No. 20-1294

In the Supreme Court of the United States

SIMON CAMPBELL, ET AL.,
Petitioners,

v.

PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONERS

Robert Corn-Revere*
Davis Wright Tremaine LLP
1301 K Street, NW
Suite 500 East
Washington, DC 20005
(202) 973-4200
bobcornrevere@dwt.com
Counsel for *Amici Curiae*

*Counsel of Record

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QUESTIONS PRESENTED

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?

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INTERESTS OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization that works to defend the rights to free speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society groups in cases at the intersection of political regulation and First Amendment liberties.

REASONS FOR GRANTING THE WRIT

The Third Circuit agreed that the government defendants in this case suppressed or punished Petitioners' use of the Pennsylvania Right to Know Law by filing objectively baseless state tort claims for defamation, tortious interference with contractual relations, and abuse of process. App. 25a-26a. However, it applied the *Noerr-Pennington* doctrine—a judicially created defense securing First Amendment rights against certain business torts—to bar Petitioners' Section 1983 action alleging government retaliation. App. 14a-17a, 27a-30a.[2] Thus, the Third Circuit held that the First

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[1] All parties have consented to this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

Amendment shielded government defendants from Petitioners' retaliation claim.

Amicus Institute for Free Speech support Petitioners and urge the Court to grant certiorari, focusing on the threshold question of whether a state entity has a First Amendment "right" to petition that may provide immunity from liability for constitutional torts. If the Court grants review, it should also address Petitioners' second question, but a correct resolution of the first question would render it superfluous.

I. THE DECISION BELOW REFLECTS A FUNDAMENTAL MISUNDERSTANDING REGARDING THE NATURE OF CONSTITUTIONAL RIGHTS

The Third Circuit's decision that the First Amendment provides the government immunity from Section 1983 claims based on a "right to petition" fundamentally misapplies constitutional doctrine. Governments do not have constitutional ***rights***; they exercise ***powers*** limited by the Constitution. "Constitutional rights like those embodied in the Bill of Rights have not been extended to government bodies, but only to individuals and groups within the private sector." Mark G. Yudof, WHEN GOVERNMENT SPEAKS 44 (Univ. of Cal. Press 1983).

A governmental unit "created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator." *Williams v. Mayor & City Council of Balt.*, 289 U.S. 36, 40 (1933). It is "inconceivable that governments

should assert First Amendment rights antagonistic to the interests of the larger community," and doing so in this context especially "would be standing the world on its head." Yudof, *supra*, at 45. *See CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government.").

The government speech doctrine, based on the principle that the power to engage in speech is integral to performing governmental functions, recognizes this distinction between state powers and personal rights. *E.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207-08 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009). Government speech is an aspect or manifestation of sovereignty. Accordingly, once speech is categorized as that of the government, the First Amendment does not apply. *Walker*, 576 U.S. at 207 ("government actions and programs that take the form of speech[] do not normally trigger … First Amendment rules"); *Summum*, 555 U.S. at 467 ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). *See also Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550, 553 (2005) ("[T]he Government's own speech ... is exempt from First Amendment scrutiny").

No doubt, government officials retain their personal First Amendment rights *to speak as citizens*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968), but "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v.*

Ceballos, 547 U.S. 410, 421 (2006); *see Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011). When government officials speak as agents of the state, their actions are an exercise of governmental power that can be limited by the First Amendment. *Walker*, 576 U.S. at 208 ("the Free Speech Clause itself may constrain the government's speech").[3]

The government speech doctrine merely acknowledges the well-established principle that the government's power to "speak" cannot be used to achieve an unconstitutional result – either through official pronouncements or informal proclamations that have "at least as much coercive effect as an ordinance." *Lombard v. Louisiana*, 373 U.S. 267, 273-74 (1963) ("[O]fficials' statements … that the city would not permit Negroes to seek desegregated service in restaurants … must be treated exactly as if [the city] had an ordinance prohibiting such conduct…. [T]he voice of the State directing segregated service at the restaurant[] cannot stand.").

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[3] Thus, a county clerk has a First Amendment right to join any church she wants and express her opposition to gay marriage, but has no constitutional right as a government official to refuse to issue marriage licenses to gay couples based on her faith. *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015), *vacated as moot*, 2016 WL 11695944 (E.D. Ky. Aug. 18, 2016). Likewise, a candidate for a judicial position has a First Amendment right to advocate his views during his campaign, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002), but has no authority as a judge to impose his personal beliefs from the bench. *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) (Chief Justice of Alabama Supreme Court violated Establishment Clause by placing monument to the Ten Commandments in the state judicial building).

These principles apply with particular force in this case, where the government is seeking First Amendment immunity in the form of a "right to petition" so that it may retaliate against a citizen's exercise of First Amendment rights. As various courts have stressed, a government actor "has a First Amendment right to express his views" about issues or particular citizens or groups, but "a public official who tries to shut down an avenue of expression of ideas and opinions through 'actual or threatened imposition of government power or sanction' is violating the First Amendment." *Backpage.com, LLC v. Dart*, 807 F.3d 229, 230 (7th Cir. 2015) (quoting *Am. Family Ass'n v. City & Cty. of San Francisco*, 277 F.3d 1114, 1125 (9th Cir. 2002)). It is one thing when an official is speaking as "a citizen or father, or in any other private capacity," but quite another when speaking in an official capacity and wielding the coercive authority of the state. *Id.* at 234.

To suggest that government speech is both immune from, yet protected by, the First Amendment is a constitutional *non sequitur*. Government agencies certainly are empowered to file suit or petition other government bodies in performance of their duties, but they enjoy no "right" to avoid liability when they abuse the courts to silence their critics.

This Court should accept review in order to clarify this important distinction.

II. THE COURT SHOULD ACCEPT REVIEW TO RESOLVE A SPLIT BETWEEN THE CIRCUITS

This Court also should grant the Petition because the circuit courts are divided as to whether the *Noerr-Pennington* doctrine extends to state actors, as the Third Circuit acknowledged. App. 14a-16a. It noted different degrees of scrutiny have been applied to restrictions on government speech, and that such variability "is compounded here because there is some confusion over *Noerr-Pennington*'s applicability to state actors." App. 15a. Yet the Third Circuit did nothing to help clear up the confusion. Only this Court can do that.

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

The *Mariana* court invoked both *Manistee Town Center v. City of Glendale,* 227 F.3d 1090 (9th Cir. 2000), and *Miracle Mile Assocs. v. City of Rochester,* 617 F.2d 18 (2d Cir. 1980), but neither of those cases addressed the concept of First Amendment protections for government speech. The Second Circuit in *Miracle Mile* did not discuss "the public versus private dichotomy" at all, and the Ninth Circuit in *Manistee Town Center* acknowledged the application of *Noerr-Pennington* was a "question of first impression." *Mariana*, 338 F.3d at 200 (quoting *Manistee Town Center*, 227 F.3d at 1093). It applied *Noerr-Pennington* only because it concluded that doing so "is consistent with the 'representative democracy' rationale enunciated by the Supreme Court in *Noerr*." *Id*. That rationale equates to the exercise government *power* to serve constituents, not the *right* of constituents to petition government.

These cases all predated this Court's explication of the government speech doctrine, and its conclusion that such speech is generally not subject to First Amendment limits. *Walker*, 576 U.S. at 207; *Summum*, 555 U.S. at 467; *Johanns,* 544 U.S. at 553. But just as the First Amendment does not bar the government from subjecting its own speech to restrictions that are anathema for private speech (such as prior restraint or viewpoint discrimination), the First Amendment does not protect government speech either, as the Bill of Rights is not the source of the state's authority to engage in expressive activities. Accordingly, the fundamental rationale for *Noerr-Pennington* immunity is missing where state speech is concerned.

The question could not be more ironic, for the issue here is whether the government may "petition" the courts to retaliate against a citizen for engaging in activity that unquestionably *is* protected by the First Amendment. It is well-established that the government may not take direct action to retaliate against disfavored speakers. *Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("the First Amendment prohibits government officials from subjecting an individual to retaliatory actions"); *Lozman v. City of Rivera Beach*, 138 S. Ct. 1945 (2018). It is equally settled that government may not achieve the same result indirectly, by threatening speakers or publishers it dislikes. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64-72 (1963). And, of course, "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (footnote omitted).

It would be perverse indeed if the government could bypass these constitutional rules by claiming a First Amendment "right" to petition and filing frivolous civil actions to punish protected speech. The Court should grant review to resolve this disagreement between the circuit courts.

CONCLUSION

For the reasons set forth above, this Court should grant the Petition for Certiorari.

Respectfully submitted,

Robert Corn-Revere*
Davis Wright Tremaine LLP
1301 K Street, NW
Suite 500 East
Washington, DC 20005
(202) 973-4200
bobcornrevere@dwt.com
Counsel for *Amicus Curiae*

*Counsel of Record