

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 09-1809

THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC.,

Plaintiff - Appellant,

v.

NATIONAL REAL ESTATE INFORMATION SERVICES AND
NATIONAL REAL ESTATE INFORMATION SERVICES, INC.,

Defendants - Appellees.

On Appeal from a Judgment of the United States District Court
for the District of Massachusetts

**BRIEF OF *AMICUS CURIAE*,
THE BOSTON BAR ASSOCIATION,
IN SUPPORT OF PLAINTIFF-APPELLANT
AND REVERSAL OF THE JUDGMENT BELOW**

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Dated: February 12, 2010

CORPORATE DISCLOSURE STATEMENT

The Boston Bar Association (“BBA”), is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. The BBA is a bar association established almost 250 years ago, and currently has approximately 9,500 members. There is no parent corporation or publicly-held corporation that owns 10% or more of BBA’s stock.

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I. INTEREST OF AMICUS CURIAE

The Boston Bar Association (“BBA”) was founded in 1761 by John Adams and other Boston lawyers and is the nation’s oldest bar association. The BBA’s mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. From its early beginnings, the BBA has served as a resource for the judicial, legislative and executive branches of government.

The BBA does not here seek to be heard on whether defendants-appellees, National Real Estate Information Services and National Real Estate Information Services, Inc. (together, “NREIS”) actually engaged in the unauthorized practice of law in violation of Mass. Gen. Laws c. 221, § 46A, or on the application of the Dormant Commerce Clause to the claims of plaintiff-appellant, the Real Estate Bar Association for Massachusetts, Inc. (“REBA”). As amicus, the BBA takes no position on either of those issues. Rather, the interest asserted by the BBA as amicus in this case is in preserving the constitutionally protected right of all litigants, including bar associations, to petition courts for the redress of grievances that have a reasonable basis in fact and in law, regardless of whether the courts ultimately grant or deny relief on the merits. This right is protected by the First Amendment to the United States Constitution and is central to the mission of the

BBA. In the words of BBA founder and drafter of the Massachusetts Constitution

John Adams:

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obligated to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Mass. Const. pt. 1, art. XI.

In this case, the district court imposed liability on REBA under 42 U.S.C. § 1983 for pursuing a claim that NREIS engaged in the unauthorized practice of law, finding that REBA's interpretation of Mass. Gen. Laws c. 221, § 46A would violate the Dormant Commerce Clause. The BBA respectfully submits that the district court's judgment penalizes the free exercise of the constitutionally protected right to bring reasonably based claims for judicial relief and, in so doing, inhibits not just bar associations, but all potential litigants, from exercising important rights protected by the First Amendment.

The source of authority to file this brief is Fed. R. App. P. 29(a). The BBA has filed contemporaneously a motion for leave to file this brief pursuant to Fed. R. App. P. 29(b).

II. SUMMARY OF ARGUMENT

The district court imposed liability on REBA for violation of 42 U.S.C. § 1983 (and subsequently ordered REBA to pay NREIS \$904,076.17 in legal fees pursuant to that statute) based solely upon REBA's request for a judicial ruling on an important and complex question of state law. Although the district court rejected the legal theories advanced by REBA, it acknowledged the difficult nature of the issues presented and made no findings that REBA's claims were frivolous or were in any way a sham attempt to use the litigation process for an ulterior motive. Under these circumstances, no matter what the ruling on REBA's claims on the merits, imposing liability for bringing a non-frivolous lawsuit penalizes protected petitioning activities and chills the rights of all potential litigants to petition the courts for redress of grievances. (Pages 4 - 11).

The plain text of 42 U.S.C. § 1983 compels the same conclusion. A Section 1983 claim lies only if the defendant acts "under color of state law." The fact that a litigant has standing to sue under a state statute, like Mass. Gen. Laws c. 221, § 46B, does not turn the litigant into a state actor. The district court's contrary conclusion would turn any private litigant with a claim created by state legislation into a potential Section 1983 defendant. For this reason too, the district court's judgment that REBA is liable under § 1983 for bringing a non-frivolous legal claim should be reversed. (Pages 11 - 15)

III. ARGUMENT

A. The First Amendment Right To Petition Protects Reasonably Based Litigation Claims.

The district court imposed liability on REBA under 42 U.S.C. § 1983 based on its finding that REBA's claim that NREIS engaged in the unauthorized practice of law in violation of Mass. Gen. Laws c. 221, § 46A would, if adopted as Massachusetts law, violate NREIS's rights under the Dormant Commerce Clause. Add. at 4, 9.¹ As shown below, because REBA's lawsuit was a reasonably based petition for judicial relief, the suit cannot form the basis for liability under the First Amendment.

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." The Supreme Court has recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights." *Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222 (1967). The right is implied by the "very idea of a government, republican in form." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)).

¹ Citations to the addendum contained in the Brief of Plaintiff-Appellant are made by reference to "Add. at ____" and the page number of the addendum.

The right to petition the judicial branch to resolve a dispute falls squarely within the First Amendment right to petition the government. *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“The right of access to the courts is indeed but one aspect of the right of petition.”). *See generally Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742-43 (1983). This constitutionally protected right to petition the courts is not limited to suits against governmental actors or other types of public interest litigation. To the contrary, the First Amendment protects the right of litigants to “use . . . courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors.” *Cal. Motor Transport*, 404 U.S. at 511. *See also BE & K*, 536 U.S. at 525.

In addition, just as the text of the First Amendment is not limited to “successful petitioning,” but instead “speaks simply of the ‘right of the people . . . to petition the Government for a redress of grievances,’” the right to petition the courts is not bestowed only upon prevailing parties. *BE & K*, 536 U.S. at 532. Stated otherwise, the First Amendment protects petitioning “whenever it is genuine, not simply when it triumphs.” *Id.* As the Supreme Court has recognized, “even unsuccessful but reasonably based suits advance some First Amendment interests.” *Id.*

Like successful suits, unsuccessful suits allow the “public airing of disputed facts,” and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around. Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force.

Id. (citation omitted).

The principle that even unsuccessful litigants enjoy petitioning rights was illustrated in the Supreme Court’s *BE & K* decision. *BE & K* arose out of a lawsuit brought by a non-union employer alleging that two unions violated federal labor and antitrust laws by their lobbying, picketing, litigation and grievance activities. 536 U.S. at 519-20. Ultimately, the employer either lost or withdrew all of its claims. In response to the suit, the unions filed complaints with the National Labor Relations Board (the “Board”), which ruled that the employer violated federal labor law by pursuing its claims against the unions. Among the sanctions entered by the Board was an order that the employer pay the legal fees and expenses incurred by the unions in defending against the employer’s claims and cease and desist from prosecuting similar suits. *Id.* at 519, 523.

The Supreme Court reversed, citing prior precedent holding that “First Amendment and federalism concerns prevented ‘[t]he filing and prosecution of a well-founded lawsuit’ from being ‘enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff’s desire to retaliate against

the defendant for exercising rights protected by the [NLRA].” 536 U.S. at 526-27 (quoting *Bill Johnson’s Restaurants*, 461 U.S. at 737, 743). The Court also noted that, in the antitrust context, it had relied on the First Amendment to interpret the Sherman Act as permitting competitors to petition the executive, legislative and judicial branches to take action that would produce a restraint or a monopoly. *Id.* at 525 (citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *California Motor Transport*, 404 U.S. at 511).

“This line of cases,” stated the Court, establishes that, unlike “sham petitioning,” “genuine petitioning is immune from antitrust liability.” *BE & K*, 536 U.S. at 525-26. For a lawsuit to lose the *Noerr-Pennington* protections for petitioning activities, the Court continued, the suit “must be a sham *both* objectively and subjectively.” *BE & K*, 536 U.S. at 526 (emphasis in original).

“[F]irst, it ‘must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits’; second, the litigant’s subjective motivation must ‘concea[l] 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.’”

Id. (citation omitted; emphasis in original).

Applying these principles, the *BE & K* Court held that reasonably based lawsuits are protected petitioning activities, regardless of whether the claims

succeed on the merits. *See* 536 U.S. at 532 (“the genuineness of a grievance does not turn on whether it succeeds”). According to the Court, if a litigant’s belief that his adversary’s conduct is unprotected is “subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning.” *Id.* at 534.

Indeed, even if a plaintiff harbors ill will towards a defendant, the right to petition is not necessarily lost. As the Court observed in *BE&K*, “ill will is not uncommon in litigation.” *Id.* at 534. “Disputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the situation. But that does not mean such disputes are not genuine. As long as a plaintiff’s *purpose* is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively.” *Id.* (emphasis in original). Permitting sanctions to be imposed for filing a suit brought for retaliatory purposes even if the suit was not objectively baseless would, according to the Court, “fai[l] to exclude a substantial amount of petitioning activity that is objectively and subjectively reasonable.” *Id.* at 534-35.²

² The Court concluded that it “need not decide whether the Board may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity, since the Board’s standard does not confine itself to such suits.” *Id.*

In sum, there can be no doubt that REBA's legal action against NREIS was a petitioning activity protected by the First Amendment. As shown below, the district court's findings do not support the conclusion that REBA's exercise of that constitutional right may form the basis for liability under § 1983.

B. The District Court's § 1983 Judgment Violates REBA's First Amendment Right To Petition The Courts.

By filing the complaint in this action, REBA was exercising a right expressly granted under § 46B to "petition" the courts to restrain the unauthorized practice of law. Even assuming that the district court correctly ruled that NREIS was not engaged in the unauthorized practice of law under § 46A and that a contrary interpretation of the statute would violate the Dormant Commerce Clause (issues on which the BBA takes no position), REBA's pursuit of the lawsuit was petitioning protected by the First Amendment.

First as established above, the fact that REBA failed on its claim under § 46A is utterly irrelevant to the petitioning analysis. *BE & K*, 536 U.S. at 532. Although the district court rejected REBA's legal theory, the record contains no findings – indeed, not so much as a suggestion – that REBA's suit was "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" or that REBA's subjective motivation was to interfere with the business of NREIS "through the use [of] the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon." *BE & K*, 536 U.S. at

526 (emphasis in original; citations and quotations omitted). To the contrary, the district court expressly acknowledged that REBA's complaint raised difficult, case-specific issues of law. Add. at 9. Accordingly, there is no basis on which to conclude that REBA's claim that NREIS was engaged in the unauthorized practice of law was sham litigation beyond the protections of the First Amendment. *BE & K*, 536 U.S. at 526.

That REBA's members were in some sense business competitors of NREIS did not disqualify the organization from the constitutional protection afforded petitioning activities. *Cal. Motor Transport*, 404 U.S. at 511. Moreover, treating § 46A's prohibition against the unauthorized practice of law as merely a means to restrain competition degrades the important public policy underlying the legislative framework. "The justification for excluding from the practice of law persons not admitted to the bar is to be found, not in the protection of the bar from competition, but in the protection of the public from being advised and represented in legal matters by incompetent and unreliable persons, over whom the judicial department could exercise little control." *Lowell Bar Ass'n v. Loeb*, 315 Mass. 176, 180, 52 N.E.2d 27, 31 (1943). The prohibition "is in no sense promoted and fostered for the personal advantage of individuals. It can be justified only on the ground that long experience has shown it to be absolutely essential to the public welfare." *In re Keenan*, 314 Mass. 544, 547, 50 N.E.2d 785, 787 (1943). *See generally LAS*

Collection Management v. Pagan, 447 Mass. 847, 850, 858 N.E.2d 273, 276 (2006) (“The purpose of the limitation is to protect the public.”).

Bar associations have an important role to play in ensuring that the public is protected from the harm that § 46A and § 46B were enacted to prevent. That goal cannot be accomplished without resort to the courts. The district court explicitly acknowledged that the Massachusetts Supreme Judicial Court has found it “impossible to frame any comprehensive and satisfactory definition of what constitutes the practice of law,” and has required that “to a large extent each case must be decided upon its own particular facts.” Add. at 9 (*quoting In re Shoe Mfrs. Protective Ass’n*, 295 Mass. 369, 372, 3 N.E.2d 746, 748 (1936)). *See also Lowell Bar Ass’n v. Loeb*, 315 Mass. 176, 180, 52 N.E.2d 27, 31 (1943) (“It is not easy to define the practice of law.”). Regardless of whether, with the benefit of 20/20 hindsight, REBA’s position on the scope of § 46A is determined to be right or wrong, its request that a court decide a complicated question of such importance to the public welfare cannot form the basis for liability under § 1983. The district court’s judgment against REBA under § 1983 therefore should be reversed.

C. REBA Was Not Acting Under Color Of State Law

NREIS also claims that REBA lost its First Amendment right to petition the government because it acted under the “color of state law” under § 1983 when it exercised its statutory cause of action under § 46B. This analysis is fatally flawed.

First, even assuming that REBA became a state actor by filing a civil lawsuit, it still retained First Amendment rights. *See generally Pleasant Grove City, Utah v. Summum*, ___ U.S. ___, 129 S.Ct. 1125, 1131 (2009) (“A government entity has the right to speak for itself” and “is entitled to say what it wishes”) (citations and quotations omitted). “Indeed, it is not easy to imagine how government could function if it lacked this freedom.” *Id.*; *see also Sutcliffe v. Epping School Dist.*, 584 F.3d 314, 329-30 (1st. Cir. 2009). Because REBA, like any private or public citizen, has a constitutional right to pursue a reasonably based judicial grievance, the judgment against REBA under § 1983 must be reversed.

In all events, NREIS’s § 1983 argument independently fails as a matter of statutory construction. A substantial body of case law compels the conclusion that the correct interpretation of the “color of state law” provision of § 1983 must be significantly influenced, and limited, when First Amendment interests are at stake. This is, of course, the familiar rule of statutory construction applied in the Supreme Court’s *Noerr-Pennington* line of cases under the Sherman Act. Construing the federal antitrust laws to impose liability for pursuing reasonably based litigation claims – even claims that would produce a restraint or a monopoly – raises First Amendment considerations of sufficient magnitude that the Supreme Court has found prudential reasons to adopt alternative statutory interpretations that avoid

unnecessary constitutional conflicts. *Noerr*, 365 U.S. at 136; *Pennington*, 381 U.S. at 670.

Those same prudential considerations have been applied by this court, and other courts, in interpreting the scope of § 1983. *See Yeo v. Town of Lexington*, 131 F.3d 241, 255 (1st Cir. 1997). In determining whether a private party has acted under color of state law under § 1983, the court must take into account whether its holding will have the effect of restricting protected First Amendment interests. *Id.* at 249-50. As this Court stated in *Tomaiolo v. Mallinoff*, 281 F.3d 1, 11 (1st Cir. 2002):

A finding that these private actors were state actors, even if they can arguably be said to have induced the particular statutory interpretations by the state actors, might well chill the exercise of their own rights to communicate with government. Several circuits have held, and this one has at least hinted, that in view of the First Amendment the courts should avoid an interpretation of § 1983 so broad as to encompass petitions for government action. *See Tarpley v. Keistler*, 188 F.3d 788, 793-95 (7th Cir. 1999) (collecting cases); *cf. Munoz Vargas v. Romero Barcelo*, 532 F.2d 765, 766 (1st Cir. 1976) (“[T]here is no remedy . . . against private persons who urge the enactment of laws, regardless of their motives.”).

Id. (footnote omitted). *See also id.* at 9 (claim that government actor took the allegedly incorrect advice of a private actor did not warrant finding that private person acted under color of state law); *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1093 (9th Cir. 2000) (declining to interpret § 1983 to reach

activities of town officials who lobbied to prevent a county from leasing space from a property owner in the town); *Tarpley* 188 F.3d at 794-95 (“Although originally applied to provide immunity from antitrust prosecution, the *Noerr-Pennington* cloak of protection has been extended to cover other areas of law, including claims under § 1983.”); *Video Int’l Prod., Inc. v. Warner-Amex Cable Comm’cns*, 858 F.2d 1075, 1084 (5th Cir. 1988) (applying *Noerr-Pennington* rationale to § 1983 claims).

At bottom, NREIS contends that REBA was acting under color of state law for § 1983 purposes simply because it exercised a private right of action granted under § 46B. The implications of such an argument vividly illustrate the error of NREIS’s position. For if merely exercising a right to sue granted by a statute means that a private person is acting under color of state law, the following categories of plaintiffs would be exposed to § 1983 liability simply by virtue of filing litigation claims: (1) abutters challenging orders under the Massachusetts Wetlands Protections Act (Mass. Gen. Laws c. 131, § 40); (2) persons aggrieved by zoning decisions (Mass. Gen. Laws c. 40A, § 17); (3) discrimination plaintiffs (Mass. Gen. Laws c. 151B); (4) civil rights plaintiffs (Mass. Gen. Laws c. 12, §§ 11H and 11I); and (5) plaintiffs bringing *qui tam* actions under the Massachusetts False Claims Act (Mass. Gen. Laws c. 12, §§ 5A-5O). There

simply is no basis for interpreting § 1983 so expansively and at the expense of fundamental First Amendment freedoms.

Finally, the color of state law element is consistent with § 1983's requirement that, for liability to exist, a defendant must "subject, or cause to be subjected" a person to "the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." 42 U.S.C. § 1983. *See generally Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 691-94 (1978); *Donahue v. City of Boston*, 304 F.3d 110, 115-16 & n.5, 119 (1st Cir. 2002); *Yeo*, 131 F.3d at 256 (Stahl, J., concurring in the judgment). Because the interpretation of § 46A advanced by REBA never was adopted or enforced in Massachusetts, it is impossible for NREIS to prove that REBA caused the deprivation of *any* rights whatsoever. NREIS successfully defended REBA's lawsuit; it did not suffer any deprivation of rights, and certainly not at the hands of REBA. Even if REBA's interpretation of § 46A had prevailed, it would have been an act of the Massachusetts legislature, not REBA, that would have prevented NREIS from continuing its business in the Commonwealth. The judgment should therefore be reversed due to NREIS's inability to show that REBA acted under color of state law in causing any cognizable deprivation of a federal right.

IV. CONCLUSION

For the foregoing reasons, the BBA respectfully submits that the judgment of liability entered by the district court against REBA under § 1983 should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 3,673 words, which is less than half the length allowed for a party's principal brief under Fed. R. App. P. 32(a)(7)(B), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2003 in 14 point Times New Roman.

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d)(1)(B), I certify that the BRIEF OF AMICUS CURIAE, THE BOSTON BAR ASSOCIATION, IN SUPPORT OF PLAINTIFF-APPELLANT AND SUPPORTING REVERSAL, filed electronically with the Clerk's Office of the United State Court of Appeals for the First Circuit, was served by hand delivery to the following counsel of record on February 12, 2010:

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