No. 20-1294

In The
Supreme Court of the United States

SIMON CAMPBELL AND
PENNSYLVANIANS FOR UNION REFORM,

Petitioners,

v.

PENNSYLVANIA SCHOOL BOARDS ASSOCIATION; MICHAEL FACCINETTO, SOLELY IN HIS INDIVIDUAL CAPACITY; DAVID HUTCHINSON, SOLELY IN HIS INDIVIDUAL CAPACITY; OTTO W. VOIT, III, SOLELY IN HIS INDIVIDUAL CAPACITY; KATHY SWOPE, SOLELY IN HER INDIVIDUAL CAPACITY; LAWRENCE FEINBERG, SOLELY IN HIS INDIVIDUAL CAPACITY; ERIC WOLFGANG, SOLELY IN HIS INDIVIDUAL CAPACITY; DANIEL O'KEEFE, SOLELY IN HIS INDIVIDUAL CAPACITY; DARRYL SCHAEFER, SOLELY IN HIS INDIVIDUAL CAPACITY; THOMAS KEREK, SOLELY IN HIS INDIVIDUAL CAPACITY; AND LYNN FOLTZ, SOLELY IN HER INDIVIDUAL CAPACITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Are private, nonprofit corporations that advocate for public interests precluded from invoking the *Noerr-Pennington* doctrine to protect their right to petition the government for a redress of grievances by means of filing a tort action in state court for redress of torts committed?

2. Does the sham exception provide an effective limit on *Noerr-Pennington* immunity if an opposing party proves both objective and subjective prongs as established by this Court in cases such as *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993)?

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INTRODUCTION

Petitioners, Simon Campbell ("Campbell") and an associated corporation, Pennsylvania for Union Reform ("PFUR"), sued Respondents, the Pennsylvania School Boards Association and current and former members of its Governing Board (hereinafter referred to individually or together as "PSBA" or the "Respondents") for one act by PSBA – its filing of a tort action against Petitioners in the Court of Common Pleas of Cumberland County, Pennsylvania ("the Underlying Action").

PSBA believed that Campbell and PFUR had committed three torts – defamation, abuse of process and tortious interference with contractual relations. Consequently, PSBA filed a tort action in state court to vindicate its rights. Petitioners responded by filing this action in federal court, claiming that their First Amendment rights were violated.

The state court action was voluntarily stayed while this case proceeded. This case was vigorously litigated, and many issues were raised by the parties. Fundamental to the case is whether PSBA or its Governing Board members are state actors and whether the filing of a tort action to vindicate private rights is a state action. In light of the tortured procedural interplay of all of the issues raised in the courts below, neither the District Court nor the Third Circuit issued a final ruling whether PSBA or its Governing Board members are state actors. Instead, both courts decided the case on the basis of *Noerr-Pennington* immunity,

assuming that PSBA was a state actor for purposes of deciding a Motion for Summary Judgment.

Both "Questions Presented," as articulated by the Petitioners, depend upon the finding that PSBA and its Governing Board members when acting on the PSBA Governing Board are state actors. The Petitioners' first question asks "Are state actors, acting under color of state law, entitled to claim petitioning immunity . . . ?" The Petitioners' second question asks whether petitioning immunity "claimed by the state actor" can be overcome if it is shown to be objectively baseless and filed for the purpose and intent of chilling First Amendment protected speech. However, PBSA and its Governing Board members when acting as Governing Board members are not state actors. In other words, the fundamental premise advanced by the Petitioners and upon which the Petition for Certiorari is based is not accurate and has not been established in this case.

STATEMENT OF THE CASE

In approximately 2013, Campbell founded PFUR, a 501(c)(4) civic league that seeks to "eliminate compulsory unionism in Pennsylvania while allegedly promoting transparency and efficiency in government for taxpayers." App. 6a, 34a. Campbell and PFUR have filed countless, voluminous Right to Know Law ("RTKL") requests with Pennsylvania public school districts and other government entities. Campbell has also filed hundreds of appeals of local agencies' RTKL

decisions with Pennsylvania's Office of Open Records ("OOR") and has appealed many OOR decisions to Pennsylvania courts of common pleas and the Commonwealth Court. App. 6a-7a.

PSBA is a private, nonprofit corporation organized under the laws of the Commonwealth of Pennsylvania. App. 35a. PSBA exists to further the interests of public education and to provide assistance to public school entities that are members of PSBA, to advocate on behalf of public education, and in turn, the ability of public school systems to do their job and do their job well. PSBA was not created by any public school entity, and no public school entity took any action to incorporate the PSBA. PSBA was not created by the General Assembly, any state agency, or any state or local government entity. Each individual Respondent in this action was a member of PSBA's Governing Board that approved the filing of the Underlying Action in the Court of Common Pleas of Cumberland County, Pennsylvania, against Campbell and PFUR. App. 35a.

Campbell's 2017 RTKL Requests

In March 2017, Campbell and PFUR sent a request pursuant to the RTKL to most, if not all, public school entities in Pennsylvania ("Statewide Request 1"). App. 7a. PSBA's staff attorneys provide guidance to PSBA members, including providing guidance regarding responding to RTKL requests. On March 28, 2017, PSBA staff attorney Emily Leader ("Leader") sent an e-mail to PSBA's members and others offering PSBA's

guidance to school districts in responding to Statewide Request 1. PSBA identified information to which Campbell was seemingly entitled under the RTKL, as well as information which school districts were not required to provide to Campbell. App. 7a.

On April 14, 2017, PSBA staff attorney Stuart Knade ("Knade") sent an e-mail to PSBA's members and others offering additional guidance from PSBA to school districts in responding to Statewide Request 1. Knade urged members to comply with the RTKL, but also informed members that they are prohibited from releasing certain information protected by the RTKL and the Pennsylvania Constitution. App. 40a. Knade also provided analysis on whether members could require RTKL requesters to review records at members' offices rather than mailing or e-mailing records.

On or about May 8, 2017, Campbell served voluminous, identical RTKL requests (Statewide Request 2) to approximately 600 PSBA members statewide, seeking not only public school entity records, but also seeking PSBA records from the public school entities. App. 39a.

More than 240 school districts wrote to PSBA requesting that PSBA provide them with the information responsive to Items 15-21 of Statewide Request 2 in order to provide that information to Campbell. App. 40a. Many school district solicitors wrote letters to PSBA asking PSBA to provide them with the information responsive to Items 15-21 of Statewide Request 2.

After receiving a copy of Statewide Request 2, PSBA decided that it would not agree to provide any data and/or records that Campbell sought through Items 15-21 of his request because there was nothing requested in those items that PSBA was legally obligated to provide. It is clear that Campbell was using the RTKL Requests to have public school entities give him PSBA records to use as a weapon to harm PSBA with its members and to cause an avalanche of document requests to be made by the public school entities to PSBA. PSBA believed that the May 8 RTKL requests to public school entities demanding PSBA records were an abuse of process, that Mr. Campbell was disparaging PSBA and others, and that Campbell was "basically getting in the middle of any agreements that PSBA had with its member entities" – *i.e.*, attempting to interfere with PSBA's contractual relations with its members. PSBA is a voluntary membership association that depends upon its goodwill with its members.

Campbell's Web Sites Defame PSBA

At some point, Campbell began to maintain at least two web pages defaming PSBA or its staff on PFUR's web site, www.paunionreform.org – "PSBA Horror" and "PSBA Investigation." Campbell registered the web site psbahorror.com in 2017 and paid for it with his personal funds. App. 34a-35a. On his websites, Campbell attacked PSBA, Mains, Knade and Leader. Although PSBA agrees that much of what was posted by Campbell was protected speech, PSBA

believed that some of the false and defamatory speech was not protected and that it crossed the line.

In addition to sending thousands of RTKL requests, Campbell makes videos of himself speaking on various topics and then sends Internet links to the videos to various people.

PSBA Files the Underlying Action

At its June 2017 meeting, PSBA's Governing Board unanimously voted to approve the filing of the initial complaint in the Underlying Action. App. 9a. Neither Petitioners' RTKL requests nor the fact that such requests involved financial information of PSBA were ever presented to PSBA's Governing Board as bases for suing Petitioners. PSBA sued Campbell and PFUR on July 17, 2017, in the Cumberland County Court of Common Pleas, alleging claims for defamation, abuse of process and tortious interference with contractual relations. App. 9a, 42a. An Amended Complaint was filed in December 2017. Campbell then sent communications to public school entities asking that they pass resolutions or take votes denouncing PSBA's lawsuit against him.

Lower Court Rulings

Campbell and PFUR filed the Complaint in this case on February 28, 2018, contending that the actions of PSBA and 10 then-current and former PSBA Governing Board members had infringed Petitioners' First

Amendment rights by filing the Underlying Action, warranting injunctive relief as well as compensatory and punitive damages. App. 9a. On June 29, 2018, the Respondents filed a motion for summary judgment, raising five arguments: (1) the conduct of PSBA and the individual defendants did not constitute state action; (2) plaintiffs' activity was not protected by the First Amendment; (3) the state suit was immunized under the First Amendment by the *Noerr-Pennington* doctrine; (4) the individual defendants were shielded by qualified immunity; and (5) plaintiffs had not adduced evidence to support the imposition of punitive damages. App. 47a. In granting summary judgment, the Court stated:

> The Court concludes that although plaintiffs' activities are protected by the First Amendment, they have not carried their burden to show that defendants' filing of the state suit is not. Consequently, the Court cannot grant plaintiffs the relief they seek. Because those two issues are dispositive of the case, the ***Court does not reach the parties' contentions with respect to state action***, qualified immunity, or punitive damages.

App. 47a-48a (emphasis added).

In analyzing the Respondents' *Noerr-Pennington* argument, the District Court noted that

> [T]he *Noerr-Pennington* doctrine "immunizes petitioning directed at any branch of government, including the executive, legislative, judicial, and administrative agencies." *Mariana*

> *v. Fisher*, 338 F.3d 189, 199 (3d Cir. 2003) (*citing Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). That protection extends to citizens' petitioning activities in general, *WE, Inc. v. City of Philadelphia*, 174 F.3d 322, 326-27 (3d Cir. 1999), including the filing of a suit in court, *PREI*, 508 U.S. at 57 (*quoting Cal. Motor Transp. Co.*, 404 U.S. at 510).
>
> Under the doctrine, litigation is protected unless it can be shown to be a "sham" under the two-prong test described above: first, the activity must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; second, the petitioning must be subjectively baseless in that it "conceals" the "use [of] the governmental process – as opposed to the outcome of that process – as a[] . . . weapon." *PREI*, 508 U.S. at 60-61 (1993)). "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id.* at 60. Once defendants show that their activity is protected by the First Amendment, plaintiffs bear the burden of proving that defendants' state suit was a sham. *Id.* at 61.

App. 57a-58a. In analyzing the subjective prong of the test, the Court noted

> [A] suit may be subjectively baseless where the litigant was "indifferent to the outcome on the merits" of the suit, any recovery "would be too low to justify . . . investment in the suit," or the litigant "decided to sue primarily for

> the benefit of collateral injuries inflicted through the use of legal process."

App. 63a (*quoting PREI*, 508 U.S. at 65). Ultimately the Court held that "no reasonable factfinder could conclude that plaintiffs have shown by clear and convincing evidence that the state suit was subjectively baseless." App. 68a. Accordingly the Court granted summary judgment on August 24, 2018. App. 10a, 43a.

On appeal, the Third Circuit Court of Appeals held that the District Court erred in holding that the Petitioners had to prove subjective baselessness by clear and convincing evidence, and that preponderance of the evidence was the proper standard. App. 17a-24a. However, the Third Circuit held that even using the less-stringent standard and viewing Petitioners' evidence in a light most favorable to them, they failed to show subjective baselessness:

> Yet even under this deferential standard, we cannot discern a single quantum of evidence, amidst the mountain of facts that Campbell provides, that would support a conclusion that PSBA aimed to use the process of the suit, as opposed to a successful outcome, to accomplish its objective: ending Campbell's RTKL onslaught.

App. 29a. Accordingly, the Third Circuit issued an order affirming the District Court on August 27, 2020. App. 31a-32a.

SUMMARY OF THE ARGUMENT

Respondents respectfully request that this Court deny the Petitioners' Petition for a Writ of Certiorari (the "Petition") for the following reasons: (1) the factual premise underlying the Petition is false, as neither the District Court nor the Third Circuit held that PSBA or any of the Respondents is a state actor; (2) the District Court and Third Circuit both held that even if the Respondents were state actors, Petitioners failed to offer any evidence whatsoever on the subjective prong of the "sham" exception to the *Noerr-Pennington* doctrine; (3) there is no circuit split on this issue as the one Fifth Circuit case finding no *Noerr-Pennington* protection for the government is distinguishable on its facts; and (4) the sham exception provides the proper tool for balancing *Noerr-Pennington* protection and opposing parties' rights.

ARGUMENT

Petitioners ask this Court to grant a writ of certiorari to determine whether state actors may invoke the protections of the *Noerr-Pennington* doctrine. However, an examination of the record here reveals that Respondents are not state actors, and no court has declared any of them to be state actors. Instead, in an abundance of caution, the lower courts analyzed the *Noerr-Pennington* issue as if the Respondents were state actors and found that Respondents could still

invoke its protections because the Petitioners could not meet the requirements to prove the sham exception.

Moreover, as will be shown, each of the Petitioners' claims is clearly refuted in the thoughtful and thoroughly analyzed opinions below from both the District Court and the Third Circuit, both of which denied the Petitioners' efforts to strip Respondents of *Noerr-Pennington* protection.

I. Petitioners' Questions Presented Require State Actors and State Action

As described above, Petitioners' case relies on a finding that Respondents were state actors taking state action under color of law. That is simply not the case here.

A. PSBA and its Board Members Are Not State Actors

PSBA is a private, nonprofit corporation organized in Pennsylvania. PSBA was not created by the state. It is a voluntary membership association composed of public school entities and the members of the board of directors of those public school entities. PSBA has no oversight responsibilities or powers with regard to public schools. PSBA has no power or authority to take action for or on behalf of public schools.

Although eligibility to be a director or officer of PSBA is generally based on the individual's status as a public school director, when serving on the PSBA

Governing Board the individual is not acting in the scope of his or her duties as a public school director. On the contrary, the decision for any individual to run for PSBA service is a private decision. Service on the PSBA Governing Board is private conduct outside of service to a board member's school district. When Governing Board members serve PSBA, they are not representing their school districts, and they owe their fiduciary duties to PSBA as a corporate entity under law and in fact. School districts do not "sponsor" PSBA Governing Board members, and school districts do not authorize their board members to engage in service with PSBA or on the Governing Board.

When acting at meetings of the PSBA Governing Board, members are addressing PSBA business operations, not the operations of school districts. PSBA Governing Board members perform their PSBA service in their private time and not as part of their duties to their school districts. Under these facts, the Respondents submit that it is clear that PSBA and its Governing Board members are not state actors and are not subject to Section 1983 liability.

B. PSBA's State Court Lawsuit Against Petitioners Was Not State Action

Not only is PSBA not a state actor, but the act of filing the state court tort action was not state action. The phrase "under color of law" has been interpreted to mean that the defendant in a lawsuit filed under

Section 1983 must not be acting as a private entity or individual. This Court has said:

> To state a claim for relief in an action brought under § 1983, [Plaintiffs] must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. Like the state-action requirement of the Fourteenth Amendment, the under-color-of state-law element of § 1983 excludes from its reach "'merely private conduct, no matter how discriminatory or wrongful,'" *Blum v. Yaretsky*, 457 U.S. 991, 1002, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (*quoting Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948)).

Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999). Describing these concepts in different language, the Supreme Court said in another case:

> "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law" and avoids the imposition of responsibility on a State for conduct it could not control. *Lugar* [*v. Edmondson Oil Co.*, 457 U.S. 922 (1982)] at 936-37, 102 S.Ct. at 2753-2754. When Congress enacted § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred "under color of" state law; thus, liability attaches only to those wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in

> accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961). As we stated in *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of' state law."

Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988). In *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), the Court considered the factors to determine whether a private entity – such as PSBA – might be considered to be a state actor for First Amendment analysis purposes. Introducing its analysis, the court said in *Brentwood*:

> Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not. The judicial obligation is not only to preserv[e] an area of individual freedom by limiting the reach of federal law and avoi[d] the imposition of responsibility on a State for conduct it could not control, but also to assure that constitutional standards are invoked when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental

> organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed. ***Thus, we say that state action may be found if, though only if, there is such a close nexus between the State and the challenged action*** that seemingly private behavior may be fairly treated as that of the State itself.

Brentwood, 531 U.S. at 295 (citations and quotations omitted) (emphasis added). The court concluded in *Brentwood* that the Tennessee Secondary School Athletic Association ("TSSAA") engaged in "state action" when it enforced a rule against a private school exerting "undue influence" in recruiting athletes by writing to incoming students and their parents about spring football practice. The TSSAA placed Brentwood's athletic program on probation for four years, declared its basketball team ineligible to compete in playoffs for two years, and imposed a $3,000 fine. The court concluded that the TSSAA was a state actor when it took these actions against Brentwood under what it called "entwinement" between the state and the association. While the Supreme Court found that TSSAA was a "state actor," the court ruled more importantly that TSSAA had taken "state action." The court stated that ***"[t]he issue is whether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school."*** *Brentwood*, 531 U.S. at 290 (emphasis added).

There is no indication by the Court in *Brentwood* that it would have come to the same conclusion that there was state action if the TSSAA had filed a lawsuit as opposed to issuing binding regulations on its members.

Simply stated, PSBA has no power or authority to regulate school districts or school directors. The filing of a tort action to vindicate its private rights is not state action.

C. Petitioners' Questions Presented Fail for Lack of State Actor or State Action

Without a determination that PSBA and its Governing Board members were state actors or that the filing of a state court tort action to vindicate its rights was state action, the Petitioners' "Questions Presented" fall flat like a house of cards.

The first question asks, "Are state actors, acting under color of state law, entitled to claim petitioning immunity from liability for a First Amendment retaliation claim brought under 42 U.S.C. § 1983?" Accordingly, because there are no state actors in this case and no action under color of state law, the first question is moot.

Meanwhile the second question asks, "If such immunity exists, is a showing that a state actor's civil lawsuit was (a) objectively baseless, and (b) filed for the purpose and with the intent of chilling First Amendment-protected speech and petitioning activities,

sufficient to overcome any petitioning immunity claimed by the state actor?" As with the first question, the second question fails in this case for lack of a state actor. Because both of Petitioners' Questions Presented fail, this Court should deny certiorari.

II. Respondents' First Amendment Right to Petition the Government for a Redress of Grievances Must Be Protected

Petitioners present this case as a defense of their First Amendment rights to free speech and to petition the government for a redress of grievances without government retaliation. Pet. 18. Their argument fails for at least two reasons: 1) Respondents are not state actors; and 2) Petitioners seek to enforce their free speech rights by curtailing the Respondents' First Amendment right to seek a redress of grievances.

As noted in the Statement, the District Court never addressed the Respondents' summary judgment argument that they are not state actors because it did not have to do so. App. 47a-48a. Similarly, the Third Circuit never made any finding that the Respondents were state actors. Instead, the Third Circuit analyzed whether state actors should receive less protection under the *Noerr-Pennington* doctrine than other citizens as Petitioners suggest, and the court rejected that argument.

> Stripping state actors of protection would expose them to an unreasonably increased risk of interference. . . . We are unconvinced

> that government defendants seeking *Noerr-Pennington* immunity receive similar benefits by virtue of their position. Moreover, the Supreme Court has been careful to extend rights to state actors in many fields, especially when they are acting as market participants. In some cases, the petitions of state actors will be "nearly as vital" as those of private individuals, given the representative role that public institutions play in democratic life. We therefore decline to adopt Campbell's suggestion that PSBA is ineligible for *Noerr-Pennington* protection as a universal rule.

App. 16a.

Yet even if Respondents were state actors, Petitioners fail to explain why they should be stripped of their right to petition the government just as Petitioners have done.

The right to petition the government is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (*quoting United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967)). Petitioning serves numerous, fundamental interests of petitioners and the government alike. It is "essential to freedom," liberty and self-government. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 382 (2011); *see also McDonald v. Smith*, 472 U.S. 479, 483 (1985).

Petitioning a court normally is not an actionable wrong that can give rise to a claim for damages. Absent a claim of malice, the ordinary rule is that "'no action

lies against a party for resort to civil courts' " or for "the assertion of a legal argument." *Lucsik v. Board of Ed. of Brunswick City School Dist.*, 621 F.2d 841, 842 (6th Cir. 1980) (*per curiam*); *see*, *e.g.*, *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 770, n.14 (1983); *Russell v. Farley*, 105 U.S. 433, 437-38 (1882). Petitioners fail to explain why their First Amendment rights should trump Respondents' First Amendment rights.

III. The Third Circuit's Decision is Correct

A. The Sham Exception Provides the Limit to Petitioning Immunity That Petitioners Claim to Seek

Petitioners argue that this Court has long "imposed limits on petitioning immunity to prevent abuse." Pet. 21. Respondents assert that the sham exception provides exactly the limit to petitioning immunity that Petitioners claim to seek.

When creating the *Noerr-Pennington* doctrine, this Court recognized that some parties might look to abuse the litigation process to harm competitors rather than seek a redress of grievances.

> There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here.

E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961); *see also Cal. Motor*, 404 U.S. at 515 ("First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils.'"). This Court then laid out its two-part definition of "sham" litigation in *PREI*.

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus 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.

PREI, 508 U.S. at 50. This test provides assurance that a party seeking *Noerr-Pennington* protection is not seeking to harm another party, just as Petitioners purportedly seek. And the decisions below make clear that the courts were satisfied that Petitioners were unable to provide even the most meager amount of evidence that Respondents were seeking to improperly use the litigation process. Indeed, Petitioners provide no explanation how stripping state actors of *Noerr-Pennington*

immunity would protect parties any more than the sham exception does now.

Meanwhile, the Third Circuit has analyzed whether government actors qualify for *Noerr-Pennington* immunity and found that they do.

> Although *Noerr-Pennington* immunity typically applies to private, not public, actors, this would not be the first time an appellate court has applied such immunity to public actors. Both the Ninth and Second Circuit Courts of Appeals have extended Noerr-Pennington immunity to government actors. *See*, *e.g.*, *Manistee Town Center v. City of Glendale*, 227 F.3d 1090 (9th Cir. 2000); *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18 (2d Cir. 1980). . . . [T]he Ninth Circuit examined the issue in some detail in *Manistee*. Plaintiff, Manistee Town Center, purchased and renovated a rundown shopping mall. *Manistee*, 227 F.3d at 1091. When unsuccessful in attracting major retail tenants to the mall, the plaintiff began to explore alternative lease arrangements which were opposed by defendants, the City of Glendale and the Mayor, City Manager, and two City Council members. *Id.* Defendants sought to prevent the plaintiff's efforts to lease space to certain lessors by encouraging residents and the local press to vocally oppose non-commercial use of the space and by lobbying government officials of the County. *Id.* at 1092. When Manistee Town Center's lease arrangements fell through, it filed a complaint against defendants, in their

> official capacities, pursuant to 42 U.S.C. §§ 1983 and 1985. *Id.* The district court dismissed plaintiff's § 1983 claim on *Noerr-Pennington* immunity grounds. *Id.*
>
> In affirming the dismissal, the Ninth Circuit . . . reasoned that extending such immunity to state actors is consistent with the "representative democracy" rationale enunciated by the Supreme Court in *Noerr*, as "[g]overnment officials are frequently called upon to be ombudsmen for their constituents" whereby "they intercede, lobby, and generate publicity to advance their constituents' goals." *Id.* In holding that *Noerr-Pennington* immunity extended to defendants, the court concluded that this form of petitioning is "nearly as vital" to democracy as petitioning by private citizens. *Id.*
>
> We know of no Supreme Court or federal appellate case holding that *Noerr-Pennington* cannot apply to government actors, and are persuaded by the reasoning employed by the *Manistee* court. Governmental petitioning is as crucial to the modern democracy as is that of private parties.

Mariana v. Fisher, 338 F.3d 189, 200 (3d Cir. 2003). Petitioners make no argument that preventing state actors from invoking the *Noerr-Pennington* doctrine would prevent improper legal action in a way that the sham exception cannot do. In fact, such a rule would merely cause harm to public entities by subjecting them to unnecessary liability.

B. There Is No Circuit Split as Alleged by Petitioners

Seeking to encourage a grant of certiorari, Petitioners claim that there is a circuit split on whether to grant *Noerr-Pennington* immunity to state actors. Pet. 21-25. However, Petitioners cite only one case in which a court held that *Noerr-Pennington* protection does not apply to the government, and that case is distinguishable.

In *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075 (5th Cir. 1988), a cable television company, Video International Productions, Inc. ("VIP"), accused a competing cable company – Warner–Amex Cable Communications, Inc. ("WAX") – of colluding with the city of Dallas to put VIP out of business. One of the claims was that WAX improperly petitioned Dallas to enforce zoning codes that reduced VIP's ability to service customers. *Id.* at 1082. Both WAX and Dallas invoked the *Noerr-Pennington* doctrine as a defense. The Fifth Circuit held that WAX was protected by the doctrine, but the city was not.

The *VIP* case is distinguishable from this case and any other *Noerr-Pennington* case because the city of Dallas was not petitioning anyone, but merely sought *Noerr-Pennington* immunity based on WAX's petitioning of the city. Respondents argue that given similar facts, other circuits would rule similarly because in order to invoke the *Noerr-Pennington* doctrine, a party must have engaged in protected petitioning activity.

In this case, the Respondents are not state actors as the city of Dallas clearly was in *VIP*. More importantly, even if Respondents were deemed to be state actors, they engaged in protected petitioning activity by filing a state court lawsuit against Petitioners. Therefore, as the Third Circuit held in *Mariana*, Respondents were able to invoke the *Noerr-Pennington* doctrine so long as their actions did not fall into one of the doctrine's exceptions.

Importantly, counsel for Respondents were unable to find any case – even in the Fifth Circuit – in which a court cited *VIP* for the proposition that state actors cannot invoke the *Noerr-Pennington* doctrine. Accordingly, it seems that the holding in *VIP* has not even been adopted in the Fifth Circuit and does not represent a circuit split.

C. The Third Circuit's Decision Properly Balances Competing Rights

Petitioners argue that this is the first case allowing a state actor to invoke the *Noerr-Pennington* doctrine to retaliate against First Amendment protected speech and petitioning activities. Pet. 26. However, this argument mischaracterizes the Respondents' position.

Rather than using *Noerr-Pennington* as "a retaliatory sword," Respondents merely invoked the doctrine to shield against Petitioners' continued harassment and defamatory statements. It is indeed ironic that Petitioner Campbell, who has admittedly wielded the Pennsylvania RTKL as a weapon to bend school

districts across the Commonwealth to his will, claims to be a victim of state action after the Respondents took steps in filing the state lawsuit to defend PSBA and its member school districts from Petitioners' ongoing pattern of harassment.

The District Court and Third Circuit decisions below properly balanced the Petitioners' First Amendment free speech and petitioning claims with the Respondents' First Amendment right to petition government. The Third Circuit chose to balance the competing First Amendment claims not by removing the Respondents' ability to invoke *Noerr-Pennington* protection, but by adjusting the standard of proof applied in evaluating the sham exception.

> As a general rule, the Supreme Court instructs that the heightened clear and convincing standard is necessary "where particularly important individual interests or rights are at stake." Nevertheless, "imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence." Since *Noerr-Pennington* cases will necessarily involve constitutional rights, a clear and convincing standard initially seems appropriate. Indeed, many courts, including other circuit courts of appeals, have required that level of proof in patent disputes involving *Noerr-Pennington* immunity.
>
> This case by contrast, arises in the § 1983 realm, and it necessarily reflects a different tension. A balance that makes sense in the

> patent or antitrust context holds less weight for civil rights litigants, and vice-versa. This is because antitrust disputes must generally strike a balance between First Amendment rights and statutory restrictions on anticompetitive behavior. Justice Black was unwilling in such scenarios to "lightly impute to Congress an intent to invade" the First Amendment right to petition. Here, by contrast, PSBA and Campbell both seek to vindicate their constitutional right to petition. Thus, we cannot simply transplant the standard of proof used to balance a statutory and a constitutional right in order to resolve this clash of matching constitutional ones. . . . Instead, we have a face-off between two identical interests. The collision produces "an undeniable tension." It would be "intolerable [if] one constitutional right should have to be surrendered [or restricted] in order to assert another." . . . Accordingly, we have repeatedly held preponderance of the evidence to be the proper standard for § 1983 claims.

App. 18a-24a.

Petitioners seemingly seek to do away with the subjective prong of the sham exception test, arguing that Respondents' "'illegal' motive serves to vitiate any claimed immunity." Pet. 28. However, the Third Circuit explained how the subjective prong of the sham exception test differs from a party's motivation to act.

> We readily agree that PSBA's eagerness to achieve this goal radiates from each incident he complains of. However, that does not prove

> that the suit itself, as opposed to prevailing on the merits, was PSBA's subjective motivation.
>
> . . .
>
> PSBA's leadership harboring personal animus against Campbell does not establish that the State Suit was subjectively baseless. If animus alone were the test, it would readily devour the rule, since litigation is rarely sparked by feelings of warmth and amity. The protection of *Noerr-Pennington* immunity cannot be swept away by simple dislike.

App. 30a.

Meanwhile, Petitioners argue that permitting state actors to invoke the *Noerr-Pennington* doctrine allows them to penalize protected expression and petitioning. Pet. 28. Yet Petitioners fail to explain why permitting state actors to invoke *Noerr-Pennington* is any more unfair than allowing private parties to use the defense. In fact, the competitive free market offers much greater incentive for improper use of process than a citizen will typically face from state action. However, that has not prevented courts from applying the *Noerr-Pennington* doctrine and indeed expanding its application over time well beyond the antitrust field in which it was created.

Moreover, Petitioners have not explained how they have been harmed by the lower courts' decisions. Although the Third Circuit decision shielded Respondents from Petitioners' claims in this litigation, the decision also held that the Respondents' claims against

the Petitioners were objectively baseless. As such, the Petitioners have been free to continue their RTKL campaign and free speech activities criticizing PSBA and have done so. As such, the Petitioners' First Amendment claims have been vindicated.

IV. This Case Turns on Unique Facts That Make It a Poor Vehicle to Decide Any Outstanding Questions of *Noerr-Pennington* Application

To the extent that this Court seeks to make clear whether or not state actors may invoke the *Noerr-Pennington* doctrine, this case does not provide the proper vehicle to do so, for the simple reason that the Respondents – and PSBA specifically – are not state actors.

Respondents submit that it is clear that PSBA and its Governing Board members are not state actors and not subject to Section 1983 liability. And importantly, the lower courts never addressed whether or not Respondents are state actors. Therefore, to the extent that there is a need to consider whether state actors may invoke the *Noerr-Pennington* doctrine, this Court should address the issue in a case where the doctrine has been invoked by an individual or entity that is undoubtedly a state actor.

However, Respondents question whether the issue must be decided at all. Petitioners claim that this case marks the first time that a state actor has invoked *Noerr-Pennington* in defending against First Amendment retaliation claims in the 60 years that the

doctrine has been in use. If this claim is true, the issue is not likely to be repeated any time soon, and therefore such a narrow issue seems inappropriate for certiorari.

Combined with the fact that there is no true circuit split as described above, this case offers none of the qualities this Court seeks when choosing its docket.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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