No. 15-1156

IN THE

Supreme Court of the United States

VILLAGE SUPERMARKETS, INC. AND HANOVER AND HORSEHILL DEVELOPMENT, LLC.,

Petitioners,

v.

HANOVER 3201 REALTY, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

JAMES E. CECCHI
Counsel of Record
JOHN M. AGNELLO
LINDSEY H. TAYLOR
CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700
jcecchi@carellabyrne.com

Attorneys for Respondent

265090

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether there are compelling reasons to grant certiorari to review an issue of antitrust standing governed by well-settled Supreme Court precedent.

2. Whether there are compelling reasons to grant certiorari to:

(a) review the manner in which the "sham" exception to *Noerr-Pennington* immunity is applied under *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) and *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), when every Court of Appeals to have considered the issue have come to the same result, or

(b) create a "bright-line" test as to the number of proceedings required to be a "pattern" or "series" under *California Motor Transport*.

LIST OF PARTIES TO THE PROCEEDING

PETITIONERS

Village Supermarkets, Inc. ("Village")
Hanover and Horsehill Development, LLC ("Horsehill")

RESPONDENT

Hanover 3201 Realty, LLC ("Hanover Realty")

RULE 29.6 STATEMENT

Plaintiff/Respondent Hanover Realty is a special purpose entity wholly owned by Mack-Cali Realty, L.P. Mack-Cali Realty Corporation, which is publicly traded on the New York Stock Exchange, owns 10% or more of Mack-Cali Realty, L.P.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

STATUTES AND OTHER AUTHORITIES

BASIS FOR SUPREME COURT JURISDICTION

The subject of the petition is the Order of the Third Circuit entered on November 12, 2015. Rehearing was denied by Order dated December 11, 2015. The basis for jurisdiction in this Court is 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

Congress shall make no law . . . abridging the freedom . . . to petition the government for a redress of grievances.

15 U.S.C. § 15(a)

AMOUNT OF RECOVERY; PREJUDGMENT INTEREST [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . .

COUNTER-STATEMENT OF THE CASE

I. COUNTER-STATEMENT OF FACTS

A. The Parties

Hanover Realty owns real property located in Hanover, Morris County, New Jersey at the intersections of Interstate 287 and State Route 10 (the "Property"). (Complaint, ¶6)[1] Village is the second-largest owner

1. "Complaint" means the Amended Complaint filed on April 14, 2014.

of Shop Rite grocery stores. Of the 29 ShopRite supermarkets owned by Village, 26 are located in New Jersey. (Complaint, ¶¶7-8) Horsehill, a subsidiary of Village, owns the land located at 178 East Hanover Avenue, Hanover, New Jersey upon which Village built and operates the ShopRite of Greater Morristown.[2] (Complaint, ¶¶9; 36-37)

B. The Full Service Supermarket Market

Village's public filings acknowledge that the supermarket business in general is "highly competitive and characterized by narrow profit margins". (Complaint, ¶27) In order to gain a competitive edge, supermarket chains have begun to open "full service" supermarkets, which offer not only traditional groceries but additional amenities, including prepared foods that can be eaten either on-site or "to go", wine and liquor available for purchase or for consumption both on-site and off-site, specialty products, and other services such as pharmacies, banks and fitness centers. (Complaint, ¶24)

The full-service supermarket is designed to cater to customers' preferences to purchase their food from supermarkets located near their homes and for a "one-stop shopping" experience, so that they can make a single trip for most of their food shopping needs. In order to meet those preferences and be competitive, a full-service supermarket must be close to both a large upscale population and major thoroughfares. The value of a full-service supermarket location is tied to the shoppers' ability to quickly arrive at

2. Village is publicly traded on the NASDAQ exchange ("VLGEA").

home after conveniently completing all of their shopping at a single location. (Complaint, ¶¶22-25) There are high barriers to entry into the full-service supermarket market because of the shortage of available, appropriately zoned property, the financial costs associated with development of a full-service supermarket, the finite needs of shoppers and the necessity of pre-existing name recognition to attract shoppers. (Complaint, ¶26)

C. Village's ShopRite Of Greater Morristown

Village's ShopRite of Greater Morristown is a 77,000 square foot full-service supermarket.[3] (Complaint, ¶35) Village boasts that the ShopRite of Greater Morristown is "a shopping experience unlike any other supermarket or food store." (Complaint, ¶40) In addition to traditional groceries, the Morristown store is described as having a "Health & Wellness Center including a fitness studio," and a "European Food Hall offering food crafted in store by an experienced internationally trained culinary team." The ShopRite of Greater Morristown is also touted as incorporating "a liquor store showcasing a wide variety of packaged goods from craft brews, fine wines and top shelf liquors." Shoppers can buy liquor for consumption on-site or off-site. The ShopRite of Greater Morristown is, according to Village, designed to "reinvent your idea of food shopping." (Complaint, ¶¶41-42)

---

3. According to public filings, on November 6, 2013, Defendant Village opened the ShopRite of Greater Morristown as a "replacement store in Hanover Township" to "serve the greater Morristown area and replace the Morris Plains store." Village's ShopRite supermarket in Morris Plains has since closed. (Complaint, ¶39)

D. The Proposed Wegmans Supermarket

Hanover Realty entered into a lease and site development agreement with Wegmans under which the Property is leased to Wegmans for the purpose of constructing a large full-service supermarket ("Wegmans Supermarket"). (Complaint, ¶14) Hanover Realty has the obligation to obtain all necessary government approvals for the construction of the Wegmans Supermarket. (Complaint, ¶16) If Hanover Realty failed to obtain the necessary government approvals within 24 months of the July 6, 2012 effective date of the lease, Wegmans, absent an extension, may nullify the agreements. (Complaint, ¶¶17-18)

The proposed Wegmans Supermarket would be approximately 2,000 feet from the intersection of Route 10 and Interstate 287, and approximately 2 miles from the ShopRite of Greater Morristown. (Complaint, ¶¶44-45) Other than the ShopRite of Greater Morristown, there are no other full-service supermarkets in Hanover. (Complaint, ¶46) Likewise, there are no other full-service supermarkets within a distance of the proposed Wegmans Supermarket similar to the distance between the ShopRite of Greater Morristown and the proposed Wegmans Supermarket. (Complaint, ¶47)

As a result, the proposed Wegmans would compete directly with the ShopRite of Greater Morristown. Village has acknowledged in its public filings that Wegmans is one of Village's "principal competitors," and that competition with Wegmans, among others, is based in part on store location. (Complaint, ¶49) It has also acknowledged in public filings that "[r]esults of operations may be

materially adversely impacted by competitive pricing and promotional programs, industry consolidation and competitor store openings." (Complaint, ¶27) If the Wegmans Supermarket were to open, it would inevitably cut into the business of Village's ShopRite of Greater Morristown.

E. Village's Sham Litigations Against Hanover Realty And Other Anti-Competitive Conduct

In direct response to Hanover Realty's efforts to secure the necessary government approvals and permits to build the Wegmans Supermarket, Village has taken every opportunity to interfere with the approval/permitting process. Village's actions include the submission of baseless objections by counsel and independent consultants hired by Village, requests for adjudicatory hearings, meetings and conferences regarding Hanover Realty's various applications, and filing multiple lawsuits, all with the intent to delay and/or prevent Hanover Realty from developing the Wegmans Supermarket. These actions were not designed to achieve a legitimate positive result for Village on the merits. Rather, they were intended only to invoke the processes themselves, to cause Hanover Realty to incur the expense of having to defend itself and to delay the regulatory processes. (Complaint, ¶¶50-51)

1. The FHA Permit

In conjunction with the Wegmans project, Hanover Realty sought a Flood Hazard Area ("FHA") Individual Permit from the New Jersey Department of Environmental Protection ("DEP"). That permit was granted on August 16, 2013 ("FHA Permit"). (Complaint, ¶¶60-61)

On October 3, 2013, Village submitted an appeal to the DEP challenging the issuance of the FHA Permit, and seeking an order vacating the FHA Permit and requiring Hanover Realty to start the FHA permitting process before the DEP all over again (the "FHA Permit Challenge"). Village also requested an adjudicatory hearing on the FHA Permit Challenge. (Complaint, ¶63) The sole asserted basis for Village's standing to bring the FHA Permit Challenge was that Village's operations of its Shoprite of Greater Morristown, and its then-existing Shoprite located in Morris Plains, "will be detrimentally impacted" by the competition created by the Wegmans Supermarket. (Complaint, ¶64)

On October 21, 2013, Hanover Realty submitted a letter to the DEP explaining that Village did not have standing to seek an adjudicatory hearing relating to the issuance of the FHA Permit. Specifically, the New Jersey Flood Hazard Area Control Act, N.J.S.A. 58:16A-50 ("FHA Act") contains no provision granting third parties a right to an adjudicatory hearing to contest a permit issued by the DEP. In addition, Village had no particularized property interest that would otherwise give it standing to challenge the FHA Permit, since Village's only claim was that it was a competitor and that the issuance of the FHA Permit would injure its economic interests. (Complaint, ¶¶65-66)

Despite not having standing, Village persisted in its FHA Permit Challenge, submitting multiple letters in support of its challenges, including repeated requests for adjudicatory hearings, and bringing to the DEP's attention "new" facts that were known to Village at the time it filed its original appeal. At no time did Village

ever address the fact that it did not have standing under the FHA Act to contest the issuance of the FHA Permit. (Complaint, ¶¶68-76)

By Order dated May 5, 2014, the DEP rejected Village's request for an adjudicatory hearing because it had no standing to make the request. (JA-155 to 158)[4] It also rejected Village's objections to the issuance of the FHA Permit on the merits. (JA-158 to 161)

2. The Wetlands Permits

In May 2013, Hanover Realty submitted a Multi-Permit Application to the DEP seeking the FHA Permit discussed above, as well as Freshwater Wetlands General Permits and a Transition Area Waiver under the Freshwater Wetlands rules (collectively, the "Wetlands Permit Application"). (Complaint, ¶77) On August 8, 2013, Wander Ecological Consultants ("Wander") submitted a letter to the DEP on behalf of Village, setting forth numerous alleged issues and objections to the Wetlands Permit Application. (Complaint, ¶80)

Wander's August 8, 2013 list of issues included a complaint that the "Notice to Neighboring Landowners" was technically deficient.[5] Wander also claimed that the Property was a potential habitat for certain endangered species, including the Indiana Bat. (Complaint, ¶¶81-82) On August 14, 2013, Village's counsel submitted a letter to the DEP re-submitting Wander's August 8 letter

4. "JA" refers to the Joint Appendix filed in the Third Circuit.

5. Hanover Realty corrected the administrative error in the Notice and mailed the corrected notice on August 16, 2013.

and explaining to the DEP that Village, which owns 29 ShopRite supermarkets, had concerns and objections to the Wetlands Permit Application and had separately submitted objections to the FHA Permit Application. Village's August 14 letter "strongly urge[d]" the DEP to "diligently and prudently" evaluate Hanover Realty's FHA Permit and Wetlands Permit Application and to not act with "haste" in approving Hanover Realty's permit applications. (Complaint, ¶¶83-84) However, Village had no standing to object to the issuance of a Wetlands Permit because it was not an adjoining landowner and its property interests were not otherwise affected except for the fact that if the Wegmans Supermarket were to open, the competition from Wegmans would hurt Village's business. (Complaint, ¶¶87-88)

Hanover Realty's environmental consultants addressed all of Village's objections. (Complaint, ¶¶91-92) Subsequently, Wander contacted both the DEP and the United States Fish and Wildlife Service by telephone, email, and in an additional letter in order to submit additional information regarding Village's complaints about the Wetlands Permit Application.[6] (Complaint, ¶¶93-96) In addition, Village made numerous requests for documents to Hanover Township pursuant to the Open Public Records Act ("OPRA") relating to the Wetlands Permit Application. (Complaint, ¶¶97) These requests were designed to seek out alleged deficiencies in the application that could be used by Village to hinder, impede,

6. In an email from Wander to the Fish and Wildlife Service dated September 12, 2013, Wander admitted that Village's objections submitted to DEP had "*managed to delay the issuance of approvals based on a technicality.*" (Complaint, ¶94)

delay, obstruct, and/or prevent Hanover Realty's efforts to promptly obtain the necessary permits and approvals for the construction of the Wegmans Supermarket.

On November 14, 2013, Village submitted additional comments and objections to the DEP. Village's November 14, 2013 letter set forth numerous comments and arguments regarding alleged technical deficiencies in the Wetlands Permit Application and the DEP's treatment of the Application, which were mostly a rehash of its prior objections. (Complaint, ¶¶99-100, 102) However, in addition, Village also included a claim that the DEP had rejected Hanover Realty's initial Wetlands Permit Application and therefore Hanover Realty should resubmit a completely new application to the DEP before the DEP considers the Wetlands Permit Application. (Complaint, ¶100)

On January 31, 2014, the DEP issued the requested Freshwater Wetlands General Permits and a Transition Area Waiver to Hanover Realty with conditions, including a condition that an Indiana Bat survey be conducted in the spring before any site prep, land clearing, grading or construction activities could proceed.[7] (Complaint, ¶105) On March 19, 2014, Village submitted a request for an adjudicatory hearing to the DEP with respect to Hanover Realty's Wetlands Permit Application. (Complaint, ¶106) On June 9, 2015 the Commissioner of the DEP denied Village's request, both because Village lacked standing and on the merits.

---

7. The bat survey, not surprisingly, found no Indiana Bats in the area.

On August 25, 2015 (after oral argument before the Third Circuit), Village, through its COO John Sumas as nominal plaintiff, filed a complaint and order to show cause in New Jersey Superior Court seeking to enjoin further work at the Property, alleging that the Wetlands Permits had been improperly issued. (3d Cir. Docket Entry 9/10/2015) The Superior Court denied Village's application for a preliminary injunction based on a lack of jurisdiction. *Id.* The Superior Court held that the appropriate vehicle to challenging the issuance of the Wetlands Permits was to appeal the DEP decision to the Appellate Division (which Village was out of time to do), not institute a separate lawsuit. *Id.* The Superior Court did direct the Morris County Soil Conservation District to conduct an investigation as to whether there were any current violations of environmental regulations involving the Property. *Id.* The Soil Conservation District found no violations. On January 26, 2016 (after the Third Circuit decision), the Superior Court dismissed this action. On February 12, 2016, Village filed a notice of appeal with the Appellate Division and an emergent motion for injunctive relief pending appeal. That motion was rejected by the Appellate Division by Order dated February 29, 2016.[8]

3. The DOT Dispute

The Property was previously owned by Prudential Insurance Company of America ("Prudential"). It is a portion of a larger piece of land, running beside Route 10

8. The events occurring after the Third Circuit's decision are all matters of public record, which are appropriately considered on a motion to dismiss. *See In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1426 (3d Cir. 1997).

between I-287 and U.S. 202, which was envisioned as an office campus (the "Campus"). In 2011, the Property was transferred to Hanover Realty. (Complaint, ¶110)

In 1978, Prudential entered into a four-phased Developer's Agreement with the New Jersey Department of Transportation ("DOT") to build road improvements as Prudential reached certain levels of development on the Campus.[9] (Complaint, ¶111) Ultimately, Prudential and DOT agreed upon a roadway improvement plan that was tied to a total development of 1,750,000 square feet. The proposed Wegmans Supermarket is part of a proposed 170,455 square foot shopping center being developed as part of the Phase III 1,750,000 square foot allotment. (Complaint, ¶¶112-115) All Phase III traffic improvements required by the Developer's Agreement were completed long ago. (JA-84, ¶118) The Phase IV traffic improvements set forth in the Developer's Agreement, which included what is referred to as a "grade separation" or "overpass" over Interstate 287, were not required until such time as the Phase III permitted 1,750,000 square feet of development was completed. (Complaint, ¶119)

As part of the approval process for the Wegmans project, Hanover Realty submitted a Major Street Intersection with Planning Review Application ("MSI Permit Application") to DOT proposing improvements to the intersection of Ridgedale Avenue and Route 10. (Complaint, ¶¶120-121)

---

9. The Developer's Agreement contemplated that the DOT and the developer would meet to discuss the portions of the agreement addressing development associated with Phases III and IV.

On September 17, 2013, Village submitted a letter to DOT containing objections to the MSI Permit Application, including a traffic engineering analysis commissioned by Village, and requesting that the DOT deny Hanover Realty's MSI Permit Application. Village's September 17 letter also requested a meeting with DOT to discuss Village's "concerns" regarding the MSI Permit Application. However, Village had no standing to complain about the MSI Permit Application because it owned no property near the Ridgedale Avenue/Route 10 intersection. (Complaint, ¶¶123-127)

On October 7, 2013, Hanover Realty wrote to DOT in response to Village's submission and noted Village's lack of an interest in the MSI Permit Application other than as a competitor seeking to avoid competition. (Complaint, ¶128) Village never addressed its lack of standing. It did, however, make a series of OPRA requests to DOT, the Township of Hanover, the Township of Morris Plains, and the Township of Parsippany in order to seek out additional information it could use to contest Hanover Realty's right to make the proposed intersection improvements. (Complaint, ¶129)

Village also complained to DOT that Hanover Realty had an obligation to build the I-287 overpass before it could begin any further development of the Property.[10] (Complaint, ¶131) On November 12, 2013, Hanover Realty submitted a letter to DOT, as well as a letter from its traffic engineering consultant, explaining that

10. Village was aware that Hanover Realty had no obligation to build the I-287 overpass because its counsel had previously represented Prudential in negotiating the Developer's Agreement.

it was not required to build the I-287 overpass because the proposed Wegmans Supermarket is part of the allowable build-out of 1,750,000 square feet of development associated with Phase III. Hanover Realty subsequently submitted another letter explaining, point by point, why the Developer's Agreement did not require it to build the Phase IV roadway improvements, including the I-287 overpass.[11] (Complaint, ¶¶132-136)

On February 12, 2014, DOT issued a letter rejecting certain of the traffic calculations advanced by Village. DOT also directed Hanover Realty to consider constructing a reverse-loop jughandle at the Ridgedale Avenue/Route 10 intersection. In addition, while noting that the proposed retail development would generate weekend peak hour traffic greater than that contemplated for Phase III under the Developer's Agreement, the DOT acknowledged that any contemplated improvements may not be possible or beneficial. Thus, the DOT recommended a further modification to the Developer's Agreement be negotiated. (Complaint, ¶137) The DOT permit was ultimately issued on April 23, 2015.

On June 1, 2015, Village, through its bookkeeper, Maria Esposito as nominal plaintiff, filed an appeal of the issuance of the DOT permit with the Superior Court of New Jersey, Appellate Division. (3d Cir. Docket Entry 6/11/2015) That appeal is pending.

---

11. On February 20, 2014, the Hanover Township Committee adopted an ordinance eliminating the I-287 overpass requirement entirely. That ordinance later became an issue in Village's Action in Lieu of Prerogative Writs filed against Hanover Realty and Hanover Township.

On December 15, 2015 (after the Third Circuit's decision), Village, in the name of its COO John Sumas, sent a letter to the NJDEP complaining that the design of the reverse-loop jughandle put forth by DOT would adversely impact flood runoff and should be rejected.

4. The Action in Lieu of Prerogative Writs

Throughout the summer of 2012, a variety of state and local media outlets ran repeated stories advising the public that a Wegmans Supermarket would be opened at the Property. Thus, as a member of the public, Village was aware of Hanover Realty's plan to develop the Property with a Wegmans Supermarket and connected shopping center. (Complaint, ¶¶143-44)

On August 28, 2012, Hanover Realty appeared before the Hanover Township Committee requesting the Township Committee to amend Hanover's Zoning Ordinance to allow the Property to be used for retail space. (Complaint, ¶¶145-46) On October 25, 2012, after public notice of the proposed rezoning, the Township Committee granted Hanover Realty's zoning change application for the Wegmans' project. (Complaint, ¶148) Village did not attend any of the hearings regarding the zoning change and did not submit any objections to the zoning change to the Township Committee. (Complaint, ¶149)

On March 7, 2013, after the adoption of the zoning change, Hanover Realty filed an application before the Hanover Township Planning Board for preliminary and final site plan and bulk variance approval for the Wegmans project. (Complaint, ¶150) On June 18, 2013,

the Planning Board held a public hearing on Hanover Realty's application and voted to approve the application. (Complaint, ¶151) At a public hearing on June 25, 2013, the Planning Board adopted a resolution approving Hanover Realty's preliminary and final site plan and bulk variance application. (Complaint, ¶152) No Village representative attended the hearings before the Planning Board, or submitted objections. (Complaint, ¶153)

On August 12, 2013, Village filed an action in lieu of prerogative writs (the "PW Action") in the Superior Court of New Jersey, Law Division, Morris County, against the Planning Board and Hanover Realty in an effort to nullify the site plan and bulk variance approvals. (Complaint, ¶154) The initial complaint in the PW Action contained twelve counts alleging that Hanover Realty's approvals were arbitrarily and capriciously granted. (Complaint, ¶¶154-55, 157)

After filing the PW Action, Village did its best to delay. On September 12, 2013, Village filed a First Amended Complaint, which added 5 new paragraphs. There was no purpose for filing the amendment other than delay. In addition, Village sought extensive and unnecessary discovery in the PW Action regarding the DOT approvals. As a matter of law, Planning Board approval is subject to other agency approval pursuant to N.J.S.A. 40:55-22. Thus, the need for state agency approvals could not be grounds to attack the Planning Board approval. On February 18, 2014, just prior to a scheduled trial date, Village filed a Second Amended Complaint, and simultaneously moved for leave to supplement the record and to file a Third Amended Complaint. The Third Amended Complaint was designed to add the Hanover Township Committee

as a defendant in order to challenge the 2012 ordinance changing the zoning of the Property to allow a retail store. (Complaint, ¶¶156-62)

On June 30, 2014, the Superior Court dismissed the PW Action, both because Village had no standing to challenge Hanover Realty's zoning approvals, and on the merits. (JA-121 to 150) The Superior Court addressed each of Village's substantive arguments and found them to be without merit. (JA 140-151) On December 24, 2015 (after the Third Circuit's decision), the Appellate Division held that Village had standing, but affirmed the Superior Court's judgment on the merits as being "unassailable". (Pet., 118a) "Having reviewed the record, briefs, and argument of counsel, we are satisfied that we need not add to the judge's thoughtful analysis of the issues presented. Thus, we affirm substantially for the reasons set forth in the trial judge's opinion."[12] (Pet., 120a)

On June 1, 2015, while the PW Action was on appeal, Village's bookkeeper Maria Esposito, as nominal plaintiff, filed yet another action in New Jersey Superior Court seeking to void the approvals granted by the Planning Board because Hanover Realty could not satisfy all of the conditions of the approvals (particularly the DOT approvals), and because notice of the approvals was improper. This action was summarily dismissed by the Superior Court by way of Order dated March 8, 2016 (after the Third Circuit's decision). In its Statement of

12. Village characterizes this result as having "prevailed on some of the arguments raised in the underlying proceedings." (Pet., 20) At best, since the Appellate Division affirmed the Superior Court's judgment of dismissal on the merits, Village "prevailed" on a hollow argument that it had standing to assert baseless claims.

Reasons, the Superior Court held "[a]fter conducting an in-depth review of the Complaint, as a matter of law, the Court finds that Plaintiff does not have a valid cause of action, and therefore, dismisses Plaintiff's Complaint with prejudice, as it fails to state a claim upon which relief may be granted."

II. PROCEDURAL HISTORY

Hanover Realty filed this action on February 28, 2014 against Village and unknown John Doe and ABC Corp. defendants alleging that, by filing a series of frivolous challenges to Hanover Realty's applications for the various approvals and permits necessary to construct a competing Wegmans Supermarket, Defendants were attempting to monopolize the full-service supermarket market in the greater Morristown, New Jersey area (the "Supermarket Market"). Hanover Realty asserted claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, *et seq.*, tortious interference with contractual relations, tortious interference with prospective economic advantage, and civil conspiracy. (JA-19 to 61)

On April 14, 2014, on consent from Defendants, Hanover Realty filed an Amended Complaint, which added Defendant Horsehill, a wholly owned subsidiary of Village, and added claims under the Sherman Act and the New Jersey Antitrust Act alleging that Village and Horsehill were also attempting to monopolize the full-service supermarket shopping center market in the greater Morristown area (the "Shopping Center Market"). (JA-61 to 114)

On June 13, 2014, Defendants filed a motion to dismiss the Amended Complaint. (JA-115) Defendants argued, among other things, that Hanover Realty lacked standing to assert antitrust claims.

On October 2, 2014, the District Court dismissed Hanover Realty's claims with prejudice. The District Court found that Hanover Realty did not have standing to assert antitrust claims against Village or Horsehill because it was not a competitor of either of them. The District Court did not rule on the merits of Hanover Realty's claims and dismissed its state law claims for lack of subject-matter jurisdiction because it had dismissed the federal antitrust claims. (Pet., Appendix D)

Hanover Realty filed its notice of appeal on October 14, 2014. (JA-1)

On November 12, 2015, the Third Circuit reversed in part, holding that Hanover Realty had antitrust standing to assert claims for monopolization of the full-service supermarket market because Village's anticompetitive actions to keep Wegmans out of the market had been directed at Hanover Realty and Hanover Realty had suffered injuries separate and apart from any suffered by Wegmans or consumers. The Third Circuit also ruled on the merits of Hanover Realty's claims, holding that Hanover Realty had pleaded a monopolization claim on the merits and that Village's repeated meritless petitioning fell within the sham exception of the *Noerr-Pennington* doctrine. (Pet., Appendix B)

REASONS FOR DENYING THE PETITION

Village asks the Court to review the Third Circuit's holding that Hanover Realty has standing to assert antitrust claims and that those claims are not barred by the *Noerr-Pennington* doctrine. In doing so, Village contends that there is a split among the Circuits as to whether antitrust standing is limited exclusively to competitors and consumers. Village further posits that the Third Circuit ignored Supreme Court precedent when it found the "sham" exception to *Noerr-Pennington* immunity applicable in this case. Village is wrong on both counts.

As demonstrated below, Village has failed to satisfy any of the criteria for granting certiorari.

I. ANTITRUST STANDING IS GOVERNED BY WELL-SETTLED SUPREME COURT PRECEDENT AND THERE IS NO SPLIT AMONG THE CIRCUITS ON THE ISSUE

Village seeks this Court's review with respect to the issue of whether antitrust standing is exclusively limited to competitors and consumers. It argues that there is a split among the Circuits on this issue requiring this Court's guidance. The issue does not require this Court's attention since over 30 years ago the Court held that antitrust standing is not limited to competitors and consumers. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483 (1982), Blue Shield allegedly conspired with psychiatrists not to cover services provided by psychologists in an effort to force psychologists out of the market. The Court held that even though the plaintiff, who was a Blue Shield

subscriber, was not a competitor of the defendants, her injury was "inextricably intertwined" with those at whom the conspiracy was directed and her injury "flow[ed] from that which makes the defendants acts unlawful." To further explain "inextricably intertwined" injury, the Court put forth a hypothetical example:

> If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.

Id. at 484, n. 21. *McCready's* hypothetical bank is the party at whom the anti-competitive scheme is aimed. Like Hanover Realty, the hypothetical bank is neither a competitor (of the psychiatrists) nor a consumer (of psychiatric services), but would still have standing to assert an antitrust claim.

A year after *McCready* was decided, the Court again visited the issue of antitrust standing in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). There, the Court specifically eschewed enunciating a "black-letter" rule on antitrust standing.

> There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause," and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. It is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing. In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case.

Associated General Contractors, 459 U.S. at 535-36. In lieu of the black-letter alternative, the Court set forth a number of factors courts should consider as to whether a plaintiff has antitrust standing *Id.* at 537-38. Thus, the hard-and-fast rule limiting antitrust standing to competitors or consumers – the very interpretation Village is lobbying for – has already been considered and rejected by the Court.

Furthermore, despite Village's strained argument, there is no split among the circuits as to whether antitrust standing is limited to competitors and consumers. Although Village contends that the Fifth, Seventh, Eighth and Ninth Circuits have so limited antitrust standing (Pet., 5-6), Village is wrong. Each of these Circuits have recognized that there is no bright-line rule limiting antitrust standing to competitors and consumers. *Waggoner v. Denbury Onshore, LLC*, 612 Fed. Appx. 734, 737 (5th Cir. 2015) ("Typically, parties with antitrust injury are either competitors, purchasers or consumers in

the relevant market. . . . But standing is not necessarily limited to this group." (citing *McCready*)); *Nelson v. Monroe Regional Medical Center*, 925 F.2d 1555, 1562 (7th Cir. 1991) ("In *Associated General Contractors, supra,* the Court recognized that, in light of 'the infinite variety of claims' that might arise under § 4, it was 'virtually impossible to announce a black-letter rule that will dictate the result in every case.' Instead of promulgating such a rule, the Court pointed to various 'factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.'" (internal citations omitted)); *State of South Dakota v. Kansas City Southern Industries, Inc.*, 880 F.2d 40, 46 n. 16 (8th Cir. 1989) ("The antitrust laws 'were enacted for the protection of *competition*, not *competitors*.' This does not mean that the statute confines its protection solely to consumers, competitors, buyers and sellers. Standing determinations must be made on a case by case basis." (internal citations omitted; emphasis in original); *American Ad Management, Inc. v. General Telephone Co. of California*, 190 F.3d 1051, 1057 (9th Cir. 1999) ("The Supreme Court has not imposed a 'consumer or competitor' test but instead held that the antitrust laws are not so limited.").[13]

Unmasked, Village's petition is not asking this Court to resolve an unsettled issue of law. Rather, Village is asking the Court to overrule *McCready* and *Associated*

13. Village cites *Sullivan v. Tagliabue*, 25 F.3d 43, 49 (1st Cir. 1994) for the proposition that "[t]he circuits are split, however, over the question of whether a plaintiff must be either a consumer or competitor in the market harmed by the antitrust violation at issue in order to establish antitrust injury." (Pet., 4). To the extent that there may arguably have been such a split in 1994, a split no longer exists.

General Contractors and impose a bright-line rule that antitrust standing is limited to competitors and consumers. As such, Village's invitation is directly at odds with the doctrine of *stare decisis* and should be rejected. The Court does not depart from the doctrine of *stare decisis* without compelling justification. *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991). No compelling justification is presented here.[14]

The Third Circuit meticulously applied this Court's precedent regarding antitrust standing to the unique facts of this case. The court analyzed at length the factors for determining antitrust standing enunciated by *McCready* and *Associated General Contractors*. *See Hanover 3201 Realty, LLC v. Village Supermarkets, Inc.,* 806 F.3d 162, 172-177 (3d Cir. 2015). The court recognized that antitrust standing is generally limited to competitors and consumers in the restrained market, "and those whose injuries are the means by which the defendants seek to achieve their anticompetitive ends." *Id.* at 172.

The Third Circuit determined Hanover Realty had antitrust standing because it falls into the latter category.

---

14. Even under the worst circumstances, the Court is reluctant to overturn settled precedent. *See Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007). This case is far from being "the worst of circumstances." It involves the interpretation of Section 4 of the Clayton Act, 15 U.S.C. § 15(a), which provides for private civil actions for violation of the antitrust laws. The doctrine of *stare decisis* is particularly strong with respect to issues of statutory interpretation, in recognition of the ability of Congress to change the statute if it so desires. *See, e.g., Halliburton Co. v. Erica P. John Fund*, 134 S.Ct. 2398, 2411 (2014) (quoting *John R. Sand & Gravel Co. v. U.S.*, 552 U.S. 130, 139 (2008)).

> Hanover Realty admits it is neither a competitor nor a consumer in the market for full-service supermarkets; it is a land owner and lessor of property, not a food retailer. It instead argues that its injuries were "inextricably intertwined" with Defendant's attempt to monopolize that market.
>
> The Supreme Court first recognized this form of antitrust injury in *McCready* . . . .

Id. at 172.

> Because Hanover Realty alleges that its harm was the essential component of Defendants' anticompetitive scheme as opposed to an ancillary byproduct of it, we conclude that Hanover Realty has sufficiently pleaded antitrust injury under *McCready*. . . . The end goal of Defendants' alleged anticompetitive conduct was to injure Wegmans, a prospective competitor. To keep Wegmans out of the market, Defendants sought to impose costs not on their competitor, but on Hanover Realty, the party tasked with obtaining the necessary permits before construction could begin. Absent this relationship between Hanover Realty and Wegmans, Defendants' conduct "would have been without purpose or effect." And Defendants would succeed in their scheme either by inflicting such high costs on Hanover Realty that it was forced to abandon the project or by delaying the project long enough so that Wegmans would back out of the agreement. In

> both scenarios, injuring Hanover Realty was the very means by which Defendants could get to Wegmans; Hanover Realty's injury was necessary to Defendants' plan.
>
> Had Wegmans purchased the property from Hanover Realty and itself applied for the permits, the costs imposed by Defendants' challenges would have qualified as antitrust injuries. It should make no difference that the parties' lease shifted these costs to Hanover Realty. Regardless of who bore these costs, Defendants' objective remained the same: to keep Wegmans out of the relevant market.

Id. at 173-74.

Village concedes that Wegmans and consumers would have antitrust standing. (Pet., 12) Their standing does not exclude Hanover Realty from also having antitrust standing, nor does Hanover Realty having antitrust standing give rise to the concerns expressed in *Associated General Contractors* about potentially duplicative recoveries or the danger of complex apportionment of damages as Village suggests. (*See* Pet., 12-13) The Third Circuit directly addressed these issues and found that they were not of concern in this case.

First, the Third Circuit found that Hanover Realty had been directly injured as a result of Village's anti-competitive challenges.

> Defendants' legal challenges directly injured Hanover Realty. If Defendants' attempt to

> prevent Wegmans from leasing the property fails, then Hanover Realty will have suffered the costs of responding to the legal challenges while Wegmans may have experienced no loss at all. In addition, to the extent Defendants succeed in obstructing the lease, Hanover Realty's loss of rent under the contract would result directly and not through "several somewhat vaguely defined links." That Wegmans is another possible direct victim "does not diminish the directness of [Hanover Realty's] injury."

Id. at 177 (internal citations omitted).

The Third Circuit then considered, and rejected, Village's contention that there was a risk of duplicative recovery and/or complex apportionment of damages.

> The final factor, the potential for duplicative recovery or complex apportionment of damages, also supports standing. Hanover Realty's recovery of the costs of responding to the legal challenges would not pose a risk "of overlapping damages as no other [party has] suffered this distinct type of injury." Furthermore, any damages awarded for the delay or obstruction of the lease would not yield duplicative recovery as the lost rent to Hanover Realty would have to be subtracted as a cost from any subsequent claim by Wegmans for lost profits. Although this last scenario would require some apportionment of damages, the calculation would not be complex.

Id. (internal citations omitted).

Equally unavailing is Village's position that a circuit split exists because other circuits (on different records) have found that landlords do not have antitrust standing. The Third Circuit found the primary case relied upon by Village for this proposition to be unpersuasive since "it addressed a different set of facts and a different kind of injury."[15] *Id.* at 175.

The Third Circuit's decision neither misconstrued nor ignored the controlling law on the issue of antitrust standing. (*See* Pet., 10-12) To the contrary, the Third Circuit painstakingly *followed* this Court's well-settled precedents in reaching its decision that Hanover Realty has antitrust standing.

No compelling reason has been presented for this Court to grant the Petition to review the issue of antitrust standing.

---

15. Village continues to rely upon *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983), as it did before the Third Circuit. The Third Circuit distinguished *Southaven* on the facts. *Hanover 3201 Realty*, 806 F.3d at 175-76. It observed that the harm Southaven claimed, "subverting its business and financial interests," were simply incidental effects of Malone's actions in the real estate market, not the means by which Malone was attempting to achieve its legal ends. *Id.* "In fact, *Southaven* supports the view that there *was* antitrust injury here, for Hanover Realty was used as the 'fulcrum, conduit or market force' that was missing in *Southaven.* Forcing Hanover Realty to pay thousands of dollars in legal fees to defend itself against alleged anticompetitive filings and imposing significant delays on the project were the very means by which Defendants sought to keep a competitor out of the market." *Id.* at 176 (emphasis in original).

II. THE THIRD CIRCUIT PROPERLY APPLIED *CALIFORNIA MOTOR TRANSPORT* IN HOLDING VILLAGE HAD ENGAGED IN A PATTERN OF BASELESS LITIGATION GIVING RISE TO THE SHAM EXCEPTION

Ordinarily, efforts to influence or induce governmental actions are protected from antitrust liability by the *Noerr-Pennington* doctrine, as falling within the First Amendment right to petition the government. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,* 508 U.S. 49 (1993) ("*PRE*"). However, *Noerr-Pennington* immunity does not apply where the actions are nothing more than a sham to cover an attempt to interfere with the business relationships of a competitor. *Id.* at 56-57. "The 'sham' exception to *Noerr* encompasses situations in which persons use the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon. 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." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991) (emphasis in original).

When a single legal challenge is the basis for the alleged antitrust injury, the court must engage in a two-step analysis to determine if the "sham" exception applies. First, the action must be objectively baseless, such that it was not reasonably calculated to elicit a favorable outcome. *PRE*, 508 U.S. at 60. If the action is objectively baseless, the Court must focus on the defendant's motivation in invoking government process, whether the defendant was attempting to use the process, rather than the outcome of

the process. *Id.* at 60-61 (citing *Noerr* and *Omni*, emphasis in original).

In *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), the Court spoke to a situation where a number of proceedings had been instituted as an integral part of conduct giving rise to alleged antitrust liability. There, the Court observed:

> It is alleged that petitioners 'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.' . . . As stated in the opinion concurring in the judgment, such a purpose or intent, if shown, would be 'to discourage and ultimately to prevent the respondents from invoking' the processes of the administrative agencies and courts and thus fall within the exception to Noerr.

California Motor Transport, 404 U.S. at 512.

Village argues that *PRE* requires that the two-part objective/subjective *PRE* test, not the test articulated in the earlier *California Motor Transport* decision, be applied in all situations where the sham exception to *Noerr-Pennington* immunity is invoked. (Pet., 15-17) *PRE* did not overturn or modify *California Motor Transport.* In fact, *PRE* relied extensively upon *California Motor Transport* and noted that *Noerr-Pennington* immunity had always incorporated an element that the petitioning activity must lack objective reasonableness for the sham exception to apply. *See PRE*, 508 U.S. at 56-59.

The first case to reconcile *PRE* and *California Motor Transport* was *USS-POSCO Industries v. Contra Costa Co. Building & Construction Trades Council*, 31 F.3d 800 (9th Cir. 1994). There, the defendant union argued, just as Village does here, that *PRE* had overruled *California Motor Transport* and required that each individual challenge or proceeding claimed to give rise to antitrust injury must be found to be objectively baseless. *USS-POSCO*, 31 F.3d at 810. The Ninth Circuit rejected that contention, finding that *PRE* and *California Motor Transport* dealt with different situations. *PRE* addressed a single act of petitioning while *California Motor Transport* addressed a series of legal proceedings

> *California Motor Transport* deals with the case where the defendant is accused of bringing a whole series of legal proceedings. Litigation is invariably costly, distracting and time-consuming; having to defend a whole series of such proceedings can inflict a crushing burden on a business. *California Motor Transport* thus recognized that the filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action, and can serve as a very effective restraint on trade. When dealing with a series of lawsuits, the question is not whether any one of them has merit—some may turn out to, just as a matter of chance—but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival. The inquiry in such cases is prospective: Were the legal filings made, not out of a genuine interest in redressing grievances,

> but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?

USS-POSCO, 31 F.3d at 811.

Since *USS-POSCO*, each of the other Circuits which have addressed the apparent tension between *PRE* and *California Motor Transport* have followed *USS-POSCO*. *See Primetime 24 Joint Venture v. National Broadcasting Co.*, 219 F.3d 92, 101 (2d Cir. 2000) (following *USS-POSCO*); *Waugh Chapel South LLC v. United Food and Commercial Workers Union Local 27*, 728 F.3d 354, 363 (4th Cir. 2013) (following *USS-POSCO* and *Primetime*). Here, the Third Circuit followed the Second, Fourth and Ninth Circuits in holding that *PRE* addresses a single act of petitioning, while *California Motor Transport* addresses a series of petitions. *Hanover 3201 Realty*, 806 F.3d at 179-80.

> Accordingly, when a party alleges a series of legal proceedings, we conclude that the sham litigation standard from *California Motor* should govern. This inquiry asks whether a series of petitions were 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 a market rival and restrain trade. In deciding whether there was such a policy of filing petitions with or without regard to merit, a court should perform a holistic review that may include looking at the defendant's filing success—i.e., win-loss percentage—as circumstantial evidence of the

> defendant's subjective motivations. If more than an insignificant number of filings have objective merit, a defendant likely did not have a policy of filing "willy-nilly without regard to success." A high percentage of meritless or objectively baseless proceedings, on the other hand, will tend to support a finding that the filings were not brought to redress any actual grievances. Courts should also consider other evidence of bad-faith as well as the magnitude and nature of the collateral harm imposed on plaintiffs by defendants' petitioning activity (e.g., abuses of the discovery process and interference with access to governmental agencies).

Id. at 180-81.[16]

---

16. The Third Circuit did not, as Village contends, discard the objectively baseless consideration from the *Noerr-Pennington* analysis. (Pet., 18) Rather, the Third Circuit, following the other Circuits, did not apply the objectively baseless to each and every argument the defendant makes in each and every petition. Rather it conducted a holistic review of the multiple petitions filed by Village. As the Ninth Circuit recognized in *USS-POSCO*, in a series of petitions, even though advanced pursuant to a policy of petitioning regardless of the merits, some position, even if by random chance, might be meritorious. *USS-POSCO*, 31 F.3d at 811. "[T]he fact that a small number in the series of lawsuits turn out not to be frivolous will not be fatal to a claim under *California Motor Transport;* even a broken clock is right twice a day." *Id.* Village also quotes from Judge Greenberg's dissent to support its position that the Third Circuit discarded the objectively baseless element of *Noerr-Pennington*. (Pet., 17) Judge Greenberg's dissent is simply an incorrect reading of the majority's opinion, and those of the other Circuits upon which the Third Circuit relied.

Village's contention that the Third Circuit should have applied the "objectively baseless" prong of the test enunciated by this Court in *PRE* to each of Village's challenges to determine whether Village's petitioning activities fell within the sham exception of the *Noerr-Pennington* doctrine is without merit. *PRE* "is ill-fitted to test whether a series of legal proceedings is sham litigation." *Waugh Chapel*, 728 F.3d at 364. The Third Circuit, in fact, *did* address whether Village's petitioning was objectively baseless. However, it did so in the context of *California Motor Transport*'s test applicable to serial petitioning. Thus, rather than ignoring Supreme Court precedent, as Village argues, the Third Circuit followed applicable precedent.

Village also complains that it had not filed enough challenges to qualify as a "series" under *California Motor Transport* and that the Court should create a bright-line test (to Village's advantage), whereby the *California Motor Transport* "series" or "pattern" test only applies when the number of baseless petitions is greater than four. (Pet., 18-19) *California Motor Transport* disposed of the notion that a bright line could be drawn and specifically created a "know it when I see it" test for determining whether a series of baseless petitioning exists. [17]

> One claim, which a court or agency may think baseless, may go unnoticed; but a pattern

17. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hardcore pornography]; and perhaps I could never succeed in intelligibly doing so. But I *know it when I see it*, and the motion picture involved in this case is not that." (emphasis added)).

> of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result . . . .

California Motor Transport, 404 U.S. at 513.

On the facts of this case, the Third Circuit drew the line on the side of Village's petitioning being a "series" or "pattern" falling within *California Motor Transport*.

> Defendants argue as a threshold matter that the four actions they filed against Hanover Realty are too few to even qualify as a pattern or series. We are not convinced. In so concluding, we do not set a minimum number requirement for the applicability of *California Motor* or find that four sham petitions will always support the use of *California Motor*. It is sufficient for our purposes that four petitions were filed against Hanover Realty and it alleges that Defendants filed these sham proceedings at every opportunity to obstruct Hanover Realty from "obtaining all necessary government approvals."

Hanover 3201 Realty, 806 F.3d at 181.

Village argues that even using four as the number of challenges is suspect, since it was only because of "New Jersey's regulatory structure" that it had to file

four challenges to a single project. (Pet., 19) The fact New Jersey has separate agencies that oversee zoning, environmental and highway permitting and approvals is far from uncommon. Moreover, Village conveniently omits the fact that it filed multiple challenges to each approval for the Property with every agency possible, and as soon as one challenge was rejected, it would file another.

Village filed an action in lieu of prerogative writ in its own name to challenge Hanover Realty's zoning approvals and, when that was rejected, it filed another lawsuit in the name of its bookkeeper to challenge the approvals. Village objected in its own name to the DOT approvals for the intersection improvements and, after that was rejected, it filed an appeal in its bookkeeper's name in the Appellate Division. As part of its challenge to the Wetlands Permit, in addition to repeatedly sending challenges to the DEP, it complained to the Fish & Wildlife Service that there might be Indiana Bats on the property. When its challenge to the Wetlands Permit was rejected by the DEP, Village's COO filed a separate lawsuit to collaterally attack the grant of the permit. Each and every one of these challenges was rejected by the agency or court in which it was filed. Viewed holistically, the Third Circuit reasonably concluded that Village's actions constituted a pattern of sham challenges. [18]

18. Drawing a bright-line that there must be some minimum fixed number of petitions to constitute a "series" would inevitably lead to unnecessary collateral litigation as to the methodology for counting the number of petitions being filed. The Third Circuit counted four petitions by Village because in its pleadings Hanover Realty had organized Village's petitioning activity by the different permits and approvals Village was contesting. However, if a count of petitions were the deciding factor, should each permit or approval

The Third Circuit also considered Village's "successes" and found that they did not dispel the overall impression that Village was engaged in a series of sham challenges designed to cause delay and expense, not achieve success on the merits.

> All in all, the allegations and the record show that Hanover Realty received the Flood and Wetlands Permits, it got the state-court action dismissed, and it avoided having to make significant highway improvements. Defendants' meager record on the merits supports Hanover Realty's allegation that the filings were not brought to redress any grievances. Nor have Defendants articulated any genuine interest in flooding or traffic near the proposed Wegmans (which is two miles away from the ShopRite), or in protecting the Indiana bat. Rather, Hanover Realty sufficiently alleges that Defendants brought these actions under a policy of harassment with the effect of obstructing Hanover Realty's access to governmental bodies. The filings have imposed significant

---

that Village challenged be the appropriate number of petitions, or should each of Village's filings before the same agency count as a separate petition? Likewise, should Village's complaints to the Fish & Wildlife Service about the Indiana Bats be a separate petition, or part of the challenge to the Wetlands Permit before the DEP? Would the lawsuits and appeals filed in the name of Village employees be separate petitions or part of the prior petition challenging the same approval(s)? This is a can of worms that does not need to be opened if the Court leaves *California Motor Transport* as is. Further, such bean counting would be contrary to a holistic review of the petitioning.

> expense on Hanover Realty, have continued to delay the project, and threaten the viability of the project altogether. That Defendants have had some insignificant success along the way does not alter the analysis when reviewing a pattern or series of proceedings. Accordingly, Hanover Realty can establish that the sham exception to *Noerr-Pennington* immunity applies because it sufficiently alleges that Defendants "instituted the proceedings and actions ... with or without probable cause, and regardless of the merits of the cases."

Hanover 3201 Realty, 806 F.3d at 182-83.

No compelling reason has been presented for this Court to grant the Petition to review the manner in which the "sham" exception to *Noerr-Pennington* immunity is applied under *California Motor Transport* and *PRE*, or create a "bright-line" test as to the minimum number of proceedings required to be a "pattern" or a "series" under *California Motor Transport*.

CONCLUSION

For the reasons set forth above, Village's Petition for Certiorari should be denied.

Respectfully submitted,

James E. Cecchi
Counsel of Record
John M. Agnello
Lindsey H. Taylor
Carella, Byrne, Cecchi, Olstein,
Brody & Agnello
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700
jcecchi@carellabyrne.com

Attorneys for Respondent