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**

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE COURTS OF APPEAL ARE DIVIDED ON AN ISSUE OF NATIONAL IMPORTANCE	3
II. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE IMPORTANT CONSTITUTIONAL QUESTIONS PRESENTED	6
A. This Case Centers Squarely on Whether State Actors' Petitioning Can Foreclose the Citizens' Remedies for Violations of the First Amendment	6
B. Respondents' Attempts to Argue that There Was No State Action Are a Misleading Smokescreen	8
CONCLUSION	11

TABLE OF AUTHORITIES

CASES Page(s)

Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001) 2, 9, 10

CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) 7

Eastern R. Conference v. Noerr Motors, 365 U.S. 127 (1961) ....*passim*

Herr v. Pequea Twp., 274 F.3d 109 (3d Cir. 2001) 4, 5

Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) 6

Manistee Town Center v. City of Glendale, 227 F.3d 1090 (9th Cir. 2000) 4

Mariana v. Fisher, 338 F.3d 189 (3d Cir. 2003) 4

Pleasant Grove City v. Summum, 555 U.S. 460 (2009) 6

Sanghvi v. City of Claremont, 328 F.3d 532 (9th Cir. 2003) 4

United Mine Workers v. Pennington, 381 U.S. 657 (1965) ....*passim*

Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns Corp., 858 F.2d 1075 (5th Cir. 1988) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200 (2015) 6

Williams v. Mayor & City Council of Balt., 289 U.S. 36 (1933) 7

CONSTITUTION

U.S. Const. amend. I .... *passim*

STATUTES

42 U.S.C. § 1983 8

OTHER AUTHORITIES

Mark G. Yudof, WHEN GOVERNMENT SPEAKS (Univ. of Cal. Press 1983) 7

REPLY BRIEF FOR PETITIONERS

This case involves state actors who retaliated against speech, but then were shielded from liability by the *Noerr-Pennington* doctrine. As the Petition demonstrated, the courts of appeals are sharply divided on the central issue presented by this case: whether state actors acting under color of state law may invoke First Amendment petitioning immunity to evade liability for otherwise-actionable constitutional torts—here, naked First Amendment retaliation against citizen critics. Moreover, as highlighted by *amicus curiae* Institute for Free Speech, that division of authority reflects a broader confusion among the lower courts regarding the proper constitutional balance between the civil liberties that protect the speech and petitioning rights of the people, and the government's power to counter that speech.

Respondents' attempts to cast doubt on Petitioners' arguments are unavailing. They concede that the Pennsylvania School Boards Association ("PSBA") filed the State Lawsuit against Petitioners in express retaliation for Petitioners' political speech and petitioning activities. Further, Respondents do not really take issue with the conclusion of both lower courts that the State Lawsuit was objectively frivolous, or that the First Amendment protects all of Petitioners' Right to Know Law ("RTKL") requests and speech.

Instead, Respondents attempt to distract the Court from the questions clearly presented by the Third Circuit's ruling, and this petition, by seeking to reprise their unsuccessful (and meritless) arguments below that neither PSBA nor its 10 all-elected-school-board-director governing board members were engaged in state action when they authorized and pursued the plainly baseless and retaliatory State Lawsuit. But this is a

red herring that was effectively dispatched at the motion to dismiss stage. There, the district court concluded that Petitioners' Complaint was sufficient to establish PSBA's status as a pervasively-entwined state actor under *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). The Complaint appended PSBA's bylaws, as well as a 2005 memorandum from the Chief Counsel of the Pennsylvania Public School Employees Retirement System (PSERS) reiterating the Commonwealth's decades-long position that PSBA is a "governmental entity," and that its employees are public "school employees" entitled (and required) to participate in a taxpayer-subsidized pension program. The fact that neither court below saw any need to further address this issue is of no moment as it is not before the Court.[1] Indeed, if the district court or the Third Circuit had harbored any doubts as to whether PSBA is a state actor, considerations of constitutional avoidance would have counseled that they first decide *that* issue. Instead, both courts headed directly into the constitutional thicket to rule on the parties' supposedly competing First Amendment interests.

Contrary to Respondents' contentions, this case is an ideal vehicle for the Court's review of the questions presented. There is an entrenched and deepening split between the Fifth Circuit on the one hand and the Third and Ninth Circuits on the other over whether state actors may claim First Amendment petitioning immunity to shield their conduct. The Third Circuit's decision squarely ruled that state actors are entitled to invoke the *Noerr-Pennington* doctrine to avoid liability for filing and prosecuting a SLAPP suit in

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[1] Respondents have not invited review of the state action issue by filing a cross-petition for certiorari on that point.

retaliation for Petitioners' protected speech and petitioning. In so ruling, the Third Circuit's decision upends and renders toothless the fundamental protections of the First Amendment itself.

Further, contrary to Respondents' assertions (at 28-29) that this case presents "unique facts" and a "narrow issue" that is unlikely to recur, the fundamental issue is broad, and national: whether *Noerr-Pennington* has any place in evaluating the liability of state actors—in the civil rights context or elsewhere. Moreover, as emphasized in the Petition, the Third Circuit's ruling draws a road map for future state actors to retaliate against their detractors for their constitutionally-protected speech without fear of incurring liability under civil rights laws. Indeed, even Respondents avoid making any representations that PSBA will not file more retaliatory lawsuits against anyone else who files RTKL requests seeking to learn what PSBA does with the millions of taxpayer dollars it receives annually.

This Court should grant review to resolve the division of authority among the courts of appeals and answer these important constitutional questions.

I. THE COURTS OF APPEAL ARE DIVIDED ON AN ISSUE OF NATIONAL IMPORTANCE

The Court should grant the Petition because the circuit courts are divided as to whether the *Noerr-Pennington* doctrine extends to state actors, as the Third Circuit acknowledged. App. 14a-16a. It noted different degrees of scrutiny have been applied to restrictions on government speech, and that such variability "is compounded here because there is some confusion over *Noerr-Pennington's* applicability to state

actors." App. 15a. Yet the Third Circuit did nothing to help clear up the confusion. Only this Court can do that.

The Fifth Circuit has held that "*Noerr–Pennington* protection does not apply to the government, of course, since it is impossible for the government to petition itself within the meaning of the first amendment." *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns Corp.,* 858 F.2d 1075, 1086 (5th Cir. 1988). The Third Circuit below reached the opposite conclusion, but did not explain the basis for its disagreement with the Fifth Circuit other than to say "we have already declined to adopt that view." App. 16a (citing *Mariana v. Fisher,* 338 F.3d 189 (3d Cir. 2003)). In *Mariana,* the Third Circuit discussed the issue more fully (including the basis for the court's disagreement with the Fifth Circuit), *id.* at 197-200, but neither it, nor any of the cases it cites, addressed the nature of government speech (or its "right" to petition) and the extent to which it can be "protected" by the First Amendment.[2]

Nowhere is the existence and significance of this persistent circuit split made more explicit (or the error in the Third Circuit's analysis more apparent) than in the cogent and scathing dissent of the late Judge Garth in *Herr v. Pequea Twp.*, 274 F.3d 109 (3d Cir. 2001). There, the dissent underscored—emphasizing the Fifth Circuit's *Video Int'l Prod., Inc.* decision—that

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[2] The Ninth Circuit also has applied *Noerr-Pennington* immunity to state actors, particularly when they engage in lobbying in a representative capacity. *See, e.g., Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1093–94 (9th Cir. 2000) (holding that a city's lobbying of a county government to frustrate land development opposed by city residents was protected by the *Noerr-Pennington* doctrine as an exercise of "representative democracy"); *Sanghvi v. City of Claremont*, 328 F.3d 532, 542–43 (9th Cir. 2003) (same).

> *Noerr-Pennington* immunity applies to *private parties-not governmental entities*-seeking redress from the government" because "government entities, unlike private citizens, are limited by the Constitution from certain conduct in ways that individuals are not. . . . Therefore, providing a private citizen an absolute *per se* immunity arising from his or her 1st Amendment right to petition is far different than providing such an absolute constitutional right to a governmental entity . . . .

Id. at 129 and 130 n.5 (Garth, J. dissenting) (original emphasis, citations omitted).

The *Noerr-Pennington* doctrine, and the rationale behind it, are simply not applicable here because, as the Fifth Circuit has held (and Judge Garth's dissent in *Pequea* underscored), government actors have no First Amendment rights—and no right to invoke petitioning immunity to shield them from liability for overt constitutional violations committed while acting under color of state law. The Third Circuit, in parting ways with the Fifth, turned our constitutional framework on its head by holding that the First Amendment serves to justify, rather than constrain, governmental overreach—both in *Pequea* and in this case. *See Pequea*, 274 F.3d at 130 ("The majority provides no authority extending *Noerr-Pennington* to conduct by *government* entities which have been shown to have acted in violation of constitutional restrictions. Nor do I know of any authority purporting to extend *Noerr-Pennington* in such a way so as to *per se* defeat an individual's constitutional rights . . . .") (Garth, J. dissenting) (original emphasis).

Had this case been litigated in the Fifth Circuit, the result would have come out the other way. This Court

should accept review to resolve the split between the circuits, and restore the principles that underpin our constitutional framework.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE IMPORTANT CONSTITUTIONAL QUESTIONS PRESENTED

A. This Case Centers Squarely on Whether State Actors' Petitioning Can Foreclose the Citizens' Remedies for Violations of the First Amendment

The Constitution speaks in terms of rights of the citizens and powers of the government. The powers vested in government are limited by the citizens' rights, as well as by structural checks and balances. Government speech is a power, not a right, and is therefore limited by the First Amendment. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.,* 576 U.S. 200, 207-08 (2015); *Pleasant Grove City v. Summum,* 555 U.S. 460, 467-68 (2009); *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 553 (2005).

Enforcing the distinction between the citizens' right to petition and engage in free speech under the First Amendment and the government speech doctrine is critical to protecting fundamental civil liberties. One of the core purposes of the First Amendment is to prevent the government from muzzling those who are critical of it. Although the government is not required to be neutral on matters of public concern merely because it must permit others to be critical, there is a difference between the government acting as speaker and the government exerting its power to regulate or censor its critics. Here, Respondents were not engaged in competing speech. They filed the State Lawsuit to punish Petitioners and deter them from exercising

their First Amendment rights—and should not be shielded from liability for their unconstitutional conduct.

As *amicus curiae* Institute for Free Speech explained, a governmental unit "created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." *Williams v. Mayor & City Council of Balt.,* 289 U.S. 36, 40 (1933). It is "inconceivable that governments should assert First Amendment rights antagonistic to the interests of the larger community," and doing so in this context especially "would be standing the world on its head." Mark G. Yudof, WHEN GOVERNMENT SPEAKS 44, 45 (Univ. of Cal. Press 1983). *See CBS, Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government.").

The facts and procedural posture of this case make it an ideal vehicle to define the existence and/or scope of state actors' petitioning immunity. The two courts below did not hesitate to find that Petitioners' petitioning activity and speech are protected under the First Amendment, and that Respondents' SLAPP suit was motivated by an intent to censor and retaliate against Petitioners for those activities and was objectively a sham.[3] Additionally, this case was decided on summary

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[3] As shown in the Petition, even if applicable, the lower courts' findings should have sufficed to overcome any state actor's claim of *Noerr-Pennington* immunity under both the objective and subjective prongs of the sham exception, and certainly to defeat summary judgment. The State Lawsuit was objectively frivolous on the merits, and Respondents' retaliatory animus and censorial intent are unlawful motivators in the context of the First Amendment.

judgment, so the standard of review is plenary in all respects, and all factual inferences are drawn in Petitioners' favor. Accordingly, this case provides the Court a perfect framework to answer the key question presented: whether a citizen who has made out a First Amendment retaliation claim against state actors can be denied a remedy under § 1983 because his state actor attackers are entitled to invoke their own supposed First Amendment petitioning immunity.

B. Respondents' Attempts to Argue that There Was No State Action Are a Misleading Smokescreen

Lacking any satisfactory reply to the questions presented, Respondents attempt to divert the Court's attention, setting up and knocking down a straw man by rewriting the questions presented to presuppose that their filing of the retaliatory State Lawsuit did not involve state action by any of them. But Respondents' portrayal of the posture of the case is inaccurate, and their implication that the issue is before this Court or is a barrier to reviewing the Third Circuit's actual holding is false. Instead, the Third Circuit (and the district court) *assumed* for purposes of their *Noerr-Pennington* analysis that defendants were state actors and proceeded to address the issues as to which petitioners seek review here.

Indeed, the district court had no hesitation in concluding that PSBA was a state actor, and its reasoning warrants reproduction here:

> Defendants argue that they are not state actors, because their state suit "is not a government function" and PSBA is not under the "control of the state." In response, plaintiffs contend that defendants are state

actors under the "entwinement" standard applied by the Supreme Court in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295 (2001). For the reasons stated below, the Court agrees with plaintiffs.

In *Brentwood*, the Supreme Court concluded that a state athletic association of public and private high schools acted under color of state law because the "private character of the Association was overborne by the pervasive entwinement of public institutions and public officials in its composition and workings." 531 U.S. at 298. The Supreme Court reached that conclusion because 84% of the Association's members were public schools, each school was entitled to vote for the members of the Association's governing board, and the Association's governance of "interscholastic athletics obviously played an integral part in the public education of Tennessee." *Id*. at 299-300.

The same analysis applies in this case. Although PSBA is a private entity, its membership is composed entirely of public schools represented by their school board officials. As in *Brentwood*, those schools vote for the members of the PSBA's Governing Board, each of whom must also serve as an elected school board official. Furthermore, the PSBA, at the direction of its board, provides key services to its public school members, including legal advice, lobbying of the state legislature, and the filing of the state suit at issue in this case. Taking the allegations of the Verified Complaint as true, the Court concludes,

> pursuant to *Brentwood*, that defendants are state actors for purposes of plaintiffs' First Amendment claims.

App. 81a-82a (cleaned up). In addition, Petitioners at all times pursued the additional and alternative theory that, even if PSBA were not itself a state actor, each of the governing board directors—who held their offices solely by virtue of their status as publicly elected school board directors of PSBA-member public school districts—were acting under color of state law in directing PSBA to file and maintain the State Action.

Thus, the fact that "neither the District Court nor the Third Circuit issued a final ruling whether PSBA or its Governing Board members are state actors" as Respondents emphasize (at 1) is misleading. The district court *did* rule—and the Third Circuit did not question—that Respondents are state actors. Respondents are thus raising an issue that they lost below to argue against certiorari. But they did not file a cross-petition, so the issue is not before this Court and is not a basis for denying the Petition.[4]

Ultimately, the district court and the Third Circuit found it unnecessary to expend any further effort on the question of Respondents' status as state actors. Respondents at all times were acting under color of state law. Their decision to silence Petitioners through

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[4] Although the issue of state action is not before the Court, it bears noting that Petitioners amassed further evidence supporting a finding of state action under both the "pervasive entwinement" and concerted action theories. These materials are summarized in Petitioners' Proposed Findings of Fact and Proposed Conclusions of Law filed with the district court (at ECF Nos. 40 and 40-1).

a civil lawsuit is subject to scrutiny under the First Amendment. On this score, the district court and the Third Circuit agreed.

This case presents an enormously important First Amendment issue: if state actors retaliate against protected speech through the use of civil proceedings, can they then invoke the *Noerr-Pennington* doctrine to completely evade accountability for their actions? The circuits are split and this case clearly and cleanly presents this question.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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