FIRST AMENDMENT PROTECTION FOR UNFAIR LABOR PRACTICES?: REEXAMINING THE *NOERR-PENNINGTON* DOCTRINE

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The U.S. Supreme Court's decisions in Noerr *and* Pennington *invoked the First Amendment to protect from antitrust liability the act of collectively petitioning legislatures and agencies for favorable regulations. Through what has become known as the* Noerr-Pennington *doctrine, courts have extended First Amendment protection for various other petition activities outside the antitrust context. Recently, the D.C. Circuit further expanded* Noerr-Pennington *when it held that the act of summoning the police was a direct petition to the government protected from unfair labor practice liability by the* Noerr-Pennington *doctrine. The practical result of the holding was that the employer's otherwise unlawful intimidation of lawfully present union strikers could no longer be considered an unfair labor practice under the NLRA.*

This Note argues that Noerr-Pennington *is incompatible with, and contrary to, the purposes of the NLRA. Expansion of the doctrine into the labor law realm would constrain employees' § 7 rights, and would make lawful conduct that Congress intended to proscribe when it passed the NLRA.*

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I. INTRODUCTION

Suppose you are a businessman and prospective employer. You purchase a piece of land occupied by a recently closed casino. You intend to build another resort or casino in its place. Construction commences. To increase traffic flow on the street adjacent to your property, you make an arrangement with the City to build a temporary walkway on your property in exchange for the City agreeing to add another lane to the street. After construction of the temporary sidewalk, but before your business is ready to open, you are informed that hundreds of the previous casino's unionized, and laid-off culinary workers have a permit to protest on the sidewalk you built. You have not even begun hiring culinary workers, unionized or non-unionized. You protest to the City that the temporary sidewalk is your property and that they should revoke the union's demonstration permit. The City maintains the temporary sidewalk is not your property, but a public forum. Your pleas fall on deaf ears. The District Attorney says he will not have police officers remove the protestors from the sidewalk on the day of the demonstration because the protestors have a license to be there.

Now, suppose you are a culinary worker, recently laid off after the closing of your jobsite by your former employer. You learn that a new company has purchased the jobsite with the intent of opening another

hotel and casino. You find out your union has obtained a permit from the City to hold a demonstration on the public sidewalk outside the jobsite. In solidarity with your former co-workers, you and more than 1,000 people arrive on the day of the protest with the collective aim of convincing the company to hire you and your peers. At the protest, you see signs posted telling you the sidewalk on which you stand is private property. There is a message blaring over a loudspeaker warning you that you are subject to arrest for trespassing. You see one of the company's security guards place your union leader under citizens' arrest. You learn that the company has called upon the police to arrest you and your fellow protestors for trespass.

Such are the facts of *Venetian Casino Resort, L.L.C. v. National Labor Relations Board*.[1] The union leading the demonstration filed unfair labor practice charges with the National Labor Relations Board ("N.L.R.B." or "Board") against the company, Venetian Casino Resort ("The Venetian"). A complaint was subsequently issued, alleging that The Venetian committed unfair labor practices by "(1) summoning the police to cite the demonstrators for trespass and block them from the walkway; (2) playing the trespass warning over a loudspeaker system; and (3) attempting to place [a] union agent . . . under citizen's arrest."[2] The Board affirmed the administrative law judge's finding that the actions taken by The Venetian interfered with the protected labor demonstration, and therefore constituted unfair labor practices under § 8(a)(1) of the National Labor Relations Act ("NLRA" or "Labor Act").[3] On appeal, the D.C. Circuit upheld the Board's finding of unfair labor practices as to all but one allegation: The Venetian's summoning of the police.[4]

The Venetian argued that it could not be held liable under the NLRA for summoning the police because such conduct was a "direct effort to influence . . . law enforcement practices, and is therefore protected activity under the First Amendment."[5] Following a remand to the N.L.R.B. to examine this question,[6] the D.C. Circuit sided with The Venetian on this issue, holding that "the act of summoning the police to enforce state trespass law is a direct petition to government subject to First Amendment protection under the *Noerr-Pennington* doctrine."[7]

The First Amendment guarantees the right to engage in peaceful public labor demonstrations, with public streets and sidewalks being the

1. 484 F.3d 601, 603–05 (D.C. Cir. 2007).

2. *Id.* at 605.

3. Venetian Casino Resort, LLC, 345 N.L.R.B. 1061 (2005), *vacated in part sub nom.* Venetian Casino Resort, L.L.C. v. NLRB., 484 F.3d 601 (D.C. Cir. 2007), *remanded to* Venetian Casino Resort, LLC, 357 N.L.R.B. 1725 (2011).

4. *Venetian Casino Resort*, 484 F.3d at 614.

5. *Id.* (internal citations and quotation marks omitted).

6. Venetian Casino Resort, LLC, 357 N.L.R.B. 1725 (2011), *rev'd sub nom.* Venetian Casino Resort, L.L.C. v. NLRB, 793 F.3d 85 (D.C. Cir. 2015).

7. *Venetian Casino Resort, L.L.C.*, 793 F.3d at 90.

"archetypal" public fora.[8] The First Amendment simultaneously protects the right of the people to petition the government for redress of grievances.[9] Originally intended to ensure a legislative audience for citizen's proposals,[10] the scope and meaning of the Petition Clause in the years since ratification has been judicially transformed into a concomitant protection of speech and the press.[11] The Supreme Court has held that included among the Petition Clause's guarantees is a right of access to the courts, and that "the right to petition extends to all departments of government."[12] Federal and state courts have additionally recognized a plethora of communications under the clause's orbit of protection.[13]

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* ("*Noerr*") and *United Mine Workers of America v. Pennington* ("*Pennington*"), the Supreme Court invoked the Petition Clause to insulate from liability certain conduct which might otherwise be unlawful under the Sherman Antitrust Act.[14] In *Noerr*, the court held that "the Sherman Act does not apply to . . . activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws."[15] This principle has become known as the *Noerr-Pennington* doctrine.[16] Since its inception, *Noerr-Pennington* has been broadly construed by some courts to protect various "petitioning" activities from liability under a multitude of statutory and common law claims.[17]

Application of the *Noerr-Pennington* doctrine in the labor realm has numerous implications. As *Venetian Casino Resort* illustrates, a success-

8. U.S. CONST. amend. I; Frisby v. Schultz, 487 U.S. 474, 480 (1988) ("We have repeatedly referred to public streets as the archetype of a traditional public forum."); Thornhill v. Alabama, 310 U.S. 88, 102 (1940) ("In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.") (citing cases).

9. U.S. CONST. amend. I.

10. *See* Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 166 (1986).

11. *See* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2154 (1998) ("Modern doctrine has elevated the protections for speech and press, while the protection of petitioning has not stayed proportionally greater; indeed, it has been all but subsumed in the protections of speech and press."); *see, e.g.*, Borough of Duryea, Pa. v. Guarnieri, 131 S. Ct. 2488, 2492 (2011) (approving the lower court's application of the same framework to govern both Speech Clause and Petition Clause claims of public employees).

12. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

13. *See, e.g.*, B.E. WITKIN ET AL., SUMMARY OF CALIFORNIA LAW 317-18 (10th ed. 2012) (citing Matossian v. Fahmie, 101 C.A.3d 128 (Cal Ct. App. 1980) and Long Beach v. Bozek, 645 P.2d 137 (Cal. 1982)); Aaron R. Gary, *Sued for Speaking Out*, WIS. LAW., March 2000, at 14, 15 ("Wisconsin cases have recognized that . . . demanding action from the Public Service Commission, . . . testifying at a zoning hearing, and complaining to law enforcement about suspected illegal conduct, are all forms of protected petitioning activity.").

14. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669–72 (1965); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961).

15. *Noerr*, 365 U.S. at 138.

16. Venetian Casino Resort, L.L.C. v. NLRB, 793 F.3d 85, 87 (D.C. Cir. 2015).

17. *See* Dan Fligsten, *Big Doctrine: The U.S. Supreme Court May Ultimately Decide How Far* Noerr-Pennington *Applies Outside the Antitrust Context*, L.A. LAW., February 2014, at 25, 25–26; Gary, *supra* note 13, at 14–16. For examples of state courts acknowledging *Noerr-Pennington*'s application outside the antitrust context, *see, e.g.*, Zeller v. Consolini, 758 A.2d 376 (Conn. App. Ct. 2000); Arim v. Gen. Motors Corp., 520 N.W.2d 695 (Mich. Ct. App. 1994).

ful *Noerr-Pennington* defense will allow employers to summon the police to arrest lawfully present demonstrators even though doing so would otherwise be an unfair labor practice under the NLRA.[18] The *Venetian Casino Resort* decision not only constrains employees' statutory right to engage in protected labor picketing, but it may also implicate First Amendment protection for the commission of additional unfair labor practices. Moreover, by expanding *Noerr-Pennington* and the scope of the Petition Clause to protect an ever-increasing variety of "petitioning" communications, courts are supplanting what would otherwise be a mere qualified right to petition with nearly absolute immunity for those who invoke that right.[19] Thus, both within and outside the labor context, categories of conduct that Congress or state lawmakers had good cause to prohibit will be presumed immune from liability once *Noerr-Pennington* is applied. Because of its adverse effects on employees' statutory rights, its potential to make lawful other deservedly proscribed conduct, and its existence being owed to unique characteristics of anti-trust law, *Noerr-Pennington* should not be extended to the labor law context.

This Note argues that the Petition Clause was not intended to protect the free speech act of summoning the police, and that the *Noerr-Pennington* doctrine is not designed to protect such acts from liability under the NLRA. Part II of this Note discusses the purposes and relevant provisions of the NLRA, the history and scope of the Petition Clause, and the development and application of the *Noerr-Pennington* doctrine. It also summarizes the arguments in *Venetian Casino Resort* regarding the applicability of *Noerr-Pennington*. Part III describes the unique antitrust underpinnings of *Noerr-Pennington*, its incompatibility with labor law, and its potential ramifications, if extended. Finally, Part IV recommends judicial restraint in expanding the scope of activities subject to *Noerr-Pennington* immunity, and favors treating the right to petition as a qualified right on par with other First Amendment rights of speech and press.

II. BACKGROUND

Understanding the D.C. Circuit's decision in *Venetian Casino Resort* to make available a *Noerr-Pennington* defense to unfair labor practice liability requires a discussion of the context in which it was rendered. First, this Section briefly discusses the purposes of the NLRA, its unfair labor practice provisions, and the legal issues present in *Venetian Casino Resort*. It next examines the history and scope of the First Amendment's Petition Clause, as well as the creation and development of *Noerr-Pennington* as a doctrine to protect petitioning activity from liability. Lastly, this Section describes the N.L.R.B.'s and the D.C. Circuit's re-

18. 29 U.S.C. §§ 157–58 (2012); *Venetian Casino Resort*, 793 F.3d at 92.

19. *See* Fligsten, *supra* note 17, at 25, 28; Robert A. Zauzmer, Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right to Petition Cases*, 36 STAN. L. REV. 1243, 1261–62 (1984)

spective reasoning with regard to whether a *Noerr-Pennington* defense should be available to The Venetian in *Venetian Casino Resort*.

A. Unfair Labor Practices and the Purposes of the NLRA

At issue in *Venetian Casino Resort* was whether The Venetian committed unfair labor practices in attempting to disrupt the labor demonstration.[20] Section 7 of the NLRA provides statutory employees with the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[21] To guarantee these rights, § 8(a)(1) makes it "an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[22] Since its enactment, the N.L.R.B. has set out to determine the scope of an employee's § 7 rights, and has acknowledged a variety of activities that fall within its protections.[23] In *Venetian Casino Resort*, the Court deferred to the Board's determination that the demonstration was a protected § 7 activity because it constituted a "concerted activit[y] for . . . mutual aid or protection . . . ."[24]

The scope of an employee's § 7 rights, however, is not unlimited.[25] Conflicts can arise when employees' rights under the NLRA conflict with an employer's property or other rights. The Supreme Court, beginning with *Republic Aviation Corporation v. National Labor Relations Board*, acknowledged this conflict, stressing the importance of balancing the rights of the employees on one hand with the rights of the employer on the other.[26] In *Republic Aviation*, the Court upheld the Board's ruling that, absent special circumstances, § 7 protects an employee's right to solicit or organize other employees on nonwork time in nonwork areas of the employer's property.[27] Further, in *Hudgens v. National Labor Relations Board*, the Court stated that the balancing of interests is a "basic objective" of the NLRA, and that "[a]ccommodation between employee's § 7 rights and employers' property rights . . . must be obtained with

20. Venetian Casino Resort, LLC, 345 N.L.R.B. 1061 (2005).

21. 29 U.S.C. § 157.

22. *Id.* § 158.

23. *See id.* §§ 151–169; *see also Employee Rights*, NLRB, https://www.nlrb.gov/rights-we-protect/employee-rights (last visited May 31, 2017).

24. 29 U.S.C. § 157; Venetian Casino Resort, L.L.C. v. NLRB, 484 F.3d 601, 608 (D.C. Cir. 2007).

25. 29 U.S.C. § 157; *see, e.g.*, Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797–98 (1945).

26. *See Republic Aviation*, 324 U.S. at 797–98 ("These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.").

27. *Id.* at 801–05.

as little destruction of one as is consistent with the maintenance of the other."[28]

In many cases, no accommodation for employees, and therefore no infringement on an employer's property rights, need even be made. According to the Court in *Lechmere, Inc. v. National Labor Relations Board*, "[s]o long as nonemployee union organizers have reasonable access to employees outside the employer's property, the requisite accommodation has taken place. It is only where such access is infeasible that it becomes necessary . . . [to] balanc[e] the employees' and employers' rights . . . ."[29]

One such reason for a balancing test of employer and employee rights lies at the heart of the NLRA itself. The Act sets forth:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[30]

The Supreme Court has noted that the NLRA "was framed with an awareness that [employer] refusals to confer and negotiate had been one of the most prolific causes of industrial strife [prior to 1935]."[31] As a result, "[o]ne of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."[32] The NLRA was enacted to address the inequality of bargaining power that had hitherto favored employers, and its selected mode of redress for labor strife was to set forth policies that encouraged resolution of labor disputes through collective bargaining.[33] A balancing of party interests is instrumental to the peaceful settlement of such disputes.

28. Hudgens v. NLRB, 424 U.S. 507, 521–522 (1976) (quoting NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956)) (internal quotations omitted).

29. Lechmere, Inc. v. NLRB, 502 U.S. 527, 538 (1992).

30. 29 U.S.C. § 151.

31. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 211 (1964).

32. *Id.*

33. 29 U.S.C. § 151 ("[The] inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms . . . ."); *Fibreboard*, 379 U.S. at 211; ARCHIBALD COX, DEREK CURTIS BOK, ROBERT A. GORMAN, MATTHEW W. FINKIN, LABOR LAW: CASES AND MATERIALS 42–43 (Robert C. Clark et al. eds., 15th ed., 2011) (discussing the failed National Industrial Recovery Act and the mid-1930's federal policy of encouraging unionization as a response to the economic collapse of the Great Depression).

B. Unfair Labor Practices in Venetian Casino Resort

The Venetian argued in *Venetian Casino Resort* that, under *Lechmere*, the Board should accommodate The Venetian's property rights in the temporary sidewalk which played host to the demonstration, and dismiss the unfair labor practice charges against it.[34] This argument failed, however, because the Ninth Circuit had already held that the temporary sidewalk at issue was properly deemed a public forum.[35] As a result, The Venetian had no legal right to exclude the demonstrators, and the demonstrators could not legally be arrested for trespass. Importantly, since the sidewalk was permitted by the City as a demonstration site and not the Casino's property, the Casino could not successfully argue, under *Lechmere*, that its efforts to interfere with the demonstration were exempt from § 8(a)(1) unfair labor practice liability.[36] In other words, because the sidewalk was not the Casino's property, the Casino had no property interests the Board could accomodate in determining the existence of unfair labor practices.[37] Accordingly, the Board initially held the Casino to have committed unfair labor practices by summoning the police to cite demonstrators for trespass, playing a trespass warning over a loudspeaker, and attempting to place a union agent under citizen's arrest.[38]

The issue subsequently raised on appeal by the Casino was whether the Casino's actions to interfere with the demonstration were protected by a First Amendment right to petition the government for redress of grievances.[39] The D.C. Circuit agreed with the Board that The Venetian's trespass warning and placement of a demonstrator under citizen's arrest were not activities protected as conduct incidental to a direct petition.[40] Regarding the summoning of the police however, the D.C. Circuit held that such activity is a direct petition to government subject to protection by the *Noerr-Pennington* doctrine.[41]

The D.C. Circuit remanded the case to the Board to determine whether or not the summoning of the police was "genuinely intended to influence government action." If not "genuinely intended to influence government action," the summoning would constitute a "sham petition"

34. Venetian Casino Resort, L.L.C. v. NLRB, 484 F.3d 601, 609 (D.C. Cir. 2007).

35. Venetian Casino Resort v. Local Joint Exec. Bd., 257 F.3d 937, 948 (9th Cir. 2001).

36. *See Venetian Casino Resort*, 484 F.3d at 609 ("The Venetian reads *Lechmere* to support its argument that its efforts to deny the union demonstrators access to the sidewalk constituted a permissible exercise of its own property rights. But Venetian's argument misses a fundamental point of *Lechmere. Lechmere* allows an employer the right to deny access to its premises only where it has a property right to do so, and as the Ninth Circuit held, The Venetian has no property right to the sidewalk . . . .").

37. *Id.*

38. Venetian Casino Resort, LLC, 345 N.L.R.B. 1061, 1069 (2005), *vacated in part sub nom.* Venetian Casino Resort, L.L.C. v. NLRB, 484 F.3d 601, 605 (D.C. Cir. 2007), *remanded to* Venetian Casino Resort, LLC, 357 N.L.R.B. 1725 (2011).

39. *Venetian Casino Resort*, 484 F.3d at 611.

40. *Id.* at 612.

41. Venetian Casino Resort, L.L.C. v. NLRB, 793 F.3d 85, 92 (D.C. Cir. 2015)

not subject to First Amendment protection from unfair labor practice liability.[42] Notwithstanding the Board's prospective determination of this question as it pertains to The Venetian, the D.C. Circuit's holding indicates that an employer's summoning of the police to disperse lawfully present demonstrators cannot be held as a violation of the NLRA so long as such action was "genuinely intended to influence government action."[43] Although such an action interferes with an employee's § 7 right to demonstrate in concert for mutual aid and protection and would otherwise violate § 8(a)(1) of the Act,[44] the D.C. Circuit has held that such genuine action is protected under the First Amendment's Petition Clause by way of *Noerr-Pennington*.[45]

C. History and Scope of the Petition Clause

The First Amendment to the U.S. Constitution states that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[46] The Congressmen debating the passage of the Bill of Rights in 1789 said very little with regard to the Petition Clause from which to glean intent and meaning.[47] House members, however, did debate over whether the words "to instruct their representatives" should be included among the First Amendment protections.[48] James Madison and others voiced concerns that the inclusion of such a phrase might be construed to impose a binding directive upon elected representatives to adhere unwaveringly to the petitions of their constituents.[49] Although ultimately excluded from the bill, he cautioned that the "doubtful" meaning of such a phrase might ultimately lead to the failure of the states to ratify the Bill of Rights.[50] Instead, he favored "confin[ing] ourselves to an enumeration of simple, acknowledged principles [such that] ratification will meet with but little difficulty."[51] Mr. Wadsworth similarly argued that "[i]nstructions have frequently been given to the representatives of the United States; but the

42. *Id.* (quoting United States v. Philip Morris USA Inc., 5566 F.3d 1095, 1123 (D.C. Cir. 2009)), *remanded to* N.L.R.B.

43. *See id.* (quoting United States v. Philip Morris USA Inc., 5566 F.3d 1095, 1123 (D.C. Cir. 2009)).

44. 29 U.S.C. §§ 157, 158(a)(1) (2012).

45. *See Venetian Casino Resort*, 793 F.3d at 92.

46. U.S. CONST. amend. I.

47. *See* 1 ANNALS OF CONG. 731–47 (1789) (Joseph Gales ed.); *see also* Higginson, *supra* note 10, at 155–56.

48. 1 ANNALS OF CONG. 761 (1789) (Joseph Gales ed.).

49. *Id.* at 761–66 (James Madison said: "Suppose they instruct a representative, by his vote, to violate the Constitution; is he at *liberty to obey* such instructions? Suppose he is instructed to patronise certain measures, and from circumstances known to him, but not to his constituents, he is convinced that they will endanger the public good; is he obliged to sacrifice his own judgment to them? Is he absolutely bound to perform what he is instructed to do?").

50. *Id.* at 766.

51. *Id.*

people did not claim as a right that they should have any obligation upon the representatives; it is not a right that they should."[52]

Counter to the arguments of Mr. Madison and Wadsworth, some delegates voiced support for the proposition that the First Amendment should protect the right of the people not just to petition for redress of grievances, but also to have their petitions heard ("to instruct their representatives").[53] Arguing in support of the phrase, Mr. Burke noted that the state constitutions of Massachusetts, Pennsylvania, and North Carolina, among others, already "recognise, in express terms, the right of the people to give instruction to their representatives."[54] Indeed, some academic literature points to the existence of petition clauses in eighteenth century state constitutions and the development of colonial jurisprudence as evidence of the framers' intent for the right to petition to include the right to due consideration by the elected representative.[55] At least one academic argues that "[t]he original design of the First Amendment petition clause—stemming from the right to petition local assemblies in colonial America, and forgotten today—included a governmental duty to consider petitioners' grievances."[56] Examining the Connecticut colony and other colonial legislatures of the seventeenth and eighteenth centuries, Stephen Higginson found that bills were often written in response to petitions, and that "petitioners retained vital, albeit uncoordinated, lawmaking initiative."[57] Higginson concluded: "That the Framers meant to imply a corresponding governmental duty of a fair hearing seems clear given the history of petitioning in the colonies and the colonists' outrage at England's refusal to listen to their grievances."[58]

Early on, Congress attempted to consider every petition brought before it by reading each state's petitions aloud at the commencement of each day's business.[59] The increasing volume of petitions and the divisive nature of their subject matter, however, quickly proved too much for Congress to continue this practice.[60] As a result of petitioning drives led by various groups in the 1830's, Congress became inundated with petitions calling for the abolition of slavery.[61] Scholars argue that this petitioning en masse transformed the nature of the right to petition as effectuated by Congress.[62] It has also been argued that the subject matter of the petitions—the request to abolish the institution of slavery—was so repugnant to Southern Congressmen that it elicited Congress's retreat

52. *Id.* at 772.
53. *Id.* at 767–68.
54. *Id.* at 774.
55. *See* Mark, *supra* note 11, at 2199–203; Higginson, *supra* note 10, at 166.
56. Higginson, *supra* note 10, at 142–43.
57. *Id.* at 144–52.
58. *Id.* at 155.
59. *See* Higginson, *supra* note 10, at 157.
60. *See* Mark, *supra* note 11, at 2212–20; Higginson, *supra* note 10, at 157.
61. *See* Mark, *supra* note 11, at 2212–20; Higginson, *supra* note 10, at 157–58.
62. *See* Mark, *supra* note 11, at 2212–13 ("[T]he traditional explanation is that volume [of petitions] debased the right [to petition], precipitating its demise."); Higginson, *supra* note 10, at 157–58.

from the original Petition Clause interpretation.[63] In any event, beginning in 1836, Congress adopted "gag rules," whereby abolitionists' petitions were expressly excluded from legislative consideration, and the nature of the right to petition was subsequently altered.[64]

It has been argued that the right to petition has since been "collapsed" or "subsumed" or "narrow[ed]" into the concomitant First Amendment rights of speech and the press.[65] While some of the original intended protections offered by the Petition Clause may be gone, the definition of what constitutes a "petition" for First Amendment protection purposes has significantly expanded. As previously discussed, at the time of the amendment's passage, a "petition for redress of grievances" was synonymous with a request directed to an elected representative to enact, repeal, or amend a law.[66] In *Borough of Duryea*, *Pennsylvania v. Guarnieri*, however, the Supreme Court offered its interpretation of the historical roots of the "petition."[67] Tracing its origins back to the Magna Carta in 1215, the Court noted that "[p]etition, as a word, a concept, and an essential safeguard of freedom, is of ancient significance in the English law and Anglo-American legal tradition."[68] The Court stated that "the right to petition applied to petitions from nobles to the King, from Parliament to the King, and from the people to Parliament, and it concerned both discrete, personal injuries and great matters of state."[69]

Courts have interpreted the Petition Clause to protect a wide array of "petitioning activities" directed at government officials, even though such activities could fall under the protections of speech or the press.[70] An individual has a constitutionally protected First Amendment right anytime she petitions the government for redress.[71] Significantly, courts have held that the Petition Clause protects a right of access to the courts (except for baseless litigation),[72] including the right of prisoners to file grievances.[73] It has also been held that petitioning activity is generally subject to the clause's protections regardless of the personal motives behind its making, even when motivated solely by personal gain or competitive advantage.[74] The Petition Clause, however, does not protect peti-

63. *See* Mark, *supra* note 11, at 2217.

64. *See id.* at 2216–18. For a history of the spirited defense led by John Quincy Adams for the original-meaning Petition Clause against pro-slavery, gag-rule proponents, see *id.* at 2216–26.

65. *See* Mark, *supra* note 11, at 2154–55; Higginson, *supra* note 10, at 142.

66. *See* Higginson, *supra* note 10, at 142.

67. 564 U.S. 379, 394–98 (2011).

68. *Id.* at 395.

69. *Id.*

70. *See, e.g.*, Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741, 743 (1983); Van Deelen v. Johnson, 497 F.3d 1151, 1155–56 (10th Cir. 2007).

71. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("Certainly the right to petition extends to all departments of the Government."); *Van Deelen*, 497 F.3d at 1155–56.

72. McDonald v. Smith, 472 U.S. 479, 484 (1985) (citing *Bill Johnson's*, 461 U.S. at 743).

73. Hudson v. Palmer, 468 U.S. 517, 523 (1984).

74. *See, e.g.*, E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138–39 (1961); *see also* 16A Am. Jur. 2d *Constitutional Law* § 571 (citing Hobart v. Ferebee, 692 N.W.2d 509 (S.D. 2004)).

tions made with the intent to harass others[75] or deceive others through fraud or deliberate misrepresentation.[76] In addition, the right to petition, like other First Amendment protections, is subject to reasonable time, place, and manner restrictions.[77]

State courts have recognized a variety of petitioning activities as protected by the Petition Clause.[78] Wisconsin courts, for example, have acknowledged writing letters to a veteran's administration and demanding action from a public service commission as protected petitioning activity.[79] California courts have held that the Petition Clause protects, among other things, an individual's filing of a tort suit from subsequent liability for malicious prosecution of a government entity, as well as alcoholic beverage license holders from liability for lobbying against the government's granting of additional licenses.[80] Courts have also recognized the lobbying of government officials for changes in business regulations, testifying at zoning hearings, and complaining to and cooperating with law enforcement as protected petitioning activity.[81]

D. Creation of the Noerr-Pennington *Doctrine*

The *Noerr-Pennington* doctrine was created to protect certain collusive "petitioning" activities from antitrust liability.[82] In 1961, the Supreme Court held in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* that a group of railroad companies' efforts to secure favorable legislation were protected from liability by the First Amendment's Petition Clause under the Sherman Antitrust Act.[83] In *Noerr*, Pennsylvania truck operators sued an association of eastern railroads, alleging that the railroads had engaged in a publicity campaign designed to destroy the trucking business in violation of the Sherman Act.[84] In particular, the truck operators alleged a "conspiracy" among the railroads "to foster the

75. *See, e.g.*, Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859, 865 (Colo. 2004) ("The First Amendment will not protect petitioning activity that is . . . undertaken to harass an opponent . . . .") (citing Protect Our Mountain Env't, Inc. v. Dist. Court, 677 P.2d 1361, 1366–67 (Colo. 1984)).

76. *See, e.g.*, United States v. Philip Morris USA Inc., 566 F.3d 1095, 1123–24 (D.C. Cir. 2009); Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260, 1267 (D.C. Cir. 1995) (citing Whelan v. Abell, 48 F.3d 1247 (D.C. Cir. 1995)).

77. *See* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972) (implying that because "First Amendment rights may not be used as the means . . . for achieving 'substantive evils,'" the right to petition is not absolute); Va. Acad. of Clinical Psychologists v. Blue Shield of Va., 624 F.2d 476, 482 (4th Cir. 1980) (declining to extend Petition Clause protections via *Noerr-Pennington* to certain antitrust violations of defendants).

78. *See, e.g.*, WITKIN ET AL., *supra* note 13, § 180; Gary, *supra* note 13, at 14–15.

79. Gary, *supra* note 13, at 15 (citing State *ex rel.* Thomas v. State, 198 N.W.2d 675, 680 (Wis. 1972)); Wis. Power & Light Co. v. Pub. Serv. Comm'n, 92 N.W.2d 241, 247 (Wis. 1958).

80. Matossian v. Fahmie, 161 Cal. Rptr. 532 (Cal. Ct. App. 1980); WITKIN ET AL., *supra* note 13, § 180 (citing Long Beach v. Bozek, 645 P.2d 137 (Cal. 1982)).

81. Eaton v. Newport Bd. of Educ., 975 F.2d 292, 293 (6th Cir. 1992) (lobbying); Christian Gospel Church, Inc. v. City & Cty. of San Francisco, 896 F.2d 1221, 1226 (9th Cir. 1990) (zoning); United States v. Hylton, 710 F.2d 1106, 1111 (5th Cir. 1983) (filing a complaint with law enforcement); Arim v. Gen. Motors Corp., 520 N.W.2d 695, 700 (Mich. Ct. App. 1994) (cooperating with law enforcement).

82. E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

83. *Id.* at 138.

84. *Id.* at 129–30.

adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers."[85] In its opinion, the Court first noted that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage and enforcement of laws."[86] It reasoned that a construction of the Sherman Antitrust Act prohibiting such "political activity" would threaten democratic processes and raise significant First Amendment concerns:

> To hold that the government retains the power to act in its representative capacity and yet hold, at the same time, that people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, . . . [t]he right to petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.[87]

Accordingly, the Court held that the Sherman Act "does not apply to mere group solicitation of governmental action . . . ."[88] The Court then turned to the question of whether an anticompetitive motive, in this case the railroads' alleged intent to destroy the trucking business, would put such group solicitation within the Sherman Act's prohibitions.[89] Noting that "[i]t is neither unusual nor illegal to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors," the Court concluded that an anticompetitive intent does not make such action unlawful.[90] It stated that even an attempt to deceive the public through a publicity campaign aimed at the destruction of a competing business, "reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned."[91]

The intersection of First Amendment concerns and antitrust liability were next addressed by the Court in *United Mine Workers of America v. Pennington*.[92] Instead, Pennington involved an agreement between major coal companies and the coal miner's union ("UMW"), the goal of which was to cut overproduction of coal by establishing an industry-wide wage scale.[93] The industry-wide wage scale was intended to be too costly for smaller companies to afford, forcing those smaller companies out of business, and cutting overall production to the benefit of the larger com-

85. *Id.* at 129.
86. *Id.* at 135.
87. *Id.* at 137–38.
88. *Id.* at 139.
89. *Id.* at 138–40.
90. *Id.* at 139–40.
91. *Id.* at 145.
92. 381 U.S. 657 (1965).
93. *Id.* at 660.

panies and the union.[94] In furtherance of their plan, the parties to the agreement successfully lobbied and obtained a minimum wage order from the U.S. Secretary of Labor under the Welsh-Healey Act for employees of contractors selling coal to the Tennessee Valley Authority.[95] In a suit by the union to obtain outstanding royalty payments due to them from noncompliant companies subject to the agreement, the noncompliant companies cross-claimed.[96] They alleged that the UMW and certain large coal companies "had conspired to restrain and to monopolize interstate commerce in violation . . . of the Sherman [Antitrust] Act."[97] In determining the legality under the Sherman Act of the parties' collusive lobbying of the Secretary of Labor, the Court held *Noerr* to be dispositive.[98] Noting that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose," the Court that held the UMW and coal companies' lobbying efforts protected from antitrust liability, even though such efforts were undertaken with the intent to destroy competition.[99]

E. Development of the Noerr-Pennington *Doctrine*

Since the seminal *Noerr* and *Pennington* cases, the Court has excluded certain types of petitioning activities from *Noerr-Pennington*'s protective scope, while state and federal courts have expanded *Noerr-Pennington* protections to additional petitioning activities from liability under a variety of legal theories.[100]

1. The Sham Petition Exception

Noerr-Pennington does not protect all petitions directed at government from antitrust liability.[101] Instead, the Supreme Court has created an exception for "sham petitions."[102] A petition is a "mere sham," and therefore not subject to *Noerr-Pennington* protection, if it is "not genuinely intended to influence government action."[103]

In *California Motor Transport Co. v. Trucking Unlimited*, the Supreme Court extended *Noerr-Pennington* to protect from Clayton Antitrust Act liability the act of filing with courts and administrative agen-

94. *Id.*
95. *Id.*
96. *Id.* at 659.
97. *Id.*
98. *Id.* at 669–70.
99. *Id.* at 670. The Court further held that collusive lobbying efforts undertaken with the intent to elicit results that violate the Sherman Act would also be protected – "[S]uch conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.*
100. *See supra* Part II.D.ii.–iii.
101. *See, e.g.*, Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972).
102. *Id.* at 515–16 (citing E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)).
103. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 507 n.10 (1988) (citing *Noerr*, 365 U.S. 127); *Noerr*, 365 U.S. at 144.

cies.[104] The Court, however, also noted that "a pattern of baseless, repetitive claims" that abuses judicial processes by blocking a competitor's access to courts and agencies does not acquire *Noerr-Pennington* protection.[105]

The Court, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* ("*PREI*"), set forth a two-part inquiry to determine when petitions directed at courts are "sham petitions."[106] The test consists of both an objective and subjective component.[107] First, to qualify as a sham petition, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."[108] Second, if found to be objectively baseless, "the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon."[109] Thus, while a purpose to obtain an overall anticompetitive result is protected by *Noerr-Pennington*, abusing the governmental process with an objectively baseless lawsuit solely to disrupt a competitor's business is not protected.[110] In other words, for a suit to be a "sham," it not only has to be objectively baseless, but it also must be shown that the petitioning litigant knew her suit was objectively baseless.[111] In addition, the Court specifically left open the possibility of fraudulent suits garnering *Noerr-Pennington* protection, stating in a footnote, "[w]e need not decide here whether . . . *Noerr* permits imposition of antitrust liability for a litigant's fraud or other misrepresentations."[112]

With respect to the sham petition exception for petitions directed at legislators, as opposed to adjudicators, the Court set forth its standard in *City of Columbia v. Omni Outdoor Advertising*.[113] In *Omnia*, the Court held that for petitions directed at legislators, "a 'sham' situation involves

104. *Cal. Motor Transp.*, 404 U.S. at 510–11 ("Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition . . . . We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.") (internal citations omitted).

105. *Id.* at 513.

106. Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc. (*PREI*), 508 U.S. 49, 60–61 (1993).

107. *Id.*

108. *Id.* at 60 (emphasis added).

109. *Id.* at 60–61 (internal citations and quotations omitted) (emphasis added).

110. *See id.*; *see also* Stuart N. Senator & Gregory M. Sergi, Noerr-Pennington*: Safeguarding the First Amendment Right to Petition the Government*, 23 COMPETITION J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. B. CAL. 83, 86–87 (2014).

111. *See PREI*, 508 U.S. at 60–61; *see also* Senator & Sergi, *supra* note 110, at 86–87.

112. *PREI*, 508 U.S. at 62 n.6.

113. City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 380–82 (1991).

a defendant whose activities are not genuinely aimed at procuring favorable government action at all."[114]

2. Application of Noerr-Pennington *by the Supreme Court*

Although the Supreme Court has discussed types of petitioning immunity in the contexts of antitrust, defamation, and labor law, the *Noerr-Pennington* doctrine itself has been applied by the Court in only a handful of cases.[115] Furthermore, the Court has only applied *Noerr-Pennington* to decide cases that: (1) allege antitrust violations; and (2) involve petitions directed at courts, administrative agencies, and lawmakers.[116] Whether the *Noerr-Pennington* doctrine applies as a defense to liability from non-antitrust statutes is an issue that has not been expressly decided by the Court.[117] In a pair of cases, *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board* and *BE & K Construction Co. v. National Labor Relations Board*, however, the Court expressed the same First Amendment concerns underlying *Noerr-Pennington* in interpreting the extent of unfair labor practice liability under the NLRA.[118]

In *Bill Johnson's*, the Court, citing First Amendment concerns, held that the NLRA does not permit the N.L.R.B. to order the withdrawal of a party's lawsuit unless the suit is both objectively baseless and motivated by retaliation.[119] The Court vacated the Board's finding that an employer's filing of a state court lawsuit against a former employee constituted an unfair labor practice.[120] Noting that "[w]e should be sensitive to . . .

114. *Id.* at 380 (internal quotations omitted) (emphasis added).

115. *See* Michael Pemstein, *The Basis for* Noerr-Pennington *Immunity: An Argument That Federal Antitrust Law, Not the First Amendment, Defines the Boundaries of* Noerr-Pennington, 40 T. MARSHALL L. REV. 79, 81 (2014). For cases in which the Supreme Court specifically addressed *Noerr-Pennington* arguments, see Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749 (2014); BE & K Constr. Co. v. NLRB, 563 U.S. 516 (2002); *PREI*, 508 U.S. 49; City of Colom. v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). *Noerr-Pennington* was argued, but not addressed in the following cases, because the Court decided them on other grounds: F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621 (1992); S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985); Hoover v. Ronwin, 466 U.S. 558 (1984).

116. *See* Pemstein, *supra* note 115, at 82–86.

117. *See* Fligsten, *supra* note 17, at 30 ("The issue of whether *Noerr-Pennington* applies outside of the antitrust context remains open to debate."); Pemstein, *supra* note 115, at 112 ("[T]he Supreme Court has not explicitly stated whether the *Noerr-Pennington* doctrine is a constitutional doctrine or a statutory interpretation doctrine . . . .").

118. *See BE & K*, 536 U.S. 516 (2002); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741–49 (1983).

119. *Bill Johnson's*, 461 U.S. at 748–49.

120. *Id.* at 737. In *Bill Johnson's*, a terminated waitress, believing her firing to have been unlawfully motivated by the employer's desire to prevent unionization of its work force, filed a charge with the N.L.R.B. *Id.* at 733. In response to an ensuing picket over the waitress's firing, the employer filed a state court lawsuit, alleging libel and harassment. *Id.* at 734. The terminated waitress subsequently filed another unfair labor practice charge with the N.L.R.B., this time alleging that the employer's state court lawsuit was an unlawful retaliatory response to her filing of the initial charge with the N.L.R.B. *Id.* at 735. The Board concluded the employer's state court lawsuit was an unfair labor prac-

First Amendment values in construing the NLRA," the Court interpreted the NLRA not to preclude the filing of retaliatory lawsuits unless the suit could also be shown to be objectively baseless.[121] Thus, the Court, in expressing the same constitutional concerns undergirding *Noerr-Pennington*, essentially limited the reach of unfair labor practice liability to situations of "sham" petitioning.[122] In doing so, however, the Court never cited Noerr-Pennington, nor did it explicitly hold the doctrine to protect petitions from unfair labor practice liability.[123]

The nexus of First Amendment petitioning rights and NLRA liability was most recently addressed by the Court in *BE & K Construction Co. v. National Labor Relations Board*.[124] There, the Court clarified *Bill Johnson's* by holding that unsuccessful suits brought with retaliatory intent are also beyond the reach of unfair labor practice liability, so long as they are not objectively baseless.[125] After determining that unsuccessful lawsuits motivated by retaliation may be protected by the First Amendment's Petition Clause, the Court turned to the question of whether Congress intended such suits to be deemed unlawful.[126] In doing so, the Court examined the text of the NLRA.[127] Noting that the Court has, in other cases, "avoided a similarly difficult First Amendment issue by adopting a limited construction of the relevant NLRA provision,"[128] the Court found the NLRA not to prohibit such suits.[129] Importantly, although the Court analogized to the antitrust context for help in determining the boundaries of protected petitioning, the Court never explicitly extended the doctrine of Noerr-Pennington to cases brought under the NLRA.[130]

3. Expansion of Noerr-Pennington *by State and Federal Courts*

While the Supreme Court has not expressly applied *Noerr-Pennington* beyond the antitrust context,[131] numerous state and federal courts have extended *Noerr-Pennington* immunity to protect petitioning activity from liability under a variety of statutes and common-law

tice in retaliation for the waitress's having engaged in protected activity by filing her original charge with the Board. *Id.* at 736–37.

121. *Id.* at 741–44.

122. *See id.* at 744 ("Considerations analogous to these led us in the antitrust context to adopt the 'mere sham' exception in *California Motor Transport Co.* . . . . We should follow a similar course under the NLRA.").

123. *See id.* at 744.

124. BE & K Constr. Co. v. NLRB, 536 U.S. 516 (2002).

125. *Id.* at 536 ("Because there is nothing in the statutory text indicating that § 158(a)(1) [of the NLRA] must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, we decline to do so.").

126. *Id.* at 524–37.

127. *Id.* at 536–37.

128. *Id.* at 535 (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

129. *Id.* at 536–37.

130. *See BE & K*, 536 U.S. at 525–28; *see also* Fligsten, *supra* note 17, at 30.

131. *See* sources cited *supra* note 115.

claims.[132] Commentators note that courts have applied *Noerr-Pennington* in various situations, including suits for defamation,[133] tortious interference with contract and business relations, civil rights violations, and intentional infliction of emotional distress, among others.[134] In addition, courts have expanded the scope of what constitutes "petitioning" for First Amendment purposes,[135] even applying *Noerr-Pennington* immunity to protect the action of cooperating with local law enforcement.[136]

F. Application of Noerr-Pennington in Venetian Casino Resort

In *Venetian Casino Resort*, the D.C. Circuit reversed the N.L.R.B. and held that "the act of summoning the police to enforce state trespass law is a direct petition to government subject to protection" by *Noerr-Pennington*, and therefore exempt from unfair labor practice liability.[137] The case turned on the differing interpretations of the Supreme Court's reasoning in the Noerr-Pennington line of cases.[138]

1. N.L.R.B.'s Reasoning

In determining that *Noerr-Pennington* does not apply to the act of summoning the police, the Board first examined the case of *Noerr* itself.[139] The Board stressed the Court's concern in *Noerr* about the democracy-impinging implications of construing an antitrust statute to "forbid[] associations for the purpose of influencing the passage and enforcement of laws . . . ."[140] It also pointed to the *Noerr* Court's limited holding that the Sherman Act did not apply "to the activities of the railroads[,] at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws . . . ."[141] The Board likewise construed *Pennington* as providing pro-

132. *See* Fligsten, *supra* note 17, at 25; Senator & Sergi, *supra* note 110, at 83–84. For examples of federal courts delving into *Noerr-Pennington* arguments or applying *Noerr-Pennington* immunity outside the antitrust context, see, e.g., Luxpro Corp. v. Apple Inc., No. C 10-03058 JSW, 2011 WL 1086027, at *5 (N.D. Cal. Mar. 24, 2011); Sierra Club v. Butz, 349 F. Supp. 934, 938 (N.D. Cal. 1972). For examples of state courts applying *Noerr-Pennington* outside the antitrust context, see, e.g., Zeller v. Consolini, 758 A.2d 376, 382 (Conn. App. Ct. 2000); Arim v. Gen. Motors Corp., 520 N.W.2d 695, 700 (Mich. Ct. App. 1994).

133. For an analysis of *Noerr-Pennington* immunity, as applied by courts to defamation actions, see Eric M. Jacobs, *Protecting the First Amendment Right to Petition: Immunity for Defendants in Defamation Actions Through Application of the* Noerr-Pennington *Doctrine*, 31 AM. U. L. REV. 147, 149-50 (1981).

134. *See* Gary, *supra* note 13, at 16 n.11 (citing cases).

135. *See supra* Part II.C and accompanying notes

136. *See, e.g.*, *Arim*, 520 N.W.2d at 700.

137. Venetian Casino Resort, L.L.C. v. NLRB, 793 F.3d 85, 90 (D.C. Cir. 2015).

138. *Id.* at 90–92; Venetian Casino Resort, LLC, 357 N.L.R.B. 1725, 1727 (2011), *rev'd sub nom.* Venetian Casino Resort, L.L.C. v. NLRB, 793 F.3d 85, 90 (D.C. Cir. 2015).

139. *Venetian Casino Resort, LLC*, 357 N.L.R.B. at 1727, *rev'd sub nom.* Venetian Casino Resort, L.L.C. v. NLRB, 793 F.3d 85, 90 (D.C. Cir. 2015).

140. *Id.* (quoting E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137–38 (1961)).

141. *Id.* at 1727 (quoting *Noerr*, 365 U.S. at 138).

tection for political petitioning activity regardless of anticompetitive intent.[142]

In addition to the seminal Supreme Court cases, the Board relied, in part, on two federal appellate court decisions wherein the courts expressly declined to extend *Noerr-Pennington* protections to petitioning activity lacking a political element.[143] It looked to both *Woods Exploration & Producing Co. v. Aluminum Co. of America*, where the 5th Circuit held that *Noerr-Pennington* immunity was "inapplicable '[w]here . . . political considerations are absent.'"[144] Similarly, the Board cited *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* where the First Circuit reasoned that because no attempt was made by the litigants to influence the passage of any law or seek any "significant policy determination," Noerr-Pennington did not apply.[145] The Board quoted *Whitten* for the proposition that "'*Noerr* is aimed at insuring uninhibited access to government policy makers,' not at 'dealings with officials who administer' existing laws and policy determinations."[146]

Applying this interpretation of the *Noerr-Pennington* doctrine, the Board held that the act of summoning the police is not a direct petition to government subject to *Noerr-Pennington* immunity.[147] The Board pointed to the fact that such an act involves neither an "effort to influence the passage of any law" nor a "significant policy determination in the application of a statute."[148] It also noted that "there is no indication that [The Venetian's] communications with the police involved any interaction with any official with policymaking authority."[149] Moreover, the Board found "no evidence that [The Venetian actually] communicated any information to the police when it summoned them."[150] Accordingly, the Board held that an unfair labor practice finding based upon a party's summoning the police to arrest lawfully present demonstrators does not conflict with the "values embodied in the *Noerr-Pennington* doctrine."[151] In fact, it argued that "[NLRA] Section 7 rights can be achieved—and was achieved here—without any infringement of the First Amendment right to petition."[152]

142. *Id.* (citing United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965)).

143. *Id.* (citing Woods Expl. & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1296–98 (5th Cir. 1971); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 32–33 (1st Cir. 1970)).

144. *Venetian Casino Resort, LLC*, 357 N.L.R.B. at 1727 (quoting *Woods Expl.*, 438 F.2d at 1296–97).

145. *Id.* (quoting *George R. Whitten, Jr.*, 424 F.2d at 32).

146. *Id.* (quoting *George R. Whitten, Jr.*, 424 F.2d at 32–33).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 1728.

152. *Id.*

2. D.C. Circuit's Reasoning

In holding the act of summoning the police to enforce state trespass law a direct petition to government subject to *Noerr-Pennington* immunity, the D.C. Circuit interpreted the doctrine as protecting not only petitions directed to policy-making authorities, but petitions directed to all levels of government.[153] The court framed its analysis by first examining the Supreme Court's language on what constitutes a "petition" for purposes of *Noerr-Pennington* protection.[154] To garner Noerr-Pennington protection, The Venetian's act of calling upon the police would first have to be deemed a petition under the First Amendment's Petition Clause.[155] The D.C. Circuit pointed to language in *California Motor Transport Co.* that indicated that parties exercise their petition rights when they "advocate their causes and points of view respecting resolution of their business and economic interests."[156] Quoting another Supreme Court case, the D.C. Circuit also noted that "whether conduct constitutes petitioning activity 'depends not only on its impact, but also on the context and nature of the activity.'"[157] In this case, because "[r]equesting police enforcement of state trespass law [was] an attempt to persuade the local government to take particular action with respect to a law," the D.C. Circuit concluded it was a direct petition to government for redress of grievances under the Petition Clause.[158]

Contrary to the N.L.R.B's interpretation of *Noerr-Pennington*, the D.C. Circuit concluded that the doctrine's protections are not limited to petitions directed at officials with policy-making authority.[159] Instead, the court focused on language in *California Motor Transport* referring to protection for petitions directed at "all departments of government."[160] The D.C. Circuit relied, in part, on other circuits' decisions for the proposition that *Noerr-Pennington* should protect petitions to police.[161] Importantly, the Ninth Circuit, in F*orro Precision, Inc. v. International Business Machines Corp.*, had held that the *Noerr-Pennington* doctrine applies "to citizen communications with police."[162] The Ninth Circuit reasoned that it "would be difficult indeed for law enforcement authorities to discharge their duties if citizens were in any way discouraged from providing information."[163] *Forro's* concern was that by imposing liability for certain communications with police, individuals would be discour-

153. Venetian Casino Resort, L.L.C. v. NLRB, 793 F.3d 85, 90 (D.C. Cir. 2015) (citing Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972)).

154. *Id.*

155. *See* E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137–38 (1961).

156. *Venetian Casino Resort*, 793 F.3d at 90 (quoting *Cal. Motor Transp.*, 404 U.S. at 511).

157. *Id.* (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 504 (1988)).

158. *Id*.

159. *See id.*

160. *Id.* (quoting *Cal. Motor Transp.*, 404 U.S. at 510).

161. *Id.* (citing Ottensmeyer v. Chesapeake & Potomac Tel. Co. of Md., 756 F.2d 986, 993–94 (4th Cir. 1985); Forro Precision, Inc. v. Int'l Bus. Machs. Corp., 673 F.2d 1045, 1060 (9th Cir. 1982)).

162. *Forro Precision*, 673 F.2d at 1060.

163. *Id.*

aged from providing information to police.[164] In the *Forro* court's opinion, this consideration warranted extension of *Noerr-Pennington* immunity to calling the police.[165]

Despite its holding that summoning the police is a petition subject to Noerr-Pennington protection, the D.C. Circuit remanded to the N.L.R.B. to determine whether The Venetian's summoning of the police was "genuinely intended to influence government action."[166] If not genuine, then it was a "sham petition" not protected by *Noerr-Pennington*.[167]

III. ANALYSIS

The import of the *Noerr-Pennington* doctrine and its sham petition exception is that it will protect all petitioning activity from liability unless it is proved that the petition made was both objectively baseless and subjectively intended to abuse process.[168] This is a very high presumption of First Amendment protection, one that provides greater immunity for petitioning activities than the Petition Clause would provide standing alone.[169] Accordingly, it is very difficult for a party to overcome its burden of proving a sham petition, especially when evidence of subjective bad faith may, in many cases, be lacking. Furthermore, if the Petition Clause is construed to protect everyday speech actions like "summoning the police," there may be a boundless variety of deservedly regulated conduct also protected as First Amendment expression. If *Noerr-Pennington* is applied outside the antitrust context, it has the potential to provide nearly absolute immunity for an ever-expanding array of "petitioning" activities from liability under a myriad of statutory and common law claims.[170]

A. Noerr-Pennington *as Protective of Political Petitioning Only*

In applying *Noerr-Pennington* to protect from unfair labor practice liability the act of an employer's summoning of the police, the D.C. Circuit stated that "[n]owhere . . . does the Supreme Court suggest that everyday attempts to influence government action . . . are excluded from the *Noerr-Pennington* doctrine's ambit."[171] Neither, however, does the Court

164. *See id.*

165. *See id.*

166. Venetian Casino Resort, L.L.C. v. N.L.R.B., 793 F.3d 85, 92 (D.C. Cir. 2015) (quoting United States v. Philip Morris USA Inc., 566 F.3d 1095, 1123 (D.C. Cir. 2009)).

167. *Id.*

168. Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc. (*PREI*), 508 U.S. 49, 60–61 (1993).

169. *See, e.g.*, Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885, 890–91 (10th Cir. 2000) (noting that *Noerr-Pennington*'s use of the term "petitioning immunity" goes beyond the guarantees of the Petition Clause); *see also* Zauzmer, *supra* note 19, at 1271–72.

170. *Cf.* Fligsten, *supra* note 17, at 28. Fligsten explains that if the *Noerr-Pennington* doctrine is a constitutional doctrine, as opposed to an antitrust doctrine, *Noerr-Pennington* will apply to causes of action other than antitrust. If this is the case, there is no defined limit to the types of statutory and common-law liability to which *Noerr-Pennington* will provide a defense.

171. *Venetian Casino Resort*, 793 F.3d at 91.

suggest that everyday attempts to influence government action should be included within the doctrine's ambit.[172] In fact, there are many reasons to believe Supreme Court precedent indicates *Noerr-Pennington* immunity should apply exclusively to: (1) antitrust suits; and (2) protecting petitions directed at courts, legislatures, and administrative agencies.

The first of these reasons is that the Supreme Court has never expressly applied Noerr-Pennington in any other situation.[173] The Court has invoked *Noerr-Pennington* exclusively to protect against antitrust liability petitions directed at lawmaking authorities.[174] While some legal scholars have interpreted the Supreme Court's *Noerr-Pennington* line of cases as a constitutional doctrine capable of immunizing various petitioning activities from liability under a variety of legal theories,[175] the Supreme Court has never extended Noerr-Pennington beyond the aforementioned context.[176]

Courts, such as the D.C. Circuit, that have applied *Noerr-Pennington* to protect petitions directed at nonlawmaking governmental bodies, however, point to language in the *Noerr* line of cases that implicate *Noerr-Pennington* immunity for petitions directed at any governmental body.[177] Indeed, the Court has stated that "the right to petition extends to all departments of government."[178] Additionally, *Noerr* stated that "the Sherman Act does not apply to . . . mere solicitation of governmental action with respect to the passage and enforcement of laws."[179]

The "enforcement of laws" language has been construed by the D.C. and other circuits to mean that petitions made to "law enforcement" (the police) are similarly protected from liability under the principles of *Noerr-Pennington*.[180] This interpretation, however, misses the point of those cases. *Noerr* particularly stressed the importance of not

172. *See* E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139–40 (1961).

173. *See* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749 (2014); *PREI*, 508 U.S. 49; City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

174. *See Octane Fitness, LLC* 134 S. Ct. 1749; *PREI*, 508 U.S. 49; *Omni Outdoor Advert., Inc.*, 499 U.S. 365; *Allied Tube & Conduit Corp.*, 486 U.S. 492; *Cal. Motor Transp. Co.* 404 U.S. 508; *Pennington*, 381 U.S. 657; *Noerr*, 365 U.S. 127.

175. *See, e.g.*, Gary, *supra* note 13, at 17 ("These cases strongly suggest a First Amendment basis for the Noerr-Pennington doctrine, and hint that the doctrine may be applied outside the antitrust context.").

176. *See Octane Fitness, LLC* 134 S. Ct. 1749; *PREI*, 508 U.S. 49; *Omni Outdoor Advert., Inc.*, 499 U.S. 365; *Allied Tube & Conduit Corp.* 486 U.S. 492; *Cal. Motor Transp. Co.*, 404 U.S. 508; *Pennington*, 381 U.S. 657; *Noerr*, 365 U.S. 127.

177. *See* Venetian Casino Resort, L.L.C. v. NLRB, 793 F.3d 85, 90 (D.C. Cir. 2015); *see also* Ottensmeyer v. Chesapeake & Potomac Tel. Co. of Md., 756 F.2d 986, 994 (4th Cir. 1985); Forro Precision, Inc. v. Int'l Bus. Machs. Corp., 673 F.2d 1045, 1059–60 (9th Cir. 1982).

178. *Cal. Motor Transp*., 404 U.S. at 510 (emphasis added).

179. E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961) (emphasis added).

180. *See Venetian Casino Resort, L.L.C.*, 793 F.3d at, 90; *see also Ottensmeyer*, 756 F.2d at 993; *Forro Precision, Inc.*, 673 F.2d 1045.

construing the Sherman Act to forbid "political activity."[181] It stated that "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[182]

Noerr was concerned with the detrimental impact that restrictions on "political" petitioning would have in a democratic society that relies on public participation for its lawmaking process.[183] The parties in *Noerr* and *Pennington* were attempting to influence legislators and executive officials who had authority to promulgate laws and regulations favorable to them.[184] By contrast, the employer in *Venetian Casino Resort* was soliciting the police to arrest protestors.[185] These scenarios are distinct. As the N.L.R.B. alluded to, police officers have no power to enact, amend, or repeal legislation or regulations.[186] As a result, *Noerr* and *Pennington*'s concerns about impinging democratic lawmaking processes are not triggered in the case of *Venetian Casino Resort*.

Second, the Supreme Court would be justified in limiting *Noerr-Pennington* protection to petitions directed only at lawmaking authorities because of the comparative extent of government intrusion implicated. It might be that government restrictions on your right to petition elected officials are so antithetical to notions of liberty and democracy that they carry the necessity for greater protection than would a law imposing limited liability for summoning the police in certain situations.

A third reason supporting a conservative interpretation of the scope of petitioning subject to *Noerr-Pennington* is based in the history of the Petition Clause itself. As previously discussed in Section II.C of this Note, the right to petition, at the time of the Bill of Rights' adoption, was grounded in the notion that people should have the right to petition their elected representatives to act legislatively to redress their grievances.[187] Certainly, the right to petition, as described in the constitutional debates[188] and colonial state constitutions,[189] shows no indication whatsoever of a definition of "petition" that could be construed to encompass requests made to local police. Thus, the right to petition the legislatures for redress of grievances is certainly one contemplated by the drafters,[190] and should therefore be accorded comparatively weightier protection from government interference when invoking the Petition Clause as a basis for protection.

Fourth, *Noerr-Pennington*'s origins as a doctrine designed to protect certain petitioning activities from antitrust liability suggest the Court's specific concern for infringement of group petitioning. The facts of *Noerr*

181. *Noerr*, 365 U.S. at 137–38.
182. *Id.* at 137.
183. *See id.* at 137–38.
184. *See id.* at 129–30; United Mine Workers of Am. v. Pennington, 381 U.S. 657, 658–61 (1965).
185. Venetian Casino Resort, L.L.C. v. NLRB, 484 F.3d 601, 603–05 (D.C. Cir. 2007).
186. Venetian Casino Resort, LLC, 357 N.L.R.B. 1725, 1727–28 (2011).
187. *See supra* Section II.C and accompanying footnotes.
188. *See* 1 ANNALS OF CONG. 731–47 (1789).
189. *See* Higginson, *supra* note 10, at 142–45.
190. *See supra* Section II.C and accompanying footnotes.

and *Pennington* involved multiple entities facing potential antitrust liability for attempting to influence government policy decisions as a group.[191] In *Venetian Casino Resort*, on the other hand, a single entity attempted to influence a governmental decision.[192] A court's affording of greater protections to collaborative petitioning rights than to individual petitioning rights would be justified. In a sense, imposing prohibitions on group petitioning activity is more egregious, more contrary to democracy, and entails a more extensive detrimental impact to a larger number of people than would the imposition of a petitioning restriction upon a single individual in a specific instance. It is possible that implicit in the Court's protection of group petitioning is a recognition of the need to preserve freedom of association, as well. Antitrust statutes are intended to outlaw certain associative acts, and the right to associate with others for choosing, supporting, and condemning government officials in a democratic society is paramount to the proper functioning of our lawmaking process, as is indicated by the *Noerr* opinion.[193]

Antitrust violations, unlike most unfair labor practices, involve the collusion of multiple entities.[194] Because antitrust liability attaches in settings of collaborative efforts, construing the antitrust statutes to prohibit group petitioning of lawmakers potentially implicates even greater First Amendment conflicts than would restraining an individual's petition rights. Although individual petitioning is similarly protected by the Petition Clause,[195] group petitioning is a more powerful tool in a democratic society. The collective has a greater voice and more influence on legislators than does the lone individual. Hence, restrictions on group petitioning could pose an even greater stumbling block to democratic processes than restrictions on an individual's right to petition. It may be that group petitioning, because it is more powerful and therefore more democratically meaningful than individual petitioning, ought to be accorded comparatively greater protection from statutory liability. For these reasons, the Supreme Court, in establishing the Noerr-Pennington doctrine, could have been primarily concerned with protecting collaborative petitions to policymakers.

B. Noerr-Pennington *as an Antitrust Doctrine Only*

1. Noerr-Pennington *as Statutory, Not Constitutional Interpretation*

Determining whether *Noerr-Pennington* is a constitutional or antitrust doctrine is crucial. If it is a constitutional doctrine, it will apply in all situations involving government interference with the First Amendment

191. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 658–61 (1965); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 129–30 (1961).

192. Venetian Casino Resort, L.L.C. v. NLRB, 484 F.3d 601, 603–05 (D.C. Cir. 2007).

193. *Noerr*, 365 U.S. at 137–38.

194. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (2012).

195. U.S. CONST. amend. I.

right to petition.[196] Because *Noerr-Pennington* provides heightened immunity,[197] its deployment as a constitutional doctrine would have the potential to protect all kinds of petitioning activities from liability under all kinds of statutory and common law claims.[198] The *Noerr-Pennington* line of cases, as well as *Bill Johnson's* and *BE & K*, all indicate, however, that *Noerr-Pennington* is an antitrust statutory interpretation doctrine only, and not exportable beyond that context.

First, it is revelatory that the Supreme Court has never explicitly applied *Noerr-Pennington* in a context other than antitrust.[199] A holding that extends the heightened immunity of *Noerr-Pennington* to eradicate liability under an inestimable number of statutes is a holding of significant weight, and one that should not be lightly imputed to the Court. Instead, it is highly unlikely the Court would intend a doctrine to shelter certain activity from the reach of all positive law unless that intent is made explicit. Here, however, it is not.

Second, *Noerr* and *Pennington* were decided on statutory interpretation grounds, not First Amendment grounds.[200] In *Noerr*, the Court's concern about the constitutional implications of interpreting the Sherman Act to prohibit the petitioning activity at issue led it to "reject such a construction of the Act."[201] Similarly, *Pennington* reiterated this interpretation of the statute, finding that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."[202] The *Noerr* line of cases thus indicates the doctrine as unique to antirust because the doctrine is itself an interpretation of antitrust statutes.

196. *See*, *e.g.*, Fligsten, *supra* note 17, at 28 ("Is the doctrine based in the First Amendment right to petition, or is it based on the Sherman Act? If it is based on the right to petition, it should logically apply to other causes of action and not be limited to antitrust. On the other hand, if it is rooted in the Sherman Act or at least in antitrust legislation, its application to other causes of action would not necessarily be appropriate.").

197. *See, e.g.*, Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885, 890–91 (10th Cir. 2000) (noting that *Noerr-Pennington*'s use of the term "petitioning immunity" goes beyond the guarantees of the Petition Clause); *see also* Zauzmer, *supra* note 19.

198. *Cf.* Fligsten, *supra* note 17, at 28. Fligsten explains that if the *Noerr-Pennington* doctrine is a constitutional one, *Noerr-Pennington* will apply to causes of action other than antitrust. If this is the case, there is no definable limit to the types of statutory and common-law liability to which *Noerr-Pennington* will provide a defense. *Id;* Pemstein, *supra* note 115, at 112 ("Thus, lower courts that interpret *Noerr-Pennington* as mandating a constitutional level of protection may potentially be shielding petitioning activities from liability that may constitutionally be imposed.").

199. *See* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749 (2014); Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc. (*PREI*), 508 U.S. 49 (1993); City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

200. *See* Stephen Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of* Noerr, 57 ANTITRUST L.J. 327, 363–64 (1988); Joseph B. Maher, Note, *Survival of the Common Law Abuse of Process Tort in the Face of a* Noerr-Pennington *Defense*, 65 U. CHI. L. REV. 627, 646 (1998); Pemstein, *supra* note 115, at 112–13.

201. E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138–40 (1961).

202. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965).

Third, despite being presented with opportunities to firmly extend the *Noerr-Pennington* doctrine to non-antitrust contexts, the Court notably declined to do so.[203] *Bill Johnson's* and *BE & K* dealt with liability for petitioning activity under federal labor laws.[204] The issue in these cases was whether the NLRA should be construed to prohibit retaliatory lawsuits.[205] Citing the same Petition Clause concerns expressed in *Noerr* and its progeny, the Court held that the NLRA does not prohibit all suits brought with retaliatory intent.[206] The Court's decision was based on its examination and construction of the labor statute.[207]

For these reasons, many commentators agree that *Noerr-Pennington* is a statutory interpretation doctrine unique to antitrust.[208] Some courts and commentators, however, argue that what the Supreme Court has done suggests *Noerr-Pennington* is a constitutional doctrine.[209] Practitioner Aaron R. Gary points to (1) dicta in *PREI* indicating the Court's intent to open the door to expansion of *Noerr-Pennington* beyond the bounds of antitrust; and (2) the fact that *Bill Johnson's* applied a *Noerr-Pennington*-type analog in analyzing First Amendment Petition Clause concerns in a labor law case.[210]

The *PREI* court stated: "[W]hether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham."[211] Gary notes that this language, as well as the *Noerr-Pennington*-like analysis in *Bill Johnson's*, acknowledges the Court's "invoking" of *Noerr* "in other contexts."[212] While it may be true that cases such as *Bill Johnson's* and *BE & K* referred to the principles outlined in *Noerr* for guidance, ambiguous dicta and the presence of common constitutional concerns are not sufficient to outweigh the statutory interpretation nature of the Court's decisions.[213] Moreover, the Court has had several opportunities to explicitly extend

203. *See, e.g.*, BE & K Constr. Co. v. NLRB, 536 U.S. 516 (2002); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731 (1983). *BE & K* and *Bill Johnson's* provided the Court the opportunity to formally apply *Noerr-Pennington* in the labor law realm, but the Court never explicitly held to that effect.

204. *See, e.g.*, *BE & K*, 536 U.S. at 533; *Bill Johnson's*, 461 U.S. at 731.

205. *See, e.g.*, *BE & K*, 536 U.S. at 529–30; *Bill Johnson's*, 461 U.S. at 737.

206. *See BE & K*, 536 U.S. at 536 ("Because there is nothing in the statutory text indicating that § 158(a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, we decline to do so.").

207. *Id.*

208. *See, e.g.*, Calkins, *supra* note 200, at 364 ("The case [of *Bill Johnson's*] involved an interpretation of the NLRA, not . . . an interpretation of the Constitution."); Maher, *supra* note 200, at 645–46 (noting that *Bill Johnson's* "rested on statutory construction—not constitutional interpretation"); Pemstein, *supra* note 115, at 112–13 ("*Noerr-Pennington* is difficult to conflate with the Court's own petitioning immunity jurisprudence if read as a doctrine defining the contours of the First Amendment right to petition. A statutory interpretation reading of the *Noerr-Pennington* doctrine, however, ameliorates the contradictions and problems that would otherwise result from a constitutional reading.").

209. Gary, *supra* note 13, at 16–17.

210. *Id.* (citing Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc. (*PREI*), 508 U.S. 49 (1993); *Bill Johnson's*, 461 U.S. at 731).

211. *PREI*, 508 U.S. at 59 (citing cases) (emphasis added).

212. Gary, *supra* note 13, at 16–17. (quoting *PREI*, 508 U.S. at 59).

213. BE & K Constr. Co. v. N.L.R.B., 536 U.S. 516 (2002); *Bill Johnson's*, 461 U.S. at 731.

Noerr-Pennington protection beyond the antitrust context, but has instead chosen not to do so.[214] To infer from the Court's silence an intent to expand the *Noerr-Pennington* doctrine in a way that abolishes liability under an unspecified number of statutes is misguided.

2. Noerr-Pennington*'s Incompatibility with Labor Law*

The tenets of the *Noerr-Pennington* doctrine are far from seamlessly transferrable to the labor law context. Justice Breyer made note of this in his dissent in *BE & K*.[215] In concluding that antitrust precedent should not determine the outcome of the labor law case before the Court, he stated: "[A]ntitrust and labor law differ significantly in respect to their consequences, administration, scope, history, and purposes."[216]

a. No Damages = No Chilling of First Amendment Expression

A major indicator of *Noerr-Pennington*'s exclusively antitrust nature, and its subsequent incompatibility with labor law, is the disparity in damages available under the two statutes. The Sherman Antitrust Act allows for treble damages,[217] whereas the NLRA does not.[218] The issue of available damages under the Sherman Act, its chilling effect on the exercise of petition rights, and its relation to *Noerr-Pennington* was recently addressed by the Court in *Octane Fitness, LLC v. ICON Health & Fitness*.[219] In *Octane Fitness*, the plaintiff argued, among other things, that the fee-shifting remedial provisions of the Patent Act (foisting lawyers' costs upon the plaintiff in the event the suit is determined baseless) chilled his First Amendment right to freely petition the courts.[220] The plaintiff argued that the statutory trigger for the fee-shifting provision should be interpreted in a narrow way identical to Noerr-Pennington's "sham petition" exception (*i.e.*, that in order for the Court to impose fee-shifting under the Patent Act, it must first be proved that (1) the suit was objectively baseless, and (2) the party acted in subjective bad faith).[221] In declining to apply *Noerr-Pennington*'s sham petition analysis to the issue of fee-shifting in Patent Act litigation, Justice Sotomayor, writing for the majority, stated: "The threat of antitrust liability (and the attendant tre-

214. *See, e.g.*, *BE & K,* 536 U.S. at 525; *Bill Johnson's*, 461 U.S. at 743. *BE & K* and *Bill Johnson's* provided the Court the opportunity to formally extend *Noerr-Pennington* into the labor law realm, but the Court never explicitly did so.

215. *BE & K*, 536 U.S. at 541.

216. *Id.*

217. 15 U.S.C. § 15(a) (2012).

218. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (2012); *BE & K*, 536 U.S. at 529 (noting that the Board cannot "issue punitive remedies . . . and instead is limited to restoring the pre-violation status quo . . . .") (citing Republic Steel Corp. v. NLRB, 311 U.S. 7, 10–12 (1940)).

219. Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1756–58 (2014).

220. *Id.* at 1754–58.

221. *Id.* at 1757–58.

ble damages) far more significantly chills the exercise of the right to petition than does the mere shifting of attorney's fees."[222]

This brief statement from the Supreme Court provides critical guidance in interpreting the limitations of *Noerr-Pennington*'s scope. Importantly, it should first be noted that the *Octane Fitness* case is the Court's most recent foray, albeit if only briefly, into the depths of the *Noerr-Pennington* doctrine, and therefore provides the most up-to-date insight into its current status.[223] Second, by refusing to extend Noerr-*Pennington*'s sham petition exception outside the bounds of antitrust and into patent law,[224] the Court makes it known that there are indeed limits to the doctrine's scope.

Third, and crucially, by refusing to create a *Noerr-Pennington* analog in this non-antitrust context, and basing this refusal on the comparative chilling effect of the remedies available under the respective statutes, the Court implies that determining applicability of *Noerr-Pennington* depends on the amount of damages available under the statute.[225] In other words, the lesser the available damages are under a given statute, the lesser the chilling effect a restriction will have on your right to petition, and therefore the less apt the Court will be to provide *Noerr-Pennington* immunity.[226] For example, a plaintiff need not fear filing a suit under the Patent Act to the same extent that a group of corporations would fear collectively petitioning their legislators for passage of favorable legislation. Why? Because in the Patent Act litigation scenario, if the judge deems the suit baseless, the plaintiff will only have to pay attorney's fees.[227] In the antitrust litigation scenario, however, the corporations could all be liable for far greater monetary losses in the form of treble damages.[228] Because people would lose more money from an adverse antitrust judgment, they would be more discouraged from exercising their petition rights; therefore, the antitrust statute imposes a greater chilling effect on petitioning activity.[229] Under the *Octane Fitness* Court's reasoning,[230] it is in this antitrust situation where *Noerr-Pennington* immunity is deserved.

Unlike the Sherman Antitrust Act, for which the *Noerr-Pennington* doctrine was uniquely created, remedies available under the NLRA for unlawfully interfering, restraining, or coercing employees in their exer-

222. *Id.*

223. *Id.* at 1749. This is the Supreme Court's most recent mention of *Noerr-Pennington* as of February 2016.

224. *Id.* at 1757–58.

225. *See id.*

226. *See id.*

227. *See id.* at 1753–55 (citing Patent Act, 35 U.S.C. § 285 (2012)).

228. Sherman Antitrust Act, 15 U.S.C. §§ 1–2 (2012).

229. In a brief before the Supreme Court in *BE & K*, the NLRB made a similar argument. *See* Brief for the National Labor Relations Board at 39–41, BE & K Constr. Co. v. NLRB, 536 U.S. 516 (2002) (No. 01-518), 2002 WL 449275 at *39–41.

230. *Octane Fitness*, 134 S. Ct. at 1757–58.

cise of § 7 rights are underwhelming.[231] The NLRA does not allow for punitive damages at all.[232] Further, in the *Venetian Casino Resor*t situation, since it does not appear the union suffered any monetary damages as a result of the employer's summoning of the police,[233] the employer likely would not have to pay a dime for its transgressions. Instead, the probable remedy would be a mere cease-and-desist order barring the employer from disrupting lawful protests.[234]

Some might argue that even though the threat of treble damages under an antitrust statute would deter First Amendment expression to a greater degree than would the threat of an N.L.R.B. remedy, any chilling effect on First Amendment expression is unjustifiable. In *BE & K*, the Court acknowledged that First Amendment concerns are important, no matter how small: "[T]he threat of an antitrust suit may pose a greater burden on petitioning than the threat of an NLRA adjudication. This does not mean the burdens posed by the NLRA raise no First Amendment concerns."[235] Indeed, the First Amendment was meant to protect expression from government interference,[236] and any laws making unlawful certain expression should be subject to judicial scrutiny. First Amendment protection, though, is not absolute.[237] Courts have upheld laws placing reasonable restrictions on certain types of expression.[238]

When there is good reason to prohibit certain conduct, and the prohibition poses a low risk of chilling First Amendment expression, the nearly absolute immunity embodied in a *Noerr-Pennington* defense is entirely unwarranted. A good example of a *de minimis* chilling effect on First Amendment expression can be drawn from the facts of *Venetian Casino Resort*.[239] While the threat of an N.L.R.B. cease-and-desist order might deter some from calling the police on lawfully present demonstrators, many would not be so deterred. The Venetian's calling of the police in this situation is itself evidence of the insignificance of any chilling effect created by the threat of an N.L.R.B. remedy. The Venetian was hardly deterred by the threat of a cease-and-desist order from calling the police. Under the *Octane Fitness* Court's reasoning,[240] the minimal chilling effect of a cease-and-desist order on an employer's right to petition local law enforcement makes such action unworthy of *Noerr-Pennington* immunity.

231. *See* National Labor Relations Act §§ 7, 8(a)(1), 10(c), 29 U.S.C. §§ 157, 158(a)(a), 160(c) (2012); Republic Steel Corp. v. NLRB, 311 U.S. 7, 10–12 (1940).

232. *See* National Labor Relations Act § 10.

233. *See* Venetian Casino Resort, LLC, 357 N.L.R.B. 1725, 1728–29 (2011) (issuing, as remedies for summoning the police on protestors in violation of the NLRA, a cease-and-desist order, as well as a requirement on the employer to post a notice).

234. *Id.*

235. BE & K Const. Co. v. NLRB, 536 U.S. 516, 529 (2002).

236. U.S. CONST. amend. I.

237. Elrod v. Burns, 427 U.S. 347, 360 (1976).

238. *See id.*

239. Venetian Casino Resort, L.L.C. v. NLRB, 484 F.3d 601, 603–05 (D.C. Cir. 2007).

240. *See* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1757–58 (2014).

b. Employers and Employees Are Not Business Competitors

Another major difference between the antitrust and labor contexts is the difference in relationship dynamics between the parties in each scenario. For example, the sham petition exception to *Noerr-Pennington* immunity does not easily analogize in the labor context. In *Noerr* and *Pennington*, the Court protected political activity from liability under the Sherman Antitrust Act, even when the lobbying efforts' "sole purpose . . . was to destroy . . . competitors . . . ."[241] Naturally, *Noerr-Pennington*, because of its antitrust origins, assumes that there are competitors. In the labor context, however, labeling employer and employee as "competitors" is both inappropriate and incompatible with the spirit of the NLRA.[242] The NLRA recognizes that there are two sides to a labor dispute, but it also recognizes and attempts to ensure that there is a bargaining table.[243] Indeed, the NLRA was passed to stem the labor strife that resulted from employers' refusals to negotiate with the unions.[244]

There are innate differences between the employer-employee relationship and the relationship among business competitors that call into question the prudence of applying an immunity doctrine that does not take into account these differences. The whole dynamic of the employer-employee relationship is different. For one thing, employers' and employees' interests lawfully align much more frequently than would those of business competitors.[245] For example, in most cases, a business is not self-interested in helping a competing businesses succeed. Employees and employers, however, are not strictly competitors with one another. Employees have an interest in helping the employer's business succeed because, with no business coming in, that employee is out of a job. While labor disputes certainly arise over wages, hours, and terms of conditions of employment, and while economic weapons may be resorted to, ultimately, once an agreement is reached, employees have a very real self-interest in helping their employer's business succeed.[246] Competing businesses, on the other hand, generally do not share this common concern.

Moreover, this is not merely a difference without a distinction. The practical result of extending Noerr-Pennington and its sham exception to the labor realm is that all kinds of unfair labor practices may be protected even if undertaken with anticompetitive intent. This is because Noerr-Pennington protects conduct that is carried out with "anticompetitive in-

241. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669 (1965) (internal citations omitted) (quoting E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961)).

242. *See* 29 U.S.C. § 151 (2012); *supra* Part II.A.

243. *See* 29 U.S.C. § 157; *supra* Part.II.A.

244. *See* 29 U.S.C. § 151; Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 209–10 (1964); *see supra* Part II.A.

245. See Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 IOWA L. REV. 1179, 1186 (2010).

246. *See id.*

tent."[247] Protection of petitioning activity undertaken with anticompetitive intent in the labor realm will have the effect of polarizing the employer-employee relationship and will introduce greater antagonism into labor disputes.[248] It will also unnecessarily constrain employees' § 7 rights, and ultimately contravene the policies of the NLRA which seek to encourage collective bargaining for a "peaceful settlement of industrial disputes."[249]

3. Detrimental Implications of Venetian Casino Resort

Under *Venetian Casino Resort*, application of *Noerr-Pennington* to protect an employer from unfair labor practice liability for summoning the police implicates a number of potential problems. First, by immunizing such action from unfair labor practice liability, it encourages employers to commit this action in the future, even though the action has a concededly coercive effect in restraint of employees' § 7 rights.[250] With the *Noerr-Pennington* doctrine firmly in place to protect such action, the employer knows she can summon the police free from liability so long as doing so is a "genuine" attempt to influence police action, and not a "mere sham."[251]

Additionally, in future cases with fact patterns similar to those of *Venetian Casino Resort*, an employer would be disincentivized from seeking a declaration of sidewalk ownership status from the City in the first place. Without knowledge that the property rights to the sidewalk reside with the City, the employer preserves her "genuine" belief that the property is hers at the time she summons the police to arrest the demonstrators for trespass. As a result, the call to police would be a "genuine" attempt to elicit governmental action, and is therefore protected from unfair labor practice liability under *Noerr-Pennington*. In other words, why inquire about your sidewalk ownership status at all if doing so might preclude you from receiving *Noerr-Pennington* immunity? Thus, extension of *Noerr-Pennington* to protect summoning of the police to arrest protestors not only constrains employees' rights by encouraging employers to use this new legal tactic, but also, somewhat ironically, disincentivizes petitioning the courts for clarification of legal rights.

247. Ottensmeyer v. Chesapeake & Potomac Tel. Co. of Md., 756 F.2d 986, 992–93 (4th Cir. 1985) (citing United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)).

248. *See, e.g.*, Hunt v. Crumboch, 325 U.S. 821, 824–26 (1945).

249. *Fibreboard*, 379 U.S. at 211.

250. *See* Venetian Casino Resort, LLC, 345 N.L.R.B. 1061, 1069 (2005) (finding The Venetian's act of summoning the police in violation of § 8(a)(1) of the NLRA).

251. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 507 n.10 (1988); *Noerr*, 365 U.S. at 144.

IV. RECOMMENDATION

Petition rights, like other First Amendment guarantees, are vital to the operation of a democratic society. As recognized by *Noerr*, individuals need to be able to communicate freely with each other and their government representatives for the democratic process to function.[252] This right to communicate with government officials for redress of grievances is embodied in and protected by the Petition Clause.[253] The *Noerr-Pennington* doctrine shelters such rights beyond the reach of the law.[254] In so doing, *Noerr-Pennington* provides a heightened immunity for petitioning acts, regardless of the anticompetitive intent behind those acts.[255] The doctrine thus ensures strong protection for those exercising their right to communicate grievances to governmental authorities.

The problem with applying *Noerr-Pennington* as a defense to various forms of liability is the difficulty imposed in proving a petition is a sham.[256] The "sham petition" exception, as construed by the Court, is so narrow that few direct petitions to the government will ever be deemed to fall outside Noerr-Pennington's protection.[257] Extending *Noerr-Pennington* beyond the antitrust context in which it was uniquely crafted will inadvertently protect bad actors from incurring liability under an unspecified and potentially vast number of legal theories. It will, in effect, legalize and encourage otherwise unlawful tortious behavior lawmakers justifiably sought to prohibit. In the case of *Venetian Casino Resort*, for example, *Noerr-Pennington* may protect employers' disruptions of lawful worker demonstrations when those disruptions take the form of "petitions."[258] *Noerr-Pennington* thus may provide a new tool with which employers can lawfully interfere with employees' statutorily protected § 7 right to concerted action for mutual aid and protection.[259] There are, however, at least three solutions that would avoid these unwanted outcomes while still protecting First Amendment petition rights.

252. *See Noerr*, 365 U.S. at 137–38.

253. U.S. CONST. amend. I.

254. *See generally* United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); *see Noerr*, 365 U.S. at 137–38.

255. Because of the nearly insurmountable sham petition exception, *Noerr-Pennington* protection, as opposed to protection merely under the First Amendment, provides a heightened form of immunity to the petitioning activities deemed to fall within it. *See, e.g.*, Zauzmer, *supra* note 19. Regarding anticompetitive intent, see *United Mine Workers of Am.*, 381 U.S. at 669–70.

256. *See, e.g.*, Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885, 890–91 (10th Cir. 2000) (noting that *Noerr-Pennington*'s use of the term "petitioning immunity" goes beyond the guarantees of the Petition Clause); *see also* Zauzmer, *supra* note 19, at 1261–62.

257. For the elements needed to show that a petition is a "mere sham," see Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc. (*PREI*), 508 U.S. 49, 60–61 (1993). Regarding the difficulty in proving those elements, see, e.g., Zauzmer, *supra* note 19.

258. *See* Venetian Casino Resort, L.L.C. v. NLRB, 793 F.3d 85, 92 (D.C. Cir. 2015).

259. See National Labor Relations Act § 7, 29 U.S.C. § 157 (2012).

A. Petition Clause as Providing Independent Protection

Noerr-Pennington need not be utilized to safeguard the right to petition because the Petition Clause itself provides independent protection from liability under non-antitrust claims.[260] In fact, when faced with *Noerr-Pennington* arguments in non-antitrust cases, numerous courts have chosen not to extend *Noerr-Pennington* on this basis.[261] Recently, for example, the Tenth Circuit declined to apply *Noerr-Pennington* in a non-antitrust case, stating:

> While we do not question the application of the right to petition outside of antitrust, it is a bit of a misnomer to refer to it as the *Noerr-Pennington* doctrine; a doctrine which was based on two rationales. In our view, it is more appropriate to refer to immunity as *Noerr-Pennington* immunity only when applied to antitrust claims. In all other contexts, including the present one, such immunity derives from the right to petition. This distinction is not completely academic. Antitrust cases that grant *Noerr-Pennington* immunity do so based upon both the Sherman Act and the right to petition. These precedents, founded in part upon a construction of the Sherman Act, are not completely interchangeable with cases based solely upon the right to petition.[262]

Thus, as noted by the Tenth Circuit, the Petition Clause independently provides immunity for direct petitions.[263] Like the First Amendment protections of speech and the press, the right to petition ought to be similarly treated as a qualified right.[264] As a qualified right, it would be subject to reasonable time, place, and manner restrictions, and those restrictions would be subject to review under an appropriate level of scrutiny.[265]

Treating petitioning rights as qualified rights on par with other enumerated First Amendment rights is a sensible solution for a number of reasons. First, analyzing petitioning immunity claims under the Court's traditional First Amendment framework is more consistent with the Court's jurisprudence.[266] Second, there is no clear distinction between "petitioning" and "speech" activities that justifies providing heightened

260. *See, e.g.*, *Cardtoons*, 208 F.3d at 889–90.

261. *Id.*; Woods Expl. & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1292–98 (5th Cir. 1971).

262. *Cardtoons*, 208 F.3d at 889–90.

263. *Id.*; *see* Fligsten, *supra* note 17, at 26–28.

264. *See* Fligsten, *supra* note 17, at 28 (citing *Cardtoons*, 208 F.3d at 889–90) ("On this question, the Tenth Circuit takes the latter view. 'Petitioning immunity' applies only in the antitrust context. Outside of antitrust, the First Amendment right to petition is afforded protection under the First Amendment, but that right is qualified, as are freedom of speech and freedom of the press.").

265. *See* 16A Am. Jur. 2d Constitutional Law § 480.

266. *See* Pemstein, *supra* note 115, at 112–13 ("*Noerr-Pennington* is difficult to conflate with the Court's own petitioning immunity jurisprudence if it is read as a doctrine defining the contours of the First Amendment right to petition. A statutory interpretation reading of the *Noerr-Pennington* doctrine, however, ameliorates the contradictions and problems that would otherwise result from a constitutional reading. A statutory interpretation reading also fits with, and helps explain, other decisions in the Court's petitioning immunity jurisprudence.").

protection to one, but not the other. Legal scholars have noted that many of the "petitioning activities" labeled as such by courts are interchangeable with "speech activities" also protected by the First Amendment.[267] For example, The Venetian's calling of policemen to arrest protestors for trespass[268] is an exercise of freedom of expression that contains elements of both "petitioning" and "speech." Thus, providing heightened immunity via Noerr-Pennington to certain kinds of speech artificially delineates "petitioning-like" speech from other forms of speech protected by the First Amendment.

B. Constitutional Avoidance in Statutory Construction

There is no need to import *Noerr-Pennington* into the labor law context when genuine petitioning activities can be sheltered from the reach of unfair labor practice liability simply by interpreting the NLRA not to forbid them. Under the canon of constitutional avoidance, the Court should resort to every reasonable statutory construction to save a statute from unconstitutionality.[269] By applying the doctrine of constitutional avoidance, the issue of whether the NLRA prohibits certain petitioning activities is an issue that can be resolved via statutory interpretation, with no need for constitutional jurisprudence. Such was the analysis in *Bill Johnson's*.[270] In *Bill Johnson's*, the Court interpreted the NLRA not to conflict with the First Amendment by holding that the NLRA only prohibits retaliatory suits that are objectively baseless.[271] Thus, the question of whether an employer can be held liable under the NLRA for summoning the police to arrest lawfully present demonstrators is a question that a court can decide through statutory interpretation, without any need for *Noerr-Pennington*.

C. Amending the Sham Petition Requirements

Lastly, even if a *Noerr-Pennington* analysis is held to apply to claims brought under the NLRA, the sham petition exception could and should be construed more broadly so that deservedly proscribed conduct may still remain unlawful. This could be accomplished by changing the requirements for proving a sham petition. Instead of requiring the plaintiff to prove that the petition was both objectively baseless and subjectively intended to abuse process (as is required under Noerr-Pennington),[272] a standard could be imposed that finds petitions that are either objectively baseless or subjectively intended to abuse process as "shams." This re-

267. *See, e.g.*, Mark, *supra* note 11, at 2154 (noting that the right to petition "has been all but subsumed in the protections of speech and press.").

268. Venetian Casino Resort, L.L.C. v. NLRB, 484 F.3d 601, 603–05 (D.C. Cir. 2007).

269. Gonzales v. Carhart, 550 U.S. 124, 153–54 (2007).

270. Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 748–49 (1983).

271. *Id.*

272. Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc. (*PREI*), 508 U.S. 49, 60–61 (1993).

quirement would still protect genuine petitioning activity. Alternatively, the sham petition exception could require a showing that the petition was objectively baseless. This requirement would also provide protection for petitioning rights, while still ensuring that ill-motivated and retaliatory petitions made in contravention of NLRA policies will be subject to liability.

D. Counter-Arguments Favoring Noerr-Pennington *Expansion*

Few policy arguments have been made in favor of extending *Noerr-Pennington* to the labor law context. In fact, the D.C. Circuit, in holding *Noerr-Pennington* as an applicable defense to NLRA liability, never buttressed its holding with any policy arguments.[273] Instead, it grounded its analysis on its interpretation of Court precedent.[274] Presumably, application of *Noerr-Pennington*'s heightened immunity as a defense to NLRA liability provides at least two benefits: (1) decreased judicial workloads by providing a basis for granting summary judgment in favor of defendants at an early stage in litigation, and (2) stronger protection for First Amendment petition rights.

Regarding the benefit to judicial dockets, it is well-reported that federal courts are overburdened and underfunded.[275] The clearing of judicial dockets, however, hardly justifies sanctioning the commission of unfair labor practices. Moreover, because most complaints brought under the NLRA will be decided by the N.L.R.B. without federal court involvement,[276] the potential for reduction in judicial caseloads by making available a Noerr-Pennington defense is minimal. It is therefore unlikely that courts allowing a *Noerr-Pennington* defense in non-antitrust cases are motivated primarily by a desire to free up their dockets.

Regarding protection of petition rights, the *Noerr-Pennington* doctrine does not serve as the only basis for protection. As previously noted, the Petition Clause itself provides independent protection for petition rights,[277] and petition rights can still be protected by maintaining non-repugnant statutory constructions or amending the sham petition requirements.[278] While it is true that the *Noerr-Pennington* doctrine likely provides stronger protection for petition rights than the alternatives proffered here would, the problems created by *Noerr-Pennington* in a non-antitrust context outweigh its benefits. As noted in this Section, over-protecting petition rights with heightened *Noerr-Pennington* immunity

273. *See* Venetian Casino Resort, L.L.C. v. NLRB, 793 F.3d 85 (D.C. Cir. 2015).

274. *Id.*

275. Richard Wolf, *Chief Justice Warns Congress on Federal Court Cutbacks*, USA TODAY (Dec. 31, 2013), http://www.usatoday.com/story/news/politics/2013/12/31/justice-roberts-warns-congress/4266959/.

276. *Cf.* 29 U.S.C. § 160 (giving the Board the power to prevent unfair labor practices by hearing and adjudicating complaints).

277. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 208 F.3d 885, 890–91 (10th Cir. 2000); *see also* Zauzmer, *supra* note 19.

278. *See supra*, Sections IV.B–C.

will elevate petition-like speech activities to a constitutional status unjustifiably higher than those of other protected speech activities.[279] In addition, due to the burden of proof allocation in proving a "sham petition,"[280] *Noerr-Pennington* will necessarily protect a variety of conduct undertaken with the intent to abuse process simply for lack of evidence regarding the petitioner's actual intent. In doing so, it will make lawful deservedly proscribed behavior and allow actors to use their petitions to abuse judicial processes. These problems can be avoided if petition rights in non-antitrust cases are protected by means other than *Noerr-Pennington*.

V. CONCLUSION

A *Noerr-Pennington* defense to allegations of unfair labor practice liability poses numerous detrimental implications. In the case of *Venetian Casino Resort*, application of *Noerr-Pennington* may allow employers to circumvent their legal obligation under the NLRA to refrain from interfering with lawful employee demonstrations. Expansion of Noerr-Pennington immunity into the labor realm constrains employees' § 7 rights under the NLRA in derogation of Congress' intent. By providing heightened immunity for what would otherwise be a mere qualified right to petition, courts applying *Noerr-Pennington* are opening the door to the legalization of a plethora of justifiably prohibited forms of conduct. Because of its adverse effects on employees' statutory rights, its potential to make lawful other deservedly proscribed conduct, and its existence being owed to the unique circumstances of antitrust law, the *Noerr-Pennington* doctrine should not be extended to the labor law context.

279. *See, e.g.*, Mark, *supra* note 11, at 2154.

280. *See* Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc. (*PREI*), 508 U.S. 49, 60–61 (1993).