IN THE COURT OF APPEALS
STATE OF GEORGIA

DAVID COHEN, COMPLEX LAW GROUP, LLC, D.M. COHEN, INC. and JOHN BUTTERS,	)	
Appellants,	)	CASE NO: A16A1716
v.	)	
JOE ROGERS, JR.,	)	
Appellee.	)	

APPELLANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION[1]

On April 16, 2018, the Georgia Supreme Court granted petitions for certiorari, vacated the Court of Appeals majority opinion in this case (the "majority opinion") and remanded "for reconsideration by [this] Court in light of *State v. Cohen*, 302 Ga. 616 (807 SE2d 861) (2017)." *State v. Cohen* confirms the application of fundamental Constitutional protections to this case including the *Noerr-Pennington* doctrine, Georgia's anti-SLAPP statute, (O.C.G.A. § 9-11-11.1),[2] and Georgia's abusive litigation statute, (O.C.G.A. § 51-7-80)—all of which require the dismissal of this lawsuit.[3]

State v. Cohen destroys the two pillars upon which Rogers's case is built. First, Appellee Joe Rogers, Jr.'s lawsuit claims that Appellants David Cohen and

[1] There have been multiple appeals related to the Cobb 1 and Cobb 2 matters, resulting in multiple appeal records. In order to identify which appeal record is being cited to, all "R" cites refer to the record in Case Nos. A16A1714-17; all "RR" cites refer to the record in Case No. A16A0259; all "RRR" cites refer to Case No. A14A0676.

[2] The version of O.C.G.A. § 9-11.11.1 applicable to this case is the one in effect prior to July 1, 2016.

[3] *Compare*, for example, the allegations of the Complaint in this civil action (R1-5-38), *with* the overt acts alleged in the June 16, 2016 Direct Indictment ("Indictment") in *State v. Cohen*, 16SC144430, at 5-10 (listing alleged "overt acts"). *Compare* July 16, 2012 demand letter (R1-5-38 ¶ 37, overt act ¶ 12); August 2, 2012 meeting among counsel (R1-5-38 ¶¶ 39-41, overt act ¶¶ 13-14); mediation demand (R1-5-38 ¶ 42, overt act ¶ 15); filing Fulton lawsuit (R1-5-38 ¶ 45, overt act ¶ 16); filing police report (R1-5-38 ¶ 47; overt act ¶ 17); statements by counsel in Fulton lawsuit (R1-5-38 ¶ 48, overt act ¶ 18).

John Butters[4] "designed a scheme and conspired to extort money from [him]."[5] The terms "extort," "extorting" or "extortion" appear in Rogers's complaint 18 times.[6] Rogers has consistently cast himself as a victim of extortion, and the majority opinion concluded that this case "centers on Rogers's allegations that the defendants engaged in an extortion scheme . . ."[7] The Supreme Court eliminated Rogers's extortion theory by holding there was no extortion as a matter of law because "there was no agreement to unlawfully obtain property from Rogers by 'threatening' him in this case in any manner that could serve as a proper basis for a charge of illegal extortion under O.C.G.A. § 16-8-16(a)(3)."[8]

Second, Rogers's reliance on a supposedly "illegal" video has also been overtaken by subsequent events. In *State v. Cohen*, the Supreme Court acknowledged that the creation of the video evidence was also constitutionally protected because alleged threats to "file a lawsuit . . . and use the video as evidence in a court of law in the context of possible litigation" do not constitute extortion.[9] Additionally, Rogers's efforts to exploit the criminal process

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[4] The other named defendants are Complex Law Group, LLC, D.M. Cohen, Inc., Hylton B. Dupree, Jr., Dupree & Kimbrough, LLP, Hylton B. Dupree, Jr., P.C., John Does 1-5 and ABC Companies 1-5.
[5] R1-5-38 ¶ 23.
[6] R1-5-38.
[7] Mar. 16, 2017 COA Opinion (Majority) ("Majority Opinion") at 18.
[8] Nov. 2, 2017 Supreme Court Opinion, *State v. Cohen*, S17A1265 ("*State v. Cohen*") at 11.
[9] *Id.* at 11-13.

spectacularly backfired when, after viewing the video at issue, a Fulton County jury acquitted Brindle, Cohen and Butters of charges arising out of Georgia's unlawful surveillance statute, O.C.G.A. § 16-11-62.

But the fact that Rogers's scorched-earth tactics have blown up in his face does not remedy the massive costs that those tactics have imposed upon litigants, lawyers and the Courts. This case loudly calls out for the proper application of *Noerr-Pennington,* anti-SLAPP and the abusive litigation statute to dismiss it. [10] The threat this case poses to the civil justice system and to the legal profession cannot be overstated—"SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense . . . . Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."[11] As Judge McFadden's dissent recognized, failure to

[10] Numerous commentators recognize the proliferation of retaliatory lawsuits—civil actions meant to send the message that the price for speaking out is "a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings." Jeremy Rosen & Felix Shafir, *Helping Americans to Speak Freely*, 18 FEDERALIST SOC'Y REV. 62, 63 (2017); George W. Pring & Penelope Canan, *Strategic Lawsuits Against Public Participation ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 940 (1992); Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 692 (2017); Briana Lynn Rosenbaum , *The RICO Trend in Class Action Warfare*, 102 IOWA L. REV. 165, 171 (2016).

[11] *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992), *aff'd*, 616 N.Y.S.2d 98 (N.Y. App. Div. 1994).

apply these principles allows the wealthy and powerful to "us[e] the threat of crushing litigation to shut down efforts to hold them accountable."[12]

STATEMENT OF PROCEEDINGS BELOW AND MATERIAL FACTS

This case arises from a dispute between Joe Rogers, Jr., the Chairman and majority shareholder of Waffle House, and his former housekeeper, Mye Brindle. Brindle alleges that while she was employed in Rogers's homes, he repeatedly sexually abused her. After initially denying the conduct, Rogers now claims it was consensual.[13] Disputing any "relationship," Brindle testified, "[t]he only relationship Joe and I had, and I've said it a million times, and I'll tell you again, is a business relationship. He was my boss. I was his employee" adding "I was their help in their home. We weren't friends."[14] Rogers has a long history of sexual abuse of female employees.[15]

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[12] Mar. 16, 2017 COA Opinion, McFadden Dissent ("McFadden Dissent") at 6-7.
[13] R1-117-279 at 121, 146.
[14] See Mar. 16, 2017 COA Opinion, Barnes Dissent ("Barnes Dissent") at 23.
[15] Rogers's prior housekeeper Dawn White testified to Rogers's persistent sexual harassment of her, including inappropriate physical contact and verbal harassment such as his belief that she "could suck the chrome off a trailer hitch." Mar. 28, 2013 Deposition of Jeffrey R. White, Ex. 1 ¶ 9. This same type of harassing conduct, including asking a Waffle House employee "if I ever sucked the chrome off a bumper," led a Federal District Judge to find that "severe, pervasive and disgusting sexual harassment" of that employee was "condoned by the company's top executives," including by Rogers himself. *Scribner v. Waffle House,* 14 F. Supp. 2d 873, 947 (N.D. Tex. 1998) ($8.1M judgment) *vacated pursuant to settlement agreement* 62 F. Supp. 2d 1186 (N.D. Tex. 1999). Rogers's history of sexual harassment and willingness to lie about it is directly relevant to the falsity of Rogers's anti-SLAPP verification.

In June 2012, Brindle retained Appellants to represent her in potential claims against Rogers. Around that time, she met with a private investigation company that holds itself out to be an expert in legal surveillance techniques and lectures on that topic at State Bar CLE seminars—in order to obtain video evidence of Rogers's sexual abuse.[16] After a private investigator delivered the recording device to Brindle, trained her to use it, and advised her on the "one-party consent law," Brindle used the device to record video evidence of Rogers's unlawful conduct.[17] On July 16, 2012, Cohen delivered a presuit letter to Rogers, disclosing the existence of the video evidence and threatening litigation, but suggesting both parties would be better served by exploring settlement.[18] A few days later, Rogers's counsel responded thanking Cohen for the "demand letter," suggesting mediation and requesting a specific dollar demand from Brindle, since the demand letter did not contain one.[19] On August 2, 2012, at the request of Rogers's counsel, Cohen, Butters and Dupree met with Rogers's counsel who conveyed Rogers's offer to pay Brindle a "severance."[20]

On September 14, 2012, again at Rogers's request, the parties participated in

[16] R1-5-38 ¶¶ 27–28.
[17] *Id*. ¶¶ 30–32.
[18] *Id*. ¶¶ 37–38.
[19] *Id*. ¶¶ 40–41; R8-864.
[20] R1-214-17 at ¶ 8.

presuit mediation with a professional mediator selected by Rogers's counsel.[21] Everyone present, including Rogers, his wife and their attorneys, signed an "Agreement to Mediate" stating that everything that occurred in the mediation "shall not be revealed in any subsequent legal proceedings" and agreeing "not to institute any action based on the mediation."[22] Brindle's only dollar-specific demand was made during that mediation, which concluded around 5:00 p.m.[23]

Unbeknownst to Brindle and her attorneys, the mediation was a ploy. At 3:31 p.m., while the mediation was still in progress, Rogers pre-emptively filed Cobb I. He admits that he came to the mediation with a complaint already drafted and that he filed in Cobb County for "strategic" reasons.[24]

In Cobb I, on June 14, 2013, the trial court issued the Order on the Third Motion to Compel, a discovery order based on the "[w]ide latitude" given to take discovery and the "broad purpose of the discovery rules."[25] The court found a "*prima facie* showing" had been made that the video may be "illegal," and thus discoverable under the crime-fraud exception.[26]

A few days after the trial court's discovery order, on June 18, 2013, Rogers

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[21] R8-677-733 at 70:5–15; R1-214-17 ¶ 9.
[22] R8-815-17 ¶ 5.
[23] R1-214-217 ¶¶ 11-12.
[24] R8-959-66 (Civil Action No. 12-1-8807-18). The Complaint filed on September 14 was styled "*John Doe v. Jane Smith,*" and did not name Joe Rogers, Jr. or Mye Brindle; R7-414-17.
[25] RRR2-864-84 ¶ 15.
[26] *Id*. at ¶ 41.

moved to disqualify Brindle's counsel in Cobb I, relying heavily on the *prima facie* finding in the discovery order, and announcing he was going to sue Brindle's counsel based on that order.[27]

Rogers filed this action ("Cobb II") on May 30, 2014 against Brindle's attorneys, Cohen, Butters and Dupree. Rogers alleged a "scheme and conspir[acy] to extort money" that was based entirely on Cohen and Butters' representation of Brindle in Cobb I and the related proceedings.[28] Like Rogers's disqualification motion in Cobb I, his Cobb II complaint also relied heavily on the *prima facie* finding of illegality from the discovery order.

After being notified of the application of the anti-SLAPP statute, on June 27, 2014, Rogers filed an amended complaint, making no changes to his original complaint but adding verifications signed by him and his counsel.[29] On April 16, 2015, the trial court entered an order finding that the anti-SLAPP statute applied and that Rogers was required to verify his claims.[30] The Court held a two-day evidentiary hearing on Cohen, Butters and Dupree's Motions to Dismiss.

On February 17, 2016, the trial court denied Cohen and Butters' Motions to Dismiss. The trial court ignored the vast majority of Rogers's claims, which are clearly based on protected petitioning activity, conduct in courts, and other official

[27] RR4-1823-86.
[28] R1-5-38 ¶ 23.
[29] R1-56-63.
[30] R3-1026-33.

proceedings, considering instead only what it called the "gravamen" of Rogers's claims—the video recording and the demand letter.[31] Reiterating its earlier *prima facie* finding that the video was illegal, the trial court accepted Rogers's argument that the anti-SLAPP statute did not protect illegal conduct. The trial court summarily rejected the First Amendment *Noerr-Pennington* doctrine, holding without explanation that it "does not apply"[32] and that the abusive litigation statute did not cover prelitigation conduct or conduct alleged to be illegal or tortious.[33] But on July 14, 2016, this Court rejected the trial court's reliance on the *prima facie* finding of illegality, holding that the trial court's order "was not an ultimate determination of the legality of the video or whether a crime was committed,"[34] and that the "factual finding made in support of this interim discovery order does not and cannot translate into a final, binding, evidentiary determination of a dispositive issue."[35]

Cohen and Butters appealed the anti-SLAPP ruling to this Court. On March 16, 2017, this Court issued a whole court opinion affirming the trial court as to Appellants Cohen and Butters, from which Appellants sought certiorari. While that petition was pending the Supreme Court issued its opinion in *State v. Cohen*,

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[31] R3-1364-91. No SLAPP case in Georgia has ever followed this novel "gravamen" theory.
[32] R3-1052-69 at ¶ 13.
[33] R3-1142-47.
[34] *See Cohen v. Rogers*, A16A0259, July 14, 2016 Opinion at *20.
[35] *Id.* at *13.

affirming dismissal of the theft by extortion charge. But, based solely on the allegations in the indictment, it reversed dismissal of the remaining counts.[36]

Beginning on April 2, 2018, Brindle, Cohen and Butters were tried before a jury on the remaining charges of conspiracy and violation of the unlawful surveillance statute.[37] At that trial Joe Rogers, his wife, Fran Rogers, and Mye Brindle testified, among others. The alleged illegal video recording was played in open court with Rogers's full knowledge and consent.[38] The trial court granted a general demurrer dismissing the conspiracy charge and on April 10, 2018, a jury acquitted all three defendants on the sole remaining charge of unlawful surveillance.

On April 16, 2018, the Supreme Court granted the petition for certiorari in this case, vacated the Court of Appeals majority opinion and directed the Court of Appeals to reconsider its prior opinion in light of *State v. Cohen.*

ARGUMENT AND CITATION OF AUTHORITIES

The fundamental premise of Rogers's complaint is that he is a victim of

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[36] In this regard, Justice Nahmias states in his Partial Concurrence and Partial Special Concurrence that "[i]t should be emphasized as to the result that we are now reviewing a general demurrer to the indictment, which limits us to the allegations of the indictment and requires us to treat them as true. With regard to the unlawful surveillance charges we allow to stand, the analysis might be different if we ever consider a full evidentiary record after trial." *State v.* Cohen, Nahmias Concurrence at 1.

[37] Direct Indictment, *State v. Cohen*, 16SC144430.

[38] Apr. 4 2018 Draft Trial Testimony of Joe Rogers, Jr., *State v.* Cohen, 16SC144430, at 107.

extortion: every count incorporates and relies on the demand letter, the use of the video evidence and mediation. *State v. Cohen* guts that fundamental premise in narrowly construing the theft by extortion statute in order to uphold its constitutionality, the Supreme Court recognized that the First Amendment right to petition protects "mere threats to sue" including the "threat to file a lawsuit against Rogers and use the video as evidence in a court of law in the context of possible litigation."[39] The Supreme Court held there was no extortion as a matter of law. This holding conflicts with the majority opinion which concluded that the very same demand letter was extortionate, and therefore "not protected by the First Amendment,"[40] and holding the anti-SLAPP statute inapplicable.[41] *State v. Cohen* confirms Appellants' arguments that the *Noerr-Pennington* doctrine, Georgia's anti-SLAPP statute, O.C.G.A. § 9-11-11.1, and Georgia's abusive litigation statute, O.C.G.A. § 51-7-80 et seq., *all prohibit this lawsuit* and mandate its dismissal.

I. *State v. Cohen* Holds that the Demand Letter Did Not Constitute Theft by Extortion, as a Matter of Law.

Despite Rogers's assertions at every turn that he is a victim of extortion,[42] *State v. Cohen* establishes there is no extortion as a matter of law. Nor can Rogers

[39] *State v. Cohen* at 11-13.
[40] Majority Opinion at 18.
[41] *Compare State v. Cohen* at 11-12 *with* Majority Opinion at 13-15.
[42] R1-5-38 ¶¶ 23, 37-39, 91, 97, 99, 109, 111, 120; T15-8 24, 60, 97, 110, 121, 158; T16-250, 256, 258, 260, 285, 289-90, 294, 298, 306, 317; R8-677-731 at 19:25, 7:24, 85:4-5, 86:4-17.

fall back on his argument that Appellants made an allegedly illegal video recording, because a Fulton County jury has acquitted Brindle, Butters and Cohen of charges under Georgia's unlawful surveillance statute.[43]

The Supreme Court dismissed the State's charge for theft by extortion, finding that the only threat made by Brindle's attorneys against Rogers was to sue him and to use the video recording as evidence in a court of law.[44] The Supreme Court held "there was no agreement to unlawfully obtain property from Rogers by 'threatening' him in this case in any manner that could serve as a proper basis for a charge of illegal extortion under O.C.G.A. § 16-8-16(a)(3)."[45] This holding reflects Judge McFadden's dissent, which stated that, "[t]here is no evidence that Brindle or any of her attorneys disseminated [the video], attempted to disseminate it, or threatened to disseminate it."[46] The only "threat" to Rogers was the threat to hold him accountable in a court of law and that threat is constitutionally protected.

State v. Cohen also rejected the application of *Flatley v. Mauro,* a case which was the sole support for the majority's conclusion that Appellants' actions

[43] Apr. 11, 2018 AJC article, "Jury acquits Waffle House chairman's ex-housekeeper in sex tap trial," (https://www.myajc.com/news/local/jury-acquits-waffle-house-chairman-housekeeper-sex-tape-trial/TrO6VspBg8FZdoYLaTCQfO/).
[44] State v. Cohen at 11.
[45] *Id*.
[46] McFadden Dissent at 4.

were not in furtherance of the Constitutional rights of free speech and petition.[47] The threat in *Flatley* was to "publically accuse [the defendant] of rape" and other crimes, unlike the demand letter here which only threatened publicity in the context of litigation.[48] Here, Rogers cannot separate any publicity threat from the threat to litigate despite his attempts to mischaracterize portions of the demand letter out of context.[49] Despite what his briefs may claim, Rogers's actual complaint makes clear that, as Judge McFadden wrote, "[t]he central premise of [Rogers's] lawsuit is the untenable proposition that the demand letter constitutes extortion."[50]

Because the Supreme Court unequivocally held that the demand letter, confidential mediation demand, and the other alleged threats included in the extortion count did not and could not constitute theft by extortion,[51] Appellants' alleged conduct is constitutionally protected and the anti-SLAPP statute and *Noerr-Pennington* doctrine mandate dismissal.

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[47] Majority Opinion at 13.
[48] R1-5-38 at 37-8 (Demand Letter).
[49] *Id*. For example, Rogers refers to "media attention," when the demand letter actually says "protracted litigation and media attention"; Rogers refers to "injurious publicity" when the demand letter actually says "protracted litigation, injurious publicity to all parties"; and Rogers refers to "public focus on the issues" when the demand letter actually says "initiation of litigation and public focus on the issues."
[50] McFadden Dissent at 2.
[51] *See supra* n.31.

II. Under *State v. Cohen,* Use of the Video Recording for Litigation is Protected by the First Amendment.

Noerr-Pennington's and the anti-SLAPP statute's protections also extend to Appellants' actions related to the video recording for use in civil litigation.[52] The majority opinion described the Appellants' conduct regarding the video recording as "criminal."[53] That ruling, however, cannot be reconciled with *State v. Cohen*, which recognized that threats to file a lawsuit and to "use of the video as evidence in a court of law in the context of possible litigation" are protected petitioning activity.[54]

As a preliminary matter, there has only ever been an allegation of an illegal video and a *prima facie* finding by the trial court. This Court previously established that the trial court's *prima facie* finding of an illegal video during a discovery dispute has no dispositive effect.[55] The only dispositive ruling on the legality of the video was made by a Fulton County jury which acquitted Brindle, Cohen and Butters of charges under the unlawful surveillance statute. Now, all that remains is Rogers's legally unsupported assertion of illegality.

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[52] *State v. Cohen* at 11.
[53] Majority Opinion at 15.
[54] *State v. Cohen* at 11; *id.* at 12-13, quoting *United States v. Pendergraft*, 297 F.3d 1198, 1205 (11th Cir. 2002). The Supreme Court also quoted *Buckley v. DirecTV*, 276 F. Supp. 2d 1271, 1275–76 (N.D. Ga. 2003), for the same proposition: "[t]he Court is not aware of any authority holding that a demand to settle a claim before pursuing litigation amounts to extortion. In fact, such demand letters do not fit the legal definition of extortion [under O.C.G.A. § 16-8-16(a)]". *State v. Cohen* at 13.
[55] July 14, 2017 COA Opinion, A16A0259 at 10-16.

Although the majority opinion pointed out that a criminal conviction is not required in order for a plaintiff to bring a civil cause of action, that statement ignored the more fundamental flaw that Rogers's complaint fails to allege an actionable tort. The trial court and the majority both ignored black letter law holding that *violation of a criminal statute does not automatically give rise to a civil action*.[56] Moreover, neither Georgia's surveillance statute nor Georgia's theft by extortion statute creates a private right of action nor does the common law.[57] Georgia Courts have repeatedly held that threats to litigate are not tortious because a threat to file a lawsuit is "not the type of humiliating, insulting or terrifying conduct which will give rise to a claim for the intentional infliction of emotional distress."[58] And as *State v. Cohen* recognized, constitutionally protected conduct is not actionable unless it is intentionally false or completely baseless.[59]

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[56] *See* Barnes Dissent at 44-46 citing *Somerville v. White*, 337 Ga. App. 414, 415 (2016); *Anthony v. Am. Gen. Fin. Servs.*, 287 Ga. 448, 455 (2010); *Murphy v. Bajjani*, 282 Ga. 197, 200-01 (2007); *Troncalli v. Jones*, 237 Ga. App. 10, 12 (1999); *Vance v. T.R.C.*, 229 Ga. App. 608, 610-11 (1997).

[57] Georgia does not recognize a civil cause of action for extortion. R2-534-601 at 554; *see Mobley v. Coast House, Ltd.*, 182 Ga. App. 305, 307 (1987). *See United States v. Pendergraft*, 297 F.3d 1198, 1207–08 (11th Cir. 2002) (a threat to file litigation—even if made in bad faith and supported by false affidavits—was not "extortion.").

[58] *Rolleston v. Huie*, 198 Ga. App. 49, 51 (1990) *overruled in part on other grounds by Sewell v. Cancel*, 295 Ga. 235 (2014).

[59] *State v. Cohen* at 14 n.9; *See In Professional Real Estate Investors, v. Columbia Pictures*, 508 U.S. 49 (1993) (sham litigation exception to *Noerr-Pennington* must be (1) "so baseless that no reasonable litigant could realistically expect to secure

III. *State v. Cohen* Confirms that First Amendment Protections of the *Noerr-Pennington* and anti-SLAPP Require Dismissal of this Lawsuit.

Now that the Supreme Court has confirmed the applicability of these constitutional protections to this case, the *Noerr-Pennington* doctrine[60] and Georgia's anti-SLAPP statute both require the dismissal of Rogers's lawsuit. In fact, *State v. Cohen* relied on long-standing Georgia law that was binding at the time Rogers's filed his extortion-centered lawsuit—cases that made it clear Rogers's extortion claim was baseless.[61] *State v. Cohen* did not create new law—it simply confirmed bedrock constitutional and First Amendment protections to the facts of this case. Appellants' original motions to dismiss before the trial court made these same arguments for dismissal when they were filed in July 2014. The remedy for Rogers's improper claims that infringe on the First Amendment is dismissal both under *Noerr-Pennington* and the anti-SLAPP statute.

The *Noerr-Pennington* doctrine was established by the United States

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favorable relief" and (2) subjectively not "genuinely aimed at procuring favorable government action." *Id.* at 58.

[60] The right to petition the government for a redress of grievances is set forth in the First Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment, *New York Times Co. v. Sullivan*, 376 U.S. 254, 276–77 (1964). *Accord,* Georgia Constitution, Art. I, § I, Paragraph IX ("Right to Assemble and Petition").

[61] The Supreme Court relied on long-standing Georgia and United States Supreme Court authority including cases cited by Appellants to the trial court and Court of Appeals. State v. Cohen at 13-14. *See United States v. Pendergraft,* 297 F.3d 1198, *Buckley v. Directv, Inc.* 276 F.Supp.2d 271, *Borough of Duryea v. Guarnieri,* 564 U.S. 379 (2011), *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, *Davis & Brandon v. Seaboard A.L.R. Co.*, 136 Ga. 278 (1911).

Supreme Court and has been followed in *every* Circuit Court of Appeal and in at least 21 states.[62] The right to petition is "among the most precious of the liberties safeguarded by the Bill of Rights."[63] "It shares the 'preferred place' accorded in our system of government to the First Amendment freedoms, and has 'a sanctity and a sanction not permitting dubious intrusions.'"[64] Similarly, the right to petition secured by Georgia's Bill of Rights expressly includes the right to "unfettered

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[62] *Ex parte Simpson*, 36 So.3d 15, 26–27(Ala. 2009); *Gunderson v. Univ. of Alaska*, 902 P.2d 323, 326 (Alaska 1995); *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 791 P.2d 587 (Cal. 1990); *Protect Our Mountain Env't, Inc. v. District Court*, 677 P.2d 1361, 1365-66 (Colo. 1984); *Zeller v. Consolini*, 758 A.2d 376, 380-81 (Conn. App. Ct. 2000); *Abbott v. Gordon*, No. CIV.A. 04C-09-055PLA, 2008 WL 821522, at *15 (Del. Super. Mar. 27, 2008); *King v. Levin*, 540 N.E.2d 492, 495 (Ill. App. Ct. 1989); *Bond v. Cedar Rapids Television Co.*, 518 N.W.2d 352, 355-56 (Iowa 1994); *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411, 415 (Ky. Ct. App. 2004); *Astoria Entm't, Inc. v. DeBartolo*, 12 So. 3d 956, 963 (La. 2009); *Arim v. Gen. Motors Corp.*, 520 N.W.2d 695, 700-01 (Mich. App. 1994); *Harrah's Vicksburg Corp. v. Pennebaker*, 812 So. 2d 163, 171 (Miss. 2001); *Defino v. Civic Ctr. Corp.*, 780 S.W.2d 665 (Mo. Ct. App. 1989); *Green Mountain Realty Corp. v. Fifth Estate Tower, LLC*, 13 A.3d 123, 128–33 (N. H. 2010); *Fraser v. Bovino*, 721 A.2d 20, 27 (N.J. App. Div. 1998); *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 268 A.D.2d 101, 108 (N.Y. App. Div. 2000); *Hometown Props., Inc. v. Fleming*, 680 A.2d 56, 60 (R.I. 1996); *Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus., Inc.*, 336 N.W.2d 153, 159 (S.D. 1983); *RRR Farms, Ltd. v. Am. Horse Prot. Ass'n*, 957 S.W.2d 121, 129 (Tex. Ct. App. 1997); *Titan Am., LLC v. Riverton Inv. Corp.*, 569 S.E.2d 57, 62 (Va. 2002); *Anderson Dev. Co. v. Tobias*, 116 P.3d 323, 332 (Utah 2005).

[63] *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

[64] *Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329, 1342 (7th Cir. 1977) *quoting Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

access to the courts of this state."[65]

Like the *Noerr-Pennington* doctrine, Georgia's anti-SLAPP statute requires dismissal of Rogers's lawsuit. In fact, the procedure outlined in O.C.G.A. § 9-11-11.1 is directed to early resolution of motions under anti-SLAPP, because "the purpose of the anti-SLAPP statute is to quickly end oppressive and speech-chilling litigation against those who attempt to participate in discussions on matters of public importance."[66]

Under the anti-SLAPP statute, any claim "which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition the government for a redress of grievances," must be accompanied by a verification under oath by both the party asserting the claim and the attorney of record. The purpose of the verification requirement is to "discourage cavalier and unfounded lawsuits filed against someone exercising his right to petition government."[67] If a plaintiff's claims are verified in violation of the anti-SLAPP statute, as Rogers's are, the Court "shall impose" an "appropriate sanction" which may include dismissal or an award of reasonable expenses including attorneys'

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[65] *In re Lawsuits of Carter*, 235 Ga. App. 551, 552 (1998); *Id.* at 554; *see Morrow v. Vineville United Methodist Church*, 227 Ga. App. 313, 316 (1997); *Hart v. Owens-Illinois, Inc.*, 165 Ga. App. 681, 682 (1983).

[66] *Settles Bridge Farm, LLC v. Masino*, 318 Ga. App. 576, 580 (2012); *see also, Statesboro Publ'g Co. v. City of Sylvania*, 271 Ga. 92, 95 (1999) ("Our state constitution provides even broader protection of speech than the first amendment."); *State v. Miller*, 260 Ga. 669, 671 & 676-77 (1990) (same).

[67] *Hawks v. Hinely*, 252 Ga. App. 510, 515-16 (2001).

fees. "The mechanical filing of a verification with the complaint, therefore, does not preclude dismissal if the claim is found by the trial court to infringe on the rights of free speech or petition as defined by the statute."[68]

State v. Cohen confirms that the anti-SLAPP statute applies to Rogers's claims, that his claims must be verified, and that Rogers's verification was false when he filed it. Allowing this case to proceed has created a quagmire of related civil and criminal litigation, exactly what *Noerr-Pennington* and the anti-SLAPP statute are meant to prevent.

A. Mere Allegations of Criminal or Tortious Conduct Cannot Abrogate the First Amendment Protections Held Applicable in *State v. Cohen*.

The acquittals of Brindle, Cohen and Butters of criminal charges related to the making of the video recording underscore the error that lies in allowing mere allegations of illegal and tortious conduct—allegations that proved to be wrong—to override fundamental constitutional protections.

This case demonstrates why allegations of criminal conduct do not abrogate *Noerr-Pennington's* protections. In *City of Columbia v. Omni Outdoor Advertising*, the United States Supreme Court declined to adopt a conspiracy exception to *Noerr*, holding that mere allegations of "unlawfulness" are not

[68] Barnes Dissent at 19.

sufficient to pierce constitutional protections.[69] And as Appellants have pointed out at every turn, *Noerr* is consistently applied to criminal allegations, including RICO[70] (also present in this case) which by their very nature, involve allegations of criminal conduct.[71]

Nor do Rogers's allegation that Appellants' actions were tortious render *Noerr-Pennington* inapplicable.[72] "[T]here is simply no reason that a common law tort doctrine can any more permissively abridge or chill the constitutional right of petition than can a statutory claim such as antitrust."[73] It is well-established that *Noerr-Pennington* immunizes petitioning activity from a wide variety of state and

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[69] 499 U.S. 365 (1991); *Tichinin v. City of Morgan Hill*, 99 Cal. Rptr. 3d 661, 667 (Cal. App. 2009) (conduct is protected absent establishment of criminal conduct as a matter of law).

[70] *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 942 (9th Cir. 2006) (demand letter cannot form basis of RICO lawsuit); *Singh v. NYCTL 2009-A Trust*, No. 14 Civ. 2558, 2016 U.S. Dist. LEXIS 94738, at *11 (S.D.N.Y. July 20, 2016) (*Noerr-Pennington* bars RICO claims based on prelitigation demand letters and settlement communications); *Davis v. Bank of Am.*, No. 13-4396, 2014 U.S. Dist. LEXIS 124731, at *6-7 (E.D.Pa. Aug. 11, 2014) (*Noerr-Pennington* bars RICO claims that include allegations of fraudulent court filings).

[71] The undisputed application of *Noerr-Pennington* to civil RICO claims also confirms *Noerr's* application to both allegations of criminal conduct and torts because civil RICO is a statutory tort. *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263 (4th Cir. 1994) (civil RICO is a statutory tort remedy); *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1329 (8th Cir. 1993) (same); *Kaufman v. BDO Seidman*, 984 F.2d 182, 185 (6th Cir. 1993) (same); *Zervas v. Faulkner*, 861 F.2d 823, 834 (5th Cir. 1988) (same).

[72] *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983).

[73] *Harrah's Vicksburg*, 812 So. 2d at 171; *Sosa*, 437 F.3d at 930.

federal causes of action—*including torts*[74]—such as tortious interference with contract,[75] intentional interference with economic relations,[76] defamation,[77] abuse of process,[78] civil conspiracy,[79] and others.[80]

As these cases demonstrate, the majority's conclusion that the anti-SLAPP did not apply because Appellants' conduct was "tortious and criminal" was erroneous.[81] *State v. Cohen* establishes that mere accusations are insufficient to abrogate constitutional protections, otherwise the First Amendment protections of

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[74] *Campbell v. PMI Food Equip. Group, Inc.*, 509 F.3d 776, 790 (6th Cir. 2007) ("Although the *Noerr–Pennington* doctrine was initially recognized in the antitrust field, the federal courts have by analogy applied it to claims brought under both state and federal laws. . ."); *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988) (same); *Bath Petroleum Storage, Inc. v. Mkt. Hub Partners, L.P.*, 229 F.3d 1135 (2d Cir. 2000); *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818, 826 (7th Cir. 1999); *WE, Inc. v. City of Philadelphia*, 174 F.3d 322, 326-27 (3d Cir. 1999); *Anderson Dev. Co.*, 116 P.3d at 332 (*Noerr-Pennington* protects against tort claims); *Zeller*, 758 A.2d at 380 (*Noerr-Pennington* is "equally applicable to many types of claims . . ."); *Protect Our Mountain Env't.*, 677 P.2d at 1365-66 (same).

[75] *Gunderson*, 902 P.2d at 326; *Pacific Gas & Elec. Co.*, 791 P.2d at 596.

[76] *Anderson Dev. Co.*, 116 P.3d at 332.

[77] *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614 (8th Cir. 1980) (*Noerr-Pennington* bars defamation claim against attorney); *Hometown Props., Inc.*, 680 A.2d at 60; *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394 (4th Cir. 2001) (*Noerr-Pennington* protects non-party who secretly funded litigation).

[78] *Protect Our Mountain Env't*, 677 P.2d at 1365-66; *Grand Communities, Ltd.*, 170 S.W.3d at 413.

[79] *Harrah's Vicksburg Corp.*, 812 So.2d 163.

[80] *See e.g., Evers v. Custer Cty.*, 745 F.2d 1196, 1204 (9th Cir. 1984)(42 U.S.C. § 1983 claim); *Stern*, 547 F.2d at 1342 (42 U.S.C. § 1985, defamation, malicious interference with contract); *Aknin v. Phillips*, 404 F. Supp. 1150, 1153 (S.D.N.Y. 1975)(42 U.S.C. §§ 1983, 1985 claims).

[81] Majority Opinion at 15.

anti-SLAPP would be a hollow right. The dissent correctly confirmed that "[a]n allegation of criminal conduct does not necessarily remove a case from the protections of the anti-SLAPP statute."[82]

B. The First Amendment Protects Prelitigation Conduct.

1. Rogers's claims are barred by *Noerr-Pennington.*

The ground on which the majority attempted to avoid application of anti-SLAPP—that the conduct alleged occurred before an "official proceeding" commenced—is no answer to *Noerr-Pennington*, because that doctrine clearly protects prelitigation conduct. Therefore, even had the anti-SLAPP statute not barred Rogers's claims based on the video recording and the demand letter, *Noerr-Pennington* does.

Because *Noerr-Pennington* recognizes that petitioning activity is a process that begins prior to the filing of an action, "*Noerr-Pennington* immunity extends beyond filing formal grievances directly with the government."[83] Thus, courts have consistently applied *Noerr-Pennington* to actions preceding the formal filing of a lawsuit including presuit investigation,[84] hiring a private investigator,[85]

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[82] *See also,* Barnes Dissent at 37, ("[a]n allegation of criminal conduct does not necessarily remove a case from the protections of the anti-SLAPP statute") citing *Hindu Temple & Cmty. Ctr. v. Raghunathan*, 311 Ga. App. 109, 115 n.21 (2011).
[83] *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F. 3d 239, 252 (3d Cir. 2001).
[84] *See Gorman Towers*, 626 F.2d at 614 (lawyer immune under *Noerr-Pennington*).
[85] *Tichinin*, 99 Cal. Rptr. 3d at 667.

demand letters and threats of litigation (even those alleged to be "extortionate"),[86] discovery,[87] and settlement negotiations.[88] The First Amendment provides a "broad umbrella" of protection because First Amendment freedoms need breathing space to survive.[89] Likewise, an essential part of the right to petition is the ability to be represented by an attorney,[90] and to investigate and evaluate claims prior to filing suit.[91] If an attorney's evaluation of a client's case is inhibited "by the knowledge that perserverance may place the attorney personally at risk" that is an unacceptable "chilling effect" on the right to petition.[92]

For example, in *Tichinin v. City of Morgan Hill*, a California court held that *Noerr-Pennington* shielded a lawyer's presuit investigation. The lawyer hired a

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[86] *Sosa*, 437 F.3d at 926 (threats of litigation contained in a demand letter alleged to "constitute extortion"); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992)(threats of litigation); *Coastal States v. Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1373 (5th Cir. 1983) (same); *Silverhorse Racing v. Ford Motor Co*., 232 F. Supp. 3d 1206, 1211 (M.D. Fla. 2017) (*Noerr-Pennington* doctrine "extends not only to petitioning of the judicial branch (i.e., filing a lawsuit) but also to acts reasonably attendant to litigation, such as demand letters"); *Barq's Inc. v. Barq's Beverages, Inc.*, 677 F. Supp. 449, 453 (E.D. La. 1987) (demand letters and letters to suppliers).

[87] *Freeman v. Lasky, Hass & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005).

[88] *A.D. Bedell*, 263 F.3d at 252-53.

[89] *State v. Fielden*, 280 Ga. 444, 445 (2006). Georgia's Constitution provides even greater protection than the First Amendment. *Id.*

[90] *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964) (The right to petition cannot be handicapped by infringing on the right to be fairly represented).

[91] *Kendrick v. Funderburk*, 230 Ga. App. 860, 864 (1998).

[92] *Tarver v. Wills*, 174 Ga. App. 550, 553 (1985); *Bhd. of R.R. Trainmen*, 377 U.S. at 7 ("[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries"); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990).

private investigator to obtain video evidence of the city manager and the city attorney, who were rumored to be in a romantic relationship which could have established a conflict of interest.[93] The Court held:

> Given the close functional relationship between the preliminary investigation of a potential claim and the subsequent assertion of that claim, **we consider it obvious that restricting, enjoining, or penalizing prelitigation investigation could substantially interfere with and thus burden the effective exercise of one's right to petition.** Indeed, we can think of few better ways to burden that right than to make it difficult and perhaps legally risky for people to investigate and find evidence to support potential claims.[94]

As in *Tichinin*, there is a close functional relationship between the presuit investigation in this case, including the private investigator and the video evidence, and the subsequent sexual harassment claims Brindle asserts against Rogers.

2. The anti-SLAPP statute requires dismissal of Rogers's lawsuit based on Appellants' prelitigation conduct because those actions were taken in connection with an official proceeding.

The majority's unduly restrictive reading of the anti-SLAPP statute conflicted both with *State v. Cohen's* recognition that threats to litigate are themselves protected by the First Amendment and the plain language of the statute, which applies anti-SLAPP's protections to actions "in connection with" an official proceeding. The majority's narrow interpretation of the anti-SLAPP statute is contrary to the "expansive" definition of protected speech provided by this

[93] 99 Cal. Rptr. 3d at 667 (emphasis added).
[94] *Id.* (emphasis added).

remedial statute and its purpose.[95] "The purpose of the anti-SLAPP statute is to quickly end oppressive and speech-chilling litigation against those who attempt to participate in discussions on matters of public importance."[96] The anti-SLAPP statute is meant to prevent efforts, like Rogers's, to "shut down" an opponent by suing her lawyers.[97] Moreover, the General Assembly knew when it enacted anti-SLAPP that O.C.G.A. § 9-15-14 imposes a requirement of prefiling investigation upon all litigants "to the best of their knowledge, information, or belief formed *after reasonable inquiry*."[98] It would be both illogical and contrary to the purpose

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[95] As Judge Barnes's dissent points out, the Court of Appeals was precluded from addressing the trial court's holding that anti-SLAPP applies because Rogers did not cross-appeal it. Barnes Dissent at 27-28.

[96] *Masino*, 318 Ga. App. at 580; *see also*, *Statesboro Publ'g Co.*, 271 Ga. at 95 ("Our state constitution provides even broader protection of speech than the first amendment."); *Miller*, 260 Ga. at 671 & 676-77 (same).

To say that accusations of sexual assaults perpetrated by powerful men upon women whose employment they control does not present a matter of public concern is contrary to reality. In the months since the Court of Appeals issued its majority opinion, there has been an outpouring of accusations against wealthy and/or influential individuals in both the public and private sectors, involving sexual misconduct. These accusations have been carried and analyzed by the attention of every major news outlet.

[97] McFadden Dissent at 7 (recalling Rogers's argument that Dupree should have "shut[] down" Brindle's litigation upon becoming involved, and noting that "Brindle should have her day in court. What ought to be shut down is the effort to deprive her of it.").

[98] O.C.G.A. § 9-11-11.1 (b). The statute imposes a verification requirement to "discourage cavalier and unfounded lawsuits filed against someone exercising his right to petition government." *Hawks v. Hinely*, 252 Ga. App. 510, 515-16 (2001).

and intent of anti-SLAPP to require prefiling investigation but then exclude that statutorily mandated investigation from anti-SLAPP's protections.[99]

By ignoring the full scope of Rogers's allegations and isolating the video recording and the demand letter, the majority unduly cabined anti-SLAPP, concluding it did not apply because the video and demand letter were "used before any official proceeding was underway."[100] But whether certain evidence is "used" before the complaint was filed is not the test. The anti-SLAPP statute protects not only speech made "*to* an official proceeding" but also any speech made "*in connection with* an issue under consideration … by any[ ] official proceeding."[101] The majority erroneously ignored this plain language of the statute.

This Court has repeatedly held that the scope of protected activity includes actions taken *before* an actual complaint is filed. In *Hawks v. Hinely*, this Court rejected an argument that statements made prior to the initiation of the proceeding were not protected, holding that such a "myopic construction would produce such

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[99] *Rodriguez v. State*, 284 Ga. 803, 804 (2009) ("There is no better source than such a legislative expression of an act's purpose to which a court may go for the purpose of finding the legislature's meaning of an act passed by it.")(internal citations and quotations omitted).

[100] Majority Opinion at 12.

[101] *Berryhill v. Ga. Cmty. Support & Solutions, Inc.*, 281 Ga. 439, 441-42 (2006) (A protected statement may relate to an official proceeding instigated by someone else); *Adventure Outdoors Inc. v. Bloomberg*, 307 Ga. App. 356, 360 (2010); *Metzler v. Rowell*, 248 Ga. App. 596, 598 (2001) (expansive definition of speech).

undesirable and illogical results and consequences."[102] Similarly, in *Metzler*, this Court applied the "very expansive definition" of anti-SLAPP and held that a letter demanding that certain activities be "terminated immediately" or the attorney would seek injunctive relief was protected conduct taken "in connection with" an official proceeding.[103]

Rogers's complaint is based on the Cobb I litigation and relies upon specific actions taken *in connection with* that official proceeding, *during* that proceeding and *before* that court. Those allegations incorporated in all counts are diametrically contrasted with the fact of cases like *Berryhill*, where the court held anti-SLAPP did not apply because there "was not any evidence of an actual official proceeding either *before or after* the statements in question" there is no dispute that litigation ensued between Rogers and Brindle.[104]

Finally, both the trial court and the majority tried to avoid application of the anti-SLAPP statute to Rogers's complaint by recharacterizing Rogers's actual allegations to include only two events: the video recording and the demand letter.[105] Beyond the fact that *State v. Cohen* has now completely foreclosed

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[102] *Hawks*, 252 Ga. App. at 513.
[103] *Id.; see also Masino*, 318 Ga. App. at 576 (statements that initiated change in zoning law held to be a protected); *Adventure Outdoors*, 307 Ga. App. 356 (statements about litigation made at a press conference protected).
[104] 281 Ga. at 442 (emphasis added).
[105] R3-1364-91 ¶ 2 ("two most salient issues"); *Id*. ¶ 5 ("gravamen of Rogers' claims"); Majority Opinion at 12 ("heart" of claims).

reliance on those two events, these narrowed recharacterizations ignored the numerous paragraphs of Rogers's complaint devoted to Cohen and Butters' actual litigation of Cobb I and related official proceedings, including filing the Fulton Action,[106] negotiating a consent order in Cobb I,[107] making representations in court hearings,[108] dismissing the Fulton Action,[109] filing an appeal with the Georgia Supreme Court,[110] filing an affidavit in Cobb I,[111] and filing an appeal of the Fulton Action before the Georgia Court of Appeals.[112] Because Rogers's complaint admits it is based on "*conduct during this on-going litigation . . .*"[113] he cannot downplay his reliance on that conduct as "background" when it is incorporated into *every cause of action* in his complaint and then verified by him.[114]

IV. The Abusive Litigation Statute Bars Rogers's Lawsuit.

Rogers's claims fall squarely within the abusive litigation statute and were therefore preempted by the exclusivity provision of O.C.G.A. § 51-7-85. The

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[106] R1-5-38 ¶ 45.
[107] *Id.* ¶ 46.
[108] *Id.* ¶ 48.
[109] *Id.* ¶ 50.
[110] *Id.* ¶ 53;
[111] *Id.* ¶¶ 63-64.
[112] *Id.* ¶ 66; *Freeman*, 410 F.3d at 1184; *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 19 (Cal. App. 1995) (The right to petition includes the act of filing suit.)
[113] R1-5-38 ¶ 43. Similarly Brindle's report to the Atlanta Police Department (*id.* ¶ 47) also constitutes protected petitioning activity under the holding in *California Motor Transport Co. v. Trucking Umlimited*, 404 U.S. 508, 510 (1972), that "the right to petition extends to all departments of the Government" and *Annamalai v. Capital One Financial Corp.*, 319 Ga. App. 831, 833 (2013).
[114] R1-5-38 ¶¶ 69, 78, 84, 89, 95, 107, 118, 123, 135.

failure to correctly apply the abusive litigation statute has resulted in simultaneous litigation between Brindle and Rogers in her sexual harassment lawsuit and Rogers and Brindle's lawyers over their conduct in that ongoing litigation, exactly what the abusive litigation statute was meant to prevent.[115]

The majority opinion concluded, without analysis that the abusive litigation statute does not apply to prelitigation conduct. But as Judge Barnes points out, "[t]he initiation of a lawsuit necessarily involves some prelitigation activity." [116] Moreover, the text of O.C.G.A. § 51-7-81, applies to "[a]ny person who takes an active part in the *initiation*, continuation, or *procurement* of civil proceedings against another . . ."[117] And the exclusive remedy provision of O.C.G.A. § 51-7-85 would be meaningless if all a plaintiff must do to avoid it is to identify *a single act* such as a letter or phone call that occurred before the underlying litigation was filed.

"The abusive litigation statutes strike a balance between the competing public interest of preserving free access to the court and preventing 'serious abuses

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[115] *Yost v. Torok* , 256 Ga. 92 (1986).
[116] Barnes Dissent at 51-52.
[117] (Emphasis added). The words "initiation," "continuation," and "procurement" are not defined in the statute so they are presumed to have their ordinary and common meanings. *See* O.C.G.A. § 51-7-80 ("Definitions"); *May v. State*, 295 Ga. 388, 391 (2014). "Initiation" means: "The act, *process*, or an instance of beginning, setting on foot, or originating: the condition of being begun: ORIGINATION, BEGINNING." Webster's Third New International Dictionary, 1164 (4th ed. 1976) (emphasis added).

of lawsuit filing.'"[118] Rogers's effort to obtain a money judgment from Appellants must be balanced against Brindle's fundamental constitutional right to access the courts and to petition for redress. In passing the anti-SLAPP statute and the abusive litigation statute, the General Assembly made it clear the constitutional right to petition and a civil damages claim do not stand on equal footing. *State v. Cohen* confirms that the constitutional right to petition must be favored in this analysis.[119] The abusive litigation statute confirms that if Rogers does state any claim, it is premature until final termination of Cobb I and this action must be dismissed.[120]

V. Rogers's Breach of Mediation Confidentiality Has Broad Implications for the Practice of Law.

Rogers's calculated breach of the Agreement to Mediate, without more, directs dismissal of this action. As Judge McFadden's dissent states, "it appears that Rogers sought mediation only to elicit a settlement demand for use in his preemptive lawsuit." [121] Rogers's calculated breach of the Mediation Agreement is

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[118] Barnes Dissent at 50 (*citing Phillips v. MacDougald*, 219 Ga. App. 152, 156 (1995)).

[119] *Town of Gulfstream v. O'Boyle*, 654 F. App'x. 439, 444 (11th Cir. 2016) ("Our judicial system, and the Act in particular, encourages citizens to use the courts to resolve public records disputes. Moreover, citizens have a constitutional right to petition the government for redress. We believe that regardless of the scope and scale of the litigation, the courts are amply equipped to deal with frivolous litigation. Thus, *Pendergraft* and *Raney* control, and the alleged misconduct cannot as a matter of law constitute the predicate act of extortion for purposes of the plaintiff's civil RICO claim.") (internal citations omitted).

[120] *See* O.C.G.A. § 51-7-84(b).

[121] McFadden Dissent at 2.

clearly established by the record. Rogers arrived for the mediation with multiple versions of his complaint ready to be filed.[122] He then used the mediation to obtain a dollar-specific demand from Brindle so that he could portray himself as a victim of extortion. The only dollar-specific demand ever made by Brindle was made during the mediation and solicited by the mediator (who was selected by Rogers) at Rogers's behest.[123] Upon receiving the demand and before the mediation ended, Rogers filed Cobb I claiming to have been extorted[124]—establishing his manipulation of the mediation process and his deliberate violation of the terms of the Mediation Agreement.

As with court-ordered mediation, ADR and other dispute resolution processes critical to the judicial system, the Mediation Agreement here required Rogers to maintain the confidentiality of the "mediation process" and prohibited him from "institut[ing] any action based on the mediation."[125] Rogers broke both promises by disclosing the $12 million demand in open court on October 9, 2012, in a hearing in the Fulton Action,[126] and then filing this lawsuit *based on the*

[122] Rogers's wife testified that the lawsuit was "ready to go." R8-974-1052 at 158:13-14.
[123] R8-864 ("[H]e [Rogers] will want a pre-mediation demand that is realistic before moving forward.").
[124] Rogers pre-emptively sued Brindle for "strategic reasons," R7-414-417 at 417, during the mediation, not after the mediation. R1-5-38 ¶¶ 43-44. (Rogers's verified complaint alleges that Cobb I was filed after the mediation—a fact that is indisputably false). *Id.*; R8-959-966; R8-970-973 at ¶ 12.
[125] Majority Opinion at 19. R8-967-69 at 1-2; R8-677-731 at 72:22-75:13.
[126] R12-2368 - 2458 at 21:14-15. Rogers's counsel stated in open court that "They have demanded $12 million from Mr. Rogers." Brindle objected to Rogers's disclosure. R12-2724; R3-1027.

mediation, again disclosing the demand in his verified complaint.[127] "Rogers's claims should be dismissed because they are based on a demand letter and mediation proceedings he had agreed to keep confidential." [128]

Rogers perverted the mediation process, using it as a trap to foster—not resolve—litigation. To date, his breaches of the Mediation Agreement have been effectively condoned (approved by the majority opinion for other litigants to follow), which brings the mediation process into disrepute and uncertainty. This should be remediated because Rogers's calculated violations of the Mediation Agreement by breaching confidentiality and his assertion of claims based on the mediation itself require dismissal.

This submission does not exceed the word count limit imposed by Georgia Court of Appeals Rule 24.

Respectfully submitted this 29th day of May, 2018.

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[127] *See* R1-5-38 ¶¶ 42-44 (discussing September 14, 2012 mediation).
[128] Barnes Dissent at 1. *See, Hand v. Walnut Valley Sailing Club*, 475 F. App'x 277-279-80 (10th Cir. 2012) (dismissing action with prejudice as a sanction where plaintiff revealed details from mediation); *see also, Salmeron v. Enter. Recovery Sys., Inc.*, 579 F. 3d 787 (7th Cir. 2009); *Assassination Archives & Research Ctr., v. C.I.A.*, 48 F. Supp. 2d 1 (D.D.C. 1999).

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **APPELLANTS' SUPPLEMENTAL BRIEF** via electronic filing and U.S. mail upon counsel of record as follows:

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