Free Markets and Free Speech: Understanding the Limits of the *Noerr-Pennington* Doctrine

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Based in First Amendment principles, the Noerr-Pennington *doctrine immunizes parties petitioning the government from antitrust liability, even when such petitioning may be considered anticompetitive. Within the doctrine exists a narrower "sham exception" which eliminates* Noerr-Pennington *antitrust immunity when petitions are merely shams meant to interfere with a competitor's business. The Supreme Court has examined the sham exception in two cases which have produced differing standards for when and how to apply it. As a result, circuit courts have had to grapple with this uncertainty and a circuit split has developed as they have disagreed on the proper approach to applying the sham exception.*

This Comment proposes that the Supreme Court revisit its Noerr-Pennington *jurisprudence and clarify the scope under which immunity shall attach. Furthermore, this Comment advocates for the adoption of a new "holistic evaluation" rule akin to the rule of reason in which patterns of lawsuits are evaluated, not on their individual chance of success, but collectively based on intent. As part of this inquiry, this Comment argues that courts should analyze whether the legitimate gains a party stands to win from such lawsuits (i.e. damages) is less than the anticompetitive effects of bringing those lawsuits (i.e. litigation costs and attorney fees) such that the lawsuits, collectively, should not enjoy* Noerr-Pennington *antitrust immunity.*

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I. INTRODUCTION

In recent years, many Americans feel as though the influence powerful private interests enjoy over the American political process has peaked.[1] There is much disillusionment that the branches of government have been weaponized for corporate use, rather than the betterment of the American people.[2] Corporations have faced, and continue to face, heavy criticism that their dollars and economic influence provide them with the capability of buying political support on a wholesale basis.[3] While this is not a new phenomenon, "one has to go back to the Gilded Age to find business in such a dominant political position in American politics."[4] Government has become an alternative marketplace for Corporate America to extract purely private economic advantage.[5] With this knowledge, it should not be surprising that "corporate interests have reaped the benefits of legislation and administrative regulations that subsidize private interests adverse to the public interest."[6] Though this is troubling, what is even more troubling is that our judicial system has been unable to develop a cohesive and workable legal framework under the antitrust laws to regulate business encroachment on the government's territory, from which dangers to competition has resulted.[7]

Antitrust laws have existed in the United States for over a century with the stated purpose of promoting competition. Much of antitrust litigation is centered around mergers, monopolies, and collusion. A lesser-known focused area of antitrust is the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine developed through a handful of seminal Supreme Court cases that

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1 Tim Wu, *Antitrust & Corruption: Overruling Noerr* (Columbia L. Sch. Pub. L. Working Paper, Paper No. 14-663, 2020), https://perma.cc/UG9Q-JXC3.

2 Greg Coleridge, *The Corporate Weaponization of Government*, COMMON DREAMS (Feb. 15, 2023), https://perma.cc/L8TV-7G5J.

3 RICHARD HOFSTADER, THE AGE OF REFORM 229 (1955); *see also* Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, THE ATLANTIC (Apr. 20, 2015), https://perma.cc/Z899-UBAH.

4 Drutman, *supra* note 3.

5 Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the* Noerr-Pennington *Doctrine*, 41 HASTINGS L.J. 905, 907–08 (1990).

6 *Id.* at 908.

7 *Id.*

demarcated the extent to which attempts to influence the government are exempt from the antitrust laws.[8] The doctrine developed due to the friction that exists between petitioning the government, as is allowed under the First Amendment, and the trade restraints that may emerge, which may be anticompetitive and liable under the antitrust laws. "Petitioning is, at a minimum, an effort to convince the government to *do* something . . . petitioning activity is by its nature 'directed toward *obtaining governmental action*.'"[9] The doctrine provides immunity to parties from antitrust liability for all legitimate efforts to influence legislative, executive, and judicial bodies, even if such efforts may be for anticompetitive purposes.[10] For example, under this doctrine, companies can lobby and petition for federal laws that would destroy their competitors' ability to operate and such conduct would be completely legal and sanctioned. Companies are also able to weaponize existing laws to initiate lawsuits against competitors to block their introduction of competing, though government approved, products.[11]

Much turns on what "legitimate" actually means within the doctrine. Courts have taken a varied approach when dealing with conduct used to influence the legislative and executive branches and when the same conduct is applied to the judicial arena. The immunity provided by the doctrine is cabined by the existence of the sham litigation exception, which as its name suggests applies only to lawsuits. The sham exception negates *Noerr-Pennington* immunity for antitrust liability when a party uses political activity as a "sham" to solely harm a competitor.[12] The Supreme Court defined sham petitions to mean "a pattern of baseless, repetitive claims [that] may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused."[13] In recent years, a circuit split has emerged over the

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8 Daniel R. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. CHI. L. REV. 80 (1977).

9 FED. TRADE COMM'N, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE, 18 (2006), https://perma.cc/U36K-CEQS (quoting Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 140 (1961)).

10 Douglas Michael Ely, *The* "Noerr-Pennington" *Doctrine and the Petitioning of Foreign Governments*, 84 COLUM. L. REV. 1343, 1343 (1984).

11 *See* discussion *infra* Section IV on the pharmaceuticals industry.

12 Daniel J. Davis, *The Fraud Exception to the* "Noerr-Pennington" *Doctrine in Judicial and Administrative Proceedings*, 60 U. CHI. L. REV. 325, 330 (2001).

13 California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

proper test to determine whether antitrust immunity—or the sham exception—applies.

The circuit split arose following the Court's decision in *Professional Real Estate Investors Inc. v. Columbia Pictures Industries, Inc. (PRE)*,[14] where the Court introduced a two-step test that creates a higher bar than the *California Motor* test for successfully invoking the sham exception.[15] Following *PRE,* the Court has not revisited the boundaries of the sham exception to *Noerr-Pennington* immunity even though there appears to be friction between *California Motor*, which holds that a pattern of petitioning with or without probable cause may be a sham, and *PRE*, which holds that any suit with probable cause may not be a sham. Given the apparent friction between the two Supreme Court cases, the circuits have attempted to resolve the tension themselves but a circuit split has emerged as circuits disagree on how to best reconcile the two cases.

The Ninth Circuit, in *USS-POSCO Industries v. Contra Costa County Building & Construction Trades Council, AFL-CIO* (*USS-Posco*),[16] held that the *PRE* decision "provides a two-step test for determining whether a single action constitutes sham petitioning, whereas *California Motor* governs whether a whole series of legal proceedings is a sham."[17] So, under the Ninth Circuit's interpretation, the two tests apply in different scenarios; *California Motor* applies to a pattern of litigations, while *PRE* applies to an individual suit. The Second, Fourth, Third, and Tenth circuits have endorsed the Ninth Circuit's view.[18]

Meanwhile, the First and Seventh Circuits have split with the majority and endorsed the view that the *PRE* test applies to each case within a series of petitions.[19] Put differently, a pattern of petitioning can only be a sham if each petition is (1) objectively baseless and (2) has subjective intent to weaponize a

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14 Pro. Real Estate Invs. Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993).

15 Dylan Carson & Scott Russell, *Circuits Reinforce Split over When* Noerr-Pennington *Shields Serial Litigants*, THE ANTITRUST SOURCE, Feb. 2021, at 5.

16 USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, AFL-CIO, 31 F.3d 800, 804 (9th Cir. 1994).

17 Carson & Russell, *supra* note 11, at 6 (quoting *USS-POSCO*, 31 F.3d at 804).

18 *See* PrimeTime 24 Joint Venture v. NBC, Inc., 219 F.3d 92 (2d Cir. 2000); Waugh Chapel South, LLC v. United Food & Commercial Workers Union, 27, 728 F.3d 354 (4th Cir. 2013); Hanover 3201 Realty, LLC v. Village Supermarkets, Inc., 806 F.3d 162 (3d Cir. 2015); CSMN Inv., LLC v. Cordillera Metro. Dist., 956 F.3d 1276 (10th Cir. 2020).

19 *See* Puerto Rico Tel. Co. v. San Juan Cable LLC, 874 F.3d 767 (1st Cir. 2017); U.S. Futures Exch., LLC v. Bd. of Trade of the City of Chicago, 953 F.3d 955 (7th Cir. 2020).

governmental process to interfere with a competitor's business.[20] The First and Seventh Circuit's use of the *PRE* test creates a greater barrier for invoking the sham exception to *Noerr-Pennington* than the majority approach using *California Motor* for a pattern of petitioning does. The outcome of this means corporations are more easily able to undertake behavior that could negatively impact competitors while utilizing governmental processes.

This Comment will argue that the scope of *Noerr-Pennington* immunity is too broad and should be limited so as to not immunize lawsuits in which the sole intention is to harm competitors. Part II will address the purpose and origins of the *Noerr-Pennington* doctrine. Part III will explore the cases that have resulted in a circuit split on how to apply the sham exception to lawsuits. Finally, Part IV will propose, as a resolution to the circuit split, that the Supreme Court should adopt the Fourth Circuit's approach, wherein *California Motor* applies to a pattern of lawsuits and *PRE's* test to a single lawsuit, while also introducing a holistic evaluation of the party in question's action in the legislative and administrative arenas. As part of this inquiry, this Comment proposes that courts evaluate whether the legitimate gains from successful lawsuits outweigh the collective anticompetitive effects of the lawsuits such that parties should be entitled to *Noerr-Pennington* immunity for potential antitrust violations.

II. THE *NOERR-PENNINGTON* DOCTRINE'S ORIGINS

"The principal federal antitrust laws, the Sherman Act of 1890 and the Clayton Act of 1914, are broadly worded, and they give the federal courts and antitrust enforcement agencies wide leeway to develop a federal 'common law' of antitrust regulation."[21] Under this common law approach, "the courts and enforcement agencies have altered their interpretation of the antitrust laws to match prevailing economic assumptions."[22] "The Sherman Act provides the basic pronouncement of American antitrust policy favoring a competitive, free enterprise economy unencumbered by unreasonable or monopolistic restrictions on free market

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[20] *Seventh Circuit Deepens the Circuit Split on the "Sham Exception" to* Noerr-Pennington, HOGAN LOVELLS PUBLICATIONS (Mar. 31, 2020), https://perma.cc/2GTH-YQKW.

[21] Thomas A. Piraino Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 346 (2007).

[22] *Id.*

forces."[23] Section 1 of the Sherman Act makes it illegal to engage in any "combination . . . or conspiracy, in restraint of trade."[24] Section 2 of the Act makes it illegal to "monopolize, or attempt to monopolize."[25] The First Amendment provides that right to petition the government for redress.[26] An issue develops when there may be situations in which attempts to petition the government and/or seek its intervention may also raise anticompetitive considerations given the outcome of such petitioning could result in restraining or diminishing competition.[27]

Noerr-Pennington jurisprudence is derived from both the antitrust laws and the First Amendment laws. The doctrine evolved from two Supreme Court cases, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[28] and *United Mine Workers of America v. Pennington*, [29] that held political activity to be immune from antitrust liability if the imposition of such liability would infringe upon the actor's right to petition the government. Notably, the *Noerr* court cabined the doctrine so as to not protect supposed petitioning that is merely a sham to cover what is in reality nothing more than an attempt to interfere directly with a competitor.[30]

A. A Confusing Doctrine Emerges: *Noerr* and *Pennington*

A unanimous Supreme Court decision, *Noerr* was the first instance in which the court pronounced that efforts to petition the government were immune from antitrust liability. In *Noerr*, an organization of railroad companies joined together and directed a publicity campaign against the trucking industry using a public relations firm.[31] The campaign was allegedly "designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business."[32] The trucking companies' complaint further alleged that the "sole motivation behind it was

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[23] LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 7 (Earl W. Kintner, ed., 1978)

[24] 15 U.S.C. § 1.

[25] 15 U.S.C. § 2.

[26] U.S. CONST. amend. I.

[27] Earl W. Kinter & Joseph P. Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the* Noerr-Pennington *Doctrine*, 17 U.C. DAVIS L. REV. 549, 550 (1984).

[28] 365 U.S. 127 (1961).

[29] 381 U.S. 657 (1965).

[30] *Noerr*, 365 U.S. at 143.

[31] *Id.* at 129.

[32] *Id.*

the desire on the part of the railroads to injure the truckers and eventually to destroy them as competitors in the long-distance freight business."[33] Ultimately, the lobbying was successful and the Pennsylvania governor vetoed the "Fair Truck Bill" which would have increased the weight limit trucks could carry on Pennsylvania roads and so allowed them to compete with the railroads more powerfully.[34]

The truckers filed an antitrust action against the railroads, claiming that they had conspired to restrain trade in, and monopolize, the long-distance freight business in violation of both section 1 and section 2 of the Sherman Act.[35] The railroads countersued, similarly alleging that the truckers engaged in anticompetitive action by their own lobbying for the passage of the Fair Truck Bill.[36] Upon reaching the Supreme Court, the Justice Black opinion began its analysis by noting that it accepted as a starting point that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."[37] The Court went further and stated that no violation of the Act can be made out when a restraint upon trade or monopolization is the result of governmental action, as opposed to private action.[38] The basis for such pronouncement rested on "the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution." Ultimately, the Court concluded that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or executive to take particular action with respect to a law that would produce a restraint or monopoly."[39]

The Court justified the "immunity" using four arguments, which have since been heavily criticized.[40] First, the Court emphasized the "essential dissimilarity" among an agreement

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33 *Id.*

34 *Id.* at 130.

35 Lawrence D. Bradley, *Noerr-Pennington Immunity From Antitrust Liability Under* Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau Inc.: *Replacing the Sham Exception With a Constitutional Analysis*, 69 CORNELL L. REV. 1305, 1307 (1984).

36 *Noerr*, 365 U.S. at 132.

37 *Id.* at 135.

38 *Id.* at 136.

39 *Id.*

40 Fischel, *supra* note 8, at 83. *See also* Wu, *supra* note 1, at 4.

between competitors in an industry to lobby for legislation, and the agreements traditionally condemned by the Sherman Act, such as price-fixing or refusals to deal.[41] "The dissimilarity, while not 'conclusive' on the question of the antitrust laws' applicability, was a 'warning' against treating joint lobbying efforts as an unlawful restraint."[42] Second, the Court stressed that prohibiting joint lobbying efforts would substantially impair people's ability to make their wishes known to public officials which would impede the proper functioning of our democracy.[43] Third, applying the antitrust laws to lobbying efforts would impute to the Sherman Act a purpose to regulate political activity instead of business activity, as intended.[44] Finally, the Court practiced constitutional avoidance, reasoning that to construe the Sherman Act as reaching lobbying activities "would raise important constitutional questions because the right to petition the government is protected by the first amendment."[45]

The *Noerr* Court did recognize that there may be instances in which petitioning was merely a ruse for anticompetitive activity. In such cases, Justice Black cautioned that the immunity set forth by *Noerr* would not automatically extend to any activity that may be labelled as "petitioning."[46] "Activity 'ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor' would not receive *Noerr-Pennington* protection."[47] This statement serves as the origins for the confusing and ill-defined "exception-to-the-exemption interpretation of the *Noerr-Pennington* doctrine."[48]

Four years after *Noerr* came *United Mine Workers v. Pennington*,[49] where the Court upheld antitrust immunity and extended *Noerr*'s political activity exemption to include joint efforts to influence public officials acting in a non-legislative capacity.[50] The case concerned a group of large coal companies and the United Mine Workers union who allegedly conspired to restraint

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41 *Noerr*, 365 U.S. at 136–37.
42 Fischel, *supra* note 8, at 83 (quoting *Noerr*, 365 U.S. at 137).
43 *Id.*
44 *Id.*
45 *Id.* (internal quotations omitted).
46 Bradley, *supra* note 35, at 1308.
47 *Id.* (quoting *Noerr*, 365 U.S. at 144).
48 *Id.*
49 381 U.S. 657 (1965).
50 Fischel, *supra* note 8, at 85.

competition in the coal industry.[51] They did so by jointly approaching the Secretary of Labor and Tennessee Valley Authority, an autonomous federal agency, to obtain the establishment of a minimum wage in the industry and the curtailing of certain purchases in the market.[52] The alleged conspiracy was aimed at driving small coal operators out of the market;[53] the operator of one of the smaller coal companies brought suit alleging harm under Section 1 of the Sherman Act.[54] The Court, nonetheless, held that intent and purpose were irrelevant in determining whether antitrust laws applied.[55] The Court went further noting that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."[56] The distinctive use of "joint efforts" in the opinion is notable given one of the main foci of antitrust law under Section 1 is collusion, or joint efforts, amongst competitors.[57]

The reasoning that underpins *Noerr-Pennington* has been often criticized; its skeptics argue that the reasoning is unpersuasive, at times hypocritical, and not historically accurate to Court precedent.[58] Critics have argued that, as far as the antitrust laws are concerned, *Noerr* points in the wrong direction.[59] This is because "the facts in *Noerr* evidence[d] a clear purpose on the part of defendants to debilitate their competition irrespective of their success in the legislative arena."[60] It has thus been claimed that

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51 James D. Hurwitz, *Abuse of Governmental Processes, The First Amendment, and the Boundaries of* Noerr, 16 J. REPRINTS ANTITRUST L. & ECON. 771, 788 (1986).

52 Kinter & Bauer, *supra* note 27, at 556.

53 Bradley, *supra* note 35, at 1308.

54 Kinter & Bauer, *supra* note 27, at 556.

55 United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965) ("*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.").

56 *Id.*

57 Lisa Orucevic, *A Machete for the Patent Thicket: Using* Noerr-Pennington *Doctrine's Sham Exception to Challenge Abusive Patent Tactics by Pharmaceutical Companies*, 75 VAND. L. REV. 277, 297 n.35 (2022).

58 For further discussion, see Fischel, *supra* note 8; Wu, *supra* note 1; Jerrold L. Walden, *More About* Noerr*-Lobbying, Antitrust and the Right to Petition*, 14 UCLA L. REV. 1211 (1967); Karen Roche, *Deference or Destruction? Reining in the* "Noerr-Pennington" *and State Action Doctrines*, 45 LOY. L.A. L. REV. 1295, 1318 (2012).

59 Walden, *supra* note 58, at 1247.

60 *Id.* at 1248; *see also* Minda, *supra* note 5, at 909 ("The Supreme Court has immunized the vast majority of government-petitioning cases from antitrust attack, even when the petitioning is for the purpose of restraining trade and even if the restraint causes an antitrust injury.").

the Court "scarified federal antitrust policy to protect other values and rights perceived as fundamental to a representative government."[61] Even Robert Bork, known for advocating a laissez-faire approach to antitrust, has argued that the "decision in *Noerr* was based on an 'unassailable' premise, namely 'that where a restraint upon trade or monopolization is the result of a valid governmental action, as opposed to a private action, no violation of the Act can be made out.'"[62] Additionally, the Court did not make clear whether it was grounding its decision in constitutional principles or in statutory interpretation of the Sherman Act; this is an incredibly important question as it would impact the interpretation of the doctrine to be narrower or broader depending on the answer.[63]

The *Pennington* opinion too has faced criticism for its unclear language. The *Pennington* opinion seemingly extended immunity to "purely commercial functions."[64] "Exempting the defendants' concerted action to persuade the Secretary of Labor to set a higher minimum wage from the antitrust laws was clearly consistent with the rationale of *Noerr* because the Walsh-Healey Act conferred discretion on the Secretary to set wage levels."[65] But, if the TVA made its coal purchasing decision on purely economic grounds without regards to the policy considerations, this would be considered a significant extension of *Noerr*.[66] Additionally, the extension of *Noerr* to purely commercial functions, in the absence of political activity, would be in direct contrast to its decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*,[67] where the Court refused to apply or extend *Noerr* because the alleged conspiracy involved "private commercial activity."[68] The *Pennington* opinion also seemed to "harden the Court's preference for first amendment values" and "limit dramatically exceptions to the

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61 Minda, *supra* note 5, at 910.

62 *Id.* at 910 n.12 (quoting Robert Bork, The Antitrust Paradox: A Policy At War With Itself 350 (1978)).

63 Stephen Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of* Noerr, 57 ANTITRUST L.J. 327, 329 (1988).

64 Fischel, *supra* note 8, at 85; *see also* Michael W. Bien, *Litigation as An Antitrust Violation: Conflict between the First Amendment and the Sherman Act*, 16 U.S.F. L. REV. 41, 51 (1989).

65 *Id.*

66 *Id.*

67 370 U.S. 690 (1962).

68 Fischel, *supra* note 8, at 86 (quoting Cont'l Ore Co. v. Union Carbide & Carbon Corp, 370 U.S. 690, 707 (1962)).

primacy of the right to petition over the proscriptions of the antitrust laws."[69]

The Court did not mention the sham exception in *Pennington*. Still some have gone as far as to argue that "[t]he statement that concerted efforts to influence public officials are 'not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act,' simply cannot be reconciled with the sham exception."[70] Regardless, the Court's failure in *Noerr* and *Pennington* to indicate the limits of the antitrust exemption/immunity for attempts to influence governmental actions has confused the lower courts and academics.[71]

B. *California Motor*: The Scope Expands Again

The scope of *Noerr-Pennington* expanded again under *California Motor Transport Co. v. Trucking Unlimited*,[72] in which the Court utilized First Amendment analysis to determine that *Noerr* immunity extended to the use of the adjudicatory process and administrative agencies.[73] Notably, *California Motor*, decided in 1972, marked the first instance in which the Supreme Court found that a party's use of the judicial process constituted a sham and was therefore not subject to immunity from the antitrust laws. The case involved highway carriers operating in California; the plaintiffs alleged that the defendants had conspired to monopolize trade in the goods transporting business by instituting state and federal administrative and judicial proceedings in opposition to applications by plaintiffs to acquire motor carrier operating rights in California.[74] The plaintiffs alleged that the defendants had "instituted frequent, groundless actions before administrative agencies and in the courts, in an attempt to frustrate the adjudicative process, harass the plaintiffs, and deny them 'free and unlimited access' to those tribunals."[75] The plaintiffs further

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69 Kinter & Bauer, *supra* note 27, at 556.

70 Bien, *supra* note 64, at 51 (quoting United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965)).

71 Fischel, *supra* note 8, at 86.

72 404 U.S. 508 (1972).

73 *Id.* at 510 ("The [Noerr-Pennington doctrine] governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government.").

74 Fischel, *supra* note 8, at 86.

75 Kinter & Bauer, *supra* note 27, at 557 (quoting *Cal. Motor*, 404 U.S. at 511).

alleged that the defendants instituted such proceedings with or without probable cause.[76]

The complaint alleged that the aim and purpose of the defendant's conspiracy was to put competitors such as plaintiffs out of business, weaken competition, destroy, weaken, and eliminate competitors and future competitors, and to monopolize the highway common carriage business in California and elsewhere.[77] The defendants relied on the Court's previous statement in *Pennington* that *Noerr* provides antitrust immunity regardless of intent or purpose but the Court appeared to partially retreat from this absolute statement in its decision.[78] The Court stated:

> The nature of the views pressed does not, of course, determine whether First Amendment rights may be invoked; but they may bear upon a purpose to deprive the competitors of meaningful access to the agencies and courts. As stated in the opinion concurring in the judgment, such a purpose or intent, if shown, would be 'to discourage and ultimately to prevent the respondents from invoking' the processes of the administrative agencies and courts and thus fall within the exception to *Noerr*.[79]

Justice Douglas, writing for the Court, went on to dismiss the idea that *Noerr-Pennington* immunity did not apply to attempts to influence adjudication noting:[80]

> [I]t 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-à-vis* their competitors.[81]

The opinion further stated that certain methods of influencing decision-making that may be sanctioned in the political arena

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76 *Cal. Motor*, 404 U.S. at 512.
77 *Id.* at 511.
78 *Id.* at 512. *See also* Kinter & Bauer, *supra* note 27, at 557.
79 *Cal. Motor*, 404 U.S. at 512.
80 Fischel, *supra* note 8, at 87.
81 *Cal. Motor*, 404 U.S. at 510–11.

of legislative and executive activity "would not be immunized from antitrust scrutiny when undertaken in the adjudicatory setting of administrative or judicial proceedings."[82] Pronouncing that "[i]f the end result is unlawful, it matters not that the means used in violation may be lawful," the Court further cited *NAACP v. Button*[83] for the proposition that "First Amendment rights may not be used as the means or pretext for achieving substantive evils."[84] Justice Douglas further vaguely pondered that the difference in governmental body perhaps might make a difference in the applicability of antitrust laws if the defendants "had made misrepresentations of fact or law to these tribunals, or had engaged in perjury, or fraud, or bribery."[85] Nonetheless, the outcome of such behavior as related to antitrust liability was left unclear as the Court acknowledged in a footnote that the *Noerr* Court "emphasized that defendant's 'unethical' conduct did not affect their antitrust immunity for jointly exerting pressure on the Legislative and Executive Branches."[86]

Finally, Justice Douglas acknowledged the difficulty that lay in discerning whether a party's litigation efforts constituted an abuse of process from which antitrust liability may attach.[87] He then went on to state what has been seen by lower courts as the requirements for a successful sham exception application: "[o]ne claim, which a court or agency may think baseless, may go unnoticed; but *a pattern of baseless, repetitive claims* may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused."[88] While acknowledging the difficulty in detecting and drawing the line, the Court pronounced that once detected "the case is established that abuse of those processes produced an illegal result."[89] The Court found that the defendants' actions, if the alleged facts of access barring were proven, would fall within the sham exception and establish a violation of the antitrust laws and so remanded the case for trial.[90]

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82 Kinter & Bauer, *supra* note 27, at 558.

83 371 U.S. 415, 444 (1963).

84 *Cal. Motor*, 404 U.S. at 515.

85 *Id.* at 517.

86 *Id.* at 517 n.4.

87 Bradley, *supra* note 35, at 1310.

88 *Id.* (quoting *Cal. Motor*, 404 U.S. at 513) (emphasis added).

89 *Cal. Motor*, 404 U.S. at 513.

90 *Id.* at 515. The actions the Court referred to was "[a] combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts to defeat that right by massive, concerted, and purposeful activities of the group [which] are ways of building up one empire and destroying another."

The result of *California Motor* was the development of a test, however unclear it may be, for determining what constituted a sham. Most significantly, the Court made clear that even suits that were genuine efforts to influence adjudicators could still, as a pattern, be determined as sham.[91] In *California Motor* the defendants' success rate on its suits was over fifty percent.[92] But, the issue was not that all, or most, of the proceedings were baseless, but that "the defendants were instigating litigation automatically, without regard to whether the litigation had merit or not, in order to impose costs and delays on their competitors."[93]

The Court further clarified that certain activities that may be considered a sham in the adjudicative process would not necessarily be such in the political processes.[94] "But other than establishing that antitrust petitioning immunity varied with the context of the petitioning activity, this clarified very little."[95] The Court, while keeping unchanged the essential reasoning underlying *Noerr*, did appear to clarify that it was utilizing and looking to First Amendment principles to guide how it applied the doctrine of immunity and the sham exception.[96] But still, the judiciary has failed to distinguish between what is required, what is illustrative, and what is probative in determining the legal elements of a sham.[97]

C. *PRE* Adds to the Confusion

The scope of how courts were to apply the sham exception remained unclear following *California Motor*. The Supreme Court attempted to clarify the standard through a handful of cases, culminating with the test that emerged from *PRE*.[98] However, prior to deciding *PRE*, the Court first sought to define the sham exception and limit its application in *Allied Tube & Conduit Corp. v. Indian Head, Inc.* (*Allied Tube*),[99] which was decided in 1988.[100] In *Allied Tube*, the Court noted that "sham" may become "no more

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91 Eliner Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177, 1184 (1992).

92 *Id.*

93 *Id.*

94 *Id.* at 1185.

95 *Id.* at 1185.

96 Roche, *supra* note 58, at 1306.

97 Hurwitz, *supra* note 51, at 94.

98 Pro. Real Estate Invs. Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49 (1993).

99 486 U.S. 492 (1988).

100 Roche, *supra* note 58, at 1307.

than a label courts could apply to activity they deem unworthy of antitrust immunity."[101] For the first time, the Court announced "that the *Noerr* doctrine does not extend to 'every concerted effort that is genuinely intended to influence governmental action.'"[102] Ultimately, the Court found that the petitioning in question was not protected by *Noerr* immunity because the "*source*, *context*, and *nature* of the petitioning warranted traditional antitrust scrutiny."[103] Further, in *City of Columbia v Omni Outdoor Advertising, Inc.* (*Omni*),[104] the Court defined the sham exception as encompassing "situations in which persons use the governmental *process*–as opposed to the *outcome* of that process–as an anticompetitive weapon."[105] Justice Scalia further noted that:

> A classic example is the filing of frivolous objections to the license applications of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. A 'sham' situation involves a defendant whose activities are 'not genuinely aimed at procuring favorable government action' at all, not one 'who genuinely seeks to achieve is governmental result, but does so through improper means.'[106]

Finally, in 1993, the Court clarified the scope of the sham exception in *PRE*, which involved a single lawsuit brought by motion picture owners for copyright infringement against hotel owners.[107] At issue was the operators renting of Columbia's films to its guests for viewings in the hotel rooms.[108] The defendants counter-sued, alleging that Columbia's copyright infringement suit was merely a sham to cloak "underlying acts of monopolization and conspiracy to restrain trade."[109] PRE was granted summary judgement by the district court and the Court of Appeals affirmed on the copyright infringement cause of action.[110] Columbia sought

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101 Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 n.10 (1988).

102 Minda, *supra* note 5, at 977.

103 *Id.* at 976.

104 499 U.S. 365 (1991).

105 Gary Myers, *Antitrust and First Amendment Implications of Professional Real Estate Investors*, 51 WASH. & LEE L. REV. 1199, 1212 (1994) (quoting *Omni*, 499 U.S. at 380).

106 *Id.* (quoting *Omni*, 499 U.S. at 380).

107 Orucevic, *supra* note 57, at 300.

108 Pro. Real Estate Invs. Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 51–52 (1993).

109 *Id.* at 52.

110 *Id.* at 53.

summary judgement on PRE's antitrust claims, arguing that its suit was not a sham and it was therefore entitled to *Noerr-Pennington* immunity.[111] The district court granted the motion, with the judge noting that "the case was far from easy to resolve . . . there was probable cause for bringing the action."[112] The Ninth Circuit affirmed the summary judgement motion reasoning that "the existence of probable cause precluded the application of the sham exception as a matter of law because a suit brought with probable cause does not fall within the sham exception to the *Noerr-Pennington* doctrine."[113]

Justice Thomas, writing for the majority, started with a discussion of the history of the sham exception, and noted that the *California Motor* decision left unanswered the question at issue in *PRE*–whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant.[114] "We now answer this question in the negative and hold that an *objectively* reasonable effort to litigate cannot be sham regardless of subjective intent."[115] To support this, Justice Thomas reasoned that "[s]ince *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component."[116] Justice Thomas further cited *Omni* as holding that "challenges to allegedly sham petitioning activity must be resolved according to objective criteria."[117] Justice Thomas concluded the precedent recitation as compelling the Court to reject a purely subjective definition of "sham."[118]

The opinion outlined a two-part definition or test for determining "sham" litigation.

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the

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111 *Id.*

112 *Id.*

113 *Id.* at 54 (internal quotes omitted).

114 *Id.* at 57.

115 *Id.* (emphasis added).

116 *Id.* at 58. Whether *Cal. Motor* and the cases that followed actually stand for this proposition is dubious.

117 *Id.* at 59.

118 *Id.* at 60 ("In sum, fidelity to precedent compels us to reject a purely subjective definition of 'sham.' The sham exception so construed would undermine, if not vitiate, *Noerr*. And despite whatever 'superficial certainty' it might provide, a subjective standard would utterly fail to supply 'real intelligible guidance.'").

sham exception must fail. *Only if challenged litigation is objectively meritless* may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, 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.[119]

Put more simply, the two-part tests ask first, whether any reasonable litigant could expect to succeed on the merits. If so, the party obtains *Noerr-Pennington* immunity. Only after concluding there is no reasonable chance of success on the merits can the courts then ask whether the litigant used the governmental *process* as an anticompetitive weapon. Under *PRE*, the two-step test creates a higher bar for successfully invoking the sham exception.

Justice Thomas's opinion focused on objective baselessness and equated it to probable cause.[120] Probable cause, the Court said, requires no more than a reasonable belief that there is a chance the claim may be held valid upon adjudication.[121] "The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation."[122] Justice Thomas further noted that, when a defendant claiming *Noerr-Pennington* immunity demonstrates they had probable cause to sue, the plaintiff is unable to prove the objective prong of the sham exception and the defendant is entitled to antitrust immunity.[123]

Ultimately, the Court held that Columbia's suit was not baseless as it had probable cause and was therefore subject to antitrust immunity.[124] Justice Stevens, while agreeing with the outcome, disagreed with Justice Thomas's reasoning and filed a concurrence.[125] In the concurrence, he noted his disagreement with the rule that probable cause should guarantee antitrust petitioning immunity.[126] Justice Stevens observed that the two-part

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[119] *Id.* at 60–61 (emphasis added) (citation omitted).

[120] Nicholas E. Hakun, *Strategic Litigation and Antitrust Petitioning Immunity*, 12 U.C. IRVINE L. REV. 867, 876 (2022).

[121] *PRE*, 508 U.S. at 62–63.

[122] *Id.* at 62.

[123] *Id.* at 63.

[124] *Id.* at 63–64.

[125] *Id.* at 67 (Stevens, J., concurring).

[126] Hakun, *supra* 120, at 877.

test works well for simple cases, but that in more complex cases the court requires a more sophisticated analysis that goes beyond evaluating the merits of a single claim.[127] "It is important to remember that the distinction between "sham" litigation and genuine litigation is not always, or only, the difference between lawful and unlawful conduct; objectively reasonable lawsuits may still break the law."[128] Justice Steven's concurrence included a strong agreement with Judge Posner's analysis in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*[129] There, Judge Posner noted that there may be instances in which a lawsuit, while having probable cause, would not have been pursued lest there were collateral anticompetitive benefits to be had.[130]

Justice Steven's concurrence and warning has proved prescient. Lower courts have been faced with the challenge of determining whether *PRE* implicitly overturned *California Motor* and, if not, how the two cases, which fundamentally contradict one another, can co-exist.[131] It seems that *California Motor* should be dead given the case rejected immunity for cases filed with or without probable cause, while *PRE* noted that probable cause is an absolute defense to allegations of sham litigation.[132] Yet, the *PRE* Court did not make any mention of overturning California Motor, and so courts have attempted to balance this friction themselves.

III. A DIFFERENCE IN INTERPRETATION: WAS *CALIFORNIA MOTOR* OVERTURNED?

The stakes are high in determining whether *California Motor* was overturned or not. An example can be useful to illustrate. Suppose Company Alpha and Company Beta are utility providers that operate and compete with one another in the state of Sierra. There are other utility providers that also compete but Company Alpha and Company Beta control an outsized portion of the market making them the dominant players. Sierra contracts with numerous utility providers, including Company Alpha and Company Beta, to procure services for their governmental offices and buildings. In order to be eligible for bidding on these contracts,

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127 *PRE*, 508 U.S. at 73 (Stevens, J., concurring).

128 *Id.* at 75 (Stevens, J., concurring).

129 694 F.2d 466, 472 (1982).

130 *PRE*, 508 U.S. at 73–75 (Stevens, J., concurring) (quoting Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (1982)).

131 Hakun, *supra* note 120, at 877.

132 *Id.* at 878.

which occur annually, Sierra mandates a set of requirements that each bidder must meet before entering the auction process. Now say that Company Beta petitions the state of Sierra's government to create exclusive contracts for the procurement of the utility in all of the state's properties for a period of 5 years. This would essentially wipe out competition for utility services to the state government for an extended period of time since only one company would be able to provide those services, and the smaller players not named Company Alpha or Company Beta would be unable to compete for the contracts. But if any competitor sued Company Beta for this governmental petitioning, they would almost certainly fail due to the immunity provided by *Noerr-Pennington* for government petitioning.

Now let us instead posit that Company Beta challenges Company Alpha's eligibility to enter auctions for Sierra's contracts. Company Beta executes these challenges through lawsuits by alleging that Company Alpha should be disqualified from participating due to its failure to meet eligibility requirements as required by Sierra's laws. For our knowledge, Company Beta is interested in bringing these suits to eliminate the steep competition it faces from Company Alpha for contracts in certain regions of Sierra. Company Beta brings multiple lawsuits over the course of ten years, each time alleging that Company Alpha failed to meet a different eligibility requirement. Over the course of the decade, Company Beta's lawsuits are unsuccessful save for a handful of instances, though they all pass the motion to dismiss stage. After a decade of facing lawsuits, Company Alpha sues Company Beta under the antitrust laws, and alleges that Company Beta's eligibility requirement lawsuits were a sham and that they instead sought to restrain trade in, and monopolize, utility services for Sierra through the lawsuits. Company Beta defends itself by arguing that it had a reasonable chance of success in each individual lawsuit, as evidenced by its handful of wins and success at the motion to dismiss stage.

Under a system in which *PRE* applies to a series of petitions, and *California Motor* has been overturned, Company Beta would successfully be able to assert *Noerr-Pennington* immunity and not face antitrust liability because each lawsuit is evaluated on its own for objective reasonableness rather than looking at the series of lawsuits together and evaluating contextually whether the suits were intended to restrain trade. Contrastingly, if *California Motor* applies to a series of lawsuits, then it is far more likely that

Company Alpha can successfully show that—even if individual lawsuits passed the motion to dismiss stage or resulted in victory for Company Beta—taken together, the lawsuits evince a pattern of baseless, repetitive claims such that they are a sham, and Company Beta should be subject to the antitrust laws for attempting to restrain trade and monopolize. Under such a scenario, it is clear ex-post that we do not want to incentivize companies to pursue the litigation strategy that Company Beta has pursued, which has the effect of increasing Company Alpha's cost structure and is anticompetitive in intent. Notably, "[a]ntitrust regulations against sham litigation . . . serve an important purpose in the development of new technologies. If courts permit existing industry groups to use the legal system to place [] technologies at a disadvantage, progress will be stifled."[133]

While *PRE* was meant to provide clarity for determining sham litigation, it has done the opposite and instead created more confusion by way of a circuit split. The Second, Third, Fourth, Ninth, and Tenth circuits have held that a different analysis applies when the legality of a *pattern* of petitions is challenged than when just a *single* petition is challenged.[134] Based on this approach, a majority of circuits have held that the overall pattern of filings can be regarded as a sham and therefore subject to antitrust liability even if a small percentage of those petitions were individually objectively reasonable.[135] Contrastingly, the First and Seventh circuits have, in the minority, held that a separate standard for immunity does not apply when scrutinizing a pattern of sham petitioning.[136] Instead, every petition is subject to the two-step *PRE* test that determines whether the suit is objectively baseless and if so the subjective intent.[137] The outcome of such a test means an antitrust defendant who succeeds in barring entry of a competitor, or raisings its rival's costs through a pattern of unsuccessful lawsuits and administrative petitions, will

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[133] Julie Nickols, *Second Circuit Applies Sherman Act to Satellite Broadcasting Issues*, J. AIR L. & COM. 1709, 1714 (2001).

[134] Carson & Russell, *supra* note 15, at 2. *See also* PrimeTime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92 (2d Cir. 2000); Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162 (3d Cir. 2015); Waugh Chapel S., LLC v. United Food & Com. Workers Union Loc. 27, 728 F.3d 354 (4th Cir. 2013); USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, ALF-CIO, 31 F.3d 800 (9th Cir. 1994); CSMN Inv., LLC v. Cordillera Metropolitan Dist., 956 F.3d 1276 (10th Cir. 2020).

[135] Carson & Russell, *supra* note 15, at 2.

[136] *See* Puerto Rico Tel. Co. v. San Juan Cable LLC, 874 F.3d 767 (1st Cir. 2017); U.S. Futures Exch., LLC v. Bd. of Trade of the City of Chicago, 953 F.3d 955 (7th Cir. 2020).

[137] Carson & Russell, *supra* note 15, at 2.

likely be immunized from antitrust liability so long as each petition individually had a reasonable chance of success.[138] It matters not if the purpose of such suits was success or if that was simply a collateral benefit, as Judge Posner noted his concerns in *Grip-Pack*, and Justice Stevens echoed in his *PRE* concurrence.[139]

A. The Majority Approach

Following *PRE*, the circuit courts were faced with the difficult question of whether the test as recited in *PRE* for sham exceptions applied only to singular lawsuits, or whether the test applied to a *pattern* of lawsuits as well. If *California Motor* applies to a *pattern* of suits, instead of *PRE*, then it is more likely that *Noerr-Pennington* immunity may be rescinded in instances where corporations abuse the doctrine. However, if *PRE* applies to patterns of suits as well, then it would be virtually impossible for any plaintiff to make a successful sham litigation and therefore antitrust violation argument given the relatively easy hurdle the defendants must pass–possess probable cause/not be objectively baseless. Therefore, the manner in which courts interpret and apply the sham litigation has a great amount of impact on the manner in which businesses may conduct litigation against their rivals.

The Ninth Circuit was the first circuit to attempt to resolve the friction between the two Supreme Court cases and it did so in 1994 in a case that was factually similar to *California Motor*.[140] Here, the core question facing the appellate court was if the "objectively baseless" test as recited in PRE implicitly overturned or modified the *California Motor* "sham" test that multiple petitions with probable cause may still be a sham.[141] The plaintiffs alleged that the unions had engaged in a pattern of automatic petitioning of governmental bodies without regards to the merits of the petitions and that such petitioning constituted a sham.[142] The plaintiffs argued that the *California Motor* test should apply, while the unions alleged that *PRE* forecloses reliance on *California Motor* and instead each petition should individually be subject to the

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138 Carson & Russell, *supra* note 15, at 2.

139 *See supra* notes 125–30.

140 USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL-CIO, 31 F.3d 800 (9th Cir. 1994).

141 Carson & Russell, *supra* note 15, at 6.

142 *USS-POSCO*, 31 F.3d at 810.

objective baselessness and subjective intent test.[143] "The circuit held that *PRE* had not overruled *California Motor* and that repetitive litigation that is not objectively baseless can still amount to sham petitioning."[144] The court ruled that *PRE* and *California Motor* applied to different situations: *PRE* provides a two-step analysis for determining whether a *single* suit is a sham, while *California Motor* deals with cases where the defendant is accused of bringing a series of legal proceedings.[145] The Ninth Circuit noted the *California Motor* Court as recognizing that a series of legal proceedings without merit pose far more serious implications than a single action and can serve as a greater and more effective restraint on trade.[146] Following Justice Steven's concurrence reasoning, the Ninth Circuit went on to state

When dealing with a series of lawsuits, the question is not whether any one of them has merit—some may turn out to, just as a matter of chance—but whether they are brought *pursuant to a policy* of starting legal proceedings without regard to the merits and *for the purpose of injuring a market rival*. The inquiry in such cases is prospective: Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?[147]

As mentioned, the facts of the case as alleged in *USS-POSCO* were quite similar to California Motor. The success rates were also similar—*California Motor's* defendants were successful in over half the suits brought, and in *USS-POSCO* the defendants were successful in over half the lawsuits alleged as being without merit.[148] But notably, the Ninth Circuit found this dispositive, while the *California Motor* court did not.

The fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing lawsuits and other actions willy-nilly without regard to success. Given that the plaintiff has the burden in litigation, a batting average exceeding .500 cannot support BE&K's theory. BE&K therefore cannot sustain its

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143 *Id.*

144 Carson & Russell, *supra* note 15, at 8.

145 *USS-POSCO*, 31 F.3d at 810–11.

146 *Id.* at 811.

147 *Id.* (emphasis added).

148 *Id.*

burden of showing that the unions' conduct falls within the sham exception to the *Noerr-Pennington* doctrine.[149]

While the opinion overall seems to endorse the *California Motor* approach, a broad reading of *USS-POSCO* could be interpreted as breaking with *California Motor* by declaring that a series of petitions in which half the cases have proven successful cannot be sham litigation. While this is a possible reading, it is more probable that the Circuit meant to limit the ".500 batting average" litmus test to the facts and theory put forth by the plaintiffs in this case, rather than creating a broad holding that any series of petitions with a fifty percent success rate cannot be a sham.

The Second Circuit endorsed the Ninth Circuit's reasoning in a 2000 case called *PrimeTime 24 Joint Venture v. NBC, Inc.*.[150] This case involved the Satellite Home View Act ("SHVA") under which networks must license their signals to satellite operators to provide service to viewers who cannot receive an over-the-air signal.[151] Under this statute, satellite operators determine the households that they are entitled to serve but the network broadcaster can challenge a satellite provider's transmission to a household that falls within a "Grade B contour."[152] In response to this challenge, the satellite operator must either halt service to that household or conduct a signal-strength test the result of which could result in the network broadcaster reimbursing the satellite provider for the test.[153] PrimeTime, the leading American provider of network television broadcasts to satellite dish owners, brought suit alleging that NBC, ABC, CBS, and Fox, in coordination with the National Association of Broadcasters (NAB), "intentionally abused the SHVA's signal-strength challenge provision by filing baseless challenges for the purpose of raising PrimeTime's cost structure and thereby reducing competition."[154] The challenges by the networks were made pursuant to a single subscriber list unique to an NBC station.[155] The Southern District of New York granted the Networks' motion to dismiss noting that litigation to enforce a valid copyright was protected by the *Noerr-*

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149 *Id.*
150 219 F.3d 92 (2d Cir. 2000).
151 Nickols, *supra* note 133, at 1711.
152 *Id.*
153 *Id.*
154 *Id.* (quoting *PrimeTime*, 219 F.3d at 96).
155 Nickols, *supra* note 133, at 1711.

Pennington doctrine.[156] In holding that PrimeTime did not adequately allege facts constituting a sham, the court stated that PrimeTime "failed to allege . . . that the use of the NBC list was unreasonable under the circumstances or that the defendants knew that challenges based on this list would be meritless".[157]

The Second Circuit, on appeal, noted that litigation, including good faith litigation to protect a valid copyright, falls within the protection of the *Noerr-Pennington* doctrine.[158] However, the court, citing *California Motor*, held that "concerted assertion of baseless claims with the intent of imposing costs on a competition firm to prevent or impair competition from that firm . . . is predatory, without any redeeming efficiency benefitting consumers."[159] Notably, the Second Circuit cabined the application of *PRE's* two-step test as applying to "determining whether a single action constitutes sham petitioning."[160] The Court went on to state:

> As the Ninth Circuit has noted, it is immaterial that some of the claims might, "as a matter of chance," have merit. The relevant issue is whether the legal challenges "are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival."[161]

The Court held that, under this standard, PrimeTime's complaint stated a valid sham claim.[162] The Court discussed PrimeTime's allegations of how the networks brought challenges indiscriminate to merit and concluded that PrimeTime essentially alleged the classic example of a sham. If proven true, the alleged conduct would be sufficient to overcome the defendant's *Noerr-Pennington* defense and so the court overturned the district court's dismissal on the pleadings.[163]

The Fourth Circuit joined the Ninth and Second Circuits in holding that a pattern of anticompetitive petitioning is not

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156 *PrimeTime*, 219 F.3d at 97.

157 *Id.*

158 *Id.* at 100.

159 Carson & Russell, *supra* note 11, at 8.

160 *PrimeTime*, 219 F.3d at 101 (quoting USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL-CIO, 31 F.3d 800, 811 (9th Cir. 1994).

161 *Id.* (quoting *USS-Posco*, 31 F.3d at 811).

162 *Id.*

163 *Id.*

entitled to *Noerr-Pennington* immunity even if individual petitions themselves are not objectively baseless.[164] The case involved real estate developers of the Village at Waugh Chapel South who planned to lease space to Wegmans.[165] The United Food and Commercial Works Union (UFCW) and the Mid-Atlantic Retail Food Industry Joint Labor Management Fund (the "Fund") opposed the project because Wegmans did not employ organized labor.[166] Allegedly, a union executive threatened to fight every project Waugh Chapel South developed where Wegmans was a tenant if Wegmans did not unionize.[167] "The unions subsequently brought fourteen legal challenges to the development project, thirteen of which involved surrogate plaintiffs. Ten of the petitions were subsequently withdrawn, two were dismissed, and two were mooted by subsequent developments."[168] Waugh Chapel South (WCS) subsequently sued the unions under § 187 of the Labor Management Relations Act (LRMA),[169] "which provides a cause of action for victims of unfair labor practices as defined by the National Labor Relations Act (NLRA).[170] WCS alleged a secondary boycott because "the defendants orchestrated fourteen separate legal challenges against their commercial real estate project in order to force WCS to terminate their relationship with a non-unionized supermarket."[171] The defendants moved to dismiss arguing that its litigation actions fell within *Noerr-Pennington*'s protection.[172] The district court agreed and dismissed the action.[173]

The Fourth Circuit held that the *Noerr-Pennington* doctrine did not spare the defendants from the allegations at that stage of appeal.[174] The Court further held that under the sham litigation exception to *Noerr-Pennington* the pleadings and concomitant record evidence in the case, if credited by a factfinder, were sufficient to show that the unions abused their right to petition the

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164 Carson & Russell, *supra* note 15, at 8.

165 Stephen Sutherland, Waugh Chapel South, LLC v. United Food and Commercial Workers Union Local 27, No. 12-1429, S.C. L. REV. (Sept. 23, 2013), https://perma.cc/P3V9-7NBR.

166 *Id.*

167 *Id.*

168 *Id.*

169 29 U.S.C. § 187.

170 Waugh Chapel South, LLC v. United Food & Commercial Workers Union, 27, 728 F.3d 354, 356 (4th Cir. 2013).

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

courts beyond the point of constitutional protection.[175] The court noted that "[i]t is unclear whether *PRE*[] distinguished or displaced the sham litigation test first propounded in *California Motor*" but that two sister circuits reconciled the two cases by reading them as applying to different situations.[176] The court went on to state that it agreed with the distinction adopted by its sister circuits and that "[i]n the absence of any express statement that the sham litigation standard in *PRE*[] supplanted *California Motor*, we are obligated to follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions."[177] The Court explained its reasoning by stating:

> We distinguish *PRE*[] because it is *ill-fitted* to test whether a series of legal proceedings is sham litigation. When a party contends that it is defending a sham lawsuit, it is relatively simple for a judge to decide whether the singular claim it is presiding over is objectively baseless. But it is an entirely different undertaking to collaterally review–as here–fourteen state and administrative lawsuits for baselessness. It is especially difficult to do so where the presiding tribunal in those cases had no occasion to measure the baselessness of the suit because (1) it had no inkling that the action comprised a possible campaign of sham litigation, and (2) the plaintiffs preempted an assessment of frivolity by prematurely withdrawing some of their suits.
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> Accordingly, when purported sham litigation encompasses a series of legal proceedings rather than a singular legal action, we conclude the sham litigation standard of California Motor should govern. In this context, the focus is not on any single case. Rather a district court should *conduct a holistic evaluation* of whether 'the administrative and judicial processes have been abused.'" The pattern of the legal proceedings, not their individual merits, centers this analysis.[178]

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[175] *Id.*

[176] *Id.* at 363.

[177] *Id.*

[178] *Id.* at 364 (quoting California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972)) (emphasis added) (citation omitted).

The Court further noted that "other signs of bad-faith litigation–including those present in this case–may also be probative of an abuse of the adjudicatory process."[179] The court analogized the batting average simile the Ninth Circuit utilized in *USS-POSCO* to observe that "a one-out-of-fourteen batting average at least suggests 'a policy of starting legal proceedings without regard to the merits and for the purpose of violating the law.'"[180] Finally, the Fourth Circuit's decision went further than the Ninth and Second Circuit's decisions in holding that additional information may inform the analysis of whether abuse has occurred rather than limiting to the facts at hand.

The Third Circuit joined the Ninth, Second, and Fourth Circuits in 2015 in adopting the pattern exception to sham petitioning. Hanover Realty had signed a contract with Wegmans to build a supermarket on its property in New Jersey; the agreement required Hanover to secure all required governmental permits and approvals before breaking ground.[181] Village Supermarket, the defendant, owned the local ShopRite, which Hanover alleged was the "only full-service supermarket operating in the greater Morristown area."[182] Subsequently, the defendants "filed numerous administrative and court challenges to Hanover Realty's permit applications" once they realized Hanover's plans to build a Wegmans.[183] Hanover sued alleging that the filings were "baseless and intended only to frustrate the entry of a competitor" and that the defendants "attempted to restrain the market for full-service supermarkets."[184]

The court agreed with the Second, Fourth, and Ninth Circuits and held that the two standards apply to different situations: *California Motor* applies to series of sham petitions, and *PRE* to a single sham petition.[185] "[T]he Third Circuit held that, 'even if a small number of the petitions turn out to have some objective merit, that should not automatically immunize defendants from liability.'"[186] The court justified its decision by noting that "not only do pattern cases often involve more complex fact sets and a

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179 *Id.*

180 *Id.* at 365.

181 Hanover 3201 Realty, LLC v. Village Supermarkets, Inc., 806 F.3d 162, 166 (3d Cir. 2015).

182 *Id.* at 167.

183 *Id.* at 166.

184 *Id.*

185 *Id.* at 179–80.

186 Carson & Russell, *supra* note 11, at 10.

greater risk of antitrust harm, but the reviewing court sits in a much better position to assess whether a defendant has misused the governmental process to curtail competition."[187] The court further stated that "even if a small number of the petitions turn out to have some objective merit, that should not automatically immunize defendants from liability."[188]

The Tenth Circuit also addressed the split and adopted the Third Circuit's interpretation of *California Motor*.[189] The Court further quoted the Fourth Circuit's opinion to note that "sham litigation occurs where a pattern of baseless, repetitive claims . . . emerge[s] which leads the factfinder to conclude that the administrative and judicial processes have been abused."[190]

B. The First and Seventh Circuit's Minority Approach

The First Circuit created a circuit split in 2017 when it broke with the Ninth, Second, Fourth and Third Circuit's holding and "expressed doubt as to whether *California Motor* established a separate standard for immunity than *PRE*."[191] PRTC had filed a monopolization suit against a cable company for its filing of twenty-four petitions to a regulatory board and other tribunals in order to impede PRTC's efforts to secure a license to offer competing service.[192] The court explained its departure from its sister circuits by stating that "we struggle to see how a jury could reasonably conclude that the party was filing petitions regardless of the merits of the cases" when "a party files a large number of petitions . . . and every single one is objectively reasonable."[193] The Court went on to state that to interpret *PRE*'s two-step test as applying only to a single lawsuit would be to frame *PRE* "through the lens of Justice Stevens's concurrence" and that the court in *PRE* "wrote nothing to suggest that its ruling would have been different had the defendant filed a series of objectively reasonable suits."[194] Ultimately, the First Circuit granted summary judgement to the cable company "accept[ing] that *Noerr-Pennington*

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187 *Hanover 3201*, 806 F.3d at 180.

188 *Hanover 3201*, 806 F.3d at 180.

189 Carson & Russell, *supra* note 15, at 12.

190 Carson & Russell, *supra* note 15, at 13 (quoting CSMN Inv., LLC v. Cordillera Metropolitan Dist., 956 F.3d 1276, 1288 (10th Cir. 2020)).

191 Carson & Russell, *supra* note 15, at 10–11.

192 Puerto Rico Tel. Co. v. San Juan Cable LLC, 874 F.3d 767, 768 (1st Cir. 2017).

193 *Id.* at 772.

194 *Id.* at 771.

immunity applied to each petition because of its objective reasonableness."[195]

The Seventh Circuit joined the fray and sided with the First Circuit in 2020 in a case involving futures trading.[196] The U.S. Futures Exchange had applied for regulatory approval from the CFTC and two existing exchanges filed fifty-four objections to its application and requested the CFTC postpone its hearing of the application.[197] Subsequent to its failure, the U.S. Futures Exchange sued the two exchanges for causing its delayed entry; the district court held the defendants' petitioning was immune under *Noer-Pennington*.[198] The Seventh Circuit affirmed, holding that it stood with the First Circuit and that "the objective reasonableness portion of the sham exception is 'indispensable' and . . . that there is 'little logic in concluding a petitioner loses the right to file an objectively reasonable petition merely because it chooses to exercise that right more than once'" in pursuing a desired outcome.[199] The Seventh Circuit also differentiated its analysis by noting that at issue in the case was a *single* legislative proceeding, and not "multiple lawsuits or petition across various legislative and administrative fronts."[200]

IV. CALIFORNIA MOTOR + FIRST AMENDMENT JURISPRUDENCE = THE NEW SHAM EXCEPTION

The *Noerr-Pennington* doctrine provides widespread coverage to businesses that are competing against one another in the marketplace. Pharmaceutical companies are notorious for developing "patent thickets" which artificially extend patent exclusivity and discourage potential competitors from challenging the patents because of the sheer number of patents that would have to be invalidated to have an effect on competition. Courts have upheld these patent thickets under the *Noerr-Pennington* doctrine.[201] Pharmaceutical companies are also able to utilize their

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195 Carson & Russell, *supra* note 15, at 11 (quoting Puerto Rico Tel. Co. v. San Juan Cable LLC, 874 F.3d 767, 772 n.4 (1st Cir. 2017)).

196 Carson & Russell, *supra* note 15, at 12.

197 *Id.*

198 *Id.*

199 *Id.* at 12 (quoting U.S. Futures Exch. LLC v. Bd. Of Trade of the City of Chicago, 953 F.3d 955, 965 (7th Cir. 2020)).

200 *U.S. Futures Exch.*, 953 F.3d at 965.

201 *In re* Humira (Adalimumab) Antitrust Litig., 465 F. Supp. 3d 811 (N.D. Ill. 2020). For a deeper discussion on *Noerr-Pennington* as it relates to pharmaceutical patents, see Lisa Orucevic*, A Machete for the Patent Thicket: Using* Noerr-Pennington *Doctrine's Sham*

intellectual property to file patent infringement lawsuits against competitors. AbbVie did exactly that when it filed two patent infringement lawsuits against competitors Teva and Perrigo in response to their filing applications with the Food and Drug Administration (FDA) to introduce generic versions of AndroGel, Abbvie's testosterone replacement therapy drug.[202] Under the Hatch-Waxman Act, "[s]imply by suing, a patentee can delay the introduction of low-cost generic drugs to market and impede competition in the pharmaceutical industry."[203] But this sort of behavior is not limited to the pharmaceutical industry. Companies have utilized the *Noerr-Pennington* doctrine to immunize bribery attempts,[204] false and fraudulent statements while petitioning Congress,[205] deceitful and deceptive behavior opposing zoning actions,[206] and more. Much of the underhanded behavior occurs in the legislative arena; courts are able to utilize sanctions and other legal tools to punish such behavior when it occurs in the judicial process. Nonetheless, this merely provides more proof that certain methods of influencing decision-making are more immunized in one arena than they are the other, yet both are subject to the same overarching doctrine.

Noerr-Pennington as a doctrine makes practical sense; "if the government can take an action, then an individual must be able to lobby for that action" whereby individuals include corporations.[207] Antitrust laws regulate businesses, not politics; clearly then the doctrine is meant to "protect the ability of governments acting in their sovereign capacity to hinder or supplant competition and the ability of citizens to request such government action."[208] The issue with the sham exception as interpreted by the Supreme Court is that often petitioning, "while not genuinely

Exception to Challenge Abusive Patent Tactics by Pharmaceutical Companies, 75 VAND. L. REV. 277 (2022).

202 FTC v. AbbVie Inc., 976 F.3d 327, 338 (3d Cir. 2020).

203 *Id.* at 340.

204 Armstrong Surgical Ctr., Inc. v. Armstrong Cty. Mem'l Hosp., 185 F.3d 154, 162 (3d Cir. 1999) ("Liability for injuries caused by such state action is precluded even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision-making process.").

205 Tuosto v. Philip Morris USA Inc., 2007 U.S. Dist. LEXIS 61669, at *16 (S.D.N.Y. 2007). For a further discussion of misrepresentations to legislative bodies, see 50 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATIONS, § 50.04 (2d ed. 2011).

206 John M. Armentano, *An Unfair Fight — Noerr Permits Opponents of Zoning Changes to Deceive*, FARRELLFRITZ (July 26, 2000), https://perma.cc/Y2NU-QL4U.

207 FED. TRADE COMM'N, *supra* note 9, at 15.

208 *Id.* at 15–16.

aimed at procuring favorable governmental action," appears as if it is, making the application of the sham exception near impossible under *PRE*'s standards.[209]

Some academics, such as Tim Wu, have suggested overruling *Noerr* altogether and relying entirely on First Amendment jurisprudence to protect political petitioning.[210] Other suggestions have included limiting the broad language in *Noerr* and *Pennington* without overruling the premise,[211] more clearly delineating the scope of the right to petition,[212] or placing greater antitrust limitations on the right of corporate interest groups to petition the government.[213] But it is an extremely complex task to resolve the natural friction between first amendment rights and competition law.[214] The Supreme Court chose not to delve into that topic by practicing constitutional avoidance in *Noerr* and later grounding its analysis in *California Motor* and its progeny on first amendment grounds.[215] But, First Amendment rights are not absolute, and its magnitude varies as well; symbolic and commercial speech are subject to varying standards as compared to political oratory.[216]

Judge Posner, while not advocating for the overruling of *Noerr*, has questioned whether the legal merit of a case is determinative of being a sham.[217] As noted, in *Grip-Pak*,[218] he opined "on how litigants could abuse legal process[es] in order to harm competitors through delay, cost, or other means . . . Judge Posner argued, instead, to evaluate the intentions underlying the decision to sue, despite the obvious challenges such an examination would pose."[219] The method which Judge Posner advocates would be incredibly fact and time intensive. But, it would likely have the result of making corporations be far more cautious of the kinds of litigation that they undertake in fear that there is a greater possibility of being subjected to antitrust liability than currently

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209 *Id.* at 9 n.30.

210 *See* Wu, supra note 1, at 2.

211 Alan H. Melnicoe, *An Exception to the Noerr-Pennington Doctrine: Conspiracy to Utilize the Judicial and Administrative Agencies to Restrain Trade*, 22 HASTINGS L.J. 1016, 1033 (1971).

212 Walden, *supra* note 58, at 1243.

213 Minda, *supra* note 5, at 999.

214 Hurwitz, *supra* note 51, at 119.

215 Myers, *supra* note 105, at 1238.

216 Hurwitz, *supra* note 51, at 119.

217 Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982).

218 *Id.*

219 Hakun, *supra* note 120, at 874.

exists under the *PRE* standard. Much of what Justice Stevens forewarned in his endorsement of Judge Posner's intent-based test from PRE has rung true as the circuit courts and district courts evaluate sham litigation cases.

A. A Proposed Resolution to the Circuit Split

The Supreme Court should endorse the Fourth Circuit's view that *California Motor* is to be applied for a series of petitioning, while the *PRE* test is to be applied to an individual petition. The Fourth Circuit decision provides the greatest ability for the Supreme Court to maintain both *California Motor* and *PRE* as good law while allowing changes to the standards that apply for evaluating sham litigation. The Supreme Court should include in the sham litigation test "a holistic evaluation of whether the administrative and judicial processes have been abused"[220] making the examination of the plaintiff's conduct akin to a rule of reason inquiry under traditional antitrust laws. Adopting a rule of reason-like standard would help scale back the *PRE* absolute test and allow for more complex inquiries, as Justice Steven's noted was lacking in *PRE*.

When faced with an individual lawsuit absent any other legislative or judiciary actions, courts should utilize the *PRE* two-step test for objective baselessness and subjective intent. However, when courts must determine a suit in the broader context of administrative challenges or previous lawsuits, the court should apply the *California Motor* test to the *pattern* of suits to determine whether the sham exception to *Noerr-Pennington* immunity should apply. Two things can be true at once: the lawsuit can be likely to succeed and the company's sole intent can be to harm competition. As such, whether a company's actions should be immunized under *Noerr-Pennington* or whether to apply the sham exception should not be determined based on whether their suit is likely to succeed. Under the herein proposed test, the judiciary's hands would no longer be tied by unclear doctrine and courts would be allowed to appraise whether companies actually care about winning its lawsuit or if its intentions are to harm competition.

Recall the example in Part III of Sierra in which Company Alpha and Company Beta compete alongside smaller competitors.

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[220] Waugh Chapel South, LLC v. United Food & Commercial Workers Union, Local 27, 728 F.3d 354, 364 (4th Cir. 2013).

Under this new proposed test, courts would, using the Fourth Circuit's test, evaluate the multiple lawsuits Company Beta initiated as a pattern in which every suit is analyzed as one entity to determine whether Company Beta has been bringing multiple lawsuits in order to create anticompetitive effect. The court may choose to use the "baseball batting average" test which can help provide some indication of whether the suits were successful such that they cannot constitute a sham. However, a key change between the proposed test and the existing approaches that simply endorse the Ninth Circuit's position is that this test would allow courts to evaluate the intentions underlying the decision to sue, similar to Judge Posner and Justice Steven's advocated approach.

So, in our example, suppose that in addition to bringing lawsuits and petitioning Sierra's government, Company Beta also undertook administrative challenges at the Utility Agency to further hinder competition in the growing renewable energy landscape. Some of the smaller competitors of Company Alpha and Company Beta are those that have been working towards innovating new approaches to providing cost-effective renewable solar power. If the Supreme Court adopted the proposed test, the court deciding whether Company Beta is entitled to *Noerr-Pennington* immunity or whether to apply the sham exception to its actions would be able to make this decision utilizing the knowledge of Company Beta's actions in the legislative and administrative arenas. Company Beta would not be able to hide behind the "probable cause" of each individual lawsuit, as it would currently be able to do, but instead would have to provide a cohesive and coherent argument for why it has undertaken such actions notwithstanding its possibility of success. The onus would thus fall on courts in evaluating the merits of Company Beta's actions, as courts already do when evaluating traditional Section 1 and Section 2 suits under the Sherman Act.

Whether a lawsuit is likely to succeed or not does not always provide a clear indication of whether the *reason* the lawsuit was brought was to succeed. Oftentimes, success is only ancillary to the corporation's incentive to impede a competitor's ability to effectively compete in the marketplace. Lawsuits are expensive – whether offensively suing or having to defend against them. But, for large corporations that have the money and resources to hire an army of law firms to bring such suits, the economics make much more sense to bring such lawsuits if there is a strong chance that in doing so it will be able to cripple its closest rival. Such a

strategy is particularly rewarding and pursuit-worthy if the closest rival to the large corporation is a new and/or emerging firm that does not have at its disposal the resources and money required to litigate such lawsuits. As such, Courts should have the ability to parse through these motivations and assess lawsuits, not in a vacuum, but with the widest scope required to determine intentions. The FTC has already endorsed some version of this test as early as in 2006, writing in a staff report "a 'pattern' exception to *Noerr* should apply when a party invokes administrative processes, judicial processes, or a combination thereof, to hinder marketplace rivals."[221] No court has chosen to adopt this approach as it would mark a significant departure from the test decreed by the Supreme Court thus far. As such, the Supreme Court should grant certiorari in a case involving the sham exception and step back from the stringent *PRE* test in favor of the test advocated for here.

For practices that have unambiguous anticompetitive effects, per se analysis is applied. Rule of Reason analysis "is aimed at determining the competitive effects of" a particular practice or action.[222] The rule of reason analysis is a more open-ended inquiry used when the balances may tilt in favor of being either pro- or anti-competitive.[223] While not directly applicable to evaluating sham litigation suits, the rule of reason provides a helpful foundational understanding for how courts may approach the analysis of a party's actions, rather than solely relying on a test that evaluates the possibility of success. Under a rule of reason adjacent analysis, courts would be empowered to investigate abuse of process in the context of antitrust litigation, rather than as a tort. As a tort, abuse of process occurs when a legal process is used against another primarily to accomplish a purpose for which it is not designed.[224] Judge Posner advocated for such analysis in his *Grip-Pak* opinion, which though later overturned by *PRE*, still provided useful groundwork for Justice Steven's concurrence. "Judge Posner reasoned that if *Noerr-Pennington* immunity is applied too broadly–to the point that all non-malicious litigation is immunized from governmental regulation–the tort of abuse of process

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221 FED. TRADE COMM'N, *supra* note 9, at 29.

222 Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 475 (2012).

223 *Id.*

224 Joseph B. Maher, *Survival of the Common Law Abuse of Process Tort in the Face of a* Noerr-Pennington *Defense*, 65 U. CHI. L. REV. 627, 627 (1998).

will itself become unconstitutional."[225] Justice Stevens went on to observe in *PRE* that "many sham cases involve an abuse of process . . . and the distinction between sham and genuine litigation should not be the only difference between lawful and unlawful conduct."[226] Other commentators have noted that *Noerr Pennington* and the abuse of process tort cannot co-exist.[227] By increasing the leeway that courts have to examine a party's actions, the likelihood that courts will be able to discern intent and evaluate whether an abuse of process has occurred within the antitrust context will increase. As Judge Posner has noted, such an evaluation can often be fact and time-intensive but this is not a new occurrence. Courts already undertake these deliberations when evaluating the motives behind other anticompetitive actions.

Courts are sometimes unable to evaluate intentions clearly. Arguably, the batting average standard could serve as a baseline in which if a *single* individual lawsuit in a pattern of suits is baseless, the immunity provided by the doctrine is extinguished. Such a clear standard would eliminate the troubles the *California Motor* court noted as part of the difficulty in drawing to a sham conclusion. However, this would be more akin to a "per-se" rule rather than a standard. Instead, courts should, in the course of its analysis, ask whether the legitimate gain the defendant is entitled to under the law, i.e. damages, is higher than the total anticompetitive effect of the pattern of the lawsuits, which includes the litigation costs and the attorney fees imposed upon the plaintiff. Under this type of analysis, a court would be able to evaluate a non-objectively baseless lawsuit as nonetheless being anticompetitive given its imposition of huge attorney fees on the opposing party as compared to the relative meager damages payoff. Such an analysis would get to the heart of Judge Posner and Justice Steven's concerns around a broad *Noerr-Pennington* doctrine. As Justice Steven's noted, the sham moniker should probably apply to "a plaintiff who had some reason to expect success on the merits but because of its tremendous cost would not bother to achieve that result without the benefit of collateral injuries imposed on its competitor by the legal process alone."[228] To evaluate a pattern

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[225] Daniel Fullerton, *Petitioning for Cash: How Domestic Industries Exploit Antidumping Procedures and Antitrust Exceptions to Force Their Foreign Competitors into Lucrative Settlement Agreements*, 2 AM. I. BUS. L. REV. 355, 369 (2013).

[226] *Id.* at 368.

[227] Maher, *supra* note 223, at 629.

[228] Professional Real Estate Investors Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 68–69 (1993) (Stevens, J., concurring).

of lawsuits as being pursued as part of a cost-increasing strategy, instead of on their individual chances of success, would shift the evaluation of *Noerr-Pennington* back to protecting *valid* forms of speech, rather than immunizing all lawsuit simply because they had some possibility of success. A formula that evaluates legitimate gains as compared to anticompetitive effects would assist courts in evaluating whether the lawsuits, taken as a whole, constitute a sham from which *Noerr-Pennington* immunity should be removed.

We should disincentivize companies from utilizing underhanded tactics to minimize competition; a holistic evaluation of the company's use of the legal processes would remediate the shortcomings that the "objective baselessness" standard commanded by *PRE* allows for. A holistic rule of reason-esque rule alongside a return to *California Motor* principles as advocated by the Fourth Circuit would provide the ability to bring more enforcement actions that are stronger and more likely to win in line with the goals of antitrust to allow for fair competition and enhance consumer welfare. Removing corporate incentives to bring multiple lawsuits for the sake of driving up cost structures or solely harming competitors will result in a fairer marketplace across most industries and make for a more concise doctrine.

V. CONCLUSION

Corporations should be incentivized to play by the same rules throughout the nation. The Supreme Court, when given the opportunity, should encourage uniformity amongst circuits. For this reason, it is important for the Supreme Court to resolve the existing circuit split to prevent any uneven application of *Noerr-Pennington* based simply on jurisdiction. The Supreme Court should adopt the Fourth Circuit's decision in *Waugh Chapel* to delineate *California Motor* for a series of petitions and *PRE* for a single petition. In addition to endorsing the Fourth Circuit's position, the Court should go further and also clarify that the first amendment protections that exist within the doctrine are to protect freedom of speech and petition, but that they do not provide the unfettered absolute right to speech and all its harmful ancillary uses. The Court should adopt a holistic analysis approach to prevent immunizing lawsuits that are brought solely to harm competition. In order to deduce such sham lawsuits, courts should evaluate whether the legitimate gains from the lawsuit outweigh the anticompetitive effects of bringing such suits. The effect of adopting

such an evaluation method will be to provide a check on the wickedest of corporate desires to eliminate competition through the abuse of governmental processes while aligning the *Noerr-Pennington* doctrine with the changing landscape of antitrust laws by providing for a holistic evaluation of corporate actions. The *Noerr-Pennington* doctrine is an important standard that protects legitimate First Amendment interests, but it should no longer be used to enable and condone those actions which are plainly anticompetitive.