No. 20-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners, vocal critics of public school teacher unions and the school districts in which they operate, were engaged in First Amendment-protected free speech and petitioning activities when they were sued by the Respondents, an association of public school boards governed by 10 elected public school officials—all state actors—in an objectively baseless lawsuit in state court specifically targeting Petitioners' free speech and petitioning, with the admitted intention of chilling Petitioners' exercise of their First Amendment rights.

In response, Petitioners filed a federal civil rights action seeking to enjoin the lawsuit and vindicate their First Amendment rights. Petitioners' evidence was sufficient to establish the three generally accepted elements of a First Amendment retaliation claim under 42 U.S.C. § 1983, i.e., (1) constitutionally protected speech and/or conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a "but-for" causal link between the constitutionally protected conduct and the retaliatory action. The state actor Respondents, however, claimed that they were entitled to "*Noerr-Pennington*" petitioning immunity for their baseless lawsuit. The District Court agreed, and granted summary judgment to the Respondents.

On appeal, the Third Circuit held that state actors may claim constitutional petitioning immunity in filing retaliatory civil lawsuits, but that such protection is lost if the lawsuit is both objectively and subjectively a "sham." That court agreed that Petitioners had shown the state lawsuit to be objectively baseless, and filed with the intent of chilling Petitioners' First Amendment speech and activities. Nevertheless, it

held that Petitioners had failed to show that the lawsuit was a "subjective" sham and affirmed the district court's refusal to enjoin the baseless and retaliatory lawsuit.

The questions presented, therefore, are:

1. 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?

2. 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?

DIRECTLY RELATED CASES

This case arises out of a civil action commenced by Petitioners in the U.S. District Court for the Eastern District of Pennsylvania, and appealed to the U.S. Court of Appeals for the Third Circuit:

- *Simon Campbell, et al. v. Pennsylvania School Boards Association*, *et al.*, No. 18-CV-892, U.S. District Court for the Eastern District of Pennsylvania. Judgment entered August 24, 2018.
- *Simon Campbell, et al. v. Pennsylvania School Boards Association*, *et al.*, No. 18-3112, U.S. Court of Appeals for the Third Circuit. Judgment entered August 27, 2020. Rehearing denied October 16, 2020.

The names of all parties appear on the cover, and there are no other directly related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

RULE 29.6 DISCLOSURE

Pennsylvanians for Union Reform, a non-profit corporation, has no parent corporation, and no publicly held company otherwise directly or indirectly owns 10% or more of Pennsylvanians for Union Reform.

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INTRODUCTION

"Official reprisal for protected speech offends the Constitution [because] it threatens to inhibit exercise of the protected right." *Hartman v. Moore*, 547 U.S. 250, 256 (1996) (citations and internal quotation marks omitted). This is a First Amendment retaliation suit, arising under 42 U.S.C. § 1983, for injunctive relief and damages.

Petitioners, Simon Campbell and Pennsylvanians for Union Reform (PFUR), are well-known activists who use Pennsylvania's broad "Right to Know Law" (RTKL), their website, and direct communications with public officials to obtain information from government entities and advocate their views on public union and public school reform. Respondents are 10 elected government officials and the association of government agencies they run for the collective benefit of those government agencies, Pennsylvania School Boards Association (PSBA), who invoked the Petition Clause to shield their use of a retaliatory lawsuit to silence their critics.

In 2017, Petitioners made two statewide RTKL requests of the school district members of PSBA, the second of which sought financial and other information concerning those districts' relationships with PSBA, and lobbied the member districts to discontinue their memberships in PSBA. Petitioners further posted criticisms of PSBA on PFUR's website.

In direct and express retaliation, PSBA filed a state court tort action (State Lawsuit) asserting frivolous claims for defamation, abuse of process, and "tortious interference" with PSBA's "contractual relations" with its public school district members, all based on Petitioners' speech and petitioning activities. As the

Third Circuit emphasized, "[i]ndeed, PSBA did sue Campbell to get him to stop his RTKL-related conduct and PSBA never attempted to disguise or deny that objective." App. 28a. In addition to being objectively baseless, none of the asserted causes of action could have led to any injunction or other judicial remedy that would have forced Petitioners to cease making RTKL requests.

Normally, these facts would suffice to establish liability for First Amendment retaliation under 42 U.S.C. § 1983, the claim Petitioners asserted. Petitioners' speech obviously was protected by the First Amendment's Free Speech Clause, and their RTKL requests for government records—which also lobbied the receiving school districts to quit their PSBA memberships—by the Petition Clause. Undoubtedly, Respondents would not have filed (and then amended) the retaliatory State Lawsuit "but for" Petitioners' speech and petitioning. But the Third Circuit held that such retaliatory conduct by Respondents—government actors all—itself is immunized under the "*Noerr-Pennington*" doctrine, although that doctrine has never been held to shelter outright First Amendment retaliation by this or any other court that Petitioners could identify.

The Third Circuit did hold that "*Noerr-Pennington*" immunity is lost if the lawsuit at issue is "baseless." The problem is that, having imported such immunity into the civil rights arena, the Third Circuit applied a definition of the "sham" exception that ignores the very context in which this case arises: a claim of First Amendment retaliation. The Third Circuit "accept[ed] the District Court's conclusion that PSBA's State Suit is objectively baseless, as the First Amendment protected all of [Petitioners'] alleged activities." App. 25a. Nonetheless, while acknowledging that Respondents'

express goal was to halt Petitioners' speech and petitioning activity, according to that court, Petitioners could not make out the "subjective" element of the supposed "sham" exception—meaning that the lawsuit is an effort to "use the governmental ***process***—as opposed to the ***outcome*** of that process—as [a] weapon." *Professional Real Estate Investors v. Columbia Pictures Indus., Inc.* ("*PREI*"), 508 U.S. 49, 60-61 (1993) (original emphasis, internal citation omitted).

No prior decision of this Court has held that state actors can be insulated from civil rights liability for filing a baseless suit for the purpose and effect of retaliating against First Amendment-protected activities based on their own claimed First Amendment petitioning immunity. The Third Circuit's application and interpretation of petitioning immunity to protect state actors' retaliatory SLAPP suit conflicts with the bedrock principle that "'as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions or engaging in protected speech." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (quoting *Hartman*, 547 U.S. at 256).

This case is not like others where lower courts have recognized petitioning immunity for government officials who participated in regulatory proceedings or petitioned courts for the purpose of protecting public safety and health. Here, there is no doubt that the purpose of the State Lawsuit was to censor Petitioners. As the Third Circuit recognized, ample evidence exists in the record to support a finding that Respondents' true interest lay in silencing Petitioners' political speech and coercing Petitioner to stop making RTKL requests that Respondents found objectionable. App. 27a-30a.

Moreover, prior decisions of this Court have enunciated principles that guide the application of the *Noerr-Pennington* doctrine outside the antitrust context where it originated, and even if petitioning immunity could supply a defense to naked First Amendment retaliation, the Third Circuit's opinion violates those precedents. As this Court's precedents already teach, an objectively baseless lawsuit is enjoinable if there is evidence of "indifference to the outcome on the merits" of the suit; ***or*** where any recovery "would be too low to justify . . . investment in the suit;" ***or*** where the litigant "decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process." *PREI*, 508 U.S. at 65.

Further, this case is unlike First Amendment retaliation cases, where "but for" causation is in question, or other constitutional interests are involved—such as *Nieves*, a retaliatory arrest case involving the interplay of First Amendment, Fourth Amendment, and law enforcement considerations. Again, by contrast, *causation here has been established*, and purely First Amendment interests are at stake. Petitioners' and Respondents' allegedly "competing" First Amendment interests are not equal, and the Third Circuit's treatment of them as such provides cover—here and in the future—for the worst inclinations of government officials who tire of their critics.

The Third Circuit held that state actors may take action expressly intended to retaliate for First Amendment protected expression and petitioning activity—and for the express purpose of chilling that protected activity—so long as the retaliation takes the form of a lawsuit against the speaker. That decision is inconsistent with established law and offensive to the very First Amendment principles it invokes. Further,

it is inconsistent with *Nieves*, where this Court only two terms ago held that, even in the law enforcement context, the existence of probable cause for an arrest is not categorically dispositive of a First Amendment retaliation claim if the plaintiff can prove that retaliatory animus in fact was the motivating "but-for" reason for a discretionary arrest.

This Court should grant certiorari to affirm that the paramount rights requiring protection here are the First Amendment free speech and petitioning rights of private citizens. Properly understood and applied, whatever petitioning immunity these state-actor Respondents might be afforded must yield in these circumstances to the First Amendment rights of Petitioners to be free from retaliation for their petitioning and political speech in the form of a spurious SLAPP suit brought by Respondents—self-appointed enforcers of a non-existent "line" limiting the speech and activities of disfavored political adversaries.

OPINIONS BELOW

The Third Circuit's opinion (App. 3a-30a) is reported at 972 F.3d 213 (3d Cir. 2020). The opinion of the U.S. District Court for the Eastern District of Pennsylvania granting summary judgment in Respondents' favor (App. 33a-69a) is reported at 336 F. Supp. 3d 482 (E.D. Pa. 2018). The District Court's opinion denying Respondents' motion to dismiss (App. 73a-91a) is not reported in the Federal Supplement, but is available on Westlaw at 2018 WL 3092292 (E.D. Pa., June 20, 2018).

JURISDICTION

The Third Circuit entered judgment on August 27, 2020 (App. 31a-32a), and denied Petitioners' Petition for Rehearing on October 16, 2020. App. 1a-2a.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitution of the United States, First Amendment, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S. Code § 1983. Civil action for deprivation of rights, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

The appendix (App. 92a-96a) reproduces relevant provisions of Pennsylvania's Right to Know Law, Act

of Feb. 14, 2008, P.L. 6, No. 3, codified at 65 Pa. Stat. §§ 67.101 *et seq.*

STATEMENT

A. Statutory Background of Pennsylvania's Right to Know Law

Respondents' State Lawsuit was expressly filed in retaliation for Respondents having made RTKL requests of PSBA's member school districts—including requests that sought financial information concerning each district's contracts with PSBA (and lobbied the districts to discontinue their PSBA memberships)—requests that Respondents had express statutory authorization to make under Pennsylvania law.

Pennsylvania's Right to Know Law, 65 Pa. Stat. §§ 67.101 *et seq.* was enacted "to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions." *Office of the DA of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Cmwlth. 2017) ("*Bagwell*") (internal quotation and citation omitted). This Court similarly has recognized the purpose of the Freedom of Information Act, 5 U.S.C. § 552, the federal counterpart to the RTKL, and its importance and value to true self-government:

> FOIA is often explained as a means for citizens to know "what the Government is up to." This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy. The statement confirms that, as a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information. A person requesting

> the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose.

NARA v. Favish, 541 U.S. 157, 171-72 (2004) (citation omitted).

Government agency records are presumed public by the RTKL, subject to specified exceptions which themselves are "narrowly construed so as not to frustrate the remedial purpose of the RTKL." *Bagwell*, 155 A.3d at 1130. Under the RTKL, "a requester has a legislatively granted and judicially enforceable right to secure information from the hands of government" to inquire and investigate government, and "within explicit, enacted constraints—to go fishing." *Id.* at 1138. "The rights afforded a requester under the RTKL are constrained by the presumption and exemptions contained in the law itself." *Id.* at 1139 (citing 65 P.S. §§ 67.305, 67.708).

Records made public under the RTKL are "open to the entire public at large." *Coulter v. Pa. Bd. of Prob. & Parole*, 48 A.3d 516, 519 (Pa. Cmwlth. 2012). The identity and subjective intentions of the requester are legally irrelevant to the validity of a request. *See Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Cmwlth. 2014); 65 P.S. § 67.301(b). The RTKL also explicitly provides for public access to records related to a public contract, even if those records are in the possession of the contractor, rather than the government agency. 65 P.S. § 67.506(d)(1) (which is why Petitioners could ask school districts to produce information in the possession of PSBA about services it provided pursuant to its contracts with its members).

No agency policy or regulation may include a "limitation on the number of records which may be requested or made available for inspection or duplication" nor may it include a "requirement to disclose the purpose or motive in requesting access to records." 65 P.S. § 67.1308. There is no limit on the number of government agencies to which a requester may direct a RTKL request, nor is there any such thing as a "lifetime maximum" to the number of requests a requester may make.

The RTKL itself provides remedies—to the receiving governmental entities, not to PSBA—which can deny a statutorily-defined "disruptive" request. 65 P.S. § 67.506(a). Notably, not a single school district denied the RTKL requests for which PSBA sued Campbell on the ground that it was "disruptive."

B. Petitioners' Constitutionally Protected Speech and Petitioning Activities

Petitioners Campbell and PFUR, the nonprofit he founded, are vocal critics of public teacher unions and school districts in which they operate. They are also passionate advocates for government transparency. Their advocacy work is conducted through a number of channels, including the filing of RTKL requests, lobbying government officials directly, and by maintaining an official PFUR website. App. 34a. Following PSBA's filing of the State Lawsuit, Campbell personally established a website, www.psbahorror.com. App. 34a-35a.

Respondent PSBA is a Pennsylvania-incorporated, nonprofit association comprised exclusively of Pennsylvania public school boards, nearly all of which hold PSBA membership. App. 35a. PSBA is governed entirely by government officials, elected by government entities to

its Governing Board. App. 36a. The individual Respondents were the ten voting members of PSBA's 2017 Governing Board ("Board") who voted unanimously to authorize the State Lawsuit against Petitioners. App. 42a.

PSBA's mission and relationship with its membership had been a focus of Petitioners' advocacy since March 2017, when Petitioners sent RTKL requests to "most, if not all, public school agencies" in Pennsylvania. App. 38a. In response to these requests, PSBA offered its member school boards two sets of "guidance" regarding Petitioners' RTKL requests, advising school boards that they could withhold some of the requested information, and require Campbell to pick up the documents Petitioners sought in person—contrary to the position of Pennsylvania's Office of Open Records, the state agency charged with implementing and enforcing the RTKL. Petitioners posted these "guidance" e-mails on PFUR's website on a page titled "PSBA Horror." App. 7a.

In May 2017, Petitioners emailed another set of RTKL requests to approximately 600 public school entities. App. 39a. Among numerous requests, Petitioners requested that each public school entity provide information about its contractual relationship with PSBA and financial records related to those contracts that Petitioners believed to be in the possession of PSBA, but accessible under the RTKL. App. 39a-40a. In the transmittal emails, Campbell wrote, "I call upon elected school officials to terminate the taxpayers' forced relationship with PSBA. Revoke PSBA membership. . . . Stop making taxpayers fund the salaries and . . . pensions of a private corporation's employees." App. 40a.

Petitioners also used PFUR's website to air criticisms of PSBA and, in particular, PSBA's advice to its members to resist Petitioners' RTKL requests, and only to make documents available at the "district offices" across Pennsylvania for "pickup." App. 40a-42a. Some of that criticism took the form of satirical cartoons criticizing PSBA's taxpayer funding and advice regarding the RTKL. *Id*. Petitioners also published their email exchanges with PSBA's General Counsel, as well as other correspondence expressing criticism of PSBA and its responses to Petitioners' RTKL requests. *Id*.

C. Respondents File, and then Amend, an Objectively Baseless State Court Complaint

On July 17, 2017, PSBA, at the unanimous direction of its Board of elected government officials, sued Petitioners in the State Lawsuit asserting that several of Petitioners' statements were defamatory, that Petitioners' use of the RTKL amounted to "abuse of process," and that their lobbying the school districts to sever their ties with PSBA constituted "tortious interference" with PSBA's contractual relations with its member public school entities. App. 42a.

As was established in the lower courts, PSBA's claims were all objectively baseless. App. 58a-60a. All of Petitioners' RTKL requests constituted statutorily authorized, constitutionally privileged, government petitioning. All of their internet postings were satire and otherwise non-defamatory opinions and statements about PSBA—a public figure. App. 48a-57a.

Moreover, PSBA could never have accomplished its stated goals—making Petitioners stop making RTKL requests of PSBA's member school districts and lobbying them to quit PSBA, and stop publicly criticizing

PSBA by prevailing in the State Lawsuit. As for the RTKL requests, there was no claim seeking to halt Petitioners' RTKL requests, nor could there have been one. Petitioners had every right to make as many RTKL requests of as many government entities as they wished. It was up to the school districts themselves to evaluate Petitioners' requests and deny them as statutorily "disruptive"—which none of them did. Instead, many school districts sought to collect responsive records from PSBA to provide to Petitioners. App. 40a.

As for ending Petitioners' public criticism, PSBA sought no injunction, and Pennsylvania law does not allow a court to enjoin allegedly defamatory speech. *Willing v. Mazzocone*, 393 A.2d 1155, 1157 (Pa. 1978). Thus, forcing Petitioners to stop making RTKL requests to school districts and stop publicly criticizing PSBA could only have been accomplished by using the process itself as the weapon.

At first, Campbell, individually, continued speaking out, criticizing PSBA, moving the allegedly defamatory content from PFUR's web site to www.psbahorror.com, a web site maintained and funded by Campbell personally, and lobbying its member school boards to pass resolutions calling for PSBA to withdraw the State Lawsuit (over 20 school districts in fact did so). App. 66a. In December 2017, PSBA made a settlement demand that would have censored Petitioners' First Amendment activities. App. 29a. Promptly after Petitioners rejected PSBA's demands, PSBA amended its complaint to sue Petitioners for Campbell's post-suit First Amendment speech and petitioning activities. App. 28a. Thereafter, Campbell ceased all PSBA-related speech and activities, and removed the allegedly offending web postings from public view.

D. Proceedings in the District Court

Petitioners sued PSBA and its ten voting Board members (all elected public officials) in the United States District Court for the Eastern District of Pennsylvania alleging that PSBA's pursuit of the State Lawsuit constituted prohibited state action in retaliation for Petitioners' exercise of their First Amendment free speech and petitioning rights. Campbell sought an injunction requiring PSBA to dismiss the State Lawsuit, and damages.

As relevant here, Respondents moved to dismiss the Complaint, arguing that the State Lawsuit is protected by the *Noerr-Pennington* doctrine and that they were not state actors. The district court denied Respondents' motion in a June 20, 2018 Memorandum and Order, holding, *inter alia*, that PSBA is a "state actor" under the "pervasive entwinement" test announced in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001).[1] App. 79a-71a.

The district court, though, held that Respondents were entitled to invoke "*Noerr-Pennington*" immunity unless Petitioners could show that the State Lawsuit was a "sham," both objectively and subjectively.[2] That

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[1] Given this conclusion, the district court had no occasion to address Petitioners' alternative theory of state action, i.e., that even if PSBA were itself considered a private actor, the ten individual defendants who served as PSBA's voting directors held their positions solely by virtue of their status as publicly elected members of school boards that themselves were voting members of PSBA, and thus were acting under color of state law in voting to cause PSBA to file the State Lawsuit.

[2] That court rejected Petitioners' position that *Noerr-Pennington* does not protect state actors with respect to First Amendment retaliation claims (App. 82a.), a position that Petitioners continued

court based its holding on a single case, *Mariana v. Fisher*, 338 F.3d 189 (3d Cir. 2003), a Sherman Act lawsuit where the Third Circuit held that Pennsylvania's attorney general was immunized by *Noerr-Pennington* from anti-trust liability for Pennsylvania's participation in a multi-state settlement with cigarette manufacturers that created an otherwise forbidden output cartel.[3]

Respondents thereafter filed a motion for summary judgment, raising the same issues as their motion to dismiss, plus an argument that Petitioners' actions were not protected by the First Amendment. On August 24, 2018, the district court granted Respondents' motion for summary judgment. In its opinion, that court concluded that Petitioners' RTKL requests, commentary, and lobbying activities all were protected by the First Amendment, and that every claim in the State Lawsuit was objectively baseless. App. 48a-60a. Thus, the district court concluded that Petitioners had proven that, objectively, the State Lawsuit was a "sham."

Turning to the question of Respondents' subjective intent, however, the district court found that Petitioners' evidence of the purpose of PSBA's and its Board in filing, and PSBA's manner in prosecuting, the State Lawsuit, was insufficient to raise a triable issue of material fact on whether the State Lawsuit was subjectively baseless—which that court defined as "whether defendants subjectively intended to prevail on the merits." App. 65a. Accordingly, the district

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to preserve on appeal. Brief of Appellants, Document: 003113111762, p. 39, n.3.

[3] The district court also denied Respondents' motion to strike Petitioners' description of the State Lawsuit as a "SLAPP" suit, the acronym for "strategic litigation against public participation," i.e., a frivolous lawsuit intended to chill the defendants' protected speech and punish them with the litigation process. App. 89a-91a.

court entered summary judgment in Respondents' favor solely on this basis.[4]

E. The Third Circuit Appeal

On appeal, the Third Circuit, like the district court, accepted that Petitioners' evidence was sufficient to make out all the traditional elements of a First Amendment claim under § 1983. Again, however, like the district court, the Third Circuit viewed this dispute as "dueling claims to *Noerr-Pennington* immunity" (App. 5a), and erected an additional hurdle to the vindication of Petitioners' First Amendment rights by affording so-called "*Noerr-Pennington*" immunity to the state actors themselves.

After surveying the development of *Noerr-Pennington* in the anti-trust arena, and the expansion of the concept of petitioning immunity to other areas of the law, the Third Circuit, like the district court, viewed its *Mariana* decision as dispositive of the issue of whether state actors may lay claim to "*Noerr-Pennington*" immunity. This, despite the fact that neither that case, nor any of the other cases cited by the Third Circuit arose in the context of a First-Amendment retaliation action—much less one where the state actors' weapon of choice was an objectively-baseless lawsuit targeting constitutionally-protected speech and activities. The Third Circuit further recognized the existence of a split with the Fifth Circuit, which "found it axiomatic

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[4] The district court, relying primarily on cases evaluating the "sham" exception in patent cases, held that Petitioners were required to prove the "sham" exception to *Noerr-Pennington* immunity by clear and convincing evidence, rather than the preponderance of the evidence standard that this Court has held applies to civil rights claims. As explained *infra*, the Third Circuit sustained Petitioners' assignment of error on this point.

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 [sic].'" App. 15a (quoting *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns., Inc.*, 858 F.2d 1075, 1086 (5th Cir. 1988).

Having engrafted a new burden onto the traditional three-step test for establishing a First Amendment retaliation claim, the Third Circuit then proceeded to articulate and apply a "sham" exception—the "sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief." App 13a. The Third Circuit's "sham" exception, nominally, had an "objective" and a "subjective" component.

The court "accept[ed] the district court's conclusion that PSBA's State Suit is objectively baseless, as the First Amendment protected all of [Petitioners'] alleged activities." App. 25a. Turning to the subjective component of the test, the court properly found that the District Court erred in requiring Petitioners to meet a "clear and convincing" standard to show that Respondents' retaliatory lawsuit was a sham. The imposition of a heightened burden of proof in a civil rights case, the Third Circuit wrote, "'lacks any common-law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983.'" App. 23a (quoting *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998)).

Nonetheless, the Third Circuit interpreted *Noerr-Pennington* to frustrate Petitioners' First Amendment retaliation claim, despite acknowledging that Respondents' express goal was to halt Petitioners' petitioning activity—and even while acknowledging that the evidence that Respondents filed their suit to intimidate

Petitioners into giving up their speech and petitioning is ubiquitous:

> Indeed, PSBA did sue Campbell to get him to stop his RTKL-related conduct and PSBA never attempted to disguise or deny that objective. . . . [T]he record indicates that PSBA wanted Campbell to stop overwhelming its members with RTKL requests and that it filed the State Suit in hopes of accomplishing that goal.

App. 28a-29a. Yet, according to the Third Circuit, such admitted retaliatory animus and censorial intent, coupled with an objectively frivolous lawsuit targeting First-Amendment protected speech and petitioning, was insufficient to remove the roadblock of Respondents' own "*Noerr-Pennington*" immunity from civil rights liability.

The Third Circuit held that such evidence was insufficient to create a triable issue of fact on the "subjective" sham element, which it defined as PSBA's: (1) indifference to the outcome of the suit, (2) insufficient potential recovery to justify bringing the State Suit, or (3) that PSRB "decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process." App. 26a. As that court wrote: "The fact that PSBA readily accused Campbell of defamation, that it sought to terminate his activities, and that it celebrated its progress in achieving that goal simply fails to satisfy the subjective prong, even by a preponderance of the evidence." App. 29a-30a. On that basis, the Third Circuit affirmed the district court grant of summary judgment in Respondents' favor despite finding ample evidence that the frivolous State Lawsuit was filed by state actors with the express

intention of retaliating against, and censoring, Petitioners' protected speech and petitioning.

REASONS FOR GRANTING THE PETITION

I. PROTECTING FIRST AMENDMENT RIGHTS IS A MATTER OF PARAMOUNT IMPORTANCE

This case is about those most precious of constitutional freedoms—the rights of citizens to petition government and to engage in political speech on issues of public importance, and the need for untrammeled access to judicial relief when state actors retaliate against citizens for their exercise of these rights.

The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). A long line of this Court's jurisprudence emphasizes "the paramount public interest in a free flow of information to the people concerning public officials." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

The First Amendment stands as a bulwark protecting the citizenry's ability to evaluate and challenge the government—both by seeking access to information about how the government functions, and in debating such issues. Accordingly, the First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (of "highest importance" are the aims of "preventing corruption and sustaining the active alert responsibility of the individual citizen in a democracy for the wise conduct of government").

In light of these constitutional imperatives and their centrality to the citizenry's ability to self-govern, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman*, 547 U.S. at 256. "Official reprisal for protected speech offends the Constitution [because] it threatens to inhibit exercise of the protected right." *Id.*

Thus, the ability to seek redress under 42 U.S.C. § 1983 when such "retaliatory actions" occur serves as both an important check on government abuse, and an opportunity—often the only one—for citizens to vindicate their precious, yet fragile, constitutional rights. *See*, e.g., *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978) (Section 1983 is designed to compensate those injured by deprivation of federal rights and to prevent abuses of power by those acting under color of state law). The decision below severely limits the effectiveness of this check, all but barring a plaintiff from succeeding on a claim for retaliation when government censorship comes in the form of an objectively baseless civil lawsuit.

Petitioners were the targets of a SLAPP suit brought by state actors who wished to keep their use of taxpayer dollars out of the public eye. When Petitioners began seeking financial information regarding PSBA through RTKL requests of its public school district members, and lobbying against the public funding of PSBA, Respondents took those tax dollars and used them to prosecute a frivolous civil action against them. The State Lawsuit had nothing to do with obtaining an adjudication of a legitimate, legally cognizable dispute between PSBA and Petitioners. Indeed, the courts below had no hesitation in concluding that PSBA's

claims against petitioners plainly are barred by the First Amendment and Petitioners' own petitioning immunity. Nor did those courts disagree that the Respondents brought the State Lawsuit to retaliate against Petitioners for their constitutionally privileged speech and activities and to chill Petitioners—both now and in the future—from requesting government records and action and from engaging in political speech critical of PSBA.[5] But because Respondents testified that they hoped to succeed on the merits of the frivolous State Lawsuit, both the district court and the Third Circuit foreclosed relief to Petitioners for what is otherwise a clear-cut case of prohibited First Amendment retaliation.

Petitioners submit that the enforceability of their core First Amendment rights through the Civil Rights laws cannot be made to depend upon the choice of the weapon that the state actor Respondents elected to use as their cudgel to retaliate against them. Yet, that is what the Third Circuit in effect has done, and in light of the importance of the First Amendment interests that are at stake, the writ should issue in order to review and correct the Third Circuit's erroneous decision.

II. THE THIRD CIRCUIT'S DECISION IS WRONG

The Third Circuit framed this dispute as "dueling claims to *Noerr-Pennington* immunity." But that is not a fair characterization of the stakes involved, and that

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[5] Indeed, despite demand—and being told by two federal courts that the State Lawsuit is objectively baseless, i.e. frivolous—PSBA refuses to dismiss it, thereby tacitly threatening to reactivate it should Petitioners make any further RTKL requests, or engage in further political commentary that PSBA disapproves of. *See* Cumberland County, PA, Case #2017-07303 Docket, https://onbaseweb.ccpa.net/psi/v/detail/Case/181001 (last visited March 12, 2021).

court's creation of a false parity led it to a manifestly unjust result that leaves Petitioners unprotected from Respondents' objectively frivolous retaliatory lawsuit. If any petitioning immunity is to be afforded to state actors, it necessarily must yield to the citizens' right to petition and speak freely on matters of public concern under First Amendment. Any other conclusion—including the Third Circuit's holding below—will create a breach in the wall of the First Amendment's protections, allowing overt acts of First Amendment retaliation to go unchecked.

A. In Every Context Where It Has Been Recognized, this Court Has Imposed Limits on Petitioning Immunity to Prevent Abuse

The *Noerr-Pennington* doctrine originally allowed competitors to lobby collectively for or against government action without fear of statutory antitrust liability because "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot . . . lightly impute to Congress an intent to invade these freedoms." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961); *see also Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). This Court later extended immunity to situations where groups "use . . . *courts* to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972) (emphasis added).

This Court has drawn upon *Noerr-Pennington*'s First Amendment underpinnings to recognize Petitioning Clause immunity from federal liability for "genuine" petitioning by *private* parties in other contexts, specifically liability under the National Labor Relations Act.

See Bill Johnson's Rests. v. NLRB, 461 U.S. 731, 743-44 (1983); *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524-27 (2002) ("*BE&K*"). This Court has further extended the concept of First Amendment petitioning immunity to preclude state tort claims. Thus, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court applied *Noerr-Pennington*'s rationale to defeat claims of civil conspiracy and malicious interference with business by White merchants whose businesses were the subject of a boycott organized by the NAACP.

In every context where this Court has recognized such immunity, it has taken care to articulate context-specific exceptions needed to prevent abuse. While *Noerr-Pennington* immunity has been extended to lawsuits, it has never protected "illegal and reprehensible practices which may corrupt the . . . judicial process." *California Motor Transport*, 404 U.S. at 513. So, too, petitioning immunity in other areas of the law has context-based limitations. Thus, for example, "it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA." *Bill Johnson's Rests.*, 461 U.S. at 743-44 ("[S]ince sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition.")

Accordingly, while "genuine" petitioning has been held to be immune from liability, "illegal," "reprehensible," or "sham" petitioning has never been protected in any setting. *PREI*, 508 U.S. at 60-61. In *BE&K*, this Court described its holding in *PREI* this way: "Instead, in cases like *Bill Johnson*'s and *Professional Real Estate Investors*, our holdings limited regulation to suits that were both objectively baseless ***and*** subjectively motivated by an unlawful purpose." *BE&K*, 536

U.S. at 531 (original emphasis). And, of course, *PREI* sets forth a menu of ways in which a given petition may be found to be subjectively baseless, meaning that it is an effort to "use the governmental ***process***—as opposed to the ***outcome*** of that process—as [a] weapon." *PREI*, 508 U.S. at 60-61 (original emphasis).

B. The Circuits Are Split on Whether and How to Allow State Actors to Claim *Noerr-Pennington* and/or Petition Clause Immunity

This Court has never held that *Noerr-Pennington*/petitioning immunity may be invoked by state actors. Moreover, until now, no court has ever held that petitioning immunity may be invoked to insulate state actors from liability for First Amendment retaliation. Yet that is exactly what the Third Circuit's ruling below has sanctioned and protected.

To be sure, some courts of appeals have extended "*Noerr-Pennington*" immunity to state actors, but *never* where, as here, the motivation for the challenged petitioning was blatant First Amendment retaliation. For instance, government actors have been afforded petitioning immunity when they participate in regulatory proceedings designed to ensure public safety and health in land development, and in the operation of convalescent care facilities. *See*, e.g., *Herr v. Pequea Twp.*, 274 F.3d 109, 120 (3d Cir. 2001); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988). *Noerr-Pennington* has also been found to protect a state's ability to petition the courts to recover damages on behalf of the state and its citizens "as a result of the unlawful and concerted actions" of the tobacco industry defendants. *Mariana*, 338 F.3d at 198-200 (*Noerr-Pennington* doctrine applied to state officials acting in *parens patriae* capacity for their participating in tobacco industry settlement that

created an otherwise-unlawful output cartel). And the Ninth Circuit has extended *Noerr-Pennington* immunity to state actors when their petitioning activity was brought 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).

The Fifth Circuit, in contrast, has articulated the view that, axiomatically, "*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 [*sic*]." *Video Int'l Prod., Inc.*, 858 F.2d at 1084. Moreover, the very notion that "*Noerr-Pennington*"/petitioning immunity—with its genesis in citizens' First Amendment rights—should be available to state actors has a shaky analytical provenance. Notably, it was forcefully refuted by the dissent in *Pequea*, 274 F.3d. at 129-131 (Garth, J. dissenting). There, the dissent underscored that "*Noerr-Pennington* immunity applies to *private parties-not governmental entities*-seeking redress from the government." *Id.* at 129 (original emphasis). The dissent in *Pequea* explained that *Noerr-Pennington* cannot immunize state actors that act with intent to impinge on a citizen's fundamental rights, because the government's right to petition is not in parity with the Bill of Rights:

> It is axiomatic that 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 130 n5.[6]

C. The Third Circuit's Ruling Improperly Allows State Actors to Use *Noerr-Pennington*'s Shield as a Retaliatory Sword

What is at stake here is whether state actors can retaliate against a citizen's First Amendment rights to seek information concerning government and engage in criticism on matters of public concern by targeting that citizen with civil proceedings devoid of objective legal merit filed with the obvious intention of censoring speech and stifling petitioning, and then hide behind their own asserted petitioning right to avoid liability for such retaliation. This is the first time a court of appeals has held that the Petition Clause immunizes state actors from § 1983 liability for a concededly retaliatory lawsuit against a citizen for that citizen's political speech and petitioning activities.

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[6] Further, the panel in *Mariana*, the circuit precedent on which the Third Circuit relied below, expressed skepticism over the government's ability to invoke *Noerr-Pennington*, suggesting that state actor immunity might more properly be considered under *Parker v. Brown*, 317 U.S. 341 (1943)'s state-action immunity doctrine. But the court in *Mariana* viewed itself bound by a prior panel decision in *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 255 (3d Cir. 2001), that held that *Noerr-Pennington* applied to the actions of state actors for the same tobacco settlement.

Petitioners adduced evidence sufficient to prove that Respondents filed a tort suit asserting frivolous claims for defamation, abuse of process, and "tortious interference" with PSBA's "contractual relations" with its public school district members, because of and targeting Petitioners' First Amendment protected speech and petitioning activities. And it is self-evident that Respondents filed their SLAPP suit with the intention of forcing Petitioners to abandon their advocacy and criticism of PSBA—and in the words of the Third Circuit "celebrated [their] progress in achieving that goal" through the filing and subsequent amendment of the State Lawsuit. App. 29a. In other words, Petitioners established that the State Lawsuit was objectively baseless, and was filed with an unlawful and unconstitutional motive.

That is the *only* proof that should be required to vitiate a state actor's claim to Petition Clause immunity. State actors normally face liability for retaliation where the plaintiff can prove: "(1) [their own] constitutionally protected conduct, (2) retaliatory action [by a state actor] sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action." *Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006). Petitioning Clause immunity has always been limited—and context-based. Here, the context is First Amendment retaliation, and the "unlawful purpose" is the goal of suppressing First Amendment-protected expression. "The law is clearly established" that state actors may not use their authority to retaliate for the exercise of First Amendment rights. *Starnes v. Butler Cnty. Court of Common Pleas*, 971 F.3d 416, 429 (3d Cir., 2020). There is no countervailing interest that counsels

greater protection for a state actor who has been shown to be motivated by a desire to censor.

The fact that a state actor chooses a frivolous lawsuit, as opposed to other means, to silence citizens should make no difference at all. If anything, it makes matters worse. As this Court emphasized in *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 390 (2011), "[w]hen a petition takes the form of a lawsuit against the government employer, it may be particularly disruptive. Unlike speech of other sorts, a lawsuit demands a response. Mounting a defense to even frivolous claims may consume the time and resources of the government employer." If a frivolous lawsuit by an individual is unduly disruptive to an employer with the resources of a government, the pain it inflicts when the roles are reversed is exponentially greater. And when the state actor admits its retaliatory intent and purpose, that should end the inquiry (or, at the very least, foreclose summary judgment). To hold otherwise is to frustrate the purpose of the First Amendment—and gives state actors carte blanche to retaliate against their critics through the device of a frivolous SLAPP suit.

The Third Circuit here held that Respondents were entitled to summary judgment—and to continue "SLAPPing" Petitioners with the State Lawsuit—because, in their view, the state tort action did not fit the "subjective" requirements of a "sham" lawsuit because Respondents proffered evidence that they desired to prevail on the merits of the State Lawsuit, however baseless. But correctly considered, this is beside the point. A "pure heart, empty head" defense should have no place in permitting state actors to evade liability for violating citizen's civil rights when the traditional elements of a First Amendment

retaliation claim otherwise are present. Censorial intent *is* the "unlawful purpose" that matters here. Just as "this Court has recognized that the Petition Clause does not protect 'objectively baseless' litigation that seeks to 'interfere *directly* with the business relationships of a competitor'" in the anti-trust context, *Borough of Duryea*, 564 U.S. at 390 (original emphasis) (quoting *PREI*, 508 U.S. at 49, 60-61, additional citations omitted), so too, there should be no protection in the civil rights context for state actors who file objectively baseless litigation that seeks to "interfere *directly*" with the First Amendment activities of their citizen "competitors" in the marketplace of ideas.

The Third Circuit's decision immunizing Respondents from liability under § 1983 is inconsistent with this Court's application of First Amendment/*Noerr-Pennington* petitioning immunity and with the well-established precedent prohibiting state actors from using their authority to penalize protected expression and petitioning. State actors who use baseless civil suits to punish and chill First Amendment-protected activity deserve no protection. Their retaliatory and otherwise "illegal" motive serves to vitiate any claimed immunity—and should be more than sufficient to satisfy any "subjective" sham component of any petitioning immunity that this Court might recognize for state actors in this context.

Unless this Court grants this petition, the Third Circuit's decision will serve as a roadmap for future state actors that seek to silence their private citizen opponents through objectively frivolous lawsuits, and who will need only state that they "hoped" to succeed on the merits to avoid constitutional tort liability for trampling their critics' First Amendment rights.

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT, CLEARLY FRAMED, AND THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

The issues presented here are of fundamental constitutional importance. The Third Circuit has taken the concept of First Amendment petitioning immunity and applied it to state actors in a way that turns that immunity into an instrument for defeating the First Amendment itself. Such a result is anathema to the Constitution, the Civil Rights laws, and the jurisprudence of this Court. If permitted to take root, this ruling effectively will provide a "Get Out of Jail Free" card to state actors who will now know that the "safe" way to punish a citizen's privileged speech and petitioning is to file a retaliatory SLAPP suit and then claim that they "hoped" somehow to prevail on the merits—as well as to claim, where qualified immunity is at issue, that the unconstitutionality of such a method of retaliation was not "clearly established."

The issues are clearly presented here. Petitioners challenged Respondents' invocation of *"Noerr-Pennington*" petitioning immunity in the district court, and expressly preserved these issues through the Third Circuit. The Third Circuit dedicated the bulk of its opinion to exploring, addressing, and adjudicating the core issues presented by this Petition.

This case is also an excellent vehicle for this Court to adjudicate the issues. Because summary judgment was granted against Petitioners, the standard of review on all aspects of this appeal is *de novo*, and all factual inferences are drawn in Petitioners' favor. Petitioners adduced sufficient evidence of all three elements of a First Amendment retaliation claim:

Respondents are state actors, who targeted Petitioners with the objectively baseless State Lawsuit in specific retaliation for Petitioners' RTKL requests and privileged political speech. And there can be no disputing that being hit with an onerous SLAPP suit is enough to chill a person of ordinary firmness from continuing to exercise his constitutional rights.

Thus, this case cleanly presents the fundamental question for this Court—whether a citizen who has made out a First Amendment retaliation claim against state actors can be denied a remedy under § 1983 because his attackers are entitled to sidestep liability by invoking their own supposed First Amendment petitioning immunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 15, 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed October 16, 2020]

No. 18-3112

SIMON CAMPBELL; PENNSYLVANIANS
FOR UNION REFORM,

Appellants

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,

SUR PETITION FOR REHEARING
(District Court No. 2-18-cv-00892)

Present: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and FUENTES[1] Circuit Judges

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The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
s/ Theodore A. McKee
Circuit Judge

Dated: October 16, 2020
Tmm/cc: All Counsel of Record

[1] Judge Fuentes vote is limited to panel rehearing only.

APPENDIX B

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3112

SIMON CAMPBELL; PENNSYLVANIANS
FOR UNION REFORM,

Appellants

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,

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 2-18-cv-00892)
District Judge: Honorable Jan. E. Dubois

Submitted Under Third Circuit L.A.R. 34.1(a)
May 20, 2019

Before: MCKEE, SHWARTZ, and FUENTES,
Circuit Judges.

(Filed: August 27, 2020)

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OPINION

MCKEE, *Circuit Judge*.

In this dispute over dueling claims to *Noerr-Pennington* immunity, Simon Campbell and his organization, Pennsylvanians for Union Reform (collectively, "Campbell"), allege that the Pennsylvania School Boards Association and its Board Members (collectively, "PSBA") violated Campbell's civil rights by suing him in state court (the "State Suit"). That complaint asserted various tort claims against Campbell based on his persistent use of Pennsylvania's Right to Know laws. According to PSBA's State Suit allegations, Campbell's relentless pursuit of information about PSBA, and his related conduct, was an abuse of the Right to Know statute intended solely to harass PSBA. At that time, Campbell defended against the State Suit by arguing his conduct was constitutionally protected under the *Noerr-Pennington* doctrine.

Now Campbell sues, seeking damages under 42 U.S.C. § 1983, alleging that the State Suit was intended as retaliation. PSBA defends against Campbell's civil rights claims by itself invoking *Noerr-Pennington*. It argues the First Amendment shields its right to sue in state court. The District Court agreed with PSBA and granted its motion for summary judgment.

We conclude that the District Court erred in requiring a heighted burden of proof on PSBA's motives in bringing its tort claims in state court. However, because we find that Campbell's civil rights claim would fail under any standard of proof, we agree

that PSBA is entitled to judgment as a matter of law and will therefore affirm.[1]

I.

Simon Campbell is an active and persistent user of the Pennsylvania Right to Know Law ("RTKL"), which permits citizens to obtain certain information from the state government and its agencies.[2] In recent years, he has submitted hundreds of requests to public school agencies across the Commonwealth. Many of the recipients are members of the PSBA. The PSBA is a non-profit association created by Pennsylvania's school districts "to further the interests of public education and to provide assistance to public school entities."[3] A majority of school boards in the state are members, and the organization's roots stretch back to the 19th century.[4]

Campbell founded Pennsylvanians for Union Reform ("PFUR") in 2013 to "eliminate compulsory unionism in Pennsylvania while promoting transparency and efficiency in government for taxpayers."[5] In pursuing those goals, PFUR has energetically utilized the Commonwealth's RTKL to obtain records from PSBA's constituent school districts and other government

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[1] "We may affirm a district court for any reason supported by the record." *Brightwell v. Lehman*, 637 F.3d 187, 191 (3d Cir. 2011) (citation omitted).

[2] 65 Pa. Cons. Stat. §§ 67.101 *et seq.* (2008).

[3] App. at 1576.

[4] *Id.* at 1589.

[5] *Id.* at 1587.

entities. In the process, it has litigated cases that have expanded the reach of that law.[6]

In March 2017, PFUR turned its attention to the PSBA by sending RTKL requests to "most, if not all, public school agencies" in Pennsylvania.[7] These requests sought contact information for district employees and union representatives. PSBA's attorney, Emily Leader, responded by advising member school districts that they were required to release publicly available information, but they did not have to provide PFUR with private data such as personal email addresses.[8] PSBA later advised school districts that, although they were legally required to collate the requested information, they could simply make the results "available for pickup at the district offices," rather than forwarding it to PFUR. It also presciently informed its members that this relatively uncooperative approach might lead to litigation.[9]

When Campbell received copies of the PSBA's legal guidance, he established a page on the PFUR website entitled "PSBA Horror" with a mocking photograph of PSBA Executive Director Nathan Mains. The photograph included a word bubble which read: "Taxpayers, thanks for the $226,000 and the public pension! Now * * * * off, and drive to the school district if you want public records. And don't forget your check book."[10]

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[6] *See, e.g.*, *Reese v. Pennsylvanians for Union Reform*, 173 A.3d 1143 (Pa. 2017); *Dep't of Human Servs. v. Pennsylvanians for Union Reform, Inc.*, 154 A.3d 431 (Pa. Commw. Ct. 2017) (en banc).

[7] App. at 1632.

[8] *Id.* at 94-99.

[9] *Id.* at 109-113.

[10] *Id.* at 1546.

Campbell had also requested PSBA's tax returns. When Michael Levin, PSBA's outside counsel, provided a link to those returns, Campbell caustically told Levin to "stay out of my business whenever I'm approaching one of your public entity clients." Levin responded by threatening to sue Campbell for defamation.[11]

Campbell soon poured gasoline on this burgeoning feud by submitting a second wave of RTKL requests in May. Approximately 600 school boards across Pennsylvania received an identical 17-page request asking their respective districts to provide 27 different types of documentation regarding their relationship with PSBA.[12] More than 240 of the school districts turned to PSBA for assistance in assembling that information. This overwhelming stream of requests led PSBA to adopt a policy of providing what it viewed as the minimum legally required response.[13] Levin also sent Campbell a demand that he take down the picture of Executive Director Mains. Campbell complied, but replaced it with an illustration of PSBA alongside a message similar to the original text.[14] Campbell also established a new website with his personal funds, www.psbahorror.com. He filled it with his anti-PSBA messaging through writing and videos he posted online.[15]

Nathan Mains eventually told PSBA's legal team that he wanted to sue Campbell for damaging PSBA's

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[11] *Id*. at 1399-1401.

[12] *Id.* at 124-26.

[13] *Id.* at 1574, 1558.

[14] *Id.* at 1403.

[15] *Id.* at 1418, 1684.

reputation.[16] In June 2017, the PSBA Board voted unanimously to sue Campbell and the resulting state tort action was filed the following month alleging defamation, tortious interference with contractual relations, and abuse of process.[17]

PSBA's then-president testified that the State Suit was filed to "stop" PFUR from "harassing districts with . . . unreasonable request[s] [and] to stop defaming members of the organization."[18] Mains announced the suit in an email to all PSBA members.[19] Later that year, Campbell and PFUR removed all of the challenged content from their websites and stopped sending RTKL requests.[20]

In February 2018, as the State Suit proceeded, Campbell filed this action against PSBA and ten members of its board. His complaint alleges that PSBA's State Suit was motivated by an improper desire to retaliate against him for proper RTKL requests in violation of his First Amendment rights. Campbell seeks injunctive relief, as well as compensatory and punitive damages.[21]

PSBA moved for summary judgment. Its motion advanced multiple arguments, but we must consider only the claim that *Noerr-Pennington* doctrine shields PSBA from liability for filing the State Suit. The District Court agreed with this position and held that both Campbell's RTKL requests and PSBA's subse-

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[16] *Id*. at 1684.

[17] *Id*. at 780-831.

[18] *Id.* at 1825.

[19] *Id.* at 144.

[20] *Id*. at 1984.

[21] *Id*. at 56.

quent state tort claims were protected under *Noerr-Pennington*.[22] The Court found that PSBA's State Suit claims were objectively baseless. As we discuss later, this satisfied the first requirement for lifting *Noerr-Pennington* immunity. However, the District Court held that there was not clear and convincing evidence that the suit was "subjectively baseless."[23] Accordingly, the Court granted PSBA's motion for summary judgment and dismissed Campbell's civil rights claim without reaching the remaining contentions. This appeal followed.[24]

II.

We review this summary judgment decision *de novo*, mindful of the special care called for by these issues of "free expression."[25] As we noted at the outset, both sides seek shelter under *Noerr-Pennington* immunity. That doctrine shields constitutionally protected conduct from civil liability, absent certain exceptions.[26] Specifically, the doctrine's protective umbrella does not extend to "sham" suits, which seek to take advantage "of governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive

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[22] *Campbell v. Penn. Sch. Bds. Assoc.*, 336 F. Supp. 3d 482, 494 (E.D. Pa. 2018).

[23] *Id.* at 504.

[24] Because this is a civil rights case arising under the United States Constitution, the district court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a). On appeal, we have jurisdiction under 28 U.S.C. § 1291.

[25] *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)).

[26] *Prof'l Real Estate Invs., Inc. v. Columbia Pictures Indus.* (*PREI*), 508 U.S. 49, 56 (1993).

weapon."[27] The parties' competing claims to *Noerr-Pennington* protection can more easily be resolved if we first examine the origins and history of the doctrine.

A) Origins of Noerr-Pennington

"The *Noerr–Pennington* doctrine takes its name from a pair of Supreme Court cases that placed a First Amendment limitation on the reach of the Sherman Act."[28] In *Noerr*,[29] railroad companies, fearful of the growing power of the trucking industry, sought to use their considerable resources to encourage adoption of laws and regulations that would encumber truckers. The truckers responded by suing the railroad companies for violation of the Sherman and Clayton Anti-Trust Acts.[30] The case reached the Supreme Court, which held that the railroads' First Amendment rights to petition the government must override statutory limitations on anticompetitive behavior. The Court explained: "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[31] The Court soon extended this protection to efforts to influence executive action in *Pennington*.[32] There, the Court held that "efforts to

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[27] *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 123 (3d Cir. 1999) (quoting *PREI*, 508 U.S. at 61 (emphasis in original)).

[28] *Hanover 3201 Realty, LLC v. Vill. Supermarkets*, 806 F.3d 162, 178 (3d Cir. 2015).

[29] *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc*., 365 U.S. 127 (1961).

[30] *Id.* at 129; *see* 15 U.S.C. § 1, and 15 U.S.C. § 15, respectively.

[31] *Noerr*, 365 U.S. at 138.

[32] *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal . . ."[33] The Court concluded that efforts to influence government action were protected from liability even if driven by an illicit intent.[34]

There was, however, one conceivable exception. In *Noerr*, Justice Black had observed in dicta that an ostensible petition which in reality "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor" would not deserve protection.[35] The Court subsequently established a carve-out for such behavior. *Noerr-Pennington* protection does not extend to an objectively "[b]aseless suit [that] conceals an attempt to interfere directly with a competitor's business relationships, through the use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon."[36] This is referred to as the "sham" exception to *Noerr-Pennington* immunity.

B) The Sham Exception

"A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay."[37] The difficulty, of course, comes in evaluating intent.

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[33] *Id. at* 670.

[34] *Id.*

[35] *Noerr*, 365 U.S. at 144.

[36] *PREI*, 508 U.S at 50 (third alteration in original) (emphasis, internal quotation marks, and citations omitted).

[37] *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 380 (1991).

We employ a two-part test to determine if the sham exception applies. First, the suit must be objectively baseless. "If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr* . . . ."[38] Whereas "sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief."[39] The Supreme Court analogizes this inquiry to the common law tort of wrongful civil proceedings, which requires proof that the defendant (the plaintiff in the underlying action) lacked probable cause to bring that suit.[40] Mere ill intent does not suffice: "a showing of malice alone will neither entitle the wrongful civil proceedings plaintiff to prevail nor permit the factfinder to infer the absence of probable cause."[41]

Thus, if probable cause exists, our inquiry is at an end. However, the fact that a suit may lack any objective merit is not itself determinative. We must then inquire into the plaintiff's subjective motivations for bringing suit.[42] We take this additional step to ascertain whether the actual motivation is to dragoon the "governmental process" itself into use as a competitive

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[38] *PREI*, 508 U.S. at 60.

[39] *Id.* at 62.

[40] *Id.* at 63 (citing *Stewart v. Sonneborn*, 98 U.S. 187, 194 (1879)); *see also* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 182 (1879) ("[T]here must be such grounds of belief as would influence the mind of a reasonable person, and nothing short of this could justify a serious and formal charge against another.").

[41] *PREI*, 508 U.S. at 63.

[42] *Id.* at 60-61.

tool.[43] In the economic realm, this often means examining "evidence of the suit's *economic* viability."[44] The difficulty of proving subjective motivation obviously "places a heavy thumb on the scale" in favor of granting protection.[45] Only if these objective and subjective tests are satisfied is *Noerr-Pennington* protection lost and the suit permitted to proceed.

The doctrine has now evolved well beyond its original antitrust[46] confines. For instance, it shields constitutionally protected protesters from civil suits.[47] It has also been applied by this Court and other courts of appeals to bar § 1983 claims by state actors based upon constitutionally protected conduct.[48] That is the situation here.

C) Noerr-Pennington *for State Actors*

Nevertheless, Campbell urges a new rule. He suggests that state actors deserve less protection given their wide resources for combating falsities and special positions of public trust. He cites *Gertz v Robert Welch,*

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[43] 499 U.S. at 380 (emphasis omitted).

[44] *PREI*, 508 U.S. at 61 (emphasis in original).

[45] *Hanover 3201 Realty, LLC*, 806 F.3d at 180.

[46] *See Barnes Found. v. Township of Lower Merion*, 242 F.3d 151, 159-60 (3d Cir. 2001) (summarizing the growth of the doctrine into new fields of law).

[47] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982).

[48] *See Herr v. Pequea Township*, 274 F.3d 109, 116-17 (3d Cir. 2001) (applying this rule, and summarizing similar holding across different circuits (citing *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns., Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988))).

Inc. to support such a rule.[49] There, the Supreme Court limited the reach of its "actual malice" libel standard to public figures, making it easier for private individuals to seek restitution.[50] The Court's analysis was influenced by the advantages public officials have in responding to libelous remarks, and by the "necessary consequences" of choosing to enter the public arena.[51]

It is true that in other contexts, restrictions on government speech have been subjected to different degrees of scrutiny under the First Amendment than the speech of private citizens.[52] That variability is compounded here because there is some confusion over *Noerr-Pennington*'s applicability to state actors. The Court of Appeals for the Fifth Circuit, for instance, found it axiomatic 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 [sic]."[53]

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[49] Appellant's Br. at 31 (citing *Gertz v. Robert Welch, Inc.*,418 U.S. 323, 344-45 (1974)).

[50] *Gertz*, 418 U.S. at 345.

[51] *Id*. at 344.

[52] *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009) ("[I]t is not easy to imagine how government could function if it lacked this freedom. 'If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.'" (quoting *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990))); *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) ("When a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees.").

[53] *Video Int'l Prod., Inc.*, 858 F.2d at 1086.

However, we have already declined to adopt that view. In *Mariana v. Fisher*, we stated: "[w]e know of no Supreme Court or federal appellate case holding that *Noerr-Pennington* cannot apply to government actors . . .". [54] Indeed, it is difficult to envision how such a rule would operate. Stripping state actors of protection would expose them to an unreasonably increased risk of interference. It would uniformly tilt the playing field against them in arenas far removed from the *Gertz* context. That public figures hold enhanced capabilities in responding to libel claims was crucial to the holding there. 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.[55] 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.[56] We therefore decline to adopt Campbell's suggestion that PSBA is ineligible for *Noerr-Pennington* protection as a universal rule.

This does not, however, suggest that that *Noerr-Pennington* must necessarily be applied formulaically across every field of law. Indeed, some courts confine the doctrine to the antitrust realm, while recognizing

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[54] 338 F.3d 189, 200 (3d Cir. 2003)*; see also, Herr*, 274 F.3d at 119 (predicting the Supreme Court would permit municipal governments to receive *Noerr-Pennington* protection).

[55] *See Dep't. of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008) (describing the states freely entering the marketplace as level participants within the constitutional scheme).

[56] *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1093 (9th Cir. 2000).

a broader immunity that arises from the Petition Clause itself.[57]

D) Standard of Proof

A different approach outside of antitrust makes particular sense when we consider the necessary standard of proof. A standard of proof is more than a legal barrier. It is "the degree of confidence our society thinks [a fact finder] should have in the correctness of factual conclusions for a particular type of adjudication."[58] This standard may be allocated by Congress, or dictated by the Constitution, but where both are silent, "we must prescribe one."[59]

In *In re Wellbutrin XL Antitrust Litigation*, we explained that the Supreme Court has "indicated that the plaintiff in an antitrust suit has the burden of proving . . . 'both the objective and subjective components of a sham'" when applying *Noerr-Pennington*. [60] We also explained that, in doing so, the Supreme Court "was silent," as to whether that burden had to be satisfied by "clear and convincing evidence, or [by

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[57] *CSMN Invs., LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276, 1283 (10th Cir. 2020) ("In this circuit, this immunity extends beyond antitrust situations. But we refer to it as Petition Clause immunity, reserving the name, *NoerrPennington*, for antitrust cases." (citation omitted)).

[58] *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring); *see also id.* at 371 ("Because the standard of proof affects the comparative frequency of . . . erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.").

[59] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983).

[60] 868 F.3d 132, 148 n.18 (3d Cir. 2017) (internal quotation marks omitted) (quoting *PREI*, 508 U.S. at 61).

a] preponderance of the evidence."[61] However, since our analysis in *Wellbutrin* did not require us to decide which standard of proof was required to avoid *Noerr-Pennington* immunity, we did not answer that question.[62] Here, the District Court imposed the higher standard and required Campbell to prove the subjective component by clear and convincing evidence.

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."[63] Nevertheless, "imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence."[64] 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.[65]

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[61] *Id*.

[62] *Id*. ("Because our decision in this case does not hinge on the standard of proof, we leave that question for another day.").

[63] *Herman MacLean*, 459 U.S. at 389.

[64] *Id.* at 389–90.

[65] *See, e.g.*, *Tyco Healthcare Grp. LP v. Mut. Pharm. Co., Inc.*, 762 F.3d 1338, 1345 (Fed. Cir. 2014) ("[T]he burden [is] on the patent challenger to prove invalidity by clear and convincing evidence . . ."); *Intell. Ventures I LLC v. Capital One Fin. Corp.*, 280 F. Supp. 3d 691, 708 (D. Md. 2017) (finding that the "exception to *Noerr–Pennington* immunity is narrow, '[g]iven the presumption of patent validity and the burden on the patent challenger to prove invalidity by clear and convincing evidence.'" (alteration in original) (quoting *Tyco Healthcare Grp. LP*, 762 F.3d at 1343)) *aff'd*, 937 F.3d 1359 (Fed. Cir. 2019); *Teva Pharm.*

In the past, the Court of Appeals for the Federal Circuit has required clear and convincing proof in patent disputes.[66] But patents raise a special set of concerns. Because of the innovation and commercial viability that they encourage, courts have afforded suits to enforce patents a presumption of good faith.[67] It naturally follows that a higher standard of proof is needed to overcome that presumption. The Court of Appeals for the Ninth Circuit explains, "[t]he road to the Patent Office is so tortuous and patent litigation is usually so complex," that "no less than [c]lear, convincing proof of intentional fraud involving affirmative dishonesty" would suffice in patent cases.[68]

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

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USA, Inc. v. Abbott Labs., 580 F. Supp. 2d 345, 362 (D. Del. 2008) ("To invoke the 'sham' exception, a defendant must prove, by clear and convincing evidence, that a plaintiff's activities were not really efforts to vindicate its rights in court."); *In re Relafen Antitrust Litig.*, 346 F. Supp. 2d 349, 360 (D. Mass. 2004) (observing that under patent law, "[p]laintiffs must establish the first, objective prong of the sham definition by clear and convincing evidence.").

[66] *See, e.g.*, *Tyco Healthcare Grp. LP*, 762 F.3d at 1345; *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1369 (Fed. Cir. 1998); *Carroll Touch, Inc. v. Electro Mech. Sys., Inc.*, 15 F.3d 1573, 1584 (Fed. Cir. 1993).

[67] *Handgards, Inc. v. Ethicon, Inc.* (*Handgards I*), 601 F.2d 986, 996 (9th Cir. 1979).

[68] *Id.*

"lightly impute to Congress an intent to invade" the First Amendment right to petition.[69] 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. We are also reluctant to require a heightened standard of proof here since patent litigation involves a presumption of good faith.[70] No such presumption arises here.[71] Instead, we have a face-off between two identical interests. The collision produces "an undeniable tension."[72] It would be "intolerable [if] one constitutional right should have to be surrendered [or restricted] in order to assert another."[73]

A heightened standard fails to account for those fundamental constitutional rights, which here are advanced by both sides. As already noted, the District Court required Campbell to establish his First Amendment claim here by clear and convincing evidence. The patent context's presumption of good faith formed the backdrop for that decision. The Court's analysis rested in large part upon *FTC v. AbbVie, Inc.*, which involved

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[69] *Noerr*, 365 U.S. at 138.

[70] *Handgards I*, 601 F.2d at 996.

[71] The Court of Appeals for the Second Circuit found such logic persuasive even within the antitrust realm, because *Noerr-Pennington* itself represents a defensive mechanism for defendants: "by requiring a plaintiff to prove that a defendant's conduct was a sham, the Supreme Court has already struck a rough balance between the competing First Amendment and antitrust interests." *Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 813-14 (2d Cir. 1983).

[72] *Simmons v. United States*, 390 U.S. 377, 394 (1968).

[73] *Id.*

an FTC action against a series of sham patent lawsuits.[74] The district court in *AbbVie* relied heavily on the fact that the Court of Appeals for the Federal Circuit has adopted a clear and convincing standard of proof in patent litigation.[75]

Instead of relying on patent law, we look to the relevant standard of proof for the constitutional claims being brought here. In *Crawford-El v. Britton*, the Supreme Court explicitly rejected efforts to impose a higher standard of proof on § 1983 litigants.[76] There, a deeply divided en banc Court of Appeals for the D.C. Circuit had imposed a heightened clear and convincing standard of proof for adjudicating a claim under § 1983. The court reasoned: "If a heightened standard of proof—clear and convincing evidence—was a sound remedy in the area of public figure defamation, we think it is equally so in the cognate area of officer damage liability for constitutional torts . . ."[77]

The Supreme Court disagreed. It rejected an across-the-board elevation of the standard of proof for civil rights claims. The Court cautioned that a higher standard of proof "carries a high cost" for "plaintiffs with bona fide constitutional claims."[78] The Court explained that Congress has shown itself perfectly capable of increasing the burden of proof in specific areas (for prison litigation, for example).[79] "Neither the text of § 1983 or any other federal statute, nor the

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[74] *FTC v. AbbVie Inc.*, 329 F. Supp. 3d 98, 106 (E.D. Pa. 2018).

[75] *See, e.g.*, *Tyco Healthcare Grp. LP*, 762 F.3d at 1345.

[76] 523 U.S. 574, 595-96 (1998).

[77] *Crawford-El v. Britton*, 93 F.3d 813, 823 (D.C. Cir. 1996).

[78] *Crawford-El*, 523 U.S. at 595-96.

[79] *Id.* at 596-97.

Federal Rules of Civil Procedure, provide any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself."[80]

E) The § 1983 Context

In 1871, Congress created what is now 42 U.S.C. § 1983 as a tool to combat racial discrimination.[81] Today it is a bulwark of liberty, permitting citizens to seek relief when the government, or its agents, wrong them.[82] However, such plaintiffs must surmount several intentionally erected hurdles. "To establish any claim under § 1983, a plaintiff must demonstrate that (1) the conduct at issue was committed by a person acting under the color of state law, and (2) the complained-of conduct deprived the plaintiff of rights secured under the Constitution or federal law."[83] These limitations have been carefully adjusted in recent decades.[84] For instance, municipal defendants receive the benefit of heightened fault standards,

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[80] *Id.* at 594; *see also Herman & McLean v. Huddleston*, 459 U.S. 375, 390 (1983) (permitting a "preponderance of the evidence" standard for claims arising under federal "civil rights laws").

[81] *See Wilson v. Garcia*, 471 U.S. 261, 276-77 (1985) ("By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice . . . through the subtle power of civil enforcement.").

[82] *Id.* at 278 (finding § 1983's protections "are contained in the Bill of Rights and lie at the base of all our civil and political institutions" (internal quotation marks omitted)).

[83] *Baloga v. Pittston Area Sch. Dist.*, 927 F.3d 742, 752 n.6 (3d Cir. 2019).

[84] *See, e.g.*, *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 694-95 (1978) (titrating the first requirement); *Davidson v. Cannon*, 474 U.S. 344, 347–48 (1986) (expanding the second).

designed to avoid "open[ing] municipalities to unprecedented liability under § 1983."[85] Plaintiffs must contend with an individual state actor's possible entitlement to different forms of immunity[86] In addition, only certain remedies are allowed.[87]

A potential § 1983 litigant must therefore navigate an obstacle course erected to protect against a flood of grievances that could deter government actors from their duties.[88] Erecting yet another obstacle by requiring proof by clear and convincing evidence would threaten that careful legislative and judicial balance of competing priorities. The Supreme Court reached precisely this conclusion in *Crawford-El.* There, the Court reasoned that a heightened standard of proof in civil rights disputes, "lacks any common-law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983."[89]

Accordingly, we have repeatedly held preponderance of the evidence to be the proper standard for

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[85] *City of Canton v. Harris*, 489 U.S. 378, 391 (1989).

[86] *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.").

[87] *Compare Edelman v. Jordan*, 415 U.S. 651, 675–77 (1974) (affording sovereign immunity to § 1983 claims for retrospective relief), *with Hafer v. Melo*, 502 U.S. 21, 31 (1991) (permitting suits against state officials in their individual capacities).

[88] *See Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (recognizing the "balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions"); *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (reflecting upon the "attempted balancing of competing values" inherent to inquiries into subjective intent).

[89] *Crawford-El*, 523 U.S. at 595.

§ 1983 claims.[90] Our model jury instructions so instruct the District Courts.[91] In imposing this heightened standard of proof where both sides sought to vindicate First Amendment rights, the District Court's approach fails to appreciate the distinction between First Amendment rights and patent rights insofar as the *Noerr-Pennington* doctrine is concerned. Because there is no "[s]upport for imposing a clear and convincing burden of proof" on a § 1983 claim,[92] proof by a preponderance of the evidence remains the appropriate standard here.

III.

The District Court carefully inquired into Campbell's claims and found they were not objectively baseless. Accordingly, the Court held that Campbell was entitled to *Noerr-Pennington* protection. The Court also reasoned that the actions that gave rise to PSBA's state tort claims were obviously protected by the First

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[90] *See, e.g.*, *Baloga*, 927 F.3d at 752 ("To prevail on a First Amendment retaliation claim under 42 U.S.C. § 1983 . . . the government may avoid liability if it can show by a preponderance of the evidence that it would have taken the adverse action even in the absence of the protected conduct.") (internal quotation marks omitted); *Goodwin v. Conway*, 836 F.3d 321, 327 (3d Cir. 2016) (citing *Wilson v. Russo*, 212 F.3d 781, 786-87 (3d Cir. 2000)); *Reichley v. Penn. Dep't of Agric.*, 427 F.3d 236, 244 (3d Cir. 2005) ("The plaintiffs have the burden of establishing liability under § 1983 by a preponderance of the evidence.").

[91] Third Circuit Court of Appeals Model Civil Jury Instruction 4.3 (2019) ("[Plaintiff] must prove both of the following elements by a preponderance of the evidence . . .") (emphasis added). *United States v. Petersen*, 622 F.3d 196, 208 (3d Cir. 2010) ("We have a hard time concluding that the use of our own model jury instruction can constitute error . . . .").

[92] *Crawford-El*, 523 U.S. at 594.

Amendment, and PSBA's suit was therefore not objectively baseless.[93] Nevertheless, the Court still afforded *Noerr-Pennington* immunity to the State Suit because Campbell had not produced clear and convincing evidence that PSBA's state claims were "subjectively baseless."

Our standard of review of that decision is *de novo.*[94] We will accept for the purposes of this appeal the District Court's well-reasoned conclusion—drawing all inferences in Campbell's favor at summary judgment—that Campbell's RTKL related conduct was not baseless. Because the underlying activity was constitutionally protected,[95] we also accept the District Court's conclusion that PSBA's State Suit is objectively baseless, as the First Amendment protected all of Campbell's alleged activities. Campbell's activities here could not reasonably be construed as defamatory

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[93] The parties disagree about whether the District Court concluded that PSBA is a state actor. While that court properly reserved judgment on the question, it did determine that PSBA is at least a limited public figure and therefore had to establish Campbell's actual malice in the State Suit for it not to have been objectively baseless. *See U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 938-39 (3d Cir. 1990) (discussing the factors relevant to classification as a limited public figure).

[94] *Viera v. Life Ins. Co. of N. Am.*, 642 F.3d 407, 413 (3d Cir. 2011) ("We review a district court's grant of summary judgment *de novo*, applying the same standard the district court applied.").

[95] A fact that PSBA tacitly acknowledged by pleading "actual malice" in both its initial and amended complaints in the State Suit. App. 428, 699. Had it not been aware of its own public status, this heightened standard would not have been necessary for culpability.

given his allegations and the plausible state actor status of PSBA.[96]

The dispositive question that remains is whether PSBA's State Suit was also subjectively aimed at interfering with Campbell's constitutionally protected conduct.

We agree that Campbell cannot satisfy the subjective prong under the clear and convincing standard. He has failed to establish PSBA's: (1) indifference to the outcome of the suit, (2) insufficient potential recovery to justify bringing the State Suit, or (3) that PSRB "decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process."[97] Campbell's evidence amounts to PSBA's statements, conduct, and choice of attorneys. This evidence does not speak to whether PSBA intended the process itself, rather than its outcome, to achieve its goals. This is not enough.[98]

As we have explained, the District Court's clear and convincing standard imposed too high of a burden on Campbell. We nevertheless will affirm the District Court's grant of summary judgment to PSBA because Campbell's evidence here is insufficient to strip PSBA

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[96] The District Court detailed how each of Campbell's actions against PSBA (including the insulting depiction of its Executive Director, Nathan Mains, on a website entitled "PSBA Horror") had some factual basis, whether obtained through RTKL responses or other sources. Further, Mains and others at PSBA had constructive notice of their public status, introducing a high bar for defamation claims to succeed.

[97] *PREI*, 508 U.S. at 65.

[98] *Noerr*, 365 U.S. at 139.

of *Noerr-Pennington* immunity even under the less onerous preponderance standard.

IV.

Under that lesser standard, Campbell's evidence needed to demonstrate by a preponderance of the evidence that PSBA intended the State Suit as "use of governmental *process*—as opposed to the *outcome* of that process" as a "weapon."[99] We consider the evidence he offers: first, the statements of PSBA and its members before filing the suit, and second, the manner in which PSBA pursued the suit.

A) PSBA's statements

Campbell argues strongly that PSBA's own words reveal its motivation in bringing the State Suit "was all about protecting [PSBA's] members" and making Campbell's alleged "harassment of school districts stop."[100] He argues that PSBA was motivated to "tak[e] legal action on behalf of its membership."[101] He claims his incessant flood of RTKL requests was causing difficulties for the targeted school districts, and PSBA intended its suit as a mechanism to terminate his RTKL requests. Campbell points to statements from Nathan Mains that PSBA was developing "a significant response" as proof that the organization sought to squelch his activities.[102] He argues that the appreciation of grateful school districts after Campbell's

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[99] *PREI*, 508 U.S. at 50 (emphasis in original).

[100] App. at 1497, 1510-11.

[101] App. at 312.

[102] App. at 140.

requests ceased proves that this was PSBA's objective in filing the State Suit.[103]

Indeed, PSBA did sue Campbell to get him to stop his RTKL-related conduct and PSBA never attempted to disguise or deny that objective. It criticized Campbell's prolific use of the RTKL requests in its filings before the District Court. In one such filing, PSBA argued: "Campbell is using the RTKL as if he were back in London standing atop his soapbox in Hyde Park."[104] Campbell argues that when he continued filing RTKL requests, PSBA amended its complaint to add his new activities in a further effort to silence him.[105]

B) PSBA's actions

Second, Campbell argues that PSBA used the legal process to punish him. He claims the attempt to punish him began before filing the State Suit, when PSBA demanded that he remove the parody of Nathan Mains and desist from further "defamatory" statements.[106] Then, when the State Suit was filed, PSBA's attorneys requested Campbell retain documents from the past seven years. But there is nothing punitive about asking an opposing party to preserve documents relevant to litigation, and we will not here attempt to erect some kind of time restriction on such a request. Moreover, Campbell's argument that such a request was intended to be punitive is laden with irony given

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[103] App. at 155, 163.

[104] ECF No. 18 at 15.

[105] Appellant's Br. at 53.

[106] App. at 138.

the voluminous records requests Campbell has repeatedly directed at school boards across the state.

Finally, Campbell claims PSBA's motives were laid bare by its distribution of the State Suit complaint to its members, though it contained claims that were later discounted as untrue, and by PSBA's settlement demand that Campbell stop attacking PSBA and its staff.[107]

C) Analysis

At summary judgment, we are charged with viewing Campbell's evidence "in the light most favorable to the party opposing summary judgment, and resolv[ing] all reasonable inferences in that party's favor."[108] 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. 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.

Indeed, the record indicates that PSBA wanted Campbell to stop overwhelming its members with RTKL requests and that it filed the State Suit in hopes of accomplishing that goal. The fact that PSBA readily accused Campbell of defamation, that it sought to terminate his activities, and that it celebrated its progress in achieving that goal simply fails to satisfy

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[107] App. at 173-74, 303-04, 1484-86.

[108] *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007).

the subjective prong, even by a preponderance of the evidence.

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.

Accordingly, Campbell simply cannot satisfy the subjective prong by a preponderance of the evidence. Because this case must be decided on the record before us at summary judgment, "[w]e need not remand to the District Court to consider it in the first instance."[109]

V.

For the reasons set forth above, we will affirm the District Court's grant of summary judgment.

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[109] *In re Ben Franklin Hotel Assocs.*, 186 F.3d 301, 306 (3d Cir. 1999) (citing *Chase Manhattan Bank, N.A. v. Am. Nat'l Bank & Tr. Co.*, 93 F.3d 1064, 1072 (2d Cir. 1996) ("An appellate court has the power to decide cases on appeal if the facts in the record adequately support the proper result . . .")).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed August 27, 2020]

No. 18-3112

SIMON CAMPBELL; PENNSYLVANIANS FOR UNION REFORM,

Appellants

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,

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Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 2-18-cv-00892)
District Judge: Honorable Jan E. DeBois

Submitted Under Third Circuit L.A.R. 34.1(a)
May 20, 2019

Before: MCKEE, SHWARTZ, and FUENTES,
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted on May 20, 2019. On consideration whereof,

It is now hereby ORDERED and ADJUDGED by this Court that the Order of the District Court, entered on August 24, 2018, is hereby AFFIRMED. All of the above in accordance with the opinion of the Court.

Each party to bear its own costs.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATE: August 27, 2020

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

[Filed: August 24, 2018]

CIVIL ACTION

No. 18-892

SIMON CAMPBELL, and
PENNSYLVANIANS FOR UNION REFORM,

Plaintiffs,

v.

PENNSYLVANIA SCHOOL BOARDS ASSOCIATION,
MICHAEL FACCINETTO, DAVID HUTCHINSON,
OTTO W. VOIT, III, KATHY SWOPE, LAWRENCE
FEINBERG, ERIC WOLFGANG, DANIEL O'KEEFE, DARRYL
SCHAFER, THOMAS KEREK, and LYNN FOLTZ,
in their individual capacities,

Defendants.

DuBois, J.
August 23, 2018

MEMORANDUM

I. INTRODUCTION

In this suit arising under 42 U.S.C. § 1983, plaintiffs allege that a tort suit filed by defendant Pennsylvania School Boards Association ("PSBA") in the Court of

Common Pleas of Cumberland County, Pennsylvania ("state suit") retaliates against plaintiffs for the exercise of their First Amendment rights of free expression and to petition the government. The state suit alleges that certain commentary and lobbying by plaintiffs constitute defamation, abuse of process, and tortious interference with contract. Presently before the Court is defendants' Motion for Summary Judgment. Because defendants have shown that they are entitled to judgment as a matter of law, defendants' Motion is granted.

II. BACKGROUND

The undisputed material facts in the record before the Court, taken in the light most favorable to plaintiffs, may be summarized as follows:

A. The Parties

Plaintiff Simon Campbell is a resident of Bucks County, Pennsylvania, and a naturalized citizen of the United States, originally from the United Kingdom. Plts.' Resp. Statement Undisp. Facts ¶ 1, Doc. No. 49 [hereinafter Undisp. Facts]. In "approximately" 2013, Campbell founded plaintiff Pennsylvanians for Union Reform ("PFUR"), a non-profit advocacy group that "seeks to eliminate compulsory unionism in Pennsylvania while promoting transparency and efficiency in government for taxpayers." *Id.* ¶¶ 2, 4. Campbell and PFUR conduct their advocacy work through a number of channels, including the filing of requests under Pennsylvania's Right to Know Law ("RTKL requests"), 65 Penn. Stat. §§ 67.101 *et seq.*, lobbying government officials directly, and the maintenance of an official PFUR website at the URL www.paunionreform.org. *E.g.*, *id.* ¶¶ 3, 41, 94-95, 133, 164. At the times relevant to this case, Campbell also main-

tained a website at www.psbahorror.com, paid for with his personal funds. Jt. Stip. ¶ 140.

Defendant Pennsylvania School Boards Association ("PSBA") is a non-profit association of public school boards, incorporated under the laws of Pennsylvania. Undisp. Facts ¶ 4; Joint Stipulation Facts & Evidence ¶ 66, Doc. No. 50 [hereinafter Jt. Stip.]. The individual defendants in this case were the ten voting members of the Governing Board of PSBA ("Board") at all relevant times, including the time when the Board unanimously voted to authorize the state suit against plaintiffs. Undisp. Facts ¶ 125. Seven of the individual defendants remain on the Board and collectively constitute a quorum of the Board, capable of discontinuing the state suit. Jt. Stip. ¶¶ 16-19.

B. Structure of PSBA

The structure and mission of PSBA and its relationship to the state are central to this case. As noted above, PSBA is an association of public school districts in Pennsylvania that "exists to further the interests of public education and to provide assistance to public school entities that are members of PSBA." Jt. Stip. ¶ 84. PSBA's membership consists entirely of "public school districts, Intermediate Units, career and technical schools, state-supported colleges and universities, and such other statutorily-created public education entities" ("Public School Entities"). Jt. Stip. ¶ 69. The "overwhelming majority" of Pennsylvania public school districts are members of PSBA. Jt. Stip. ¶¶ 69. Membership in PSBA is expressly authorized by statute, 24 Penn. Conn. Stat. § 5-516, and Public School Entities may elect to join PSBA only "pursuant to a vote of the entity's governing board" at a public meeting. Jt. Stip. ¶¶ 70, 86, 90.

Once the governing board of a Public School Entity elects to join PSBA, the entity itself becomes a member of PSBA. *See* Jt. Stip. ¶¶ 66, 86. "Derivative membership" is, in turn, "bestowed" on "the elected or appointed directors of such entity and upon certain other officials of that entity." Jt. Stip. ¶ 86. Votes for members of the Governing Board of PSBA are cast by each Public School Entity, as determined by "a majority vote of each member entity taken at an official public meeting of such member entity." Jt. Stip. ¶ 87. Other matters before PSBA's membership, including approval of its legislative platform, are voted on by an annual Delegate Assembly, comprised of delegates appointed by each member's respective governing board. Bylaws of the Pennsylvania School Boards Association, Inc. art. VIII, §§ 1-2, 4 (Oct. 20, 2017), Exs. P-99, D-36. Delegates must be derivative members of PSBA—that is, school board officials or the non-voting secretary of a school board. *Id.* art. VIII, § 2; art. I, § 2.

PSBA's Board consists of ten voting directors, who "must be elected, currently-serving members of the board of a member government entity that itself is a member in good standing of PSBA," along with one non-voting member. Jt. Stip. ¶ 87. As noted above, the members of PSBA's Board are elected by votes cast by PSBA's Public School Entity members. *Id.* With the exception of the President Elect, President, and Immediate Past President of the Board, the eligibility of a derivate member to serve on the PSBA Board is "contingent" on the derivative member's continued service on the board of a Public School entity. *Id.* Without exception, all Board members' respective Public School Entities must continue to be members of PSBA in good standing. *Id.*¶ 89. If a Board member or his or her respective Public School Entity fails to

meet these requirements, he or she is automatically removed from the PSBA Board. *Id.* ¶¶ 88- 89.

C. Membership in PSBA

An entity's PSBA membership is contingent on payment of a membership fee—and approval of that payment by the entity's governing board—every year. Undisp. Facts. ¶ 104; Jt. Stip. ¶¶ 90, 136. Membership in PSBA is voluntary and Public School Entities may withdraw at any time. Undisp. Facts ¶ 19. The "majority of PSBA's revenues" derive from membership dues and fees "paid for optional services and goods." Jt. Stip. ¶¶ 71, 105.

In exchange for membership fees, PSBA provides certain services to its members, including "[l]egal advocacy in the name of PSBA on issues of statewide importance to public schools" and "[l]egislative advocacy for all public schools, other than charter schools." Undisp. Facts ¶¶ 102, 105; *see also* Jt. Stip. ¶¶ 84-85. "An essential component of PSBA's purpose is advocating the interests of public education in helping to shape law and education policy in front of the legislature, administrative agencies and the courts. PSBA's judicial advocacy is one of the benefits that PSBA provides to its government entity members for the price of such entities' membership." Jt. Stip. ¶ 85

In addition to its judicial and legislative advocacy, PSBA provides its members with a number of publications, a searchable grant database, "legal links and resources," webinars, access to online training, and access to a "Career Gateway job posting site." Undisp. Facts ¶ 105. PSBA also provides its members with "assistance in the development of school policies," "personnel recruiting assistance," and assistance in employee relations. Jt. Stip. ¶ 77. Additional services

are available to members for additional fees, including executive search services, "[b]oard policy services," and a "School Law and arbitration newsletter." Undisp. Facts ¶ 106.

D. Plaintiffs' Underlying Activities

PSBA's mission and relationship with Pennsylvania public schools were the focus of plaintiffs' activity beginning in March 2017, when plaintiffs sent an RTKL request to "most, if not all, public school agencies" in the state. Undisp. Facts ¶ 136. In the request, plaintiffs sought, *inter alia*, the contact information for certain school district employees and for the representatives of public employee unions. Verif. Compl. ex. 1. On March 28, 2017, PSBA staff attorney Emily Leader sent an email to the Public School Entity members of PSBA regarding plaintiffs' RTKL request. Undisp. Facts ¶ 138; Verif. Compl. ex. 1. In the email, Leader advised the PSBA members to provide certain information such as publicly available contact information for receiving RTKL requests, the names of union presidents, and copies of collective bargaining agreements. Verif. Compl. ex. 1. Leader concluded, however, that employee email addresses that were not publicly published were not public records subject to the Right to Know Law. *Id.*

On April 14, 2017, another PSBA staff attorney, Stuart Knade, sent a follow-up email to the members of PSBA, providing further "guidance" in responding to the request. Undisp. Facts ¶ 141; Jt. Stip. ¶ 3; Verif. Compl. ex. 2. In the email, Knade advised PSBA's members, *inter alia*, that the Right to Know Law required them to do no more than make the requested documents "available for pick up at the district offices." Verif. Compl. ex. 2 at 5. Knade noted, however, that his assessment was contrary to "early

decisions" by Pennsylvania's Office of Open Records and that "anyone choosing to take [this] position . . . must be prepared to litigate this through at least the Commonwealth Court and possibly the Pennsylvania Supreme Court." *Id.* Knade also noted that the production of certain information was subject to a balancing test articulated by the Pennsylvania Supreme Court to protect the privacy interests of public employees. *Id.*

On April 25, 2017, Michael Levin, outside general counsel for PSBA, provided plaintiffs with a copy of PSBA's 2014 federal tax return via email, pursuant to a separate federal records request filed by plaintiffs. Defs.' Resp. to Pls.' St. Suppl. Mat. Facts ¶ 49, Doc. No. 56-1 [hereinafter Defs.' Resp.]. Campbell responded to Levin in a series of email on April 28, 2017, with other individuals copied, stating, in part, that Levin was serving in a "conflict-riddled role" because he served as counsel for both PSBA and some of its entity members. *Id.* ¶¶ 50, 82; Ex. P-476, exs. A-B. Campbell also stated that PSBA "has caused a disgraceful abuse of government resources by advising school solicitors that they may withhold their work email addresses under the RTKL," referring to Leader and Knade's earlier emails. Defs.' Resp. ¶ 50; Ex. P-476, exs. A-B. Plaintiffs eventually posted copies of Leader and Knade's emails to PFUR's website on a page titled "PSBA Horror." *See* Undisp. Facts ¶ 165; Exs. P-103-A, P-504.

On May 8, 2017, Campbell sent a second RTKL request "to approximately 600 members statewide." Undisp. Facts ¶ 142. Each of the 600 RTKL requests contained twenty-seven separate "items." Verif. Compl. ex. 5. A number of those items sought documents related to PSBA and its activities, including "[e]xtracted computerized information" detailing specific expendi-

tures by PSBA. Verif. Compl. ex. 5, items 15-21. In addition to the requests regarding PSBA, the May 8, 2017, RTKL request stated, "I call upon elected school officials to terminate the taxpayers forced relationship with PSBA. Revoke PSBA membership. . . . Stop making taxpayers fund the salaries and . . . pensions of a private corporation's employees." Undisp. Facts ¶ 144. The request also included a link to a thirty-three minute video of Campbell, "ostensibly to aid school districts and their solicitors in responding to his requests." Undisp. Facts ¶ 147. After receiving plaintiffs' May 8, 2017, RTKL request, "more than 240 school districts" contacted PSBA for documents sought in the request. Undisp. Facts ¶ 149; Jt. Stip. ¶ 79.

On May 16, 2017, Levin provided PSBA's members with guidance regarding plaintiffs' May 8, 2017, RTKL request. Doc. No. 71 at 24. Levin advised the Public School Entities to produce some of the requested information such as evidence that the entity "is not a member" of PSBA, while other information was subject to a balancing test to protect the privacy interests of public employees. Ex. P-44 at 6-7. Levin further advised its members that it would not respond to plaintiffs' requests for "[e]xtracted computerized information" because its services were not "nonancillary core governmental functions" as required by the RTKL. *Id.* at 12. PSBA ultimately declined to provide those documents. Undisp. Facts. ¶ 151.

Plaintiffs eventually obtained a copy of Knade's April 14, 2017, email in which he advised PSBA's members that they needed only to make the requested documents available at the "district offices" for "pickup." Defs.' Resp. ¶ 67. In response, plaintiffs posted a photo of PSBA Executive Director Nathan Mains to the paunionreform.org website on a page titled

"PSBA Horror" with a word bubble stating, "Taxpayers, thanks for the $226,000 and the public pension! Now **** off, and drive to the school district if you want public records. And don't forget your check book." Jt. Stip. ¶ 120; Exs. P-103-A, P-519 (alterations in original). Mains does, in fact, receive a salary of at least $226,000 and participates in Pennsylvania's Public School Employees Retirement System ("PSERS"), a government pension program. Defs.' Resp. ¶ 84; Jt. Stip. ¶ 72.

In response, Levin sent Campbell a letter dated May 12, 2017, demanding that Campbell remove the image of Mains. Jt. Stip. ¶ 44; Verif. Compl. ex. 7. Campbell complied, but replaced the image with an image of the letters "PSBA" and a word bubble stating, "Taxpayers, thanks for the $226,000 for our Executive Director Nathan Mains. And thanks for the public pensions too. Now *%$&@ off, and drive to the school district if you want public records under the Right to Know Law!" Jt. Stip. ¶ 45; Ex. P-504 (alterations in original). Beneath the letters "PSBA," the image stated, "Public salaries, intimidation tactics, and much more." Ex. P-504.

PFUR's website included other statements regarding PSBA. In one video posted to the website, Campbell described the RTKL requests sent to Public School Entities as "pertain[ing] to whether or not the school boards association is in fact a school boards association versus an association of individual people that show up, drink some wine at the cocktail party, and vote on things in their individual capacities." Jt. Stip. ¶ 52.

Campbell also posted images regarding PSBA on his personal website at www.psbahorror.com. For example, Campbell posted a second photo of Mains with a word bubble stating, "Hey school children, ****

the Constitution! **** the bill of rights." Defs.' Resp. ¶ 70 (alterations in original); Ex. P-505. Likewise, in response to a separate RTKL request, Campbell received a letter dated November 13, 2017, from the Pennsylvania Department of Transportation ("PennDOT") stating that it had records responsive to plaintiffs' request for documents "as to whether employees of PSBA, or members of PSERS, are entitled to be exempt from fees" for registering vehicles. Defs.' Resp. ¶ 87; Ex. P-458. In its letter, however, PennDOT denied plaintiffs' request on the ground that PennDOT had its own "statutory and regulatory scheme for" obtaining "motor vehicles records." Ex. P-458 at 2. The record does not reveal whether PSBA employees were exempted from payment of registration fees. Undisp. Facts ¶¶ 120-21. Campbell subsequently posted a stock image of vehicles with the caption "Freebie State Government Auto Tags for PSBA!" Defs.' Resp. ¶ 82.

E. The State Suit

Based on plaintiffs' conduct, the PSBA Board—comprised of the individual defendants—voted unanimously on June 12, 2017, to authorize a suit against plaintiffs. Undisp. Facts ¶ 162; Jt. Stip. ¶¶ 9, 11; Defs.' Resp. ¶ 74. Pursuant to that vote, PSBA filed suit on June 17, 2017, in the Court of Common Pleas of Cumberland County, Pennsylvania, setting forth counts against plaintiffs for defamation, tortious interference with contractual relations, and abuse of process. Jt. Stip. ¶¶ 7-8; Ex. P-106, P-473. That same day, Mains sent an email to the Public School Entity members of PSBA, announcing the filing of the state suit. Jt. Stip. ¶¶ 54, 95; Verif. Compl. ex. 10. In the email, Mains stated that Campbell's "perver[sion] of the intent of the Right to Know Law" and "his

continued defamation of PSBA . . . has caused substantial damages to the association's reputation." Verif Compl. ex. 10. Michael Faccinetto, the President of PSBA at the time the state suit was filed, testified that the state suit was meant to "stop" Campbell from "harassing districts with . . . unreasonable request[s] [and] to stop defaming members of the organization." Dep. Michael Faccinetto 79:1-9, Ex. P-511. Following the filing of the state suit, counsel for defendants sent plaintiffs a "Litigation Hold Notice" dated July 19, 2017. Jt. Stip. ¶ 55; Verif. Compl. ex. 11.

On October 16, 2017, Mains sent an email to "over 4,500 "school directors, chief school administrators, school solicitors and board secretaries"" linking to an "unsigned, unfiled copy" of the complaint in the state suit. Jt. Stip. ¶ 57; Verif. Compl. ex. 12. PSBA filed an Amended Complaint in the state suit on December 11, 2017. Jt. Stip. ¶ 14; Ex. P-476.

F. Proceedings in this Court

Plaintiffs filed suit in this Court on February 28, 2018, alleging that PSBA"s state suit, the announcement of that suit, the issuance of the litigation hold notice, and the filing of the Amended Complaint were in retaliation for plaintiffs' exercise of their First Amendment rights of free expression and to petition the government for redress. *Id.* ¶¶ 53-59. Plaintiff's Verified Complaint filed in this Court contains two counts of First Amendment retaliation under 42 U.S.C. § 1983, the first for injunctive relief and the second for compensatory and punitive damages. Pursuant to the Court's Order dated April 13, 2018, plaintiffs filed a Motion for Entry of a Permanent Injunction on April 20, 2018, and a Hearing on that Motion was scheduled for July 23, 2018 ("Hearing on Injunctive Relief"). In that same Order, the Court

directed the parties to conduct discovery in two phases; phase one was to "cover all discovery related to injunctive relief" and was to be complete by June 1, 2018. Because entry of a permanent injunction requires plaintiffs to succeed on the merits of their claims, *Coffelt v. Fawkes*, 765 F.3d 197, 201 (3d Cir. 2014), phase one of discovery included all discovery on liability.

By Order dated June 19, 2018, the Court denied defendants' Motion[s] to Dismiss Complaint and/or Strike Impertinent and Scandalous Language. Defendants filed their Motion for Summary Judgment on June 29, 2018. Due to issues unrelated to defendants' Motion for Summary Judgment, the Hearing on Injunctive Relief was continued to August 6, 2018, by Order dated July 9, 2018.

After receiving plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment and defendants' Reply Brief in Support of Defendants' Motion for Summary Judgment, the Court conducted a Final Pre-Trial Conference with the parties on July 26, 2018. During the Conference, the Court discussed, *inter alia*, defendants' Motion for Summary Judgment. The parties agreed that the record before the Court was complete with respect to issues of liability and that any ruling by the Court in favor of plaintiffs that the state suit was objectively (or subjectively) baseless under the *Noerr-Pennington* doctrine, *infra*, did not require further proceedings under Federal Rule of Civil Procedure 56(f).[1] Doc. No. 69 at 59:12-60:23. The Court also asked the parties if they

[1] Subjective baselessness was not addressed in this context at the Final Pretrial Conference but the issues under Rule 56(f) are the same.

required further notice under Rule 56(f). *Id.* at 56:20 57:13, 59:23-60:12. In response, the parties did not object to proceeding on the record before the Court. *Id.* By agreement of the parties, for reasons unrelated to this Memorandum and Order, the Hearing on Injunctive Relief was continued until further order of the Court.

On July 31 and August 7, 2018, the parties filed additional briefs on the issue of subjective baselessness under the *Noerr-Pennington* doctrine. On August 16, 2018, plaintiffs filed a Motion for Leave to Amend the Complaint to Add a Count for Declaratory Relief. Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Entry of a Permanent Injunction are ripe for decision.

III. LEGAL STANDARD

A. Motion for Summary Judgment

The Court will grant a motion for summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The Court's role at the summary judgment stage "is not . . . to weigh the evidence and determine the truth of the matter but to determine whether . . . there is sufficient evidence favoring the nonmoving party for a jury [or the court in a non-jury trial] to return a verdict for that party." *Id.* at 249. However, the

existence of a "mere scintilla" of evidence in support of the nonmoving party is insufficient. *Id.* In making this determination, "the court is required to examine the evidence of record in the light most favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party's favor." *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007). However, the party opposing summary judgment must identify evidence that supports each element on which it has the burden of proof. *Celotex Corp.*, 477 U.S. at 322.

B. First Amendment Retaliation Claims Under § 1983

Plaintiffs' Verified Complaint sets forth two claims for First Amendment retaliation under 42 U.S.C. § 1983. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983; *accord Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). By the terms of § 1983, "two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

Plaintiffs allege they were deprived of a federal right when defendants retaliated against them for exercising their First Amendment rights. "In order to plead a retaliation claim under the First Amendment,

a plaintiff must allege: (1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action." *Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006). In addition to the above elements, a First Amendment claim requires the conduct complained of to constitute "state action," which satisfies the requirement under § 1983 that the defendant act under color of state law. *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 n.2 (2001). It is under this law that the Court considers defendants' Motion for Summary Judgment.

IV. DISCUSSION

In their Motion for Summary Judgment, defendants raise five arguments: (1) the conduct of PSBA and the individual defendants does not constitute state action; (2) plaintiffs' activity is not protected by the First Amendment; (3) the state suit is immunized under the First Amendment by the *Noerr-Pennington* doctrine; (4) the individual defendants are shielded by qualified immunity; and (5) plaintiffs have not adduced evidence to support the imposition of punitive damages.

Defendants' arguments present several interrelated constitutional issues under the First Amendment. In particular, defendants argue that the filing of the state suit is protected by the First Amendment right to petition under the *Noerr-Pennington* doctrine. Significantly, however, that suit seeks to impose liability on plaintiffs for petitioning and exercise of free expression. 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.

A. Plaintiffs' Activities Are Protected by the First Amendment

Defendants argue that plaintiffs have not proven that their petitioning and commentary were protected by the First Amendment, as required for their First Amendment retaliation claim. The Court addresses plaintiffs' petitioning and commentary in turn.

1. Plaintiffs' Petitioning Is Protected by the First Amendment

The First Amendment immunizes plaintiffs' petitioning from liability, pursuant to the *Noerr-Pennington* doctrine,[2] the same doctrine that defendants contend is applicable to the filing of the state suit. "Those who petition government for redress are generally immune from . . . liability" under the *Noerr-Pennington* doctrine. *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993) [hereinafter *PREI*]; *Herr v. Pequea Twp.*, 274 F.3d 109, 116 (3d Cir. 2001). The constitutional protection of "peaceable" petitioning is not determined by either the speaker's motivation or the economic impact of the petitioning on others, "at least insofar as the . . . campaign [is] directed toward obtaining governmental action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982) (quoting *E. R. Presidents Conference v. Noerr*

[2] The doctrine is named for the cases in which it was first promulgated, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

Motor Freight, Inc., 365 U.S. 127, 140 (1961)). As one court stated:

> Under the *Noerr-Pennington* doctrine, it does not matter what factors fuel the citizen's desire to petition government. . . . The only restriction placed on *Noerr-Pennington* immunity is that the petitioners must make a genuine effort to influence legislation or procure favorable government action, rather than simply using the petitioning process as a means of interference or harassment (known as "sham exception").

Barnes Found. v. Twp. of Lower Merion, 927 F. Supp. 874, 877 (E.D. Pa. 1996). Petitioning is a "sham" only if it is both objectively and subjectively baseless—that is, the petitioner "could not reasonably expect success on the merits" and subjectively intended to use the "governmental process—as opposed to the outcome of that process—as a[] . . . weapon." *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 123 (3d Cir. 1999) (quoting *PREI*, 508 U.S. at 60-61). The Court addresses the objective and subjective baselessness of plaintiffs' petitioning in turn.

The record before the Court shows that plaintiffs' lobbying was not objectively baseless and therefore not a sham. Plaintiffs could "reasonably expect" to succeed on the merits of at least some portion of plaintiffs' requests, as demonstrated by the "guidance" provided by PSBA to its members. *Cheminor*, 168 F.3d at 123; *cf. Dentsply Int'l v. New Tech. Co.*, No. 96-cv-272 MMS, 1996 U.S. Dist. LEXIS 19846, at *9 (D. Del. Dec. 19, 1996) ("[L]itigation will not be considered a 'sham' so long as at least one claim in the lawsuit has objective merit."). In that guidance, PSBA attorneys advised the members of PSBA to provide, *inter alia*, the contact

information used to receive RTKL requests, the names of union presidents, and collective bargaining agreements. Verif. Compl. ex. 1. The guidance also noted that several of plaintiffs' requests were subject to fact-intensive balancing tests. *Id.* ex. 2. Levin reached similar conclusions in his May 16, 2017, guidance provided to the members of PSBA. Ex. P-44.

Further, plaintiffs' lobbying was not subjectively baseless, as the record establishes that it was genuinely directed toward obtaining the relief sought—governmental action. Plaintiffs' lobbying for school districts to sever their ties with PSBA was directed at those institutions in emails and RTKL requests. That lobbying fit closely with Campbell and PFUR's known policy goals and history of advocacy. *See* Jt. Stip. ¶ 78; Faccinetto Dep. 19:21-21:24, Ex. P-505. The legal analysis and videos that plaintiffs included with their RTKL requests is evidence that plaintiffs subjectively believed that they were entitled to the documents requested, including those in PSBA's possession. Verif. Compl. ex. 5 at 12; Exh. D-192 at 2. Although PSBA and its members may have found plaintiffs' conduct harassing, the record establishes that plaintiffs' lobbying was not subjectively baseless, as it was a genuine effort to procure governmental action. Thus, plaintiffs' petitioning and lobbying are protected by the First Amendment, whatever the motive or purpose of the activities.[3]

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[3] The parties do not address the applicability of the "more easily" established exception to *Noerr-Pennington* immunity for "a pattern of petitioning." *In re Wellbutrin XL Antitrust Litig.*, 868 F.3d 132, 157 (3d Cir. 2017) (quoting *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.*, 806 F.3d 162 (3d Cir. 2015)). Under that "more flexible standard" a court "should perform a holistic review" to determine whether "a series of petitions were

Despite this authority, defendants argue that plaintiffs' lobbying is not constitutionally protected for three reasons: (1) RTKL requests are a statutory right, and consequently, not protected by the First Amendment, Doc. No. 32-1 at 46; (2) RTKL requests are limited public fora and plaintiffs violated the reasonable limitations placed on RTKL requests, *id.* at 50; and, (3) plaintiffs' lobbying is not protected by the First Amendment because they "threaten[ed] taxpayer-funded school districts into complying with [their] wishes," in violation of state law, *id.* at 48. The Court rejects each of defendants' three arguments.

First, courts have regularly recognized that statutorily authorized petitions are protected by the First Amendment. *E.g.*, *Herr v. Pequea Twp.*, 274 F.3d 109, 119 n.9 (3d Cir. 2001) (applications to county planning commission); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988) (reports to state and federal agencies). There is no reason why petitions pursuant to statutory authority should be given less protection than petitions independent of that authority.

Further, the cases cited by defendants on this issue are inapposite. Despite defendants' contentions, in *Harper v. EEOC*, No. 15-cv-2629, 2015 U.S. Dist. LEXIS 154916, at *9 (W.D. Tenn. Nov. 17, 2015), the court concluded that the First Amendment did not

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filed with or without regard to merit and for the purpose of using the governmental process (as opposed to the outcome of that process) to harm" another. *Id.* As described above, the record as a whole shows that plaintiffs intended their petitioning for the purpose of procuring government action. Thus, assuming *arguendo* the standard for a pattern of petitioning is applicable to this case, the Court concludes that plaintiffs petitioning is still entitled to First Amendment protection.

guarantee a petitioner that he would receive the documents he sought under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. 552. The *Harper* court did *not* conclude that FOIA requests are not protected under the First Amendment right to petition. Similarly, in *In re Gaydos*, 519 U.S. 59, 59 (1996), the Supreme Court concluded that a *pro se* petitioner could be denied leave to proceed *in forma pauperis* after a series of "frivolous, repetitive filings" under FOIA. The *Gaydos* Court did not mention, much less discuss, the First Amendment.

Second, assuming *arguendo* that defendants are correct that RTKL requests may be properly analyzed as limited public fora, defendants' argument is nonetheless misplaced. A forum analysis serves to determine what burden the government bears in justifying restrictions on speech. *Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 142 (2d Cir. 2004). Speech in a limited forum, however, is not automatically removed from the other protections of the First Amendment merely because the speaker violated the restrictions placed on that forum.

Plaintiffs' alleged violations of those restrictions do not, in themselves, strip plaintiffs' speech or petitioning of its First Amendment protection and open the door for suits by third parties such as PSBA. Even if plaintiffs' speech were in a limited public forum, defendants would still need to show that plaintiffs' speech was actionable defamation or sham petitioning to remove it from the protections of the First Amendment.

Third, defendants fail to show that any threats made by plaintiffs are outside the protection of the First Amendment. Mere threats, without more, are still speech and still protected by the First Amend-

ment. *See Virginia v. Black*, 538 U.S. 343, 359 (2003) ("[P]olitical hyberbole' is not a true threat."). Plaintiffs' statements that they would appeal the denial of their RTKL requests—the only "threat" identified in defendants' Motion, Doc. No. 32-1 at 48—do not rise to the level of a "true threat" outside the scope of the First Amendment.

Defendants nonetheless argue that plaintiffs' purported threats are actionable because plaintiffs "abandoned [their] First Amendment protections by violating state law on defamation and abuse of process." Doc. No. 32-1 at 49 (citing *Rouse Phila. Inc. v. Ad Hoc '78*, 417 A.2d 1248 (Pa. Super. 1979)). This argument is unavailing because the decision it relies on, *Rouse Philadelphia, Inc. v. Ad Hoc '78*, addresses "the right to picket," which "involves actions as opposed to pure speech." *Rouse*, 417 A.2d at 1256. In *Rouse*, the Superior Court of Pennsylvania affirmed a contempt of court order entered against appellant for his continued picketing of private businesses despite an earlier order enjoining such conduct.[4] The *Rouse* court, however, did not conclude that threatening speech and lobbying fall outside the protection of the First Amendment simply because the speech itself violates state law. To the contrary, that court decided that certain *conduct*—including, in that case, the blocking of business entrances, "physical intimidation of patrons and store owners, and the setting afire of

[4] A second case cited by defendants with respect to this issue, *Al Hamilton Contracting Co. v. Cowder*, 644 A.2d 188, 191 (1994), discusses whether a claim for abuse of process or tortious interference with contract may arise from lobbying a state agency for certain action, but does not mention or apply the First Amendment in its analysis. *Al Hamilton* is thus inapplicable to this issue.

trash receptacles in a densely populated, downtown, commercial area"—was not entitled to constitutional protection. 417 A.2d at 1254 ("[A]s a person's activities move away from pure speech and into the area of expressive conduct they require less constitutional protection."). Plaintiffs' lobbying in this case contained no such conduct and remains within the protections of the First Amendment.

2. Plaintiffs' Commentary Is Protected by the First Amendment

Defendants argue next that plaintiffs' commentary is actionable defamation outside the scope of First Amendment protection because defendants are not public officials or public figures and plaintiff therefore is not entitled to the "actual malice" standard under *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Doc. No. 32-1 at 53. The Court rejects this argument.

In *Sullivan*, the Supreme Court concluded that a "public official" may not recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). In its decisions following *Sullivan*, the Supreme Court extended application of the actual malice standard to suits by "public figures," who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes," and "limited public figures," who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch*, 418 U.S. 323, 345 (1974).

PSBA, which filed the state suit, is, at the very least, a limited public figure. Limited public figures include "lobbyist[s]" as well as "the head of any pressure group, or any significant leader" who "possess[es] a capacity for influencing public policy." *Pauling v. Globe-Democrat Publ'g Co.*, 362 F.2d 188, 196 (8th Cir. 1966). PSBA serves to "further the interests of public education . . . , 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." Jt. Stip. ¶ 84. To carry out its mission, PSBA represents "the interests of public education" by filing suits in court and lobbying the legislature. *Id.* ¶ 85; Defs.' Resp. ¶ 28. Consequently, PSBA is at "the forefront of particular public controversies in order to influence the resolution of the issues involved" and is a limited public figure subject to the *Sullivan* actual malice standard.

The record before the Court does not establish that plaintiffs acted with actual malice. The actual malice standard is not satisfied by proof of even "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989). Instead, "actual malice" requires that "the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

There is no evidence that plaintiffs had such "serious doubts" as to the truth of their statements. As the record shows, plaintiffs undertook efforts to support most, if not all, of those statements. For example, plaintiffs' statement that Levin was serving in a "conflict-riddled role" arose from the fact that Campbell had discovered that Levin represented both

PSBA and two school districts that had received PSBA's advice. P-476, ex. B. Further, plaintiffs stated that PSBA had "caused a disgraceful abuse of government resources by advising school solicitors that they may withhold their work email addresses under the RTKL," only after learning that PSBA had, in fact, advised its members to withhold that information. Defs.' Resp. ¶ 86. Likewise, the statements in the images "lampoon[ing]" Mains and PSBA were based on documents plaintiffs had obtained and the facts set forth in those statements are correct—PSBA advised its members that they could require plaintiffs to drive to the district offices to collect documents, and Mains earns $226,000 per year. *Id.* ¶ 66-67, 84. Finally, plaintiffs published the image with the caption "Freebie State Government Auto Tags for PSBA!" after they received a letter from the Pennsylvania Department of Transportation that it had records responsive to a request for documents on that issue. The record of plaintiffs' efforts to support their statements negates defendants' claim that plaintiffs acted with actual malice.

Defendants argue that plaintiffs' *conclusions* that Levin had a conflict of interest and that PSBA's advice to its members was a "disgraceful abuse of government resources" and the *implication* that Mains and PSBA actually said those words contained in the images posted online are defamatory. The Court rejects defendants' contentions. Although plaintiffs' conclusions may not be correct—and the Court takes no position on that issue—the record shows that plaintiffs reached those conclusions based on their factual investigation. When allegedly defamatory statements concern public figures, it is not enough that the statements may be deemed rude, harassing, or even untrue. *Hustler Magazine v. Falwell*, 485

U.S. 46, 53 (1988) ("[I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.") The statements must be made with actual malice to be actionable. Based on the record before the Court, plaintiffs' commentary is within the protection of the First Amendment.

B. Defendants' State Suit Is Protected by the *Noerr-Pennington* Doctrine

1. Applicable Law

Defendants next argue that their filing of the state suit is protected First Amendment petitioning under the *Noerr-Pennington* doctrine. As noted above, the *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.

2. Objective Baselessness

Defendants' argument in their Motion for Summary Judgment is nearly identical to the one they raised in their Motion to Dismiss, Doc. No. 16, and Reply Brief in Support of Defendants' Motion to Dismiss, Doc. No. 24. In both Motions, defendants focus primarily on whether the state suit has an objective basis. In particular, defendants argue in those Motions that (1) RTKL requests are "process" that may be subject to an abuse of process claim; (2) plaintiffs' commentary would not be perceived by "the average reader" as satire; and, (3) plaintiffs' petitioning of school districts to sever their ties with PSBA was a sham.

In its Memorandum and Order dated June 19, 2018, denying defendants' Motion to Dismiss, the Court did not reach those arguments, concluding the state suit has an objective basis only if plaintiffs' underlying commentary and petitioning are outside the protection of the First Amendment. Doc. No. 30 at 10. In that decision, the Court stated that "whether the state suit has an objective basis hinges on ability to establish in that suit that plaintiffs' petitioning was a sham or that their free expression was actionable defamation." *Id.* In their Motion for Summary Judgment, defendants nonetheless contend in a footnote that "such a test would be the Defendants' burden against a *Noerr-Pennington* challenge by Plaintiffs in the underlying case," not in this case. Continuing, defendants argue that "to establish an objective basis, Defendants in this case must merely show that their claims in the

underlying case are not a sham." Doc. No. 32-1 at 36 n.8. In sum, defendants argue the Court should analyze the state claims irrespective of the First Amendment protection of plaintiffs' activities.

Defendants' argument is rejected. Defendants cite no authority whatsoever to support their argument that that they need only establish the elements of the causes of action asserted in the state suit, irrespective of the First Amendment protections for plaintiffs' petitioning and commentary, to show the state suit had an objective basis. To the contrary, the Supreme Court has instructed that a suit is objectively baseless if "no reasonable litigant could realistically expect success on the merits." *PREI*, 508 U.S. at 60. To succeed on the merits in the state suit, defendants must meet a higher burden of proof in challenging plaintiffs' protected First Amendment activity—namely, that plaintiffs' RTKL requests and lobbying were shams or that their commentary was undertaken with actual malice. *PREI*, 508 U.S. at 60-61; *Hustler Magazine*, 485 U.S. at 57. In assessing the objective baselessness of the state suit, this Court must consider that additional burden.

Other courts have also considered the First Amendment protection accorded to activity challenged in a state suit when assessing the objective basis of that suit. In *Bartley v. Taylor*, 25 F. Supp. 3d 521, 535 (M.D. Pa. 2014), cited by defendants, the district court granted summary judgment for the defendant on the ground that the state libel suit at issue in that case was immunized by the *Noerr-Pennington* doctrine. Plaintiff in that case alleged that the state libel suit, filed by defendant, constituted First Amendment retaliation. The *Bartley* court concluded that the state libel suit had an objective basis because "it was

not unreasonable" for the federal defendant, plaintiff in the state suit, to "believe" that an article written by plaintiff was libelous, as "it insinuated her liability in a lawsuit to which she was not a party." *Id.* at 537. Continuing, the court ruled that defendant's state suit was a "non-sham" because the challenged speech was reasonably considered "actionable defamation." *Id.* at 538.

In this case, however, the record does not establish that plaintiffs' underlying activities constitute actionable defamation or are otherwise outside the protection of the First Amendment. As described above, defendants are public figures who advocate for certain policies related to public schools. Plaintiffs' commentary criticized defendants for their advocacy and their relationship to Pennsylvania's public schools. Consequently, the state suit has an objective basis only if their petitioning was a sham or if plaintiffs undertook their commentary with actual malice, neither of which is supported by the record. Thus, the Court concludes that the state suit is objectively baseless.

3. Subjective Baselessness—Plaintiffs' Burden of Proof

Because the Court concludes that the state suit is objectively baseless, it next considers whether the state suit has a subjective basis. *See PREI*, 508 U.S. at 60 ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."). A suit is subjectively baseless if it "conceals 'an attempt to interfere directly with the [interests of another],' through the 'use [of] the governmental process—as opposed to the outcome of that process—as a[] . . . weapon.'" *Id.* at 60-61 (quoting *E. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961)) (second

alteration in original). The Supreme Court stated that subjective baselessness may be established where (1) the litigant was "indifferent to the outcome on the merits" of the suit, (2) any recovery "would be too low to justify . . . investment in the suit," or (3) the litigant "decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process." *Id.* at 65.

Plaintiffs argue that the state suit was subjectively baseless because it was brought, not to "obtain[] damages," but to "to stop Simon Campbell and PFUR from sending RTKL requests to PSBA"s member districts and to chill [p]laintiffs' political criticisms of PSBA." Doc. No. 68 at 4-5. In response, defendants contend plaintiffs must meet a higher burden of proof to establish that the state suit was subjectively baseless. *Id.* at 2-4. Because it is a threshold issue in assessing a motion for summary judgment, the Court first considers the burden plaintiffs must carry with respect to subjective baselessness to prevail at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

The Court agrees with defendants that plaintiffs must carry a higher burden to establish subjective baselessness. In their argument, defendants rely primarily on the decision in *FTC v. AbbVie Inc.*, No. 14-cv-5151, 2018 U.S. Dist. LEXIS 109628, *54-55 (June 29, 2018). In *AbbVie*, the court concluded that defendants had pursued subjectively baseless patent litigation. In reaching that decision, the *AbbVie* court determined that plaintiffs were required to meet a higher burden of proof in establishing subjective baselessness—showing "by clear and convincing evidence that defendants had actual knowledge" that their challenged petitioning was "baseless." *Id.* at *36,

41. The court required a showing of actual knowledge "so as not to infringe on a party's constitutional right to petition the government for redress of grievances." *Id.* at *39.

Further, in determining that actual knowledge had to be established by "clear and convincing evidence," the *AbbVie* court analogized to the imposition of liability for enforcing a fraudulently obtained patent, a type of suit known as a *Walker Process* claim. In those claims, there must be "no less than clear, convincing proof of intentional fraud involving affirmative dishonesty." *Id.* at *40 (citing *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1364 (Fed. Cir. 1998)). Based on that standard, the *AbbVie* court concluded that subjective baselessness requires establishing actual knowledge of the underlying petitioning's baselessness by clear and convincing evidence.

This Court agrees with the conclusion in *AbbVie* that establishing exceptions to First Amendment protection demands that plaintiffs carry a higher burden of proof, that is, proof by clear and convincing evidence. For example, the *Walker Process* claims discussed in *AbbVie* require proof of fraud by clear and convincing evidence. Those claims are considered a "distinct avenue[] by which a party can lose *Noerr-Pennington* immunity" under the First Amendment. Similarly, the "actual malice standard" for defamation claims "is satisfied only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1088 (3d Cir. 1985) (internal quotation marks omitted). The Court concludes that the First Amendment requires that subjective baselessness in this case be established by that same

standard. Consequently, plaintiffs must show the state suit was subjectively baseless by clear and convincing evidence.

4. Subjective Baselessness—No Reasonable Factfinder Would Conclude that Plaintiffs Have Met Their Burden of Proof

The Court next considers whether a reasonable factfinder could conclude that plaintiffs have met that burden. As noted above, 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." *PREI*, 508 U.S. at 65.

Plaintiffs argue that record before the Court supports an inference that the state suit was subjectively baseless based on (1) statements by defendants and the members of PSBA, (2) PSBA's conduct in pursing the state suit, (3) the filing of an objectively baseless suit by attorneys "well known for bringing defamation claims."

First, plaintiffs point to statements by PSBA, its Board members, and its Public Entity members that that suit was filed "as a way of vindicating or protecting PSBA's member school districts, rather than a suit to redress PSBA's alleged injuries." Doc. No. 68 at 5-6. For example, Michael Faccinetto, President of the PSBA Board, testified that PSBA brought the state suit "to make the harassment of school districts stop." Doc. No. 68 at 6 (quoting Faccinetto Dep. 78:1-9, Ex. P-511). Likewise, in the Complaint filed in the state suit, defendants alleged that plaintiffs' lobbying and commentary constituted "unrelenting harassment of

PSBA [and] its members" and were intended to "cause PSBA's 600 plus member entities considerable cost and inconvenience." *Id.* (quoting Ex. P-473 ¶¶ 3, 48). Plaintiffs further support their argument by pointing to several email "blasts" sent by PSBA to its members, statements by defendants in settlement negotiations, and statements by PSBA in this suit. *Id.* at 7-9, 12-14.

Second, plaintiffs argue that defendants' manner of pursuing the state suit is evidence that they "used the state court litigation process to punish Plaintiffs, and not to protect PSBA's reputation." Doc. No. 68 at 10. In particular, plaintiffs contend that allegations in the state Complaint that Campbell sent PSBA attorney Emily Leader a link to private videos of her family members in order to threaten her were inaccurate. Doc. No. 68 at 11 (citing P-473 ¶¶ 26-28). According to plaintiffs, the link erroneously directed Leader to her private videos—a result Campbell did not intend—and defendants did not correct the inaccuracies despite having have opportunity to do so in the Amended Complaint. Further, plaintiffs contend that the Amended Complaint sought to punish plaintiffs for their conduct following the filing of the state Complaint, "including Campbell's petitioning to PSBA's membership to repudiate the State Tort Action itself." Doc. No. 68 at 15.

Plaintiffs also argue with respect to defendants' pursuit of the state suit that defendants' issuance of a litigation hold notice in the state for documents "dating back to 2010—7 years before [the] alleged abuse and defamation" and efforts to serve Campbell by publication are "consistent with the objective of using the [state suit] as a weapon." Doc. No. 68 at 12-13.

According to plaintiffs, this conduct in pursuing the state suit shows that suit was filed solely as a weapon to chill plaintiffs' speech.

Finally, plaintiffs contend in their third argument that, because defendants "hired a firm well known for bringing defamation claims" and pursued the state suit "despite every red flag and opportunity to stop," the Court should infer that the state suit was subjectively baseless. Doc. No. 68 at 16.

The Court rejects each of plaintiffs' arguments on this issue for the following reasons:

First, as defendants point out, defendants' statements regarding the purpose of the state suit "have nothing to do with PSBA's intent in filing" that suit, but simply state "what a defamation suit is all about." Doc. No. 71 at 17, 20-21. "Under the *Noerr-Pennington* doctrine, it does not matter what factors fuel [a] citizen's desire to petition government," as long as the citizen subjectively intended to prevail on the merits of his or her petition. *Barnes Found. v. Twp. of Lower Merion*, 927 F. Supp. 874, 877 (E.D. Pa. 1996). The statements cited by plaintiffs do not address whether defendants subjectively intended to prevail on the merits in the state suit, but only defendants' stated reason for filing that suit—that is, "vindicating" the interests of the members of PSBA. That is irrelevant for purposes of *Noerr-Pennington* and does not establish that defendants intended to use the "governmental process[,] as opposed to the outcome of that process," as a "weapon."

Second, the Court rejects plaintiffs' argument that defendants' manner of pursuing the state suit is evidence of that suit's subjective baselessness. The purported inaccuracies in the state suit regarding the

link sent to Leader are insufficient to establish that the state suit was subjectively baseless. Doc. No. 71 at 24; *see* Complaint, Ex. D-473 ¶¶ 26-28; Amended Complaint, Ex. 476 ¶¶ 38-40. Leader herself subjectively believed that plaintiffs had sent the video in order to "creep [her] out and upset [her] daughter and [her]." Ex. P-518 70:5-10. Further, those allegations are directly related to and add context to plaintiffs' alleged harassment of PSBA and its employees. Consequently, the inclusion of those allegations— accurate or not— is evidence that defendants sought to bolster their claims and does not establish that they were "indifferent to the outcome on the merits."

Furthermore, plaintiffs' argument that the "only 'new' allegations in the Amended Complaint pertained to Plaintiffs' RTKL requests and complaints about PSBA made after PSBA filed the State Tort Action— including Campbell's petitioning to PSBA's membership to repudiate the State Tort Action itself," Doc. No. 68 at 15-16, is unavailing. As an initial matter, it is entirely appropriate for a plaintiff to amend its complaint to add allegations of conduct that occurred after the filing of the initial complaint. *Cf.* Fed. R. Civ. P. 15(a), (d). Further, the allegations added in the Amended Complaint do not pertain to plaintiffs' RTKL requests or the lobbying of school districts to "repudiate" the state suit. Instead, the new allegations address the parodies posted to Campbell's personal website and plaintiffs' statements that Levin was serving in a "conflict-riddled role." Amended State Complaint, Ex. 476, ¶¶ 24-30, 46-49. Those allegations are directly related to defendants' claims and their addition is evidence that defendants sought to prevail on the merits in the state suit.

The Court also rejects plaintiffs' arguments regarding the litigation hold notice and service by publication—those facts are simply irrelevant to the ultimate issue of whether defendants subjectively intended to prevail on the merits of the state suit. Without more, the Court declines to infer that defendants' use of the tools of litigation is evidence of their indifference to the merits of that litigation.

Further, the record shows that plaintiffs' lobbying campaign continued well after the filing of the Complaint in the state suit. *See* Doc. No. 71 at 58-64. Defendants excluded much of this conduct from the Amended Complaint. Had the state suit been filed solely to harass or embarrass plaintiffs, defendants could have included this conduct in the Amended Complaint. Defendants' decision to exclude that conduct from the Amended Complaint is evidence that the suit was tailored to focus on conduct defendants subjectively believed to be actionable.

Finally, the Court rejects plaintiffs' third argument, that defendants' selection of "a firm well known for bringing defamation claims" and pursuit of the state suit "despite every red flag and opportunity to stop" is evidence that the state suit was subjectively baseless. Doc. No. 68 at 16. In their argument, plaintiffs rely on the decision in *FTC v. AbbVie Inc.*, No. 14-5151, 2018 U.S. Dist. LEXIS 109628, at *54. In *AbbVie*, the court concluded that because "all of the decision-makers" who decided to file "objectively baseless [patent] infringement lawsuits" were "very experienced patent attorneys," it was reasonable to conclude that they acted with the subjective intent to "file sham lawsuits."

The AbbVie court emphasized that the individuals "who made the decision on behalf of AbbVie on

whether to file the objectively baseless lawsuits . . . were four experienced patent attorneys . . . . The record reflects that no business executives were in any way involved—not even with a perfunctory sign-off." *Id.* at *48. In this case, the record shows that the key—if not exclusive—decisionmakers were school board officials and the attorneys of PSBA; the record contains no evidence that any of those individuals were well versed in the First Amendment. Thus, on this issue, *AbbVie* is distinguishable. Further, the fact that defendants hired a firm well-known for its defamation work is evidence that defendants subjectively intended to prevail in the state suit.

Taking the record as a whole, no reasonable factfinder could conclude that plaintiffs have shown by clear and convincing evidence that the state suit was subjectively baseless. Consequently, defendants' Motion for Summary Judgment is granted.

C. Plaintiffs' Motion for Leave to Amend the Complaint Is Moot

Plaintiffs filed a Motion for Leave to Amend the Complaint to Add a Count for Declaratory Relief on August 16, 2018. Declaratory judgment is a remedy and not a cause of action. A plaintiff is "required to prevail on the merits to obtain declaratory relief." *Skold v. Galderma Labs., L.P.*, No. 14-5280, 2017 U.S. Dist. LEXIS 139217, at *47 (E.D. Pa. Aug. 29, 2017); *see also USX Corp. v. Barnhart*, 395 F.3d 161, 166 (3d Cir. 2004) (holding that a "court cannot provide a remedy, even if one is demanded, when plaintiff has failed to set out a claim for relief"). Plaintiffs have not prevailed on the merits of their First Amendment retaliation claims. Thus, their Motion for Leave to Amend the Complaint to Add a Count for Declaratory Relief is denied as moot.

D. Plaintiffs' Motion for Entry of a Permanent Injunction Is Denied

Plaintiffs filed their Motion for Entry of a Permanent Injunction on April 20, 2018. To obtain a permanent injunction, the moving party must establish, *inter alia*, "actual success on the merits." *Coffelt v. Fawkes*, 765 F.3d 197, 201 (3d Cir. 2014). Plaintiffs have not succeeded on the merits of their First Amendment retaliation claims because they have not established that defendants' state suit is subjectively baseless. Consequently, plaintiffs' Motion for Entry of a Permanent Injunction is denied.

V. CONCLUSION

For the foregoing reasons, defendants' Motion for Summary Judgment is granted, plaintiffs' Motion for Leave to Amend the Complaint to Add a Count for Declaratory Relief is denied as moot, and plaintiffs' Motion for Entry of a Permanent Injunction is denied. Judgment is entered in favor of defendants and against plaintiffs. An appropriate order follows.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

[Filed: August 24, 2018]

CIVIL ACTION

No. 18-892

SIMON CAMPBELL, and
PENNSYLVANIANS FOR UNION REFORM,

Plaintiffs,

v.

PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, MICHAEL FACCINETTO, DAVID HUTCHINSON, OTTO W. VOIT, III, KATHY SWOPE, LAWRENCE FEINBERG, ERIC WOLFGANG, DANIEL O'KEEFE, DARRYL SCHAFER, THOMAS KEREK, and LYNN FOLTZ, in their individual capacities,

Defendants.

ORDER

AND NOW, this 23rd day of August, 2018, upon consideration of Plaintiffs Simon Campbell and Pennsylvanians for Union Reform's Motion for Entry of a Permanant [sic] Injunction (Document No. 13, filed April 20, 2018), Plaintiff's Amendment to Motion for a Permanent Injunction (Document No. 14, filed April 20, 2018), Defendants' Memorandum of Law in Opposition to Motion for Entry of Permanent Injunction

(Document No. 18, filed May 4, 2018), Plaintiffs Simon Campbell and Pennsylvanians for Union Reform's Reply in Support of Their Motion for Entry of a Permanent Injunction (Document No. 20, filed May 14, 2018), Defendants' Motion for Summary Judgment (Document No. 32, filed June 29, 2018), Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment (Document No. 48, filed July 13, 2018), Defendants' Reply Brief in Support of Defendants' Motion for Summary Judgment (Document No. 56, filed July 20, 2018), Plaintiffs' Supplemental Brief on Why PSBA's State Tort Action is Subjectively Baseless (Document No. 68, filed July 31, 2018), and Defendants' Supplemental Brief on Why PSBA's State Tort Action Is Not Subjectively Baseless (Document No. 71, filed August 7, 2018), for the reasons stated in the accompanying Memorandum dated August 23, 2018, IT IS ORDERED that defendants' Motion for Summary Judgment is GRANTED and plaintiffs' Motion Entry of a Permanant [sic] Injunction is DENIED.

JUDGMENT IS ENTERED IN FAVOR OF defendants, Pennsylvania School Boards Association, Michael Faccinetto, David Hutchinson, Otto W. Voit, III, Kathy Swope, Lawrence Feinberg, Eric Wolfgang, Daniel O'Keefe, Darryl Schafer, Thomas Kerek, and Lynn Foltz, and AGAINST plaintiffs, Simon Campbell and Pennsylvanians for Union Reform.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to Amend the Complaint to Add a Count for Declaratory Relief (Document No. 73, filed August 16, 2018) is DENIED AS MOOT.

IT IS FURTHER ORDERED that the Court RETAINS jurisdiction to address issues related to defendants' pending Motion for Imposition of Sanctions

Against Plaintiffs' Counsel for Violations of the Rules of Professional Conduct (Document No. 55, filed July 20, 2018). A conference for the purpose of scheduling further proceedings with respect to the motion for sanctions will be conducted in due course.

BY THE COURT:

/s/ Hon. Jan E. DuBois
DuBois, Jan E., J.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

[Filed: June 21, 2018]

CIVIL ACTION

No. 18-892

SIMON CAMPBELL, and
PENNSYLVANIANS FOR UNION REFORM,

Plaintiffs,

v.

PENNSYLVANIA SCHOOL BOARDS ASSOCIATION,
MICHAEL FACCINETTO, DAVID HUTCHINSON,
OTTO W. VOIT, III, KATHY SWOPE, LAWRENCE
FEINBERG, ERIC WOLFGANG, DANIEL O'KEEFE,
DARRYL SCHAFER, THOMAS KEREK, and LYNN FOLTZ,
in their individual capacities,

Defendants.

DuBois, J.
June 19, 2018

MEMORANDUM

I. INTRODUCTION

In this suit arising under 42 U.S.C. § 1983, plaintiffs allege that a tort suit filed by defendants in Pennsylvania state court retaliates against plaintiffs'

exercise of their First Amendment rights of free expression and to petition the government. Presently before the Court is defendants' Motion[s] to Dismiss Complaint and/or Strike Impertinent and Scandalous Language ("Motions"). The Court concludes that plaintiff's Verified Complaint states claims against defendants under § 1983 for First Amendment retaliation and that nothing in that Complaint warrants striking. Accordingly, defendants' Motions are denied.

II. BACKGROUND

The facts below are drawn from plaintiffs' Verified Complaint. The Court construes that complaint in the light most favorable to plaintiffs, as it must in a motion to dismiss. The facts set forth in the Verified Complaint may be summarized as follows:

Plaintiffs Simon Campbell and Pennsylvanians for Union Reform ("PFUR") are, respectively, a political activist and a non-profit "affiliated" with Campbell. Verif. Compl. ¶ 2. Defendants are the Pennsylvania School Boards Association ("PSBA") and the ten voting members of PSBA's Governing Board ("individual defendants"), all of whom were elected school board officials at all times relevant to this case. *Id.* ¶ 4.

"Nominally organized as a not-for-profit corporation," PSBA is a voluntary association of Pennsylvania's public school districts and "other statutorily-created public education entities," each of which is represented in the PSBA by its respective school board members. Verif. Compl. ¶¶ 4, 64, 75, 77-78. Each school board votes as a bloc on issues before the PSBA, including the election of the members of PSBA's Governing Board, all of whom are required by PSBA's bylaws "to be elected government officials of one of PSBA's government entity members." *Id.* ¶¶ 76, 78.

PSBA provides its members with a variety of services including, but not limited to, "training for new school directors," "development of school policies" and administrative regulations, assistance in hiring school leadership, legislative advocacy, and "represent[ing] its government entity members' legal interests in court proceedings." *Id.* ¶ 83.

This case centers on "petitioning activities," Verif. Compl. ¶ 3, by plaintiffs related to the PSBA. In March 2017, Campbell and PFUR sent a request under Pennsylvania's Right to Know Law ("RTKL request"), 65 Pa. Cons. Stat. §§ 701-16, to most public schools in Pennsylvania, including those that have elected not to join PSBA.[1] *Id.* ¶¶ 31-32. In May 2017, plaintiffs submitted a second RTKL request to PSBA's member school districts for information regarding PSBA's use of funding it receives from its member school districts. *Id.* ¶ 36. Upon learning of plaintiffs' RTKL requests, PSBA attorneys advised its member school districts to require plaintiffs to travel to each district to collect the requested documents. *Id.* ¶ 32.

After Campbell learned that PSBA was instructing its members to require him to travel to each school district to collect the requested documents, he posted an image "lampoon[ing]" PSBA's Executive Director, Nathan Mains, to a website he maintained with "criticism directed at PSBA." Verif. Compl. ¶ 39. That image depicted Mains as stating, "Now **** off, and drive to the school district if you want public records." *Id.* ¶ 50 (alteration in original). Campbell later replaced Mains's image with PSBA's logo, but with similar text, after he received a cease and desist letter from PSBA's

[1] The Verified Complaint does not disclose the contents of this request.

outside counsel, Michael Levin.[2] *Id.* ¶¶ 39-41. Campbell also sent emails regarding his RTKL requests directly to school districts, in which he "lobbied" the districts "to terminate the taxpayers' forced relationship with PSBA." *Id.* ¶ 38.

Based on the above conduct, PSBA's Governing Board, whose voting members are the individual defendants in this case, voted on July 17, 2017, to file a suit against Campbell and PFUR in the Court of Common Pleas of Cumberland County ("state suit"). Verif. Compl. ¶¶ 44-46. The state suit set forth claims for defamation, abuse of process, and tortious interference with contract. *Id.* ¶¶ 49-52. In an email "blast" to PSBA's member school districts announcing the suit, PSBA Executive Directors Mains described the suit as defending PSBA's reputation and the "contractual relationship [between] PSBA and its members." *Id.* ¶ 54.

Plaintiffs filed suit in this Court on February 28, 2018, alleging that PSBA's state suit, as well as the announcement of that suit, the issuance of a litigation hold notice, and subsequent amendments to its state complaint were in retaliation for plaintiffs' exercise of their First Amendment rights of free expression and to petition the government for redress. *Id.* ¶¶ 53-59. Plaintiff's Verified Complaint states two counts of First Amendment retaliation under 42 U.S.C. § 1983, the first for injunctive relief and the second for compensatory and punitive damages. On April 27, 2018, defendants filed the Motion[s] to Dismiss and/or Strike pending before the Court. Defendants' Motions are ripe for decision.

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[2] Levin represents the defendants in this case as well.

III. LEGAL STANDARD

A. Motion to Dismiss

"The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint." *Nelson v. Temple Univ.*, 920 F. Supp. 633, 674 n.2 (E.D. Pa. 1996). To survive a motion to dismiss, plaintiffs must allege "sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 663. In assessing the plausibility of the plaintiffs' claims, a district court first identifies those allegations that constitute nothing more than "legal conclusions" or "naked assertions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555, 557 (2007). Such allegations are "not entitled to the assumption of truth" and must be disregarded. *Iqbal*, 556 U.S. at 679. The court then assesses "the 'nub' of the plaintiffs' complaint—the well-pleaded, nonconclusory factual allegation[s]"—to determine whether it states a plausible claim for relief. *Id.* In assessing the "nub" of the complaint, the Court—accept[s] all factual allegations as true [and] construe[s] the complaint in the light most favorable to the plaintiff." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008).

B. Motion to Strike

Defendants have also moved to strike language in the Verified Complaint pursuant to Federal Rule of Civil Procedure 12(f). Rule 12(f) provides a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "Because of the drastic nature of the

remedy . . . motions to strike are usually viewed with disfavor and will generally be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues.'" *Garlanger v. Verbeke*, 223 F. Supp. 2d 596, 609 (D.N.J. 2002). The moving party bears the burden on a motion to strike, and "[p]leadings will not be stricken absent clear immateriality or prejudice to the moving party." *Berke v. Presstek, Inc.*, 188 F.R.D. 179, 180 (D.N.H. 1998). "Any doubt as to the striking of matter in a pleading should be resolved in favor of the pleading." *Hanley v. Volpe*, 305 F. Supp. 977, 980 (E.D. Wis. 1969).

C. First Amendment Retaliation Claims Under § 1983

Plaintiffs' Verified Complaint sets forth two claims for First Amendment retaliation under 42 U.S.C. § 1983. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983; *accord Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999). By the terms of § 1983, "two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

Plaintiffs allege they were deprived of a federal right when defendants retaliated against them for exercising their First Amendment rights. "In order to plead a retaliation claim under the First Amendment, a plaintiff must allege: (1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action." *Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006). In addition to the above elements, a First Amendment claim requires the defendant to be a state actor, which satisfies the requirement under § 1983 that the defendant act under color of state law. *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295, 121 S. Ct. 924, 930 n.2 (2001). It is under this law that the Court considers defendants' Motions.

IV. DISCUSSION – MOTION TO DISMISS

In their Motion to Dismiss, defendants raise five arguments: (1) defendants were not state actors for purposes of plaintiffs' First Amendment claims; (2) defendants are immune from liability under the *Noerr-Pennington* doctrine; (3) the individual defendants are entitled to qualified immunity; (4) the Court should abstain from deciding the case under the *Younger* abstention doctrine; and, (5) as a governmental entity, PSBA is not liable for punitive damages.

A. State Action

Because it is a required element of plaintiffs' claims, the Court first considers defendants' argument that neither PSBA nor its individual board members were state actors for purposes of plaintiffs' First Amendment claims. A private entity may be shown to be a

state actor under a variety of tests, including where the entity acts with the "coercive power" of the state, the state provides the private entity with "significant encouragement, either overt or covert," the private entity operates as a "willful participant in joint activity with the State or its agents," or the private entity is "entwined" with governmental policies or control. *Brentwood Acad.*, 531 U.S. at 296 (citations omitted). "Under any test, "[t]he inquiry is fact-specific'" and "labels are not dispositive." *Kach v. Hose,* 589 F.3d 626, 646, 649 n.22 (3d Cir. 2009) (alteration in original) (quoting *Groman v. Twp. of Manalapan*, 47 F.3d 628, 638 (3d Cir. 1995)).

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." Doc. No. 16-1 at 24, 30. 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. at 295. Doc. No. 19 at 3. 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 "[i]nterscholastic athletics obviously play[ed] 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.

B. *Noerr-Pennington* Doctrine

1. Applicable Law

Defendants also argue that the Verified Complaint must be dismissed under the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine[3] "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)). Although the doctrine originally developed in the antitrust context, the Third Circuit and the other Courts of Appeals have expanded the doctrine to generally protect citizens' petitioning activities. *WE, Inc. v. City of Philadelphia*, 174 F.3d 322, 326 (3d Cir. 1999).

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[3] The doctrine is named from the cases in which it was first promulgated, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

Under the doctrine, petitioning is protected unless it can be shown to be a "sham" under a two-prong test: 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." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993)) [hereinafter, *PREI*]. Once defendants show that their activity is protected by the First Amendment, plaintiffs bear the burden of proving that defendants' petitioning was a sham. *Id.* at 61.

2. Analysis

In response to defendants' argument that the state suit is protected by the *Noerr-Pennington* doctrine, plaintiffs contend that (1) "*Noerr-Pennington* does not protect state actors" such as PSBA; (2) application of the *Noerr-Pennington* doctrine is inappropriate on a motion to dismiss; and (3) the Court cannot conclude, based on the allegations in the Verified Complaint, that defendants' state suit is not a "sham."

Plaintiffs' first two arguments are unavailing. First, the Third Circuit has expressly held that governmental entities may raise the *Noerr-Pennington* doctrine as a defense for their own petitioning of other governmental entities. *Mariana v. Fisher*, 338 F.3d 189, 200 (3d Cir. 2003). Second, the Courts of Appeals have affirmed grants of motions to dismiss under the *Noerr-Pennington* doctrine. *See Mariana*, 338 F.3d at 206; *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1901 (9th Cir. 2000). District courts in this Circuit have concluded that a case may be dismissed pursuant to the *Noerr-Pennington* doctrine so long as

the "court can determine, taking all allegations as true, that the plaintiff is not entitled to relief as a matter of law." *Trs. of the Univ. of Pa. v. St. Jude Children's Research Hosp.*, 940 F. Supp. 2d 233, 242 (E.D. Pa. 2013) (Dalzell, J.).

Finally, under that standard, plaintiffs argue that the allegations in the Verified Complaint are sufficient to survive dismissal. The Verified Complaint alleges that defendants' state suit is in retaliation for plaintiffs' protected First Amendment petitioning and free speech activities. Plaintiffs argue that defendants' state suit thus has no objective basis unless defendants show that plaintiffs' activities were outside the scope of the protection of the First Amendment, which they cannot do based on the allegations in the Verified Complaint. *See* Doc. No. 19 at 15-16, 20, 22-23.

The Court agrees with plaintiffs on this issue. The *Noerr-Pennington* doctrine protects not only defendants' filing of the state suit, but also plaintiffs' petitioning and free speech activities challenged in that suit. Consequently, whether the state suit has an objective basis hinges on defendants' ability to establish in that suit that plaintiffs' petitioning was a sham, *PREI*, 508 U.S. at 60-61, or that their free expression was actionable defamation, *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988). The Court cannot conclude that, based on the allegations in the Verified Complaint, plaintiffs' activities were a sham or actionable defamation. Thus, defendants' Motion to Dismiss is denied with respect to this argument.[4]

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[4] The Court also concludes that, taking the allegations in the light most favorable to plaintiffs, the Verified Complaint sufficiently alleges that the state suit was filed to use "the governmental process—as opposed to the outcome of that process—as

The Court need not reach plaintiffs' additional arguments raised in opposition to defendants' Motion to Dismiss. Plaintiffs contend, *inter alia*, that an RTKL request is not a judicial process that may be subject to an abuse of process claim and that, as a governmental entity, PSBA is precluded from bringing a defamation claim. Doc. No. 19 at 18-19; Doc. No. 24 at 9 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 291 (1964); *College Sav. Bank v. Florida Prepaid Postsecondary Educ.*, 919 F. Supp. 756, 761 (D.N.J. 1996)). Because of the applicability of the *Noerr-Pennington* doctrine, the Court need not reach these additional arguments.

C. Qualified Immunity for the Individual Defendants

Defendants next argue that if the individual board members are state actors, they are immunized from suit by the doctrine of qualified immunity. The doctrine of qualified immunity provides that government officials are immune from suits for civil damages under 42 U.S.C. § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Determining whether the defendants are entitled to qualified immunity is a two-step inquiry, which may be conducted in either order. *Pearson v. Callahan*, 555 U.S. 223, 235 (2009). The first step of the inquiry is "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right"; the second is "whether the right at issue was _clearly established' at the time of defendant's alleged misconduct." *Id.* at 232 (internal

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a[] . . . weapon" and thus is subjectively baseless. *PREI*, 508 U.S. at 60-61.

citations omitted). A right may be clearly established even if there is no "previous precedent directly in point," and the ultimate inquiry is whether "a reasonable official would have known that the conduct was unlawful." *Leveto v. Lapina*, 258 F.3d 156, 162 (3d Cir. 2001). A defense of qualified immunity "will be upheld on a 12(b)(6) motion only when the immunity is established on the face of the complaint." *Id.* at 161 (internal quotations and citations omitted).

In response to defendants' contentions, plaintiffs argue that the Courts of Appeals have clearly established that the First Amendment precludes government officials from filing suits premised on a citizen's petitioning of the government. *E.g.*, *Cate v. Oldham*, 707 F.2d 1176, 1187 (11th Cir. 1983); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1343 (7th Cir. 1977). The Court agrees with plaintiffs that these cases are sufficient to clearly establish that state officials may not sue a citizen based on the citizen's petitioning of the government. In the Verified Complaint, plaintiffs aver that the individual defendants, who held their positions on PSBA's Governing Board by virtue of their status as state officials did exactly that, voting to file the state suit in response to plaintiffs' petitioning of the government by filing the RTKL requests and lobbying school districts to sever ties with the PSBA. Taking these allegations as true—as it must—the Court concludes that the Verified Complaint sufficiently alleges the violation of a clearly established constitutional right and that defendants are not entitled to qualified immunity at this stage of the proceedings.

D. *Younger* Abstention

Defendants next argue that the Court should dismiss the Verified Complaint under the *Younger*

abstention doctrine.[5] Under *Younger* abstention, a federal court should—decline to enjoin a pending state court [proceeding] absent a showing that the charges had been brought in bad faith or with an intent to harass." *Acra Turf Club, Ltd. Liab. Co. v. Zanzuccki*, 748 F.3d 127, 132 (3d Cir. 2014). Defendants contend that, under Third Circuit precedent applying the *Younger* abstention doctrine, they are entitled to dismissal because there is an—ongoing state proceeding[]" implicating—important state interests" that—afford[s] an adequate opportunity to raise federal claims." *Anthony v. Gerald Council*, 316 F.3d 412, 418 (3d Cir. 2003) (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass*'n, 457 U.S. 423, 435 (1982)).

In response, plaintiffs argue that the Supreme Court decision *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013), forecloses defendants' argument. The Court agrees with plaintiffs. In *Sprint*, the Supreme Court held that *Younger* abstention applies only to three types of state proceedings: (1) "ongoing state criminal prosecutions" (2) "certain 'civil enforcement proceedings,'" and (3) "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." 571 U.S. at 78 (internal citations omitted). "After *Sprint*, the threshold requirement for applying *Younger* abstention is that the state civil enforcement proceeding must be 'quasi-criminal' in nature." *Acra*, 748 F.3d at 132. Defendants' state claims ring in tort and are not "quasi-criminal" in nature. *Accord Cate*, 707 F.2d at 1184 (holding that claim for malicious

[5] The doctrine is named from the Supreme Court decision *Younger v. Harris*, 401 U.S. 37 (1971), in which it was first announced.

prosecution was not a "quasi-criminal" suit entitled to *Younger* abstention). Thus, *Younger* abstention is inapplicable to this case.

E. Punitive Damages Against the PSBA

In their penultimate argument, defendants contend that if PSBA is a "government agency," it cannot be held liable for punitive damages. It is well established that punitive damages may be imposed under § 1983 for a defendant's "reckless or callous disregard for the plaintiff's rights." *Smith v. Wade*, 461 U.S. 30, 51 (1983). Punitive damages, however, may not be imposed on municipalities, *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263 (1981), or other government agencies, *Bolden v. Se. Pa. Transp. Auth.*, 953 F.2d 807, 830 (3d Cir. 1991), even with a showing of reckless disregard. Plaintiffs concede that *if* PSBA is a government agency, it may not be subject to the imposition of punitive damages, but argue that they may recover punitive damages from PSBA as "a willful [private] participant in joint activity with the State or its agents," as opposed to an agency of the state. For the reasons stated below, the Court concludes the PSBA is not immune from the imposition of punitive damages.

The parties' contentions present the question whether punitive damages may be imposed on a private entity held to be a state actor for purposes of a claim under § 1983.[6] Courts that have considered that question have concluded that punitive damages may

[6] The cases cited by defendants with regard to this argument, *Feingold v. SEPTA*, 517 A.2d 1270, 1276 (Pa. 1986), and *Doe v. Cty. of Ctr.*, 242 F.3d 437, 457 (3d Cir. 2001), address only the imposition of punitive damages on government agencies, rather than private entities, and are inapplicable to this case.

be imposed on private entities under § 1983. *See* BARBARA KRITCHEVSKY, *Civil Rights Liability of Private Entities*, 26 CARDOZO L. REV. 35, 69 (2005) (collecting cases). For example, in *Segler v. Clark County*, 142 F. Supp. 2d 1264, 1268 (D. Nev. 2001), the court concluded that Emergency Medical Service Associates ("EMSA"), a private corporation contracted to provide medical care to inmates in Nevada prisons, could be subject to the imposition of punitive damages. In reaching that decision, the court first concluded that EMSA "qualifie[d] as a state actor who may be liable under § 1983" because it was "fully vested with state authority to fulfill essential aspects of the duty, place[d] on the State by the Eighth Amendment . . . to provide essential medical care to those the State had incarcerated." *Id.* at 1268 (omission in original) (quoting *West v. Atkins*, 487 U.S. 42, 56-57 (1988)). However, notwithstanding the status of EMSA as a "state actor," the *Segler* court ruled EMSA was not immune from the imposition of punitive damages because it remained a private corporation, reasoning as follows:

> Although EMSA is a state actor through its contract with [the state], the award of punitive damages against EMSA would not punish taxpayers in the way such a decision would affect a municipality. Instead, punitive damages would be assessed against EMSA which would bear the burden of payment as a private corporation. Also, the deterrence effect of an award of punitive damages would impact EMSA as a private corporation influencing the possible future actions by EMSA or its employees.

Id. at 1269 (citing *Newport*, 453 U.S. at 266-68); *accord Campbell v. Philadelphia*, No. 88-cv-6976, 1990 U.S. Dist. LEXIS 8950, at *20 (E.D. Pa. July 13, 1990).

The conclusion in these cases that private entities may be subject to the imposition of punitive damages is supported by the Supreme Court decision in *Newport v. Fact Concerts, Inc*. In *Newport*, the Supreme Court concluded that punitive damages may not be imposed on a municipality. 453 U.S. at 271. In reaching that conclusion, the Court reasoned that, unlike private entities, municipalities were exempt at common law from the imposition of punitive damages. *Id.* at 259. The *Newport* court also reasoned that, unlike punitive damages imposed on a private entity, the "award of punitive damages against a municipality 'punishes' only the taxpayers" and would have little deterrent effect on misbehavior by government officials. *Id.* at 267-70. This Court concludes that the decision of the Supreme Court in *Newport* that municipalities are immune from punitive damages relies on characteristics unique to municipalities and is inapplicable to private entities such as PSBA.

Because the Supreme Court decision in *Newport* makes the distinction between municipalities and private entities clear, this Court concludes that punitive damages may be imposed on a private entity under § 1983. Thus, defendants' Motion to Dismiss is denied with respect to the imposition of punitive damages on PSBA.

V. DISCUSSION – MOTION TO STRIKE

Finally, with respect to the Motion to Strike, defendants argue that the references in the Verified Complaint to the state suit filed against Campbell and PFUR as a "SLAPP suit" should be stricken under

Federal Rule of Civil Procedure Rule 12(f) as an "attempt to improperly characterize the state court litigation." The term "SLAPP suit" stands for "strategic lawsuit against public participation" and is used in some state laws that seek to prevent frivolous lawsuits aimed solely at chilling the exercise of certain First Amendment rights. *Prudential Ins. Co. of Am. v. Massaro*, No. 97-2022, 2003 U.S. Dist. LEXIS 28799, at *11 (D.N.J. May 20, 2003). Plaintiffs respond that they "have not called the PSBA lawsuit a 'SLAPP Suit' to blacken PSBA's name" but because "their claims hinge on their allegation that PSBA's tort suit against them is frivolous, and designed solely to chill their speech and punish them with the litigation process." According to plaintiffs, the term is shorthand for "the basis of [their] legal theory."

The Court concludes that the Motion to Strike is denied. As noted above, Rule 12(f) provides a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "Because of the drastic nature of the remedy . . . motions to strike are usually viewed with disfavor and will generally be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues.'" *Garlanger v. Verbeke*, 223 F. Supp. 2d 596, 609 (D.N.J. 2002). The moving party bears the burden on a motion to strike, and "[p]leadings will not be stricken absent clear immateriality or prejudice to the moving party." *Berke v. Presstek, Inc.*, 188 F.R.D. 179, 180 (D.N.H. 1998). "Any doubt as to the striking of matter in a pleading should be resolved in favor of the pleading." *Hanley v. Volpe*, 305 F. Supp. 977, 980 (E.D. Wis. 1969).

Defendants have failed to aver that they will be prejudiced by references to the state suit as a "SLAPP suit" or that those references have "no possible relation to the controversy." Thus, the Motion to Strike is denied.

VI. CONCLUSION

For the foregoing reasons, defendants' Motion[s] to Dismiss Complaint and/or Strike Impertinent and Scandalous Language are denied without prejudice to defendants' right to renew the arguments raised in the Motions by motion for summary judgment or at trial, if warranted by the facts and applicable law as stated in this Memorandum. An appropriate order follows.

APPENDIX G

Pennsylvania's Right-to-Know Law was introduced as Senate Bill 1 of the 2007-08 legislative session by Senator Dominic Pileggi. The final version of SB1 was approved by the Senate, 50-0, and the House of Representatives, 199-0. It was signed into law on February 14, 2008.

Act of Feb. 14, 2008, P.L. 6, No. 3
Codified at 65 Pa. Stat. §§ 67.101 et seq.

* * *

CHAPTER 1
PRELIMINARY PROVISIONS

Section 101. Short title.

This act shall be known and may be cited as the Right-to-Know Law.

Section 102. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

* * *

"Agency." A Commonwealth agency, a local agency, a judicial agency or a legislative agency.

* * *

Financial record." Any of the following:

(1) Any account, voucher or contract dealing with:

(i) the receipt or disbursement of funds by an agency; or

(ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.

(2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.

(3) A financial audit report. The term does not include work papers underlying an audit.

* * *

Local agency." Any of the following:

(1) Any political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school.

* * *

"Office of Open Records." The Office of Open Records established in section 1310.

* * *

"Public record." A record, including a financial record, of a Commonwealth or local agency that:

(1) is not exempt under section 708;

(2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or

(3) is not protected by a privilege.

"Record." Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book,

tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document.

"Requester." A person that is a legal resident of the United States and requests a record pursuant to this act. The term includes an agency.

"Response." Access to a record or an agency's written notice to a requester granting, denying or partially granting and partially denying access to a record.

* * *

Section 302. Local agencies.

(a) Requirement.—A local agency shall provide public records in accordance with this act.

(b) Prohibition.—A local agency may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law.

* * *

Section 305. Presumption.

(a) General rule.—A record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record.

* * *

Section 506. Requests.

(a) Disruptive requests.—

(1) An agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.

* * *

(d) Agency possession.—

(1) A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

* * *

Section 703. Written requests.

* * *

A written request need not include any explanation of the requester's reason for requesting or intended use of the records unless otherwise required by law.

* * *

Section 708. Exceptions for public records.

(a) Burden of proof.—

(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.

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Section 1308. Prohibition.

A policy or regulation adopted under this act may not include any of the following:

(1) A limitation on the number of records which may be requested or made available for inspection or duplication.

(2) A requirement to disclose the purpose or motive in requesting access to records.

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Section 1310. Office of Open Records.

(a) Establishment.—There is established in the Department of Community and Economic Development an Office of Open Records. The office shall do all of the following:

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(5) Assign appeals officers to review appeals of decisions by Commonwealth agencies or local agencies, except as provided in section 503(d), filed under section 1101 and issue orders and opinions.