed to in July of 2012.” *Id.* at 67.

## **B. The Decisions Below**

1. After a 12-day bench trial, the Superior Court found that Mullins had breached his contractual and fiduciary duties to Corcoran and Jennison and awarded \$12 million in damages to compensate them for their lost profits on the Project. Pet. App. 70–75.

Contrary to the petition (at 7), the Superior Court did not find Mullins liable “simply for filing his suit.” Instead, the court made detailed findings of fact concerning Mullins’ entire course of conduct, before, when, and after he filed suit. Pet. App. 37–67. The Superior Court then found that Mullins’ withdrawal of his consent and deliberate interference with CMJ’s efforts to build the Project were in bad faith and constituted a breach of his contractual and fiduciary duties to Corcoran and Jennison. *Id.* at 70.<sup>3</sup>

2. Mullins appealed to the Massachusetts Appeals Court (the “Appeals Court”). Having admitted at trial that he had consented to the Project, Mullins primarily argued on appeal that he was justified in revoking his consent and filing his lawsuit because of the proposal to reduce his interest in the Project, the proposal to have CMJ guarantee the construction loan, and a supposedly risky financing strategy. Pet. App. 7.

In an unpublished opinion,<sup>4</sup> the Appeals Court rejected Mullins’ appeal, finding that he had no legitimate basis for revoking his consent, filing his lawsuit against Corcoran and Jennison, and “halting, unilaterally, a project on which the parties had just spent

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<sup>3</sup> The Superior Court’s findings of liability were not “an unexpected turn” or a “surprise” to anyone, Pet. 7, but rather, were entirely consistent with respondents’ requested findings. Mullins’ counsel expressed no such surprise to the Appeals Court. Mullins C.A. Br. (Dkt. 11).

<sup>4</sup> The Appeals Court’s decision issued pursuant to its Massachusetts Rule of Appellate Procedure 1:28. Rule 1:28 decisions are summary decisions primarily directed to the parties, and, therefore, may not fully address the facts of the case or the panel’s decisional rationale, have no precedential value, and do not represent the views of the entire court. Pet. App. 1.

over \$1 million to obtain regulatory approvals.” Pet. App. 7–9.

In a single paragraph of his 50-page Appeals Court brief, Mullins argued that it would chill petitioning activity and raise constitutional “concerns” if he were found liable for filing a lawsuit based on a reasonable contract interpretation. Pet. App. 92; Mullins’ C.A. Br. at 42 (Dkt. 11). In his reply brief, Mullins argued that he had not waived the issue, citing a portion of the record. Mullins C.A. Reply Br. at 14-15 (Dkt. 35 (Dec. 21, 2018)).

The Appeals Court found that Mullins had waived the petitioning activity issue, noting that despite his contention that he had not waived the issue, he had not argued that his lawsuit constituted protected petitioning at the portion of the record to which he cited, nor had he cited to any other portion of the record where he did so. Pet. App. 6 n.4. In any event, the Appeals Court agreed with the Superior Court that Mullins’ contract interpretation—that he could withhold consent until long-term financing terms were known—was “irrational and thus unreasonable” based on the costs CMJ typically incurred before finalizing long-term financing. Pet. App. 8–9.

3. Represented by new (and current) counsel, Mullins applied for discretionary further appellate review by the Massachusetts Supreme Judicial Court (the “SJC”), arguing for the first time that he had no obligation to raise the petitioning activity issue in the Superior Court. Docket No. 2, at 27-28, *Mullins v. Corcoran*, FAR-26786 (Mass. May 31, 2019). The SJC denied further appellate review. Pet. App. 79.

## ARGUMENT

### I. Mullins Waived The Arguments On Which He Bases His Petition

This Court should deny the petition for a writ of certiorari because the petitioning activity argument on which it is based suffers from two layers of waiver.<sup>5</sup>

First, as the Appeals Court correctly found, Mullins waived his petitioning activity argument by failing to raise it before the Superior Court. It is settled law that this Court is “a court of review, not of first view,” and that it therefore finds it “generally unwise to consider arguments in the first instance.” *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)); see also *Yakus v. United States*, 321 U.S. 414, 444 (1944) (“No procedural principle is more familiar . . . than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.”). In particular, in cases like this one coming from state courts, this Court only reviews constitutional issues that were “pressed or passed upon” below. *Illinois v. Gates*, 462 U.S. 213, 219–20 (1983).

The first time that Mullins ever raised his petitioning activity argument was in one paragraph of his 50-page brief to the Appeals Court. The Appeals

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<sup>5</sup> Mullins points out the distinction between waiver and forfeiture. Pet. 19-20 n.5. Because the terms are used interchangeably in the law, the Appeals Court and the parties have addressed this issue as one of waiver. The forfeiture standards, however, are no different.

Court correctly found that the portion of the trial record cited by Mullins did not raise his constitutional right to petition the courts, and instead consisted of the Superior Court’s directed verdict findings that *respondents’* counterclaims were based in part on protected petitioning activity. Pet. App. 6 n.4. Mullins was unable to cite any portion of the record below where he argued that his *own* lawsuit constituted protected petitioning activity. *Id.* “The argument,” the Appeals Court properly found, “therefore[] is waived.” *Id.*

Second, Mullins also failed to preserve his present argument—that he was not obliged to raise the petitioning activity issue in the Superior Court. Mullins did not raise that argument until his application for further appellate review in the SJC. Because this argument was not made to the Appeals Court, it is also waived. *See Gates*, 462 U.S. at 219–20 (holding that to be subject to Supreme Court review, a constitutional issue must have been presented or decided in the highest court of the state whose judicial action the Supreme Court is called upon to review).<sup>6</sup>

Not only is Mullins’ preservation argument waived, it is also wrong. Mullins is incorrect that the petitioning activity issue “arose only when the trial

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<sup>6</sup> Like this Court, “[t]he Supreme Judicial Court’s longstanding and firm policy is to refuse to consider issues not properly raised before an intermediate court from which further review is sought, *see, e.g., Kelsey v. Hampton Court Hotel Co.*, 97 N.E.2d 407, 408 (1951) (issues ‘not presented to or decided by the Appellate Division . . . cannot be considered by us’).” *Grieco v. Hall*, 487 F. Supp. 1193, 1199 (D. Mass. 1980), *aff’d*, 641 F.2d 1029 (1st Cir. 1981); *Ford v. Flaherty*, 305 N.E.2d 112, 114 n.1 (Mass. 1973).

court announced its ruling.” Pet. 20. Corcoran and Jennison argued at trial that Mullins improperly took steps to stop the Project, including filing suit in bad faith and sending the complaint to the mortgage broker. *See, e.g.*, Dkt. 15, at 10 (Tr. 28) (Corcoran and Jennison’s opening statement referring to Mullins’ suit to stop the Project); *id.* at 209-10 (Tr. 805-08 (Mullins)) (cross examination of Mullins eliciting that he filed suit intending to interfere with financing and to stop the Project). Mullins therefore had no basis for failing to raise his petitioning activity argument to the Superior Court. Moreover, Mullins fails to acknowledge, much less explain, his failure to give the Appeals Court the opportunity to consider his current argument—that he had no obligation to raise the petitioning activity issue below.

Further, no “exceptional circumstances” excuse Mullins’ waiver. Mullins suggests that this Court should consider his waived issue because it “presents purely legal questions and holding the issue forfeited would cause injustice.” Pet. 21 n.6. Mullins’ petitioning activity argument is not “purely legal”; it is intertwined with the specifics of the Superior Court’s detailed factual findings. Nor would there be any injustice to Mullins. Represented by well-qualified counsel both at trial and on appeal, Mullins had a full and fair opportunity to raise his argument in the courts below. No review by this Court is warranted to address this waived issue.

## **II. Even If His Petitioning Activity Argument Were Not Waived, Mullins Was Found Liable For Numerous Bad Faith Actions of Which His Baseless Lawsuit Was Only One**

Contrary to Mullins' repeated assertion, the Superior Court did not find Mullins liable "simply for filing his suit." Pet. 1, 7. Rather, the Superior Court found Mullins liable because he acted repeatedly in bad faith by falsely claiming that he had not consented to the Cobble Hill Center Project and taking steps to improperly interfere with its progress. Pet. App. 55–67, 70; *see also* Pet. App. 9.

Mullins' bad faith conduct included his February 28, 2014, letter in which he purported to revoke his consent and falsely asserted that he had never been apprised of the Project details and that he had never consented to the Project. Mullins filed a bad faith lawsuit, which was based on those same knowingly false assertions. The Superior Court further found that Mullins acted in bad faith after he filed his lawsuit by rejecting Corcoran and Jennison's proposal to build the Project then purchase his interest at fair market value and by remaining steadfast in his refusal to allow the Project to move forward on the terms to which he had consented, which caused the Project's entitlements to lapse. Pet. App. 55–67. Thus, even apart from filing his lawsuit, Mullins' bad faith actions were found to have prevented the Project from moving forward.

The Appeals Court's decision focused on Mullins' bad faith revocation of consent and bad faith lawsuit, but also affirmed the Superior Court's factual findings in all respects. The premise of Mullins' petition for a writ of certiorari—that he was found liable for

filing a lawsuit—is therefore incorrect. As a result, this case presents no vehicle for deciding the question presented, even if it were preserved and not waived.

### **III. In Any Event, The Findings and Rulings of the Courts Below Established that Mullins’ Lawsuit Had No Objective or Subjective Basis**

This case presents no error or constitutional issue to address because it did not involve protected petitioning activity, it was properly decided under both Massachusetts law and this Court’s “sham” litigation cases, and it is consistent with the “*Noerr-Pennington* doctrine.”

The *Noerr-Pennington* doctrine was established to protect individual and corporate rights to petition the courts and governmental agencies by immunizing entities from “antitrust liability for engaging in conduct (including litigation) aimed at influencing decisionmaking by the government.” See *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 556 (2014); see also *Proff’l Real Estate Inv’rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993) (“*PRE*”) (“Those who petition government for redress are generally immune from antitrust liability.”). Under a “sham exception” to this doctrine, such immunity does not extend to litigation that is “objectively baseless” and “concea[ls] ‘an attempt to interfere directly with the business relationships of a competitor.’ ” *Octane Fitness*, 572 U.S. at 556.

The Massachusetts “wrongful lawsuit” cases are entirely consistent with the decisions of this Court establishing the “sham” litigation exception to immunity from antitrust liability for petitioning activity.

Massachusetts adopts the Restatement (Second) of Torts standard, under which a wrongful lawsuit may serve as the basis for civil liability where it is initiated without probable cause and for a purpose other than that of properly adjudicating the claims. *G.S. Enters., Inc. v. Falmouth Marine, Inc.*, 571 N.E.2d 1363, 1370 (Mass. 1991); *see also* Restatement (Second) of Torts § 674(a) (1977).<sup>7</sup> Massachusetts’ “without probable cause” standard is equivalent to the “objectively baseless” standard established by this Court in *PRE*. 508 U.S. at 58, 60. *See Sahli v. Bull HN Info. Sys., Inc.*, 774 N.E.2d 1085, 1091 (Mass. 2002) (quoting *PRE*). Indeed, this Court’s decision in *PRE* relied on the SJC’s definition of probable cause in *Hubbard v. Beatty & Hyde, Inc.*, 178 N.E.2d 485, 488 (Mass. 1961), in defining objectively baseless lawsuits. 508 U.S. at 62–63. Probable cause exists when “a reasonable litigant in the [party’s] position could realistically expect success on the merits of the challenged lawsuit.” *Id.* at 63. The claimant must also reasonably believe in the existence of the facts upon which the claims are based. *Hubbard*, 178 N.E.2d at 488.

This case does not demonstrate any departure from this Court’s “sham” litigation standards. Mullins concedes that the Superior Court found a bad faith, improper purpose for his lawsuit against respondents. Pet. 1-2, 8. It is apparent from the Superior Court’s findings that Mullins also lacked probable cause to believe his lawsuit would succeed, meaning that Mullins’ claims were objectively baseless. In

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<sup>7</sup> The Massachusetts wrongful lawsuit cases are separate and distinct from the Massachusetts abuse of process cases cited in footnote 4 of the petition at page 16.

evaluating Mullins' February 28, 2014 letter, the Superior Court found that the facts Mullins later asserted as the essential allegations of his complaint—that he was kept uninformed about the Project and had never consented to it—were known by him to be false. Pet. App. 36–58. Mullins could not reasonably have believed (nor could any reasonable litigant) that claims based on these bad faith, false assertions of fact had a realistic chance of success.

The Appeals Court likewise ruled that although “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” to clarify those issues, he did not have a legitimate basis for suing to halt the Project. Pet. App. 7–8.

Mullins' lawsuit also lacked an objectively reasonable contract interpretation, contrary to his assertions (Pet. 1, 12). While the Superior Court found some ambiguity in the 1987 Agreement as to the timing of consent to a new project, the Superior Court and Appeals Court both “agree[d] that Mullins's interpretation was irrational and thus unreasonable.” Pet. App. 9; *id.* at 29–30.

In sum, the findings and rulings of the courts below established that Mullins lacked probable cause, *i.e.*, an objective basis, to bring his complaint to stop the Project, and that he subjectively acted in bad faith. The decisions below therefore were entirely consistent with this Court's “sham” litigation cases and the *Noerr-Pennington* doctrine. This case presents no error to correct or constitutional issue to address.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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