

THE BASIS FOR NOERR-PENNINGTON IMMUNITY: AN ARGUMENT THAT FEDERAL ANTITRUST LAW, NOT THE FIRST AMENDMENT, DEFINES THE BOUNDARIES OF NOERR-PENNINGTON

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I. INTRODUCTION

“Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.”² While perhaps not as famous as its fellow First Amendment freedoms of speech, press and assembly, the Supreme Court has maintained that the right to petition is one of “the most precious of the liberties safeguarded by the Bill of Rights.”³ To this day, however, it remains one of the least defined First Amendment rights.⁴ Few Supreme Court cases address the right to petition⁵ and the majority of cases that deal with the right to petition address it in the narrow context of a defendant’s claim to petitioning immunity.

Petitioning immunity is an affirmative defense for defendants who, in the process of “petitioning” a government decision-maker (such as Congress, an administrative agency, or a court), cause harm to another party or violate a statute.⁶ For example, suppose that an

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2. US CONST Amend. I.

3. *United Mine Workers v. Ill. Bar Ass’n.*, 389 U.S. 217, 222 (1967); *see also* *McDonald v. Smith*, 472 U.S. 479, 485 (1985) (“The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble.”).

4. *See, e.g.*, Edmund G. Brown, *The Right to Petition: Political or Legal Freedom?*, 8 UCLA L. REV. 729, 731 (1961) (“[T]he legal limits of ‘proper’ petitioning are unclear, and there are some doubts even as to basic principles.”); Gary Myers, *Antitrust and First Amendment Implications of Professional Real Estate Investors*, 51 WASH. & LEE L. REV. 1199, 1236 (1994) (“There is sparse commentary on the right to petition generally.”).

5. *See* David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL’Y 293, 362 (1994) (“The Speech Clause of the First Amendment has received considerably more attention than has the Petition Clause.”).

6. Though commonly referred to as “petitioning immunity,” courts have typically treated the “immunity” deriving from the right to petition not as an immunity from suit, but

organization engages in a successful lobbying campaign that convinces the President not to appoint a certain candidate to his cabinet. If the jilted candidate tries to sue the lobbying organization for damages resulting from the President's decision not to appoint her (lost wages, for example), or for damages which may have resulted directly from the organization's lobbying efforts (the candidate may have suffered reputational harm, for instance), then the organization may have a petitioning immunity defense. If a court finds that the organization is entitled to petitioning immunity, then the candidate's lawsuit would be dismissed and the candidate would be without redress for the damages she suffered.⁷

The First Amendment is one source of petitioning immunity. The Constitution provides a minimum level of protection for petitioning activity, and if a lawsuit or criminal prosecution would infringe on this minimum level of protection then the First Amendment mandates that the petitioner be provided immunity in these legal actions. Much like the other rights provided by the First Amendment, however, the right to petition is not absolute; the Supreme Court has made it clear that defendants are not absolutely immune from suit simply because they were engaged in petitioning activity.⁸

The First Amendment, however, is not the sole source of protection for petitioning activity. Non-constitutional considerations can extend the protection for petitioning activity beyond constitutionally mandated minimum levels.⁹ For example, a court may grant petitioning immunity to a defendant because it does not believe that the statute granting the cause of action should be used to address damages resulting from petitioning activity. This protection would not stem from the First Amendment but from a construction of

an immunity from liability. *See, e.g.,* Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd., 711 F.3d 1136, 1140 (9th Cir. 2013).

7. The facts of this example are loosely based on the case McDonald v. Smith, 472 U.S. 479 (1985).

8. *See, e.g.,* Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 61 (1982); Bill Johnson's Rest., Inc. v. N.L.R.B., 461 U.S. 731, 743 (1983).

9. *See, e.g.,* Coastal States Mktg., Inc. v. Hunt, 694 F.2d 1358, 1366 (5th Cir. 1983) ("We reject the notion that petitioning immunity extends only so far as the first amendment right to petition and then ends abruptly."); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 890-91 (10th Cir. 2000).

that statute, and therefore is not based on the constitutional right to petition the government.

The Supreme Court has addressed petitioning immunity cases in only a very small set of subject-matter contexts, including defamation law, labor law, and antitrust law. The vast majority of these cases, however, have been in the context of antitrust law. The set of guidelines governing petitioning immunity in the context of antitrust law is known as the *Noerr-Pennington* doctrine. Generally speaking, antitrust laws prevent parties from taking actions, which have anticompetitive effects.¹⁰ Under the *Noerr-Pennington* doctrine, however, defendants are protected from liability for violations of antitrust laws that result from their efforts to influence government decision makers, even if the government actions they advocate for or their means of advocacy have anticompetitive effects.

For example, an organization of freight-rail companies could lobby the legislature to pass laws imposing stricter weight limits on freight shipped by trucking companies.¹¹ If the legislature passed such a law it would cause anticompetitive harm to trucking companies who now face higher costs, which would in turn benefit the rail companies who now face less competition in the freight shipping market. If petitioning immunity applied in this example, the rail companies would be protected by the *Noerr-Pennington* doctrine from antitrust claims for these anticompetitive harms and the trucking companies would be without redress.

If, however, the rail companies had instead convinced a union of warehouse laborers not to accept shipments over a certain weight from truckers, the *Noerr-Pennington* doctrine would not protect the rail companies. This results even though this activity would cause almost identical harm to the trucking companies (higher costs for truckers, less competition for rail companies). The distinction between these two scenarios is simply that the efforts in the first scenario are intended to influence government action, whereas the efforts in the second scenario are intended to influencing a private, non-government actor.

10. See *United States v. S.e. Underwriters Ass'n*, 322 U.S. 533, 553-55 (1944) (discussing the history of the Sherman Act).

11. This example is loosely based on the case *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

With the exception of a few limited forays into the realm of labor and defamation law, the Supreme Court has not addressed the scope of petitioning immunity outside the context of antitrust law.¹² As a result, lower courts have been left to develop petitioning immunity doctrine in other areas of law without direct Supreme Court guidance. Precedential considerations require these courts to extrapolate the principles from the Supreme Court's *Noerr-Pennington* jurisprudence and apply them outside of antitrust law. The Supreme Court, however, has not always been explicit about when, and to what extent, its *Noerr-Pennington* holdings are based on the First Amendment right to petition, and when, and to what extent, they are influenced by other non-constitutional considerations, such as its interpretation of federal antitrust statutes.

This distinction between the constitutional and non-constitutional underpinnings of *Noerr-Pennington* is critical for lower courts trying to determine the exact scope of petitioning immunity in contexts that the Supreme Court has yet to address. Problems may arise if it is not clear to lower courts when the Supreme Court's holdings are constitutionally compelled and when the Court provides greater protection for sub-constitutional reasons. For example, a lower court may interpret one of the Court's *Noerr-Pennington* holdings as being based on constitutional principles, when it was actually based on non-constitutional considerations solely applicable to antitrust law. In applying that precedent outside the scope of antitrust law, where those antitrust considerations may no longer be applicable, the lower court may either provide too much petitioning immunity, or improperly attribute constitutional status to a level of protection that had been determined by non-constitutional considerations.

Lower courts, in fact, have been making this very mistake by adopting the *Noerr-Pennington* doctrine in petitioning immunity cases outside the context of antitrust law on the assumption that *Noerr-Pennington* is a First Amendment doctrine with constitutionally-mandated levels of protection.¹³ Often these courts

12. Myers, *supra* note 3 at 1240 (“The effect of *Noerr-Pennington* outside the antitrust arena has received little attention.”).

13. See, e.g., Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc., 858 F.2d 1075, 1084 (5th Cir. 1988); Pound Hill Corp. v. Perl, 668 A.2d 1260, 1263 (R.I. 1996) (“Although [the *Noerr-Pennington*] doctrine arose in a context of application of the antitrust

craft doctrines which are identical to the Supreme Court's *Noerr-Pennington* doctrine. Many lower courts even refer to petitioning immunity generally as the *Noerr-Pennington* doctrine, even outside of the context of antitrust law.¹⁴

In *Theme Promotions, Inc. v. News America Marketing FSI*, for example, a panel of the Ninth Circuit, in attempting to determine the scope of petitioning immunity in the context of a suit based on a common law tort, summarily concluded that the scope of petitioning immunity should mirror the *Noerr-Pennington* doctrine.¹⁵ The court reasoned that “[t]here is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust.”¹⁶ While it is true that a common law tort may not abridge rights afforded by the Constitution, the court’s reasoning implicitly assumes that the Supreme Court’s antitrust petitioning immunity jurisprudence rests entirely on the First Amendment.

statutes, it is based upon the First Amendment right to petition the government for redress of grievances.”); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988) (recognizing applicability of the doctrine to conspiracy, abuse of process, and other claims); *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 21 (Cal. Ct. App. 1995) (considering *Noerr-Pennington* a constitutional doctrine, and noting that “the principle applies to virtually any tort”); *Bond v. Cedar Rapids Television Co.*, 518 N.W.2d 352, 354-56 (Iowa 1994) (noting that *Noerr-Pennington* is a First Amendment doctrine and applying it to a claim of tortious interference with contracts); *Azzar v. Primebank, FSB*, 499 N.W.2d 793, 796 (Mich. Ct. App. 1993) (stating that *Noerr-Pennington* is a constitutional doctrine that applies “regardless of the underlying cause of action”); *Select Comfort Corp. v. Sleep Better Store, L.L.C.*, 838 F. Supp. 2d 889, 898 (D. Minn. 2012) (“[T]he distinction between antitrust and non-antitrust cases is not relevant to the *Noerr-Pennington* analysis, given the Supreme Court’s focus on the First Amendment right to petition, rather than a statutory construction of the Sherman Act.”); see also, Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of A Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 95 (1996) (listing cases and stating “Innumerable federal and state courts have concluded that the *Noerr-Pennington* doctrine is rooted in the First Amendment right to petition and therefore must be applied to all claims implicating that right, not just to antitrust claims.”).

14. See *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 208 F.3d 885, 889 (10th Cir. 2000) (“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 In our view, it is more appropriate to refer to immunity as *Noerr-Pennington* immunity only when applied to antitrust claims.”).

15. *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008).

16. *Id.* (citing *Video Int’l Prod., Inc. v. Warner-Amex Cable Commc’ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988)).

This article argues that decisions like *Theme Promotions* miss a critical non-constitutional, statutory interpretation basis for the *Noerr-Pennington* doctrine. As a result, these courts expand the level of protection for petitioning activity beyond what the First Amendment may require when they apply *Noerr-Pennington* outside of the antitrust context. A close analysis of the Supreme Court petitioning immunity cases reveals that the *Noerr-Pennington* doctrine is not a doctrine whose contours are primarily defined by the First Amendment but has, in a large part, been shaped by an interpretation of federal antitrust statutes. Part I of this Article briefly outlines the Supreme Court's *Noerr-Pennington* doctrine. Part II carefully parses and compares the holdings and supporting reasoning of some of the Court's petitioning immunity cases. This analysis demonstrates that the Supreme Court's petitioning immunity jurisprudence can be harmonized best if the *Noerr-Pennington* doctrine is not derived solely from the Constitution, but is also based largely on an interpretation of federal antitrust law. Therefore the *Noerr-Pennington* doctrine may extend protection for petitioning activity beyond what the Constitution requires. Part III details the mistakes of *Theme Promotions* in light of the conclusions from part II and discusses the potential consequences of these mistakes.

II. PETITIONING IMMUNITY FOR ANTITRUST VIOLATIONS: THE *NOERR-PENNINGTON* DOCTRINE

This Section sketches the basic contours of the *Noerr-Pennington* doctrine. The most important and basic principle of the *Noerr-Pennington* doctrine is that defendants are protected from liability for violations of antitrust laws, either civil or criminal, if the violations resulted from the defendant's petitioning activities. The basic facts of the founding case of the *Noerr-Pennington* doctrine, *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, were used to explain this principle in the introduction of this Article: rail companies lobbied for stricter regulatory laws on their competitors in the trucking industry.¹⁷ Though the laws had anticompetitive effects,

17. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129 (1961).

the rail companies were not held liable for those harms, despite their advocacy for the passage of the laws.¹⁸

Noerr involved the petitioning of a legislative body, but the basic principle of *Noerr-Pennington* also applies to other governmental bodies: executive, judicial, and administrative.¹⁹ In *United Mine Workers v. Pennington*, for example, a group of large mine operators lobbied the Secretary of Labor to raise the minimum wage that mine operators had to pay their employees in order to be eligible to sell coal to the Federal government.²⁰ When the Secretary did so, smaller mines that could not afford to pay the higher wages were driven out of the market.²¹ Though these lobbying activities and the subsequent passage of the higher minimum wage requirement had a clear anticompetitive effect on the mining industry, the Supreme Court held that the large mine operators were immune from liability under federal antitrust laws.²²

Importantly, *Noerr-Pennington*'s protections extend to petitioners even if their *sole* motivation in engaging in petitioning activities is to cause anticompetitive harm. In *Noerr*, the Court held that the rail companies were entitled to antitrust immunity even if they were only interested in the passage of the weight limit law because the law would harm their competitors in the trucking industry.²³ Similarly in *Pennington*, the Court held that the large mine operators were entitled to antitrust immunity even if their sole interest in raising the minimum wage requirement was that it would drive smaller mining companies out of business.²⁴

Petitioners are also entitled to *Noerr-Pennington* immunity even if they engaged in unethical tactics, such as making misrepresentations, in the course of their petition. In *Noerr*, for example, the Court held that the rail companies were still entitled to

18. *Id.* at 136.

19. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“The same philosophy [from *Noerr* and *Pennington*] 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.”).

20. *United Mine Workers v. Pennington*, 381 U.S. 657, 660 (1965).

21. *Id.* at 660-61.

22. *Id.* at 669-71.

23. *Noerr*, 365 U.S. at 138-40.

24. *Pennington*, 381 U.S. at 669-70.

petitioning immunity even though they used a campaign tactic called the “third-party technique,” whereby statements in support of the weight-limit legislation were presented to the legislature and the public as ostensibly coming from an unbiased source, but which were truly produced by the rail companies themselves.²⁵ Similarly, in *City of Columbia v. Omni Outdoor Advertising*, the Court extended petitioning immunity to the owner of a billboard company who had successfully lobbied a municipality to pass regulations that made it difficult for new billboard companies to enter the market.²⁶ The Court held that the owner was entitled to antitrust immunity even though he was alleged to have conspired with, and even bribed, the municipality officials.²⁷

Noerr-Pennington also protects petitioners from antitrust liability based not only on the harms caused by the petitioned-for government action, *e.g.*, the effects of the passed legislation or administrative order, but also from the effects of the petitioning activity itself. In *Noerr*, the truckers alleged they were harmed not only by the passage of the weight-limit laws but also by a publicity campaign conducted by the rail companies in support of the weight-limit legislation which painted truckers in a negative light.²⁸ This harm is independent from the effects of the weight limit laws, and would have occurred whether or not the legislature had passed the laws. The Court held, however, that the rail companies were also entitled to petitioning immunity from claims based on harms resulting directly from the petitioning activity itself, *i.e.* the publicity campaign.²⁹

This brief exposition reveals how extensive *Noerr-Pennington*'s protections are. These protections extend to petitions before any government decision-maker, whether legislative, executive, judicial, or administrative. They remain even if the petitioner's sole reason for making the petition is that it will have anticompetitive effects.

25. *Noerr*, 365 U.S. at 140-42 (noting that the District Court below “aptly characterized” the third party technique “as involving ‘deception of the public, manufacture of bogus sources of reference, (and) distortion of public sources of information’” and stating “[w]e can certainly agree with the courts below that this technique, though in widespread use among practitioners of the art of public relations, is one which falls far short of the ethical standards generally approved in this country”).

26. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 381, 383-84 (1991).

27. *Id.* at 384.

28. *Noerr*, 365 U.S. at 142-44.

29. *Id.*

They also remain even if the petitioner uses unethical, misleading, or deceitful tactics. Petitioners are also protected from antitrust claims based on harms caused by both the petitioned-for government action and the petitioning activity itself.

The *Noerr-Pennington* protections are so broad that the Supreme Court has only explicitly recognized a single, narrow exception: the “sham” exception. In *Noerr*, the Court first recognized the possibility for such an exception, noting that: “[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.”³⁰ It was not until twenty years later in *Professional Real Estate Investors v. Columbia Pictures Industries* (“*PRE*”) that the Court clarified the scope of this then theoretical exception.³¹

In *PRE*, the Court held that a petition must meet a two-pronged test to fall under the “sham” exception.³² First, the petitioning activity must be “objectively baseless,” meaning there must be no reasonable expectation that the petition would lead to a favorable government decision.³³ Using the facts of *Noerr* to demonstrate, this would mean that the rail companies’ petition would only have been objectively baseless if there were no reasonable expectation that the legislature would pass the weight limit laws. Note that it is not necessary that a petition succeed in order to meet this requirement, even a failed petition can be “objectively based,” there simply needs to be a reasonable expectation that it *could* succeed.³⁴ Conversely, a successful petition will always be “objectively based.”³⁵

The second prong requires that the petitioner be subjectively motivated to bring the petition solely by a desire to impose anticompetitive harm through the “use [of] the governmental process -- as opposed to the outcome of that process”³⁶ There are two

30. *Id.* at 144.

31. *See* Prof'l Real Estate Inc. v. Columbus Pictures Indus., 508 U.S. 49 (1982).

32. *Id.* at 60-61.

33. *Id.* at 60.

34. *Id.*

35. *Id.* at 58.

36. *Id.* at 60-61 (quoting *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 380 (1991)).

parts to this second prong. First, the motivation for bringing the petition must be solely to cause the anticompetitive harm.³⁷ Second, the resulting harm must be a product of the petitioning activity itself, rather than the sought-after government action.³⁸ Under the facts of *Noerr*, for example, the sham exception would only have applied to the harm that was caused by the rail companies' publicity campaign, *i.e.* the lobbying activity itself; any harm caused by the passage of the weight limit laws, *i.e.* the resulting government action, is necessarily precluded by this prong. Furthermore, the truckers would have to show that the rail companies were motivated to conduct the publicity campaign solely out of a desire that it would harm the trucking companies, rather than by a desire to see the passage of the weight limit laws, or even a desire that the weight limit laws (if passed) would cause anticompetitive harm to the truckers.

Noerr-Pennington thus provides a tremendously high level of protection for petitioning activity, at least from antitrust liability. Although the Court has left open the possibility for a "fraud" or "misrepresentation" exception to *Noerr-Pennington*, it expressly declined to address this issue in *PRE* and has yet to address it since.³⁹ Therefore, the sole exception to *Noerr-Pennington* immunity that has been recognized by the Supreme Court is the "sham" exception.

III. HARMONIZING SUPREME COURT PETITIONING IMMUNITY JURISPRUDENCE

As was discussed in the introduction, many lower courts have assumed that the primary basis for the *Noerr-Pennington* doctrine is the First Amendment right to petition.⁴⁰ This Part argues, however, that the Supreme Court's petitioning immunity decisions are best explained if the *Noerr-Pennington* doctrine is understood as being based on an interpretation of federal antitrust laws, not an interpretation of the First Amendment right to petition. Section A of this Part analyzes three cases from the Court's petitioning immunity jurisprudence in the context of antitrust law, *E. R. R. Presidents*

37. *Id.* at 60.

38. *Id.* at 60-61.

39. *Id.* at 61 n.6.

40. *See supra* note 12.

Conference v. Noerr Motor Freight, Inc., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, and *FTC v. Superior Court Trial Lawyers Ass'n*. In the first of these cases, *Noerr*, the Court granted the defendants petitioning immunity⁴¹, but it declined to do so in the other two cases.⁴² Therefore, if *Noerr-Pennington* is based primarily on constitutional principles, then *Allied Tube* and *Trial Lawyers* must be distinguishable from *Noerr* on constitutional grounds. A close analysis reveals, however, that the best reading of these cases is that they are not distinguishable on constitutional grounds, but are distinguishable if they are based on an interpretation of antitrust laws.

Section B analyzes two cases from the Court's petitioning immunity jurisprudence decided outside the context of antitrust laws, *McDonald v. Smith*⁴³ and *BE & K Const. Co. v. N.L.R.B.*⁴⁴ In *McDonald*, the Court declined to extend petitioning immunity to a defendant in a defamation suit. If *Noerr-Pennington* were based on constitutional principles and therefore should be applicable regardless of the statutory context, then *McDonald* must be distinguishable on constitutional grounds from other *Noerr-Pennington* cases where the Court extended immunity. Again, however, a close analysis of the reasoning and result in *McDonald* shows that it can be best explained if *Noerr-Pennington* is not based primarily on the First Amendment right to petition, but instead extends a greater level of protection than the Constitution requires based on non-constitutional considerations.

In *BE & K Const. Co.*, a case addressing the scope of petitioning immunity in the labor law context, the Court expressly left open the possibility that an unsuccessful but objectively based suit may be deemed a violation of the National Labor Relations Act if it would not have been brought but for a retaliatory purpose.⁴⁵ Such a possibility, however, was expressly rejected in the antitrust context by the Court in *PRE*.⁴⁶ Therefore, if *Noerr-Pennington* were based on constitutional principles, *BE & K Const. Co.* would represent a partial overruling of *PRE*. Once again, however, a close analysis of

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

42. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (FTC v. Super. Ct. Trial Lawyers Assn., 493 U.S. 411 (1990)).

43. *McDonald v. Smith*, 472 U.S. 479 (1985).

44. *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516 (2002).

45. *Id.*

46. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (holding that a suit must be "objectively baseless" to meet the "sham" exception).

the text and reasoning in *BE & K Const. Co.*, as well as the opinions of the concurring justices, shows that the better reading of *BE & K Const. Co.* is that it did not overrule *PRE*. Instead, it implicitly recognized that because *Noerr-Pennington* is based primarily on an interpretation of federal antitrust laws, the scope of its protections might not necessarily apply to the same extent outside of the antitrust context.

Finally, Section C refutes a common critique of this reading of *Noerr-Pennington*: that *California Motor Transport Co. v. Trucking Unlimited* “constitutionalized” the holdings from *Noerr*.⁴⁷

A. Petitioning immunity in antitrust: Noerr, Allied Tube, and Trial Lawyers

This Section examines the Court’s holdings and supporting reasoning in *Noerr*, a case where the Court extended antitrust petitioning immunity, and two subsequent cases where the court declined to provide antitrust petitioning immunity, *Allied Tube*, and *Trial Lawyers*. If *Noerr* provides constitutionally mandated minimum levels of protection, only constitutional considerations would allow the Court to provide a lower level of protection in *Allied Tube* and *Trial Lawyers*. An analysis of these three cases shows that the sole shared distinguishing characteristic between them is the form of the petitioning activity. Therefore, in order for *Noerr* to be primarily based on constitutional principles, the Constitution must provide a lower level of protection for the types of petitioning activity in *Allied Tube* and *Trial Lawyers* than the type of petitioning activity in *Noerr*. There is, however, no adequate constitutional justification for providing the form of petitioning in *Noerr* with a greater level of protection than the form of petitioning in *Allied Tube* and *Trial Lawyers*. In fact, the different treatment of the petitioning activity in these cases can best be explained if *Noerr* is understood as being based primarily on an interpretation of federal antitrust laws.

1. Comparing Noerr, Allied Tube and Trial Lawyers

In *Noerr*, a coalition of trucking companies sued a coalition of rail companies under the Sherman Act alleging that the rail

47. See *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

companies had conducted a publicity campaign to “foster the adoption and retention of laws and law enforcement practices destructive of the trucking business.”⁴⁸ The harm underlying the action stemmed from two sources. First, the truckers claimed injury from the government action for which the rail companies had lobbied, *i.e.* the passage of weight limit laws.⁴⁹ Second, the truckers claimed that the publicity campaign painted the truckers in a negative light thereby causing them to lose business and goodwill with their customers.⁵⁰ The truckers argued that the rail companies could be held liable because their purpose in conducting the campaign was to cause anticompetitive harm to the trucking companies.⁵¹ The truckers also argued that the rail companies could be held liable because the rail companies had engaged in unethical behavior in their publicity campaign by using the “third party technique.”⁵²

The Court explicitly held that the anticompetitive motivation of the rail companies and the unethical manner of the petition were insufficient to impose antitrust liability.⁵³ First, the Court addressed the anticompetitive motivations.⁵⁴ It determined that a petitioner could not be held liable under the Sherman Act simply because he was subjectively motivated to bring the petition by a desire to cause harm to a competitor.⁵⁵ Speaking for a unanimous court, Justice Black reasoned that the Sherman Act was meant to regulate business, not political activity, and to interpret the Sherman act as sustaining this cause of action would raise serious constitutional questions regarding the First Amendment right to petition.⁵⁶ “A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the

48. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129 (1961).

49. *Id.* at 138.

50. *Id.* at 130-31.

51. *Id.* at 138-39.

52. *Id.* at 130-31.

53. *Id.*

54. *Id.*

55. *Id.* at 138-39.

56. *Id.* at 139-40.

very instances in which that right may be of the most importance to them.⁵⁷

The Court also found unpersuasive the suggestion that the unethical means of petitioning should lead to a different result.⁵⁸ It reasoned that unethical behavior in the political realm is not meant to be addressed by the Sherman Act.⁵⁹ Historically, Congress had been cautious in regulating political activity, and if the Court were to impute this purpose to the Sherman Act it would negate this caution.⁶⁰

If these holdings from *Noerr* are rooted in the First Amendment, then they are constitutionally mandated minimum levels of protection. Therefore, the Court should apply the same levels of protection in analogous situations, or in cases that have the same considerations that were present in *Noerr*, unless other constitutional principles dictate a different result. A close analysis of two subsequent petitioning immunity cases, *Allied Tube*, and *Trial Lawyers*, however, shows that the Court did not apply the same levels of protection in these cases, though they presented analogous situations and considerations as those present in *Noerr*.

In *Allied Tube*, the plaintiff, a manufacturer of polyvinyl chloride electrical conduits, brought an antitrust action against a manufacturer of steel electrical conduits.⁶¹ The plaintiff claimed that the defendant conspired to prevent the inclusion of polyvinyl conduits in the industry safety standards.⁶² Specifically, the plaintiff claimed that the defendant along with the top steel manufacturing companies in the country recruited and paid for over 200 people to join the National Fire Protection Association with instructions that they were to vote against the inclusion of polyvinyl conduits in the industry code.⁶³ The defendants claimed they were entitled to *Noerr-Pennington* immunity because the code was commonly adopted into state safety codes by numerous state legislatures and therefore their actions were

57. *Id.* at 139.

58. *Noerr*, 365 U.S. at 140.

59. *Id.*

60. *Id.* at 141-42.

61. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-97 (1988).

62. *Id.* at 496-97.

63. *Id.* at 496-97.

a means of petitioning state legislatures to exclude polyvinyl conduit from their state safety codes.⁶⁴

It may not be apparent on its face, but *Allied Tube* actually has a factual situation very close to the one presented in *Noerr*. In both cases, the suit was brought under the Sherman Act for antitrust violations.⁶⁵ Also, in both cases the petitioning was not objectively baseless, as both the rail companies and the defendant in *Allied Tube* succeeded in obtaining their sought after government action: the passage of anti-trucking legislation and the exclusion of polyvinyl conduits from state safety codes.⁶⁶ In both cases the defendants engaged in the petitioning activity specifically because it would cause harm to their competitors.⁶⁷ Also in both cases, the harm underlying the suit resulted from both a government decision and the petitioning activity that led to that government decision. In *Allied Tube*, the harm that formed the basis of the suit derived both from the adoption of the association's safety code by state legislatures (the petitioned for government action), and from being excluded from the association's safety code (the petitioning activity itself).⁶⁸ In *Noerr*, the harm resulted from both the harmful trucking legislation (the petitioned for government action), and the negative publicity campaign (the petitioning activity itself).⁶⁹ Finally, the petitioning activity in *Allied Tube* was unethical, but did not violate any of the rules of the National Fire Protection Association,⁷⁰ just as in *Noerr* where the publicity campaign was misleading and unethical, but not necessarily illegal.⁷¹

There are a few notable differences, which distinguish *Noerr* from *Allied Tube*. First, the conduit used by the defendants to influence to the government decision maker differed in these two cases. In *Allied Tube*, the government decision maker whom the petitioning activity was ultimately intended to affect was a legislative body, as it was in *Noerr*. But unlike *Noerr*, the conduit to the legislature was not the public at large (to whom the *Noerr* publicity

64. *Id.* at 498.

65. *Id.* at 497; *Noerr*, 365 U.S. at 129.

66. *Allied Tube*, 486 U.S. at 497; *Noerr*, 365 U.S. at 130.

67. *Allied Tube*, 486 U.S. at 497; *Noerr*, 365 U.S. at 129.

68. *Allied Tube*, 486 U.S. at 500.

69. *Noerr*, 365 U.S. at 129.

70. *Allied Tube*, 486 U.S. at 497.

71. *Noerr*, 365 U.S. at 129.

campaign was aimed), but the members of a private standards setting association. Second, the form of the petitioning activity differed in these two cases. In *Allied Tube*, the petition took the form of packing the ranks of a private standards setting association, whereas in *Noerr* it was in the form of a publicity campaign.⁷²

Ultimately, the Court in *Allied Tube* found these differences to be dispositive, concluding that the defendant was not entitled to petitioning immunity.⁷³ The Court noted that the “petitioner’s actions took place within the context of the standard-setting process of a private association” whereas “the publicity campaign in *Noerr*... [took] place in the open political arena.”⁷⁴ It also noted that “[t]he essential character of the *Noerr* publicity campaign was ... political” a type of activity which “has been regulated with extreme caution,” whereas the petitioner’s activity in *Allied Tube* was “the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves.”⁷⁵ “[T]he activity at issue here ... cannot, as in *Noerr*, be characterized as an activity that has traditionally been regulated with extreme caution, or as an activity that ‘bear[s] little if any resemblance to the combinations normally held violative of the Sherman Act.’”⁷⁶ Petitioning immunity in this instance, therefore was not appropriate.

In *Trial Lawyers*, private practice attorney’s that worked as court-appointed counsel for indigent criminal defendants in the District of Columbia organized a boycott in order to coerce the District of Columbia to increase their compensation.⁷⁷ The boycott was ultimately successful, but the Federal Trade Commission brought antitrust charges under the Sherman Act against the trial lawyers.⁷⁸ The trial lawyers argued, in part, that their activities were protected as a means of petitioning the government and so were immune from liability under the *Noerr-Pennington* doctrine.⁷⁹

Trial Lawyers, like *Allied Tube*, presents a situation very similar to the one in *Noerr*. While the attorney’s were able to convince the

72. Compare *Noerr*, 365 U.S. at 129, with *Allied Tube*, 486 U.S. at 496-97.

73. *Allied Tube*, 486 U.S. at 495-97.

74. *Allied Tube*, 486 U.S. at 504, 506.

75. *Allied Tube*, 486 U.S. at 505-06.

76. *Id.* at 507.

77. *FTC v. Super. Ct. Trial Lawyers Assn.*, 493 U.S. 411, 414 (1990).

78. *Id.*

79. *Id.* at 419.

government to raise their compensation, the harm that formed the basis of the *Trial Lawyers* suit actually resulted from the petitioning activity itself. As the court pointed out: “[t]he restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted.”⁸⁰ The suit, like in *Noerr*, was brought under the Sherman Act.⁸¹ The petitioning activity was not objectively baseless, indeed it was ultimately successful, and was engaged in specifically because it would have an anticompetitive effect, *i.e.*, it created a supply shortage in the market for public defenders. Even the “audience” was the same in *Trial Lawyers* as it was in *Noerr*, as the boycott was directed not only toward the legislature, but also to the public at large as a conduit to the legislature.

The sole distinguishing characteristic in *Trial Lawyers* from *Noerr* is the form of the petitioning activity. In *Noerr*, it was a publicity campaign, but in *Trial Lawyers* it was by means of a boycott.⁸² Like in *Allied Tube*, this distinguishing characteristic led the court to a different result than in *Noerr*. Deciding that the attorney’s were not entitled to petitioning immunity, the Court, quoting *Allied Tube*, reasoned that “the *Noerr* doctrine does not extend to ‘every concerted effort that is genuinely intended to influence governmental action.’”⁸³ If it did, the Court reasoned that the *Noerr-Pennington* doctrine would immunize a whole host of anticompetitive activity simply because its purpose in doing so was to influence a government decision maker.⁸⁴

2. Constitutional Considerations Cannot Harmonize *Allied Tube*, *Trial Lawyers* and *Noerr*

Both *Trial Lawyers* and *Allied Tube* presented situations that were very close to the one in *Noerr*. The only difference with *Noerr* that was shared by *Allied Tube* and *Trial Lawyers* was the form of the petitioning activity. Yet the Court provided a lower level of

80. *Id.* at 425.

81. *Id.* at 420.

82. Compare *Noerr*, 365 U.S. at 129, with *Trial Lawyers*, 493 U.S. at 414.

83. *Trial Lawyers*, 493 U.S. at 420.

84. *Id.*

protection for the activity in both *Allied Tube* and *Trial Lawyers* than it afforded the activity in *Noerr*.

As was discussed in the introduction, the Constitution sets a mandated minimum level of protection for petitioning activity. This means that there are only two possible explanations for the differing treatment in *Allied Tube*, *Trial Lawyers*, and *Noerr*. Either *Noerr* is a constitutional decision and the Constitution requires a greater level of protection for the form of petitioning activity in *Noerr* than in *Allied Tube* and *Trial Lawyers*, or *Noerr* is not a constitutional decision and the level of protection the Court provided the petitioning activity in *Noerr* went beyond what the Constitution requires based on non-constitutional considerations. In order for *Noerr* to be a constitutional decision there must be some constitutional justification for providing publicity campaigns with greater protection than boycotts or packing private standard setting associations with supporters.

Looking first to the reasoning in *Noerr*, the Court in coming to its decision specifically focused on the concern that imposing liability would inhibit people's ability to "make their wishes known" to the government.⁸⁵ If the constitutional concern in *Noerr* was that imposing liability would deprive the government of information, and deprive the people of their ability to provide that information, then this concern should not be present in *Allied Tube* or *Trial Lawyers*, since unlike *Noerr*, they were decidedly adverse to the petitioning party. This is not the case however. Depriving boycotts or the petitioning activity in *Allied Tube* of constitutional protection would likely inhibit people's ability to "make their wishes known" to the government to the same degree as depriving publicity campaigns of constitutional protection. In fact, the Court in *Allied Tube* specifically noted that the petitioners' activity might have been "the most effective means of influencing legislation."⁸⁶ Thus, the *Allied Tube* decision may in fact raise this concern to a greater extent than the situation in *Noerr* did.⁸⁷ Similarly, boycotting is a classic form of political protest, one that the Court provided with constitutional

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

86. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 493 (1988).

87. *Compare* *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. at 492 (1988), *with* *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

protection in *NAACP v. Claiborne Hardware*.⁸⁸ In that case the Court specifically acknowledged that “a major purpose of the boycott ... was to influence governmental action.”⁸⁹ In extending the boycott in *Claiborne Hardware* constitutional protection the Court stated: “[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.”⁹⁰

One might argue then that the form of the petitioning in *Noerr* is afforded greater constitutional protection than the forms in *Allied Tube* and *Trial Lawyers* because the forms of the petitions in *Allied Tube* and *Trial Lawyers* were illegal.⁹¹ There are three problems with this argument however. First, it is circular, essentially stating that this form of petitioning activity is not protected by the First Amendment because Congress has prohibited it and Congress cannot prohibit constitutionally protected behavior. The result presumes the premise.

Second, it is premised on a definition of the right to petition that completely eviscerates that right. If petitioning activity can be moved outside the protection of the Constitution by an act of Congress or an order from the executive branch, then the Constitution would provide no protection for petitioning activity whatsoever. And while the Court does not interpret the First Amendment prohibition “Congress shall make no law” literally, this definition completely contradicts this prohibition, making the right to petition entirely dependent on laws “ma[d]e” by Congress.

Finally, other cases in the Court’s petitioning immunity jurisprudence refute this argument. In *Noerr* itself, the defendant was alleged to have “deliberately deceived the public and public officials,”⁹² a potentially illegal act for which the Court nonetheless

88. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914-15 (1982).

89. *Id.* at 914.

90. *Id.*

91. *E.g.*, Raymond Ku, *Antitrust Immunity, the First Amendment and Settlements: Defining the Boundaries of the Right to Petition*, 33 *IND. L. REV.* 385, 411 (2000) (arguing the right to petition should be partially dependent on whether the “petitioning activities were conducted in accordance with the rules and procedures of the petitioning forum”).

92. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961).

provided protection. Similarly in *City of Columbia v. Omni Outdoor Advertising*,⁹³ the Court extended petitioning immunity to a defendant who was alleged to have, as part of his lobbying strategy, conspired with and bribed public officials.⁹⁴ The Court reasoned that to allow liability under the Sherman act in such circumstances “would produce precisely that conversion of antitrust law into regulation of the political process that we have sought to avoid.”⁹⁵ Therefore, as *Omni* and *Noerr* itself demonstrate, the fact that the form of the petitioning activity is illegal is not sufficient to explain the differences in treatment between *Trial Lawyers*, *Allied Tube*, and *Noerr*, if *Noerr* were interpreted as a constitutional decision.

One final argument for why the Constitution may provide greater protection for the form of petitioning in *Noerr* than for the form in *Allied Tube* and *Trial Lawyers*, could be that the Constitution protects certain traditional forms of petitioning, such as the publicity campaign in *Noerr*, but does not protect untraditional forms of petitioning such as the boycott in *Trial Lawyers*, or the actions of the defendant in *Allied Tube*. This argument is unpersuasive for two reasons. First, nothing in the language of the Court’s *Noerr-Pennington* line of opinions indicates that it made any such distinction. Rather, to the extent that *Noerr* addresses the relevance of the historical character of the petitioning activity, it does so by analyzing whether the form of the petitioning activity is the kind of activity “traditionally condemned” by *antitrust laws*, not the Constitution.⁹⁶

Second, this interpretation of the First Amendment right to petition does not fit with the Court’s other petitioning immunity cases. For example in *NAACP v. Claiborne Hardware*, the Court extended petitioning immunity protection to a boycott of segregated businesses, the same form of petitioning which was denied protection in *Trial Lawyers*.⁹⁷ Also, in *California Motor Transport Co. v. Trucking Unlimited*, the Court refused to provide protection to what

93. 499 U.S. 365 (1991).

94. *See id.* at 383-84.

95. *Id.* at 382. Interestingly, the Court specifically noted that “[i]f the denial [to *Omni* of meaningful access to the appropriate city administrative and legislative fora] was wrongful there may be other remedies, but as for the Sherman Act, the *Noerr* exemption applies.” *Id.*

96. *See Noerr*, 365 U.S. at 136-37.

97. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914-15 (1982).

would probably be considered a very traditional form of petitioning activity: filing lawsuits in courts and grievances with administrative agencies.⁹⁸

3. *Allied Tube, Trial Lawyers and Noerr Can Be Harmonized as Statutory Interpretation Decisions*

While the results in these cases cannot be persuasively explained if *Noerr* were regarded as a constitutional holding, they can be explained if *Noerr* was a holding based on statutory interpretation principles. First, the reasoning in *Noerr* fits with this interpretation. Recall that the Court in *Noerr* stated that it must provide petitioning immunity to the defendant because interpreting the Sherman Act to sustain the cause of action “would raise important constitutional questions.”⁹⁹ By applying the doctrine of constitutional avoidance, the Court was able to avoid these questions because the Sherman Act was susceptible to another interpretation that did not raise them, specifically that the Sherman Act was not meant to regulate political activity: “[t]he proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena.”¹⁰⁰ Similarly, the Court reasoned that because Congress had been historically hesitant to regulate political activity, it would be imprudent to interpret the Sherman act to do so.¹⁰¹

In *Allied Tube* and *Trial Lawyers*, however, the form of the petitioning at issue precluded the Court from taking such a cautious approach. This is because the form of the petitioning activity in these cases was the type of conduct the Sherman Act specifically meant to prohibit. Boycotts are one of the *per se* violations of the Sherman Act.¹⁰² Similarly, in *Allied Tube*, the Court pointed out that the petitioner’s activity was “the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves.”¹⁰³

98. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 509 (1972).

99. *Noerr*, 365 U.S. at 137-38.

100. *Id.* at 140-41.

101. *Id.* at 141.

102. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 432-33 (1990) (“The *per se* rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands.”).

103. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 505 (1988).

Unable to avoid the difficult constitutional questions posed by the Sherman Act, the Court was forced to address them. In *Allied Tube*, the Court specifically noted that it is “difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact, and this is itself a case close to the line.”¹⁰⁴ The Court concluded, however, that the defendant’s activity in this case fell in the latter category, and therefore was not entitled to petitioning immunity.

In *Trial Lawyers*, the Court was also forced to answer difficult constitutional questions because in *NAACP v. Claiborne Hardware*, the Court had held that the participants in the NAACP’s boycott of white merchants were protected from suit under antitrust and common law claims.¹⁰⁵ Therefore, in order to hold the defendants in *Trial Lawyers* liable the Court needed to distinguish *Claiborne Hardware*. It did so based on the fact the boycotters in *Trial Lawyers* were “at least partially motivated by the desire to lessen competition, and... stood to reap substantial economic benefits from [the anticompetitive activity],”¹⁰⁶ whereas the petitioners in *Claiborne* did not seek to destroy their competitors in the market, but “sought only the equal respect and equal treatment to which they were constitutionally entitled.”¹⁰⁷ In *Noerr*, the Sherman Act and its purposes allowed the Court to avoid making such bold First Amendment pronouncements, but in *Allied Tube* and *Trial Lawyers* the Act clearly applied and the Court had no choice but to determine whether the First Amendment allowed the imposition of liability for these petitioning activities, which the Court held it did.

104. *Id.* at 507 n10.

105. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

106. *Trial Lawyers*, 493 U.S. at 427 n.10. Note how this reasoning seems to directly contradict the Court’s dicta in *Noerr* that “[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so.” *Noerr*, 365 U.S. at 139. It would seem then, that for *Noerr* to be a constitutional decision, courts would have to accept that *Trial Lawyers* overruled this portion of *Noerr*. Subsequent Court cases, however have not recognized such an overruling. *See, e.g.*, *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 58 (1982).

107. *Claiborne*, 458 U.S. at 914 (“Unlike the railroads in [*Noerr*], however, the purpose of petitioners’ campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself.”).

B. Petitioning immunity outside of antitrust: McDonald and BE & K Const.

If *Noerr-Pennington* were based on constitutional considerations and not an interpretation of antitrust laws, then its principles should be equally applicable outside the realm of antitrust laws. An analysis of two such Supreme Court petitioning cases *McDonald v. Smith*,¹⁰⁸ a libel case, and *BE & K Const. Co. v. N.L.R.B.*,¹⁰⁹ a labor law case, shows that this has not been the case.

In *McDonald*, the defendant made knowingly false statements in order to convince the President not to appoint the plaintiff as a United States Attorney. The plaintiff brought a libel suit and the defendant claimed that he was immune from liability because his activities were protected by the First Amendment.¹¹⁰ The Court declined to extend petitioning immunity to the defendant, reasoning that while the First Amendment protects the right to petition, it does not protect all petitioning activity.¹¹¹ Providing an absolute immunity for petitioning activity “would elevate the Petition Clause to special First Amendment status.”¹¹² It concluded therefore that the state common law standard of allowing libel liability upon a showing of “actual malice,” would not violate the First Amendment right to petition.¹¹³

This ruling would seem to at least partially overrule *Noerr* if *Noerr* were a constitutional decision. Recall that in *Noerr*, the Court provided the defendant with petitioning immunity despite the fact that the defendant’s publicity campaign had “deliberately deceived the public and public officials.”¹¹⁴ In *McDonald*, however, the Court came to the exact opposite conclusion. It specifically held that the First Amendment did not protect a petition that entailed deliberate falsehoods.

This result cannot be explained away by arguing that the petitioning activity in *McDonald* fell under the “sham” exception recognized in *Noerr*.¹¹⁵ First, the defendant’s petition was ultimately

108. 472 U.S. 479 (1985).

109. 536 U.S. 516 (2002).

110. *McDonald*, 472 U.S. at 480-82.

111. *Id.* at 484.

112. *Id.* at 485.

113. *Id.*

114. *Noerr*, 365 U.S. at 145.

115. *Id.* at 144; *see also* Prof'l Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 61 (1982).

successful: he was able to convince the President not to appoint the plaintiff as a US attorney. Therefore it cannot be considered “objectively baseless.”¹¹⁶ Second, the harm in *McDonald* did not stem solely from the petitioning process itself, as the “sham” exception requires, but also from the government action the petitioning party sought, specifically the President’s decision not to appoint the plaintiff as a US attorney.¹¹⁷

If *Noerr* were a constitutional decision, *McDonald* would at the very least seem to create a new “malicious” false statement exception to *Noerr*. In subsequent cases, however, the Court has not treated *McDonald* as establishing such an exception, instead the Court has expressly declined to “decide ... whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant’s fraud or other misrepresentations.”¹¹⁸ Even those jurisdictions that have recognized a fraud exception to the *Noerr-Pennington* doctrine limit it to petitions before adjudicative bodies.¹¹⁹ Therefore, even if the Court had implicitly recognized an analogous fraud exception, the petition in *McDonald*, which was directed to a non-adjudicative part of the executive branch, would not fall within it.

If, however, *Noerr-Pennington* does not delineate constitutionally mandated minimum levels of protection, but provides a higher level of protection for petitioning activity based on an interpretation of antitrust laws, these problems do not arise. In fact, this explanation seems to fit with the language and reasoning of other

116. *Prof'l Real Estate Investors*, 508 U.S. at 60 n.5 (“A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.”).

117. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 366, (1991) (“The [‘sham’] exception encompasses situations in which persons use the governmental process itself -- as opposed to the outcome of that process -- as an anticompetitive weapon.”). It might be argued that *PRE* partially overruled *McDonald*; however, *PRE* made no such claim. In fact *PRE* specifically noted that its conclusions were compelled by “fidelity to precedent.” *Prof'l Real Estate Investors*, 508 U.S. at 60.

118. *Prof'l Real Estate Investors*, 508 U.S. 49, 61 n.6 (1982).

119. See, e.g., Scott Filmore, *Defining the Misrepresentation Exception to the Noerr-Pennington Doctrine*, 49 U. KAN. L. REV. 423, 450 (2001); (“Many courts have refused to impose antitrust liability for misrepresentations made to a legislature and to other non adjudicatory bodies.”); C. Douglas Floyd, *Antitrust Liability for the Anticompetitive Effects of Governmental Action Induced by Fraud*, 69 ANTITRUST L.J. 403, 414 (2001) (“[T]he strong weight of authority in the courts of appeals has concluded that the Noerr doctrine does not protect bribery, perjury, and other illegal and unethical conduct aimed at influencing adjudicative or quasi-adjudicative administrative action, even if such conduct would be protected in the legislative sphere.”).

cases in the Court's *Noerr-Pennington* jurisprudence. For example, in *City of Columbia v. Omni Outdoor Advertising*, the Court held that illegal lobbying activities, such as bribery and conspiracy with elected officials "can be of no consequence so far as the Sherman Act is concerned."¹²⁰ In *McDonald*, however, the petitioner's knowingly false statements were exactly the type of activity the tort of libel is concerned with. Therefore, the Court was forced to delve into the question of how much petitioning activity the First Amendment protects in that particular instance.

BE & K Const., a Supreme Court case addressing the subject of petitioning immunity in the context of Labor law, provides further support for this interpretation of the *Noerr-Pennington* doctrine.¹²¹ In that case, the petitioner, a general contractor, filed a lawsuit against a group of unions alleging that the unions had attempted to delay one of the petitioner's projects through lobbying, litigation, and other concerted activities because the petitioner used non-union employees.¹²² After the petitioner's lawsuit failed, the National Labor Review Board's ("NLRB") general counsel filed an administrative complaint against the petitioner claiming its lawsuit violated the National Labor Relations Act ("NLRA").¹²³ The Board ruled in the general counsel's favor finding the petitioner's lawsuit violated the NLRA because it was unsuccessful and was brought with a retaliatory purpose.¹²⁴ The case subsequently came before the Supreme Court which certified the specific question of whether the NLRB "may declare that an unsuccessful retaliatory lawsuit violates the NLRA even if reasonably based."¹²⁵

If the protections afforded by *Noerr-Pennington* were constitutionally based and so were mandated even outside the context of antitrust, then this question would be easy. The Court had already determined in *PRE* that a reasonably based lawsuit, even if unsuccessful and brought with an improper motive, was entitled to petitioning immunity.¹²⁶ The *PRE* Court held that this is the case

120. *Omni*, 499 U.S. at 383-84 (quoting *Noerr*, 365 U.S. at 145).

121. *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516 (2002).

122. *Id.* at 520.

123. *Id.* at 522.

124. *Id.* at 522-23.

125. *Id.* at 529-30.

126. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indust., Inc.*, 508 U.S. 49, 60-61 (1993).

even if the suit would not have been brought *but for* its anticompetitive effects.¹²⁷

The Court in *BE & K Const.* ultimately followed *PRE* and the *Noerr-Pennington* cases, but only to a certain extent. First, it took a similar tact as in *Noerr* and held that an interpretation of the NLRA, which allowed it to punish all reasonably based but unsuccessful retaliatory suits would raise serious constitutional questions.¹²⁸ Turning to the statutory text, the Court found that “while [the NLRA] might be read to reach the entire class of suits the Board has deemed retaliatory, it need not be read so broadly.”¹²⁹ Therefore the Court held that “[b]ecause there is nothing in the statutory text indicating that [the NLRA] must be read to reach all reasonably based but unsuccessful suits filed with retaliatory purpose, we decline to do so.”¹³⁰

Up to this point the *BE & K Const.* Court is entirely in line with the *Noerr-Pennington* doctrine. In the closing paragraph of the opinion, however, the Court expressly left open the possibility “that the board may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity.”¹³¹ As was just discussed, however, such a possibility was expressly rejected in the antitrust context by the Court in *PRE*.¹³²

If *Noerr-Pennington* provides constitutionally mandated levels of protection (and therefore is equally applicable regardless of the statutory context), then by leaving this possibility open *BE & K Const.* would partially overrule this aspect of *PRE*. But there is no indication in the text of *BE & K Const.* that the Court intended such a result. In fact, the Court expressly relies on the reasoning and result

127. *Id.* at 56. (“[Petitioners] invite us to adopt an approach under which either ‘indifference to ... outcome,’ or failure to prove that a petition for redress of grievances ‘would ... have been brought but for [a] predatory motive,’ would expose a defendant to antitrust liability under the sham exception. We decline *PRE*’s invitation.” (citations omitted)).

128. *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 531-32 (2002).

129. *Id.* at 536.

130. *Id.*

131. *Id.* at 536-37.

132. *Prof’l Real Estate Investors, Inc.*, 508 U.S. at 56.

in *PRE* in its opinion.¹³³ If, however, *Noerr-Pennington* and *PRE* do not dictate constitutionally mandated minimum levels of protection, but instead provide a greater level of protection based an interpretation of federal antitrust laws, then *BE & K Const.* need not be read as overruling *PRE*. Under such an interpretation the Court in *BE & K Const.* simply left open the possibility that a lower level of protection for petitioning activity may be warranted in the labor law context than in the antitrust context due to the differences between these laws.

In fact, the debate of whether such differences justify differing treatment for petitioning activity is acknowledged in the Courts' opinion in *BE & K Const.*¹³⁴ and actually plays out in the concurring opinions of Scalia and Breyer. Breyer argues that the "Court's antitrust precedent [should not] determine[] the outcome here" because of the differences between antitrust and labor law "in respect to their consequences, administration, scope, history and purposes."¹³⁵ Scalia disagrees and argues that the scope of protection for petitioning activity should be equal in these two areas of law.¹³⁶ In fact, he argues that if anything, petitioning activity should be afforded greater protection in the labor law context because the burdens imposed on petitioning activity in that context are imposed by an executive agency, the NLRB, whereas in the antitrust context the burdens are imposed by an Article III court.¹³⁷

The answer to this debate, however, does not dictate the result here. The mere fact that such a debate exists demonstrates that *Noerr-Pennington* does not provide constitutionally mandated levels of protection because if it did then the question debated would already have been answered by *PRE*.

133. See *BE & K Constr. Co.*, 536 U.S. at 531-32.

134. "The final question is whether, in light of the important goals of the NLRA, the Board may nevertheless burden an unsuccessful but reasonably based suit when it concludes the suit was brought with a retaliatory purpose. As explained above, ... we answered a similar question in the negative in the antitrust context. And while the burdens on speech at issue in this case are different from those at issue in *Professional Real Estate Investors*, we are still faced with a difficult constitutional question: namely, whether a class of petitioning may be declared unlawful when a substantial portion of it is subjectively and objectively genuine." *BE & K Constr. Co.*, 536 U.S. at 535.

135. *Id.* at 541 (Breyer, J., concurring in part, joined by Stevens, J., Souter, J., and Ginsburg, J.).

136. *Id.* at 537 (Scalia, J., concurring, joined by Thomas, J.).

137. *Id.* at 538.

C. *Rebutting the Argument that California Motor Transport Co. "constitutionalized" Noerr-Pennington.*

Some commentators have argued that while the Court did not initially base its holdings in *Noerr* on the First Amendment, a subsequent case, *California Motor Transport Co. v. Trucking Unlimited*,¹³⁸ later interpreted *Noerr*'s holdings as being based on the Constitution and thus "constitutionalized" them.¹³⁹ The following language from *California Motor* is frequently cited in support of this proposition: "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-à-vis their competitors."¹⁴⁰ This "constitutionalization" interpretation, however, is not a necessary or even the best reading of *California Motor*.

Even were this language read in isolation from the rest of the Court's reasoning in *California Motor*, it would not support the conclusion that *California Motor* "constitutionalized" the holdings in *Noerr*. Simply because imposing liability would "be destructive of rights of association and of petition" does not mean that it would violate the First Amendment. As the Court stated in *Claiborne Hardware*: "[t]he presence of protected activity ... does not end the relevant constitutional inquiry."¹⁴¹ The Court regularly upholds government regulation even if it incidentally infringes on a constitutionally protected right.¹⁴²

When read in context, though, it is even clearer that this language is not "constitutionalizing" the holdings of *Noerr*, but only extending the *Noerr* holdings to apply to petitioning activity before courts and administrative bodies. Prior to this statement, the Court in *California Motor* noted that in *Noerr* and *Pennington* it had provided petitioning immunity to parties who attempted to "influence the

138. 404 U.S. 508 (1972).

139. See, e.g., Myers, *supra* note 3, at 1238; Milton Handler, *Twenty-Five Years of Antitrust (Twenty-Fifth Annual Antitrust Review)*, 73 COLUM. L. REV. 415, 434-35 (1973).

140. *Cal. Motor Transp. Co.*, 404 U.S. at 510-11.

141. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982).

142. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

Legislative Branch for the passage of laws or the Executive Branch for their enforcement.”¹⁴³ The *California Motor* Court then adopted two justifications from *Noerr* to support the extension of petitioning immunity beyond the realms of the Legislative and Executive branches and into the realm of the Judicial branch. The first was the people’s ability to communicate their concerns to the government, and the government’s ability to receive this information.¹⁴⁴ The second was the Court’s presumption that it should not “lightly impute to congress an intent to invade [freedoms protected by the Bill of Rights].”¹⁴⁵ The *California Motor* Court, finding these justifications equally applicable to “administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government,” held that the protections recognized in *Noerr* and *Pennington* should therefore be applicable in these realms as well.¹⁴⁶ Because this extension of *Noerr-Pennington* protection was explicitly based on these two justifications from *Noerr*, the same principles on which these justifications rest should also underlie this extension. But, as was demonstrated *supra* Part II.A.2., neither of these justifications provides a basis to conclude that the *Noerr-Pennington* doctrine defines constitutional levels of protection.

A further analysis of *California Motor* demonstrates that its holdings and supporting reasoning are not based on constitutional considerations, but like *Noerr* are based on an interpretation of antitrust laws. In *California Motor*, the plaintiff highway carrier brought a suit against a coalition of its competitors claiming these competitors violated federal antitrust laws by opposing every one of the plaintiff’s applications to acquire operating rights in California regardless of the merits of the opposition.¹⁴⁷ The Court, using an analogous line of reasoning as it would subsequently use in *Trial Lawyers* and *Allied Tube*, noted that while in *Noerr* the Court had recognized that Congress’s caution in regulating unethical political activity prevented them from imputing such a purpose to the Sherman act, Congress had not been similarly cautious in regulating unethical

143. *California Motor*, 404 U.S. at 510.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 509-11

activity before adjudicatory bodies.¹⁴⁸ The Court continued: “First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.”¹⁴⁹ Therefore, while the defendant may have a right to oppose the plaintiff’s applications, this right does not entitle him to “to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts.”¹⁵⁰ The Court held, therefore, that the defendant was not entitled to petitioning immunity.

Note that one of the first moves the Court makes in *California Motor* is distinguishing *Noerr* by noting that this petitioning activity comes before an adjudicative body. The Court does not argue that this distinction is critical to a First Amendment analysis, but rather, it is important for interpreting the Sherman act. Specifically, the Court argues that because Congress is not similarly cautious when legislating in the adjudicative sphere as it is when legislating in the political sphere, it may interpret the Sherman act to reach more activity in the adjudicative sphere than it may in the political sphere.¹⁵¹ This reasoning is explicitly based on an interpretation of the Sherman act, not the First Amendment.

Furthermore, the Court’s holding in *California Motor* is too narrow to have the expansive effect of “constitutionalizing” *Noerr*. The Court only concludes that imposing liability on the defendants in this particular instance *would not* violate the First Amendment. It does not follow from this conclusion, however, that it *would have* violated the First Amendment had the Court refused to extend immunity to the defendants in *Noerr*.

Even if such an expansive reading of *California Motor* were possible, this particular issue was not before the Court and was not necessary to the Court’s holding. Therefore, at most it would be dictum. Importantly, *California Motor* predates every case in the Court’s petitioning immunity jurisprudence except for *Noerr* and *Pennington*, including *Allied Tube*, *McDonald*, and *Trial Lawyers*. And, as was argued in the preceding sections, the results and reasoning of these subsequent cases cannot cohere with this reading of *California Motor*, as “constitutionalizing” *Noerr*. Therefore, even

148. *Id.* at 512-13.

149. *Id.* at 514 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949)).

150. *Id.* at 515.

151. *Id.* at 512.

if *California Motor* read *Noerr* as being based on constitutional principles, these subsequent cases implicitly rejected this reading and declined to follow this dictum.¹⁵²

IV. RETURNING TO THE MISTAKE AND CONSEQUENCES OF THEME PROMOTIONS

With the understanding that *Noerr-Pennington* is primarily a doctrine based on an interpretation of Federal Antitrust law, it is now possible to see how courts may be extending constitutional protections for petitioning activity outside the context of antitrust law based on a misinterpretation of Supreme Court precedent. Returning to the example from the introduction of this Article, recall that in *Theme Promotions, Inc. v. News Am. Mktg. FSI*¹⁵³ the Ninth Circuit was presented with a novel question of law: to what extent should defendants in common law tort suits be afforded petitioning immunity?¹⁵⁴ The court somewhat summarily determined that the *Noerr-Pennington* doctrine should apply to the exact same extent as in the antitrust context where it was developed: “‘There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust.’ ... [W]e hold that the *Noerr-Pennington* doctrine applies to Theme’s state law tortious interference with prospective economic advantage claims.”¹⁵⁵

Under a statutory interpretation reading of *Noerr*, this reasoning is mistaken. While it may be the case that a common-law tort doctrine may “abridge or chill the constitutional right of petition” to the same extent as an antitrust claim, the *Noerr-Pennington* doctrine is not a statement by the Supreme Court as to the level of protection the First Amendment right to petition mandates in antitrust law, but rather is a doctrine which delineates a greater level of protection for

152. See, e.g., 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, 647 (1998) (arguing that *California Motor* granted *Noerr-Pennington* constitutional status, but later cases retreated from this position).

153. 546 F.3d 991 (9th Cir. 2008).

154. *Id.* at 1007 (“We have previously declined to reach the question of whether the *Noerr-Pennington* doctrine applies to state law tort claims.”).

155. *Id.*

petitioning activity in the context of antitrust claims based on an interpretation of federal antitrust law. In fact, the closest the Court has come to making a statement regarding the scope of protection afforded by the *First Amendment* was in three cases which held that *Noerr* was inapplicable or distinguishable: *NAACP v. Claiborne Hardware Co.*,¹⁵⁶ *F.T.C. v. Superior Court Trial Lawyers Ass'n*,¹⁵⁷ and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*¹⁵⁸ Therefore, even if petitioning activity should be afforded the same level of constitutional protection from a common-law tort suit as an antitrust cause of action, the *Noerr-Pennington* doctrine does not determine that level of protection.

Mistakes like the one made by the court in *Theme Promotions* can result in a number of errors. First, the court may provide too much protection for petitioning activity. As a result of this type of error plaintiffs who are harmed by a defendant's petitioning activities may be wrongfully denied redress for those harms. In cases where the plaintiff would have ultimately been successful, this means the plaintiff will have to unjustly bear the cost of the defendant's petitioning activity, which can entail very high damages. The tort claims dismissed by the *Theme Promotions* court on appeal, for example, had received an \$833,345 award for actual damages and a \$2,500,000 award for punitive damages from a jury.¹⁵⁹ Even in cases where the plaintiff would not have ultimately prevailed, simply having the case resolved before an impartial tribunal has its own inherent benefits.¹⁶⁰

Also, because *Noerr-Pennington* provides such a high level of protection for petitioning activity, some petitioning activity that may be socially undesirable will go unpunished. In our representative system of government, which requires government officials to heavily rely on information it receives from interested parties, there is

156. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914-16 (1982).

157. *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424-25, 428 (1990).

158. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 505 (1988).

159. *Theme Promotions, Inc.*, 546 F.3d at 1006.

160. *See, e.g., BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002) ("Like successful suits, unsuccessful suits allow the 'public airing of disputed facts,' and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around. Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force." (citations omitted)).

a strong incentive for those parties to do whatever it takes to convince the government that their desired course of action is the best course of action. The problem presented by such an incentive can be seen, for example, in jurisdictions that do not recognize a “misrepresentation” exception to the *Noerr-Pennington* doctrine.¹⁶¹ In these jurisdictions parties have a huge incentive to deliberately mislead government bodies, knowing that their deceitful petitioning activities will receive full immunity.

The second type of error that may occur is not an error in result, but an error in reasoning. If the “proper” level of protection for petitioning activity in a non-antitrust cause of action happens to be the same level that would be required by the *Noerr-Pennington* doctrine, then while courts may reach the correct outcome by transposing the *Noerr-Pennington* doctrine outside the context of antitrust law, these courts will base this result on an improper analysis. Even though this is a mistake in reasoning and not in result, there still may be consequences. For example, courts which make this mistake may be avoiding constitutional questions concerning the proper scope and application of the First Amendment right to petition when they should be addressing them. This can occur because the *Noerr-Pennington* doctrine is primarily based on an interpretation of federal antitrust statutes and therefore it is imbued with statutory interpretation principles. These principles require courts to take a cautious approach and to be hesitant to attribute an intent to infringe or chill constitutionally protected freedoms to the legislature. For example, in *Noerr*, the Court avoided “difficult constitutional questions” by refusing to interpret the Sherman Act as imposing antitrust liability for political activities, noting that Congress had traditionally been hesitant to regulate such activities.¹⁶²

These statutory interpretation principles, however, are not applicable in petitioning immunity cases based on common law causes of action. The common law is the sole province of the judicial branch. By imputing these statutory interpretation principles into the realm of common law, courts, like the one in *Theme Promotions*, are

161. See Filmore, *supra* note 119 at 443 (arguing that without a misrepresentation exception the incentive to mislead the government will “pose[] a serious threat to competition and to the efficiency of the government.”).

162. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141-42 (1961).

shirking their institutional responsibility to address the “difficult constitutional questions” posed by petitioning immunity suits that are based on common law causes of action.¹⁶³ As a result, the right to petition, an already underdeveloped area of law, will continue to be neglected, potentially compounding these problems in future petitioning immunity cases.

Another consequence to this error in reasoning is that it attributes constitutional status to levels of protection which were primarily based on non-constitutional considerations. As a result it entirely precludes Congress from changing the levels of protection afforded to petitioning activity in areas of law governed by statute. Any changes to those levels of protection would have to come by way of constitutional amendment or court decision.

V. CONCLUSION

While the Supreme Court has not explicitly *stated* whether the *Noerr-Pennington* doctrine is a constitutional doctrine or a statutory interpretation doctrine, what it has *done* demonstrates that *Noerr-Pennington* falls into the latter category. *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. 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. These courts are also giving

163. Granted, it may be argued that courts should sometimes willingly choose to avoid such difficult constitutional questions; the Supreme Court, for example, has emphasized that federal courts should hesitate to imply causes of action, to craft remedies, and to resort to common law outside specified areas. *See, e.g.,* *Bush v. Lucas*, 462 U.S. 367, 378-79 (1983). When the Court does so, however, it is based on prudential, not constitutional considerations. Therefore if a court decides to extend petitioning immunity based on these prudential considerations it should be explicit about its justifications. Otherwise the court will be elevating these prudential considerations to the status of constitutional protections.

constitutional status to levels of protection determined by non-constitutional considerations and are failing to engage in the analysis needed to determine the scope of petitioning immunity in causes of action that are not based on antitrust law.

