

Case No. 08-7074

**In the
United States Court of Appeals
for the DC Circuit**

RALPH NADER; PETER MIGUEL CAMEJO; D.B. FANNING;
C.K. IRELAND; JULIE COYLE; HERMAN BLANKENSHIP;
LLOYD MARBET; GREGORY KAFOURY,
Appellants,

v.

DEMOCRATIC NATIONAL COMMITTEE; KERRY-EDWARDS 2004 INC.;
BALLOT PROJECT, INC.; AMERICA COMING TOGETHER; SERVICE
EMPLOYEES INTERNATIONAL UNION; JOHN KERRY; JACK
CORRIGAN; TOBY MOFFETT; ELIZABETH HOLTZMAN; ROBERT
BRANDON; MARK BREWER; REED SMITH, LLP,
Appellees.

**On Appeal from the United States District Court
for the District of Columbia
Case No. 07-cv-02136
Honorable Ricardo M. Urbina Presiding**

REPLY BRIEF OF APPELLANT

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GLOSSARY OF TERMS

ACT – Defendant-Appellee America Coming Together

Candidates – Ralph Nader and Peter Miguel Camejo, 2004 Independent Candidates for President and Vice President, respectively

Conspirator or co-Conspirator – Individuals or entities who assisted, materially supported or participated in wrongful and abusive litigation or other unlawful acts to interfere with the Candidates' lawful participation in the 2004 General Election

FEC – Federal Election Commission

IRS – Internal Revenue Service

SEIU – Service Employees International Union

SUMMARY OF THE ARGUMENT

The Defendants’¹ Brief of Appellees (hereinafter “Defendants’ Brief” or “Def. Br.”) fails to cure or even mitigate the several reversible errors committed by the District Court in dismissing the Candidate/Voter Plaintiffs’ Amended Complaint. It remains irrefutable that the District Court committed reversible error by: 1) improperly extending the *Noerr-Pennington* doctrine to common law tort claims, and erroneously applying it to confer absolute immunity upon the Defendants for overtly corrupt and even unlawful conduct; 2) failing to accept significant portions of the factual allegations in the Amended Complaint as true, and resolving disputed questions of fact against the Candidate/Voter Plaintiffs; and 3) maintaining jurisdiction over an action that raises state law claims only, and resolving novel and complex issues of state law by repeatedly relying upon cases that have been reversed or vacated.

The Defendants fail to advance any alternative grounds upon which this Court might affirm in spite of the District Court’s errors. As the District Court itself recognized, dismissal cannot be sustained by invoking the statute of limitations, because the Defendants denied and fraudulently concealed

¹ The parties Defendant are referred to hereinafter as “Defendants,” while parties who joined the conspiracy are referred to generally as “Conspirators.”

their tortious conduct, and because they remain engaged in ongoing acts in furtherance of their unlawful conspiracy. Moreover, the Amended Complaint clearly pleads the elements necessary to state claims for civil conspiracy, abuse of process and malicious prosecution.

Accordingly, the District Court's decision granting the motions to dismiss should be reversed, with instructions to remand this exclusively state law action to the Superior Court of the District of Columbia.²

ARGUMENT

I. The District Court Improperly Applied the *Noerr-Pennington* Doctrine to Dismiss the Candidate/Voter Plaintiffs' Common Law Tort Claims.

A. The District Court Erred By Extending the *Noerr-Pennington* Doctrine to Common Law Tort Claims.

1. The District Court's Novel Application of the *Noerr-Pennington* Doctrine to Common Law Tort Claims Is Without Precedent in the Decisions of This or Any Other Court.

The District Court committed reversible error by improperly extending and applying the *Noerr-Pennington* doctrine to immunize the

² Two related actions raising claims under 42 U.S.C. § 1983 were pending before the District Court when the District Court entered its opinion dismissing the instant action. C/V Br. 23. As discussed more fully *infra* Part III, the District Court should have consolidated the three related actions pending before it, or in the alternative, the District Court should have remanded this exclusively state law action to the Superior Court of the

Defendants for their common law torts. The *Noerr-Pennington* doctrine arises from the field of antitrust law, and carves out an exception to liability under the Sherman Act, where such liability would infringe upon the freedom to petition that is guaranteed by the First Amendment. *See generally Eastern R.R. Presidents Conf. v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961) (“*Noerr*”); *United Mine Workers v. Pennington*, 381 U.S. 657 (1968) (“*Pennington*”). This exception to liability under the Sherman Act, however, does not and never has extended to confer immunity for common law torts. Therefore, the District Court must be reversed on this ground alone.

The Defendants attempt to gloss over the lack of precedent for the District Court’s novel application of the *Noerr-Pennington* doctrine, but they cannot cite authority where there is none. Def. Br. 22. Instead, they cite two cases, neither of which applied the *Noerr-Pennington* doctrine to common law tort claims. Def. Br. 22 (citing *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 51-52 (1993) (“*PRE*”); *Whelan v. Abell*, 48 F.3d 1247, 1254 (D.C. Cir. 1995) (“*Whelan II*”). In the first case, *PRE*, the Supreme Court applied the *Noerr-Pennington* doctrine in its original antitrust context, although the claims arose under both state and

District of Columbia. To do neither, and exercise jurisdiction over an

federal law. *See PRE*, 508 U.S. at 52. In the second case, *Whelan II*, this Court explicitly declined to apply the *Noerr-Pennington* doctrine to abuse of process and malicious prosecution claims where, as here, the claims were based on allegations that the defendants engaged in misrepresentations in the adjudicatory context. *See Whelan II*, 48 F.3d at 1254; *infra* Part I.A.2.

Although this Court acknowledged in *Whelan II* that common law torts are not “sacrosanct” with respect to application of the *Noerr Pennington* doctrine, the Court did *not* extend the doctrine to include such claims, as the District Court erroneously concluded. JA 99 (citing *Whelan II*, 48 F.3d at 1254). On the contrary, in declining to extend the doctrine to immunize defendants for engaging in abuse of process and malicious prosecution, this Court noted that the *Noerr-Pennington* doctrine, thus far, has been applied “only to justify narrow constructions of federal law.” *Whelan II*, 48 F.3d at 1254. In other words, immunity under the *Noerr-Pennington* doctrine originated as, and remains, an implied exception to the liability imposed under the Sherman Act, which the Supreme Court carved out for the specific purpose of avoiding the potential clash between the statute and the First Amendment. *See id.* The District Court therefore erred in relying upon *Whelan II* as precedent for its novel application of the *Noerr*

exclusively state law action, was an abuse of discretion.

Pennington doctrine, and this Court should reverse on that basis. *See id.*; JA 99.

2. The District Court's Novel Application of the *Noerr-Pennington* Doctrine to the Candidate/Voter Plaintiffs' Tort Claims Is Improper Under the Facts in This Case.

The District Court's novel application of the *Noerr-Pennington* doctrine to the common law tort claims in this case is also improper on the merits. As the Defendants concede, the rationale underpinning the doctrine is that the statutory right to be free from anticompetitive conduct, which the Sherman Act confers, cannot trump the freedom of petition that the First Amendment guarantees. Def. Br. 21; *see Whelan II*, 48 F.3d at 1254 (citing *Noerr*, 365 U.S. at 139). When the doctrine is extended and applied to the common law tort claims in this case, however, the potential clash between the Sherman Act and the First Amendment disappears, and with it, the underlying rationale for application of the doctrine. *See Whelan II*, 48 F.3d at 1254.

The Candidate/Voter Plaintiffs do not assert statutory rights under the Sherman Act, or any other claim that remotely implicates the Defendants' valid exercise of their freedom to petition. Rather, the Amended Complaint alleges that the Defendants wrongfully invoked state statutes and federal campaign finance laws as a pretext to bankrupt their competitors by forcing

them to incur litigation costs in the defense of a pattern of baseless and repetitive claims. JA 9-11. Therefore, there is simply “no constitutional problem” with recognizing abuse of process and malicious prosecution claims arising from such conduct, because the Candidate/Voter Plaintiffs have “shouldered the burden” of showing that the Defendants were not engaged in a normal and legitimate exercise of the freedom to petition. *Whelan II*, 48 F.3d at 1254.

Even in the original and proper context of antitrust law, whether a particular form of anticompetitive activity is immune under the *Noerr-Pennington* doctrine “depends not only on its impact, but also on the context and nature of the activity.” *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988) (“*Allied Tube*”). The Amended Complaint alleges facts which, on their face, do not constitute normal and legitimate exercises of the right to petition. JA 26-29. It was therefore error for the District Court to conclude, as a matter of law, that the *Noerr-Pennington* doctrine applies to immunize the Defendants for their common law torts. *See Allied Tube*, 486 U.S. at 503.

The District Court’s error lies in applying an improper standard for determining whether litigation is a normal and legitimate exercise of the right to petition. According to the District Court, the Defendants’ filing of 29

complaints before 19 tribunals within 12 weeks, 24 of which were ultimately dismissed, was a valid exercise of the right to petition, unless the Defendants had “no real interest in the outcome of the litigation but merely [the intent] to directly injure the plaintiff.” JA 105 (citing *Allied Tube*, 486 U.S. at 500 n.4). Similarly, the Defendants urge that “the question is whether the defendant had no motive to win the lawsuit, but instead only to use the legal process to interfere with competition.” Def. Br. 31. Both the District Court and the Defendants misstate the standard, however, and in each case, they attempt to prove too much.

In *Allied Tube*, the Supreme Court did *not* conclude that proof that a litigant has no real interest in the outcome of a lawsuit is *necessary* to demonstrate that the litigation is not a valid exercise of the right to petition, as the District Court asserted, but only that such proof is *sufficient*. See *Allied Tube*, 486 U.S. at 500 n.4 (“private action that is not genuinely aimed at procuring favorable government action...cannot be deemed a valid effort to influence government action”). Moreover, the Supreme Court expressly rejected the “absolutist position” adopted by the District Court and the Defendants, “that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action.” *Allied Tube*, 486 U.S. at 503. If that were true, absurd consequences would follow, as the

Supreme Court demonstrated. *See id.* at 504 (noting that price fixing, conspiracies, boycotts and even bribery would all be permissible under such a standard).

The District Court’s application of the *Noerr-Pennington* doctrine to the tort claims in this case would also lead to absurd consequences. JA 105. Under the District Court’s standard, a lawsuit could never form the basis for a claim of abuse of process or malicious prosecution, provided that the tortfeasor hoped to prevail. *Cf. Allied Tube*, 486 U.S. at 504. Just as subjective intent is not sufficient to render a lawsuit invalid as an exercise of the right to petition, however, neither is it sufficient to render the lawsuit valid. *See PRE*, 508 U.S. at 57. Rather, the dispositive issue is whether the lawsuit was filed with the improper purpose of inflicting harm directly, by means of the process itself, as opposed to securing a favorable outcome. *See Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991).

The District Court declined to inquire whether the Defendants filed their 29 state court and Federal Election Commission (“FEC”) complaints for the improper purpose of inflicting harm directly, by means of the process itself, because it concluded that the Defendants hoped that their complaints would prevail. *See, e.g.*, JA 104 (“the First Amendment cannot be abrogated simply by alleging that one’s political opponent turned to the judicial

process for partisan motives”); JA 107 (“Initiating a *law suit* with the ulterior motive of forcing normal litigation expenses and distractions on an opponent does not constitute the sort of collateral end that is recognized as an abuse of process”) (emphasis added). This was error.

Under the controlling precedent of the Supreme Court and of this Court, if the Defendants filed 29 complaints before 19 tribunals within 12 weeks not to vindicate valid legal claims, but to injure their opponents directly by means of the process itself, and if co-conspirators engaged in numerous acts of sabotage and other unlawful conduct intended to manufacture grounds for their otherwise baseless claims, then they were not engaged in normal and legitimate petitioning conduct, and the *Noerr-Pennington* doctrine does not apply as a matter of law. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *Whelan II*, 48 F.3d at 1254. Because these facts are alleged in the Amended Complaint, the District Court improperly applied the *Noerr-Pennington* doctrine, and this Court must reverse.

B. Even If the *Noerr-Pennington* Doctrine Could Be Extended to Apply to the Common Law Tort Claims in the Amended Complaint, the District Court Erred By Concluding That the Sham Exception Does Not Apply.

In cases where underlying litigation does not constitute a valid form of the First Amendment freedom to petition, this Court has concluded that

the two-part test set forth by the Supreme Court in *PRE* for identifying “sham” litigation under the *Noerr-Pennington* doctrine is inapplicable. *See Whelan II*, 48 F.3d at 1255 (citing *Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155 (9th Cir. 1993)). Because the underlying litigation has been “deprived of its legitimacy” at the outset, it does not fall under the protection of the First Amendment. *Id.* Consequently, there is no need to determine whether such litigation is a “sham” for purposes of the *Noerr-Pennington* doctrine, because the doctrine does not apply as a matter of law. *See id.*

The Amended Complaint is replete with specific factual examples that deprive the Conspirators’ litigation of its legitimacy, including numerous acts of sabotage and other unlawful conduct intended to manufacture grounds for the Defendants’ otherwise baseless claims. JA 26-29. Such conduct plainly falls outside the scope of the First Amendment’s protection. *See California Motor Transport Co.*, 404 U.S. at 513; *Whelan II*, 48 F.3d at 1254. Moreover, because the Defendants fail to dispute this point, *see infra* Part II.A., the Court should deem it to be admitted. The *Noerr-Pennington* doctrine is therefore inapplicable as a matter of law, and this Court need not apply the two-part test set forth in *PRE*. *See Whelan II*, 48 F.3d at 1255.

Even if this Court were to adopt the District Court’s novel application of the *Noerr-Pennington* doctrine to immunize the Defendants for tortious and even unlawful conduct, however, the allegations in the Amended Complaint plainly fall under the sham exception. The sham exception applies where: 1) a lawsuit is “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits,” and 2) the lawsuit conceals “an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon.” *PRE*, 508 U.S. at 60-61 (citations omitted). As previously set forth in the Candidate/Voters’ Brief, the Defendants’ litigation – consisting of 29 complaints filed before 19 tribunals within 12 weeks, 24 of which were ultimately dismissed – is a paradigmatic example of sham litigation. *See California Motor Transport Co.*, 404 U.S. at 513 (defining “a pattern of baseless, repetitive claims” as sham litigation).

1. The Amended Complaint Alleges That Defendants Filed Objectively Baseless Complaints.

The Amended Complaint satisfies the first prong of the sham exception test by alleging that Defendants filed 29 complaints, 24 of which were ultimately dismissed, and that many of these were objectively baseless on the face of the complaint. C/V Br. 15. Furthermore, the dismissal of 24

out of 29 complaints supports the inference that the Defendants filed “a pattern of baseless, repetitive claims,” which is a paradigmatic example of sham litigation. *California Motor Transport Co.*, 504 U.S. at 513. The Defendants attempt to divert attention from these allegations by citing a slew of cases that are not part of the *res gestae* of this case, which they misleadingly refer to as “successful” proceedings. Def. Br. 28. These cases have no bearing upon the facts alleged in the Amended Complaint. Moreover, while Defendants protest that the Candidate/Voter Plaintiffs may not rely upon mere labels and conclusions, Def. Br. 29, they completely fail to address the voluminous specific facts alleged in the Amended Complaint, which support the conclusion that the Defendants’ 24 losing complaints were baseless. *Compare* C/V Br. 15 *with* Def. Br. 27-30.

The Amended Complaint also alleges specific facts indicating that Defendants’ few “successful” complaints were objectively baseless. Because such complaints relied upon manufactured evidence, by definition they cannot form the basis of a “reasonable belief” that the Defendants’ claims were valid. *PRE*, 508 U.S. at 62-63; *see Whelan II*, 48 F.3d at 1254. In Pennsylvania, for example, where the Defendants’ challenge is the subject of an ongoing Grand Jury investigation by the state Attorney General, C/V Br. 19-21, Conspirators planted approximately 7,000 fake signatures in the

Candidate Plaintiffs' nomination petitions, which formed the basis for Defendant Reed Smith's false allegations that the petitions were fraudulent. JA 28-29, 61. The fake signatures also formed the basis for a class action that Conspirators filed on behalf of the individuals who collected such signatures, which they voluntarily withdrew with prejudice. JA 56. In Oregon, Defendants America Coming Together ("ACT") and Service Employees International Union ("SEIU") jointly planned and executed a scheme to invalidate the Plaintiff Candidates' nomination petitions by signing them in a manner that invalidated entire petition sheets. JA 28, 54-55. Far from being presumptively valid, as the Defendants' claim, Def. Br. 26 n.11, complaints based upon such manufactured grounds are beyond the scope of First Amendment protection, because they are deprived of their legitimacy at the outset. *See Whelan II*, 48 F.3d at 1255.

Accordingly, the Amended Complaint satisfies the first prong of the sham exception test by alleging specific facts to support the conclusion that the Defendants filed objectively baseless complaints. *See PRE*, 508 U.S. at 60-61.

2. The Amended Complaint Alleges That Defendants Filed 29 Complaints Before 19 Tribunals Within 12 Weeks in Order to Use Judicial Processes as an Anti-Competitive Weapon.

The Amended Complaint satisfies the second prong of the sham exception test by alleging that the Defendants filed 29 complaints before 19 tribunals within 12 weeks in order to use the burden of the judicial process itself as a means to bankrupt the Candidate Plaintiffs' campaign. JA 9-11. Defendants publicly stated that this was their intention. JA 24-25 ("We wanted to neutralize [the Plaintiff Candidates'] campaign by forcing [them] to spend money and resources defending these things, but much to our astonishment, we've actually been more successful than we thought we'd be in stopping [them] from getting on [state ballots] at all"); JA 25 ("I'd be less than honest if I said it was all about the law"). By the Defendants' own admission, therefore, they filed complaints for the improper purpose of using the judicial process itself, as opposed to its outcome, as a means to inflict direct harm upon their opponents. *See Columbia*, 499 U.S. at 380.

As previously established, *infra* Part I.A.2, the "absolutist position" that the Defendants adopt in defense of their abusive litigation misstates the relevant standard governing the second prong of the sham test. *See Allied Tube*, 486 U.S. at 503. The Amended Complaint need not allege, as the Defendants claim, "that Defendants did not seek to achieve a favorable outcome in the ballot access litigation," Def. Br. 31, for if that were the case, it would lead to the absurd result that any abuse of process or malicious

prosecution claim could be defeated by the tortfeasor's subjective desire to prevail. *See Allied Tube*, 486 U.S. at 503. The relevant question is whether the process itself is "employed as a means of imposing cost and delay." *Columbia*, 499 U.S. at 382. The Amended Complaint clearly alleges that it was. JA 9-10, 19-20, 24-25.

Accordingly, the Amended Complaint satisfies the second prong of the sham exception test by alleging that the Defendants filed 29 complaints before 19 tribunals within 12 weeks in order to inflict direct harm upon the Candidate Plaintiffs' campaign by means of the judicial process itself. *See id.* The allegations in the Amended Complaint therefore satisfy the two-part test for establishing a sham under the *Noerr-Pennington* doctrine. *See PRE*, 508 U.S. at 60-61.

II. Defendants Do Not Dispute, and Therefore Concede, That the District Court Committed Reversible Error By Failing to Accept All Allegations in the Amended Complaint as True, and By Resolving Disputed Issues of Fact Against the Candidate/Voter Plaintiffs, in Violation of the Well-Established Standard of Review on a Motion to Dismiss.

A. The District Court Failed to Accept Allegations in the Amended Complaint as True.

The well settled standard governing motions to dismiss under Rule 12(b)(6) does not authorize the District Court to choose which allegations in a complaint to accept as true, and which to reject, but rather requires the

District Court to accept *all* such allegations as true. *See generally Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) (“*Aktieselskabet*”); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“Rule 12(b)(6) does not countenance. . . dismissals based on a judge’s disbelief of a complaint’s factual allegations”) (citation omitted). In plain contravention of this inviolable rule, the District Court expressly declined to consider and affirmatively rejected numerous specific allegations that were integral to the Candidate/Voter Plaintiffs’ Amended Complaint.

Specifically, the District Court expressly declined to consider any allegation that Conspirators engaged in sabotage and other unlawful acts intended to manufacture grounds for their otherwise baseless litigation. JA 26-29, 109 n.19. The District Court also affirmatively rejected any allegation that the Defendants used judicial processes for the improper purpose of bankrupting their competitors. 104 n.15, 107 n.18. Such allegations go to the heart of the Candidate/Voter Plaintiffs’ claims that the Defendants knowingly filed a pattern of baseless and repetitive claims for an improper purpose. Moreover, these allegations were not, as the Defendants claim, mere labels and conclusions, Def. Br. 42, but were supported by specific factual details. *See infra* Part I.B.1; JA 27-29, 48-49, 52-55, 64.

Whether the Defendants filed 29 complaints within 12 weeks in order to bankrupt their competitors, as the Amended Complaint alleges, or because the “piecemeal nature of our federalist electoral process” required it, as the District Court concluded, is manifestly a question of fact that cannot be resolved upon a motion to dismiss. *See Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 676 (D.C. Cir. 2005) (“The district court cannot choose between these competing explanations without first resolving questions of fact not before it upon a motion to dismiss”). Moreover, the District Court’s rejection of allegations in the Amended Complaint because it found them “unpersuasive,” JA 107 n.18, plainly confuses “a motion to dismiss pursuant to Rule 12(b)(6), which tests the sufficiency of the plaintiff’s allegations, [and] a motion for summary judgment pursuant to Rule 56, which tests the sufficiency [*i.e.*, persuasiveness] of the non-moving party’s evidence.” *Id.*; *see also* JA 104 n.15 (rejecting allegations as not “pertinent”). The District Court’s rejection of such allegations in favor of its own competing explanation for the Defendants’ conduct is therefore error that requires reversal. *See Covad Communications Co.*, 398 F.3d at 676.

The Defendants’ Brief completely fails to address the District Court’s reversible errors in disregarding and affirmatively rejecting allegations in the Amended Complaint. *See, e.g.*, Def. Br. 22 (mischaracterizing basis for

Candidate/Voter Plaintiffs' claims by failing to address Amended Complaint's allegations of sabotage and other unlawful acts). Although the Defendants assert that the District Court accepted as true "all allegations" in the Amended Complaint, the allegations that they cite to support this generic assertion are not the allegations in question. *Compare* Def. Br. 16 n.7 with JA 108 n.19, JA 107 n.18 and JA 104 n.15. Simply put, the Defendants' contention that the District Court accepted *some* allegations in the Amended Complaint as true fails to demonstrate that the District Court accepted *all* allegations in the Amended Complaint as true, as it was required to do. *See Aktieselskabet* 525 F.3d at 15. Accordingly, this Court should deem the District Court's error in disregarding and affirmatively rejecting allegations in the Amended Complaint to be admitted by the Defendants, and should reverse the District Court on that basis alone.

B. The District Court Resolved Disputed Issues of Fact Against the Candidate/Voter Plaintiffs.

The District Court compounded its error in failing to accept allegations in the Amended Complaint as true by resolving the primary question of fact in dispute between the parties against the Candidate/Voter Plaintiffs. *See Aktieselskabet*, 525 F.3d at 15 (under Rule 12(b)(6), a complaint must be construed "liberally in a plaintiff's favor...with the benefit of all reasonable inferences derived from the facts alleged")

(citations omitted). Specifically, the District Court concluded, as a matter of law, that the Conspirators' conduct constitutes a valid exercise of the freedom to petition guaranteed under the First Amendment, even though the Amended Complaint alleges facts that plainly fall outside the scope of valid First Amendment conduct. JA 9-11, 26-29. This was error.

As this Court has recognized, “[a]ttempts to influence governmental action through overtly corrupt conduct, such as bribes (in any context) and misrepresentation (in the adjudicatory process) are not normal and legitimate exercises of the right to petition.” *Federal Prescription Service, Inc. v. American Pharmaceutical Association*, 663 F.2d 253, 263 (D.C. Cir. 1981). Applying that principle, this Court has concluded that, “[h]owever broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods.” *Whelan II*, 48 F.3d at 1255. The Amended Complaint alleges that Conspirators systematically sabotaged the Candidate Plaintiffs' nomination petitions and engaged in other unlawful acts intended to manufacture grounds for their state court challenges. JA 26-29. Petitions filed on such grounds therefore constitute misrepresentations in the adjudicatory context, which cannot claim the protection of the First Amendment. *See Whelan II*, 48 F.3d at 1255. Moreover, such petitions were part of a pattern of baseless, repetitive claims (of 29 filed, 24 were ultimately

dismissed) that Conspirators filed with the intent to suppress the Candidate/Voter Plaintiffs' participation in the 2004 General Election by preventing the Candidate Plaintiffs from complying with state election laws. JA 9-11, 19-25. Such conduct cannot claim the protection of the First Amendment. *See California Motor Transport Co.*, 404 U.S. at 513.

The District Court's failure to accept allegations in the Amended Complaint as true led it to the erroneous conclusion of law that the Defendants' conduct was protected by the First Amendment. *See* JA 104. As previously established, the District Court improperly declined to consider any allegation that Conspirators engaged in sabotage and other unlawful acts with the intent to manufacture grounds for their otherwise baseless claims, and rejected allegations that Defendants filed a pattern of baseless and repetitive claims with the intent to use the process itself, as opposed to its outcome, to bankrupt their competitors. Both sets of allegations clearly fall beyond the scope of First Amendment protection. *See California Motor Transport Co.*, 404 U.S. at 513; *Whelan II*, 48 F.3d at 1254. The District Court arrived at its erroneous conclusion, however, because it improperly failed to accept as true the very allegations that preclude such a conclusion.

The Defendants' Brief fails to cite any authority for their contention that sabotage and other unlawful acts alleged in the Amended Complaint, or

the filing of 29 complaints before 19 tribunals within 12 weeks with the intent to bankrupt an adversary, also alleged in the Amended Complaint, are “normal and legitimate exercises of the right to petition.” *Federal Prescription Service, Inc.*, 663 F.2d at 263; JA 9-11, 26-29. Indeed, the Defendants completely fail to address the issue, which renders their contention that the District Court properly invoked the *Noerr-Pennington* doctrine as grounds for dismissal baseless. Def. Br. 24. Because the District Court’s conclusions and its dismissal of the Candidate/Voter Plaintiffs’ claims were founded on its failure to accept allegations in the Amended Complaint as true, this Court should reverse.

III. The District Court Abused Its Discretion By Maintaining Jurisdiction Over an Action That Raises State Law Claims Only.

Although a federal court’s exercise of supplemental jurisdiction over state law claims following dismissal of federal law claims is discretionary, the District Court committed a clear abuse of discretion by maintaining jurisdiction over this action. *See Edmondson v. Alban Tower Tenants Ass’n*, 48 F.3d 1260, 1263 (D.C. Cir. 1995). A district court’s discretion in such cases should be “guided by consideration of the factors enumerated in 28

U.S.C. § 1367(c).”³ *Id.* at 1266. When federal claims are dismissed before trial, the balance of factors to be considered, including judicial economy, convenience, fairness and comity, normally counsels in favor of declining to exercise such jurisdiction. *See Shekoyen v. Sibley International*, 409 F.3d 414, 424 (D.C. Cir. 2005). Furthermore, where the remaining claims raise novel or complex issues of state law, remand of such claims is especially warranted, *see Lemons v. Georgetown University Hospital*, 431 F. Supp. 2d 76, 94 (D.D.C. 2006), in order to ensure “a surer-footed reading of applicable law.” *Griffin v. Acacia Life Insurance Co.*, 151 F. Supp. 2d 78, 81 (D.D.C. 2001).

As set forth in the Candidate/Voter Plaintiffs’ Brief, the District Court’s failure to remand in this case was a clear abuse of discretion, because the federal claims were dismissed not only before trial and before any discovery took place, but even before the District Court had ruled upon the motions to dismiss. C/V Br. 2, 7-8, 58-59. Furthermore, the claims that remained raise novel and complex questions of state law. *Id.* Therefore, none

³ The district courts may decline to exercise supplemental jurisdiction over a state law claim if (1) The claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c).

of the relevant factors under Section 1367(c) counsel in favor of the District Court's exercise of jurisdiction. *See Edmondson*, 48 F.3d at 1266.

Not only did the District Court abuse its discretion in exercising jurisdiction over this exclusively state law action, but it also committed yet another reversible error, by repeatedly relying upon on case law that has been reversed or vacated. JA 85 (citing *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 829 F. Supp. 420, 426 (D.D.C. 1993) (dismissing abuse of process and malicious prosecution claims on ground that plaintiff lacked privity with defendants), *rev'd* at 48 F.3d 1260, 1263 (D.C. Cir. 1995) (vacating judgment with directions to remand or dismiss without prejudice so that plaintiff can file state law claims in Superior Court); JA 105-06 (citing *Houlahan v. World Wide Ass'n of Specialty Programs and Schools*, 2006 WL 2844190, at *8 n.12 (D.D.C. Sept. 29, 2006) (holding that intent to silence criticism through initiation of lawsuits is insufficient to support abuse of process claim), *vacated by Houlahan v. World Wide Ass'n of Specialty Programs and Schools*, No. 04-01161 (D.D.C. Feb. 6, 2007) (order vacating judgment granting summary judgment on abuse of process claim). As the District Court's mistaken reliance on reversed and vacated decisions underscores, the Candidate/Voter Plaintiffs' claims raise novel and complex issues of state law, and the District Court should have remanded or,

in the alternative, sought guidance from the District of Columbia Court of Appeals. *See Whelan II*, 48 F.3d at 1257 (recommending certification of issue to ascertain whether tort claim, properly construed, “clash[es] with the First Amendment right underlying *Noerr-Pennington*”). The Court’s error in this regard requires reversal, so that the parties may be assured of a proper reading of state law.⁴ *See Griffin*, 151 F. Supp. 2d at 81.

The Defendants’ objection notwithstanding, Def. Br. 10 n.4, the Candidate/Voter Plaintiffs did not waive the issue of the District Court’s errors in exercising jurisdiction over their state law claims. On April 8, 2008, the Candidate/Voter Plaintiffs submitted a Notice of Filing to notify the District Court of the related federal actions pending before it, and giving notice that they had withdrawn their motion to remand the instant action in order to allow the District Court, in its discretion, to consolidate this exclusively state law action with the related federal actions, or to remand the state law claims to the Superior Court of the District of Columbia. Notice of Filing (April 8, 2008). Either of these alternatives would have been a proper exercise of the District Court’s discretion. Instead, however, the District Court maintained jurisdiction over the instant action and adjudicated it

⁴ On these grounds, dismissal of the Voter Plaintiffs’ claims was also reversible error. C/V Br. 57-59.

separately. This was an abuse of discretion. *See Edmondson*, 48 F.3d at 1263, 1266.

The Candidate/Voter Plaintiffs did not waive their objection to the District Court's abuse of discretion, because they could not have raised such an objection until the District Court committed the abuse by adjudicating their state law claims separately. Accordingly, the Candidate/Voter Plaintiffs properly raised this issue on appeal, and did so explicitly in the Statement of Issues in their brief. C/V Br. 2 ("Whether the District Court erred in dismissing the Amended Complaint...where the Amended Complaint raises state law tort claims for abuse of process, malicious prosecution and civil conspiracy, but does not raise federal claims"). Furthermore, the issue cannot be deemed waived where, as here, it is supported not only by argument, but by extensive citation to controlling case law in support of that argument. C/V Br. 57-59.

The District Court abused its discretion in maintaining jurisdiction over this exclusively state law action, and therefore, this Court should reverse with instructions to remand.

IV. The District Court's Opinion Cannot Be Affirmed By Invoking an Affirmative Defense Based Upon the Statute of Limitations.

Contrary to the Defendants' claim, the District Court not only addressed their statute of limitations affirmative defense, but properly

concluded that it could not support their motions to dismiss. JA 99.

“Because statute of limitations issues often depend on contested questions of fact,” the District Court reasoned, a motion to dismiss can be granted on such grounds only if the complaint is, on its face, conclusively time-barred, and “no reasonable person could disagree on the date on which the cause of action accrued.” JA 99 (citing *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996); *Doe v. Dep't of Justice*, 753 F.2d 1092, 1115 (D.C. Cir. 1985); *Smith v. Brown & Williamson Tobacco Corp.*, 3 F. Supp. 2d 1473, 1475 (D.D.C. 1998). Defendants cannot meet this high bar for two reasons. First, they fraudulently concealed their tortious conduct, and second, they are engaged in ongoing acts in furtherance of a continuing tort. Therefore, this Court should reject their statute of limitations affirmative defense. *See id.*

The Amended Complaint alleges with specificity that the Defendants engaged in affirmative acts to deny and fraudulently conceal their tortious conduct. JA 25, 64; *see Richards v. Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981) (“fraudulent concealment requires that the defendant commit some positive act tending to conceal the cause of action from the plaintiff, although any word or act tending to suppress the truth is enough”). These affirmative acts were intended to conceal, and did in fact conceal, the

Defendants’ participation in the unlawful conspiracy alleged in the Amended Complaint, and even the existence of the conspiracy itself, until after the conclusion of the 2004 General Election.⁵ JA 25, 64. Therefore, Defendants cannot demonstrate, to a degree of certainty that “no reasonable person” could dispute, *Smith*, 3 F. Supp. 2d at 1475, that the Candidate/Voter Plaintiffs knew or should have known of a cause of action which the Defendants denied and fraudulently concealed – much less that such cause of action is now conclusively time barred. *See Richards*, 662 F.2d at 73 n.13 (question of plaintiff’s diligence in discovering cause of action cannot be decided on a motion to dismiss); *see also Riddell v. Riddell Washington Corp.*, 866 F.2d 1480 (D.C. Cir. 1989) (one conspirator’s act of fraudulent concealment tolls statute of limitations as to all co-conspirators and as to the underlying substantive claims).⁶

⁵ In particular, the Defendants denied and fraudulently concealed the coordinated nature of the proceedings that they initiated before 19 tribunals nationwide, thus obscuring the crucial fact that they filed a pattern of baseless, repetitive claims. JA 25, 64. Although records filed with the FEC and the Internal Revenue Service (“IRS”) now indicate that the Defendants did in fact coordinate their efforts, the Defendants’ claim that such records were “instantly publicly available” is misleading, Def. Br. 50, because the relevant records were not filed until *after* the conclusion of the 2004 General Election. JA 35, 40, 42, 51, 65.

⁶ For this reason, the Defendants’ claim that the statute runs against each of them individually is erroneous. Def. Br. 49 n.24.

Furthermore, the wrongful and abusive litigation that Defendants initiated during the 2004 General Election remains ongoing, in the form of attachment proceedings that Defendant-Conspirator Reed Smith initiated against Plaintiff Nader in the District of Columbia Superior Court, in an effort to collect on a judgment wrongfully procured as a result of the allegedly criminal conspiracy under investigation by the Pennsylvania Attorney General. JA 64. The Candidate/Voter Plaintiffs' claims are thus actionable on the alternative ground that the Defendants are engaged in ongoing acts in furtherance of a continuing tort. *See Jung v. Mundy, Holt & Mance, P.C.*, 372 F.3d 429, 433 (D.C. Cir. 2004) (citing *Whelan v. Abell*, 953 F.2d 663, 673 (D.C. Cir. 1992) (“*Whelan I*”)).

Under District of Columbia law, a plaintiff establishes a continuing tort by showing “(1) a continuous and repetitious wrong, (2) with damages flowing from the act as a whole rather than from each individual act, and (3) at least one injurious act within the limitation period.” *Whelan I*, 953 F.2d at 673 (quoting *DeKine v. District of Columbia*, 422 A.2d 981, 988 n.16 (D.C. 1980)). This Court has recognized that the “prosecution of a lawsuit can constitute a continuing tort,” because “[t]he commencement of a lawsuit is only the first link in a chain of conduct that does not end until the

complaining party ceases prosecution of the suit.” *See Whelan I*, 953 F.2d at 673-74. Further:

[A] lawsuit is a continuous, not an isolated event, because its effects persist from the initial filing to the final disposition.... A defendant subject to a lawsuit is likely to suffer damage not so much from the initial complaint but from the cumulative costs of defense and the reputational harm caused by an unresolved claim.

Jung, 372 F.3d at 433 (citing *Whelan I*, 953 F.2d at 673). This rationale applies with even greater force in the case at bar, where the Defendants’ tortious “chain of conduct” arises not from just one lawsuit, but from proceedings initiated in 18 state courts, a federal agency, and the District of Columbia, all with a common goal of inflicting financial harm on the same adversarial party.⁷ *See id.*

The Amended Complaint clearly alleges conduct occurring within the purported limitations period by virtue of the attachment proceedings initiated against Plaintiff Nader, which remain ongoing to the present day.⁸ JA 64.

⁷ The case law that the Defendants cite to suggest that their abusive litigation is not an ongoing tort is plainly inapposite, because it does not even concern allegations of abusive litigation, much less a pattern of abusive litigation, as in the case at bar. Def. Br. 49 (citing *Richards v. Duke Univ.*, 480 F. Supp. 2d 222, 235-37 (D.D.C. 2007)).

⁸ In addition, the Defendants’ FEC actions were not resolved in the Candidate Plaintiffs’ favor until April 21, 2006, well within three years of the date that the Candidate/Voter Plaintiffs filed their complaint, on October 30, 2007. Therefore, the process that the Defendants initiated before the FEC did not terminate upon the filing of their complaints in 2004, as they

The Defendants cannot argue that the Candidate/Voter Plaintiffs' claims are time-barred, while they continue to engage in the very conduct that gives rise to such claims. *See Whelan I*, 953 F.2d at 674; *Jung*, 372 F.3d at 434. Rather, plaintiffs are entitled to bring their claims so long as the continuing tort remains ongoing. *See Jung*, 372 F.3d at 434; *see also Whelan I*, 953 F.2d at 673 (statute of limitations on abuse of process claim begins to run not when abusive claim is asserted, but when it ceases to be asserted) (citation omitted).

Accordingly, because the Defendants fail to establish conclusively the date on which the Candidate/Voter Plaintiffs' claims accrued, and because the Defendants are engaged in ongoing acts in furtherance of their continuing tort, the District Court's decision cannot be affirmed on statute of limitations grounds.

V. The Amended Complaint Pleads the Elements Necessary to State Claims for Abuse of Process, Malicious Prosecution and Civil Conspiracy.

Because the Candidate/Voters' Brief clearly establishes that the Amended Complaint pleads the elements necessary to state claims for abuse of process and malicious prosecution, C/V Br. 30-42, this Reply Brief

contend, but upon the conclusion of the process that such complaints initiated, in 2006.

simply corrects the Defendants' errors with respect to their conspiracy claims.

The Amended Complaint plainly pleads facts sufficient to support the Candidate/Voter Plaintiffs' conspiracy claims. *See Twombly*, 550 U.S. 544; *Executive Sandwich Shoppe, Inc. v. Carr Realty*, 749 A.2d 724, 738 (D.C. 2000). The Amended Complaint alleges that Defendants formed their conspiracy pursuant to an agreement following the 2000 General Election, the specific details of which approximately 36 lead Conspirators and Defendants discussed at a meeting on July 26, 2004 at the Four Seasons Hotel in Boston. JA 20. The Amended Complaint further alleges numerous specific facts and cites evidence, such as eyewitness testimony, email records, IRS records and FEC records, which indicate that each Defendant joined the conspiracy. C/V Br. 12-13; JA 19-25, 52, 54. Defendants seek to cast doubt on the plausibility of such factual allegations by recasting them as "labels and conclusions," Def. Br. 42, but their reliance on *Twombly* is misplaced. *See Twombly*, 550 U.S. 544. As this Court recently explained, "*Twombly* was concerned with the plausibility of an inference of conspiracy, not with the plausibility of a claim." *Aktieselskabet*, 525 F.3d at 16. Defendants' attempts to impugn the plausibility of allegations in the Amended Complaint therefore cannot, as a matter of law, defeat the

sufficiency of such allegations to support the Candidate/Voter Plaintiffs' conspiracy claims. *See id.*

CONCLUSION

For the foregoing reasons, the District Court erroneously dismissed the Amended Complaint, and this Court should reverse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify that this Reply Brief of Appellants complies with the type-volume limitation of Federal Rule of Appellate Procedure Rule 32(a)(7)(B) because this brief contains 6,985 words, excluding the Cover Pages, Table of Contents, Table of Authorities, Glossary, Oral Argument Statement and Certificates.

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Dated: February 13, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 2009, I served two copies of the foregoing Reply Brief of Appellants via UPS upon each of the following:

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