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Protections against Retaliatory Employer Lawsuits after BE&K Construction v. NLRB

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ARTICLES

Protections Against Retaliatory Employer Lawsuits After BE&K Construction v. NLRB

Paul More†

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INTRODUCTION

Following closely on the heels of a dramatic victory against Ravenswood Aluminum Company in West Virginia, the United Steelworkers of America (USWA) launches what it hopes to be a model contract campaign at Bayou Steel, a “mini-mill” located in La Place, Louisiana. After the workers strike, the union’s international and USWA Local 9121 set up a picket-line and file unfair labor practice, Occupational Health & Safety Act (OSHA), and environmental charges against the company. The union initiates a media and political campaign to publicize the company’s demand for wage and benefits concessions and its record of environmental and labor law violations. In response, the company files a lawsuit against the union, claiming that its tactics violate the Racketeering and Corrupt Organizations (RICO) Act and seeking treble damages. The mounting cost of the litigation forces the union to settle at the summary


2. For a description of the suit by one of the attorneys representing Bayou Steel, see generally Herbert R. Northrup & Charles H. Steen, Union “Corporate Campaigns” as Blackmail: The RICO Battle at Bayou Steel, 22 HARV. J. L. & PUB. POL’Y 771 (1999).
PROTECTIONS AGAINST RETALIATORY LAWSUITS

judgment stage, but the damage is done. The lawsuit diverts attention from the campaign, as resources and energy shift from the union’s organizing departments to its legal departments. The strike concludes with decidedly mixed results.\(^3\)

In Pennsylvania, the Service Employees International Union (SEIU) begins a statewide campaign aimed at renewing its nursing home contracts with Beverly Enterprises, the nation’s largest nursing home operator, and at organizing workers at Beverly’s non-union nursing homes. As part of the campaign, Beverly workers publicize the company’s health and safety record by issuing nursing home “report cards” notifying residents and their families of low staffing levels and health and safety violations at Beverly nursing homes.\(^4\) An SEIU local and District Local 1199P successfully pressure the Occupational Health and Safety Administration to investigate health violations at Beverly nursing homes in several states.\(^5\) In response, Beverly sues SEIU Local 585 President Rosemary Trump for defamation, claiming that the union official’s comments to Beverly executive Donald Dotson at a political rally and her statements at a Pittsburgh town hall attended by five members of Congress slandered the company.\(^6\) Beverly also sues a Cornell University professor for her statement at the same town hall meeting that Beverly is “one of the nation’s most notorious labor law violators.”\(^7\) Beverly separately files suit against SEIU Locals 668 and 585, District Local 1199P and the District 1199P president for defamation, based on statements in the unions’ radio spots and handbills publicizing the company’s labor law and health and safety violations.\(^8\) The company drops the suit against the university professor after protests from other academics and negative national publicity.\(^9\) Beverly’s suit against Trump is dismissed on summary judgment,\(^10\) but the union is forced to spend $92,000 in its defense.\(^11\)

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4. Id. at 226.
5. See Katherine Sciacchitano, Unions, Organizing, and Democracy: Living in One’s Time, Building for the Future, DISSERT, Spring 2000, at 75–81.
8. Id.
12. See Jim McKay, Shop Talk: Trump trumps, PITTSBURGH POST–GAZETTE, October 10, 1999,
Employers have responded to a resurgent labor movement by taking unions, their employees, and individual workers to court. In *BE&K Construction v. NLRB*, the Supreme Court addressed the authority of the National Labor Relations Board (NLRB) to adjudicate and sanction such retaliatory lawsuits. The suit underlying *BE&K Construction* involved a non-union contractor's claim that a regional building trades council and other local unions had violated federal labor and antitrust law by opposing the contractor's permits, lobbying for a toxic waste ordinance, and suing the contractors for environmental violations. Although the contractor's claims were dismissed on summary judgment, the litigation lasted for several years, imposing a significant burden on the unions involved. After the suit was completed, the unions brought a claim before the NLRB, alleging that the contractor's suit had been brought to interfere with workers' rights protected under the National Labor Relations Act (NLRA). The Board agreed and the case eventually proceeded to the Supreme Court.

The Court avoided what it termed a "difficult constitutional question" under the Petition Clause of the First Amendment, and altered the standard applied by the Board and courts alike for twenty years in adjudicating employers' retaliatory lawsuits. Previously, under the standard set forth in *Bill Johnson's Restaurants v. NLRB*, the Board found employer lawsuits to be unfair labor practices where they were unsuccessful and were brought with an intent to interfere with rights protected under § 7 of the Act. *BE&K Construction* holds that the Board must find that the employer's lawsuit was brought for "subjectively non-genuine" reasons, rather than with an intent to interfere with rights protected under the NLRA, in order to sanction the suit. Although the Court did not define the precise scope of "subjectively non-genuine litigation," it held that the Board must now find that the employer intended to use the court process itself, as opposed to the outcome of the litigation, to interfere with § 7 rights. The Board may no longer penalize litigation where the plaintiff's purpose is to stop activity that he or she genuinely believes is illegal. Although this change in the law may not dramatically affect Board adjudication of § 8(a)(1) charges involving retaliatory employer lawsuits in the short term, the reasoning contained in the *BE&K* majority opinion and Justice Scalia's concurring opinion contain the seeds of more far-reaching limitations on unions'
ability to protect themselves from the costs of retaliatory lawsuits through federal labor law. Because the Court avoided deciding *BE&K Construction* on Petition Clause grounds, the constitutionally-permissible scope of the Board’s authority to sanction employer lawsuits that interfere with union organizing remains an open question.

The issue of the Board’s ability to address employer lawsuits that attack workers and their unions for engaging in protected activity arises at an important time. Due to a confluence of factors, unions have broadened their organizing tactics beyond the traditional strike and picket line to incorporate a wider range of strategies, such as legislative lobbying and lawsuits, shareholder actions, and creative media work. The broadening of unions’ organizing tactics, sometimes termed the shift to “comprehensive campaigns,” has been a crucial component of some of organized labor’s most successful and most visible campaigns during the last two decades. Employers have developed legal theories to respond to the effectiveness of comprehensive campaigns and the broadening of union organizing tactics generally. Employers have used state law torts, such as defamation and tortious interference with business relations, to attack unions’ use of the media, leafletting and public demonstrations. More recently, employers have sued unions under federal antitrust law to attack unions’ ability to form coalitions with community and environmental groups, and under the RICO Act against unions’ appeals to regulatory agencies. While such lawsuits have not met with much success to date, they can delay and distract union campaigns and impose substantial costs on unions that are forced to defend against them. For employers whose main advantage over a union is financial leverage, imposing such costs can be a victory in itself, regardless of the fate of the legal claim. Although the *Bill Johnson’s* unfair labor practice charge has deterred much meritless employer litigation, future employer challenges to comprehensive campaigns can be expected to take place in the courtroom.17

This Article constructs a constitutional justification for the authority of the Board to sanction employer lawsuits that are unsuccessful and brought for illegitimate, or “subjectively non–genuine,” reasons. The Article argues that lawsuits brought to impose the costs and delays of the judicial process on unions forward few of the Petition Clause values identified by the Supreme Court. Furthermore, such lawsuits are themselves directed at

17. Nearly a decade ago, Jonathan Hiatt, General Counsel for the AFL–CIO, identified the *Bill Johnson’s* charge as a critical aspect of the development of comprehensive campaigns: “[A]s employers increasingly seek to break strategic campaigns by resort to federal and state courts, issues are certain to arise as to the scope of protection under *Bill Johnson’s Restaurants Inc. v. NLRB*. An increased employer reliance on tort litigation as a tactic to combat unionization has come to mean that workers and unions are being subjected to a torrent of lawsuits alleging libel, slander, tortious interference with contract, and a variety of other state torts.” Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty–first Century*, 12 LAB. LAW. 165, 176 (1996) (internal footnote omitted).
union activity that is protected, directly or indirectly, by the First Amendment. The Court has recognized workers’ § 7 associational rights as constitutionally-derived, and retaliatory employer lawsuits are intended to interfere with these rights. Furthermore, employer lawsuits regularly target unions’ activities protected by the First Amendment, such as petitioning, handbilling, and media publicity. Because unsuccessful, non-genuine lawsuits have only a weak claim to Petition Clause protection and because they can chill the expressive activities of their targets, such suits are not within the core of the Petition Clause and may be sanctioned by the NLRB. Finally, this Article also concludes that although BE&K Construction changed the Board’s focus in adjudicating employer lawsuits, many of the forms of evidence that were previously used by the Board in assessing whether an employer’s suit was brought for retaliatory reasons remain relevant.

Part I describes unions’ shift in organizing tactics since the late 1970s and employers’ increasing use of the courts in response. Most of the legal theories used by employers to counter comprehensive campaigns have proved unavailing, due to the broad preemption of state law by federal labor law, unions’ First Amendment rights, and statutory immunities. Part II outlines the two main strands of Petition Clause jurisprudence that informed the Court’s opinion in BE&K Construction: the Noerr–Pennington line of antitrust cases and the Bill Johnson’s unfair labor practice charge. Both doctrines address the interaction between the Petition Clause and a federal regulatory regime. Noerr–Pennington exempts a market participant’s anti-competitive governmental petitioning from antitrust liability, so long as the petitioning was not a “sham.” Bill Johnson’s allows the NLRB to sanction employer litigation directed at workers’ protected rights. While the Noerr–Pennington cases and Bill Johnson’s established separate standards for determining whether litigation was protected, courts reconciled the two lines of cases prior to BE&K Construction. Part III examines BE&K Construction itself and concludes that the holding in the case was decidedly narrow. Part IV assesses the protections against retaliatory employer lawsuits that remain under the NLRA after BE&K Construction and sets forth a case for the continued, active involvement of the NLRB in policing retaliatory employer lawsuits.

I.

COMPREHENSIVE CAMPAIGNS AND EMPLOYER RESPONSE

Since the late 1970s, unions have broadened the tactics that they employ in organizing and contract campaigns, and BE&K Construction must be situated within this context. While many unions continue to center their organizing campaigns on Board-supervised elections and the
traditional leverage tactics of picketing and strikes, notable union successes, such as the Justice for Janitors campaign in Los Angeles\textsuperscript{18} and other cities, the Hotel Employees and Restaurant Employees in Las Vegas,\textsuperscript{19} and the Communication Workers of America's victory at Cingular/SBC\textsuperscript{20} have employed comprehensive, multi--faceted approaches to campaigning, centered largely outside of traditional labor law. In addition to being a key ingredient of success in many individual campaigns, the broadening of union campaign tactics and the increasing use of strategies that are not dependent on the administrative machinery of the NLRB have provided unions with a path around the impasse over federal labor law reform and a means to engage the broader public. The widened scope of union tactics and the shift in focus away from the NLRB, however, have provoked a similar reaction among employers, who are increasingly using state and federal courts to attack both comprehensive campaigns and more traditional campaigns, relying on application of state tort claims to labor disputes and the development of new federal antitrust and RICO claims. Even where unsuccessful, such suits can stop the momentum of a campaign and impose substantial costs on the defending union.

\textsuperscript{18} See Roger Waldinger, et al., \textit{Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles}, in \textit{Organizing to Win: New Research on Union Strategies} 114 (Kate Bronfenbrenner, et al., eds. 1998) (Justice for Janitors "deliberately abandoned the traditional NLRB election approach to organizing.... Instead, JfJ developed the idea of a 'comprehensive campaign,' in the words of one organizer, 'a war against the employers and the building owners, waged on all fronts [without] leaving any stone unturned.'") [hereinafter \textit{Organizing to Win}].


A. Comprehensive Campaigns

Unions have broadened their strategies in organizing workers and conducting contract campaigns in response to a confluence of factors. The deficiencies of U.S. labor law have led many unions to conduct elections and seek recognition outside of the traditional Board-supervised process set forth in the NLRA. The ossification of federal labor law and the institutional barriers to national reform have necessitated organizing beyond existing law, often through negotiated union–employer neutrality and card check agreements that set rules governing organizing drives and provide for non–NLRB elections. Attaining such agreements, however, requires that unions exercise substantial leverage over their targets. Increased capital mobility and changes in corporate form have weakened the leverage gained from the traditional primary employer strike and picketing. By most accounts, employers have also become increasingly

21. The nomenclature for the union movement’s new strategies has gone through a series of iterations. Early campaigns employing the tactics described here were almost universally characterized as “corporate campaigns.” See, e.g., INDUSTRIAL UNION DEPARTMENT, AFL–CIO, DEVELOPING NEW TACTICS: WINNING WITH CORPORATE CAMPAIGNS (1985); CHARLES R. PERRY, UNION CORPORATE CAMPAIGNS (1987). More recently, sensitivity to the scope of tactics employed in such campaigns has led to a variety of alternative titles for such campaign approaches. See Bronfenbrenner & Juravich, Strategic and Coordinated Bargaining, supra note 1 (using the terms “coordinated” and “strategic” campaigns); Cynthia Estlund, The Ossification of American Labor Law, 102 COLUM. L. REV. 1527, 1605 (2002) (distinguishing “corporate campaigns” focused on pressuring directors, lenders, customers and suppliers from “comprehensive campaigns” appealing “directly to the public by way of rallies, pickets, speeches, and leafletting in public streets and parks.”). More importantly, union opponents have seized on the term “corporate campaign,” seeking to de-legitimize associated union tactics as not ultimately aimed at winning over workers, but rather at pressuring corporations into unionization from the top down. See generally Thomas J. DiLorenzo, The Corporate Campaign Against Food Lion: A Study of Media Manipulation, 18 J. LAB. RES. 359 (Summer 1996); Herbert R. Northrup, Corporate Campaigns: The Perversion of the Regulatory Process, 23 J. LAB. RES. 345 (Summer 1996). This Article uses the term “comprehensive campaign” throughout to describe campaigns centered primarily outside of the NLRB and employing multiple leverage tactics.


23. See generally Estlund, supra note 21.


25. James Pope summarizes this point:

The legally sanctioned primary strike and polite picketing—which worked reasonably well in mass–production industries after employers resigned themselves to unionism—are woefully inadequate when deployed against conglomerates (which can amortize the costs of union resistance in one enterprise over a host of other enterprises), or industries characterized by capital mobility (where employers can run away), or industries prone to subcontracting (where
anti–union in response to the changed competitive environments and declining union density in many sectors.\(^{26}\) Success in organizing workers and negotiating contracts increasingly requires that unions act creatively in developing leverage over target employers.

Campaign tools and strategies for achieving such leverage vary widely and are context–specific, but a rough categorization is possible. The decline of the strike as an effective source of leverage has led many unions to develop innovative workplace strategies that allow workers to apply pressure from inside the company that is short of a full–blown work stoppage.\(^{27}\) Another set of comprehensive campaign strategies focuses on forging ties and working relations with other social movements, including community organizations and environmental groups. Common campaign tactics range from coordinated publicity work and joint lobbying for beneficial legislation\(^{28}\) to community–labor boycotts.\(^{29}\) Increasingly, unions mobilize their pension funds and allied capital sources to put pressure on the boards of target companies, and capital strategies are often incorporated into campaigns aimed at gaining recognition or a new contract.\(^{30}\) Union shareholder activism focuses on forwarding concrete corporate governance reforms and on using shareholder meetings as a platform for publicizing the actions of target companies or their suppliers.\(^{31}\)

Comprehensive campaigns often include the use of labor laws and other areas of the law. Most unions aggressively file NLRB charges during organizing and contract campaigns in order to protect workers from unfair

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\(^{26}\) See Kate Bronfenbrenner & Tom Juravich, It Takes More Than House Calls: Organizing to Win with a Comprehensive Union–Building Strategy, in ORGANIZING TO WIN, supra note 18, at 22–23 tbl. 1.1 (documenting increase in legal and illegal employer anti–union tactics over the period 1986/87 to 1994).


\(^{28}\) See, e.g., Ruth Needleman, Building Relationships for the Long Haul: Unions and Community–Based Groups Working Together to Organize Low–Wage Workers, in ORGANIZING TO WIN, supra note 18, at 74–78 (describing joint anti–sweatshop publicity and lobbying campaign between the Asian Immigrant Women Advocates (AIWA) and the Union of Needle Trades, Industrial and Textile Employees (UNITE)).


Labor practices, such as retaliatory discharge; immunize any eventual strike from the permanent replacement doctrine; and to put pressure on employers to change their practices. Unions also urge regulatory agencies to target employers for health and safety and environmental violations, and oppose building and zoning permits, as part of some campaigns. Such tactics are directly related to the health and safety, environmental, and planning concerns of the represented workers and the communities to which they belong.

Finally, unions increasingly incorporate a range of publicity and information-based tactics into their campaigns. Information-based tactics are not limited to the traditional picket line. Well-designed campaigns rely on research to identify and target the key decision-makers within the employer’s broader corporate network, followed by extensive use of the media, handbilling, and public demonstrations. Creating a media spectacle that highlights the issues at stake in a labor dispute and embarrasses the target employer often involves creative appropriation of the corporation’s logo or motto. Many of the labor movement’s new information-based tactics are inspired by the civil rights movement and seek to engage a broader public in labor’s struggles through highly visible public campaigns.

32. See Waldinger et al., supra note 18, at 114–115 (“While abandoning the election route, JFJ found instruments in the NLRA and other legal protections that could be used to gain leverage over employers.”); Judge Rules Caterpillar Illegally Removed Fliers from Bulletin Boards, 134 Daily Lab. Rep. (BNA) No. 134, at A–7 (July 12, 1996) (describing the more than 200 NLRB complaints filed against Caterpillar over five year period).

33. For example, SEIU successfully pressured OSHA to conduct a seven–state investigation of Beverly Enterprises, the nation’s largest nursing home operator, in the course of a multi–state comprehensive campaign. See supra note 6.


35. See, e.g., Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976) (finding no antitrust liability where labor union and restaurant employer association attempted to block the construction of additional restaurants in a chain by opposing the grant of building permits by a city board).

36. See, e.g., Bronfenbrenner & Juravich, Strategic and Coordinated Campaigns, supra note 1, at 218–19 (describing USWA research and media campaign); Waldinger et al., supra note 18, at 115 (“The SEIU’s proclivity for in–your–face media–oriented events . . . brought public embarrassment to key individuals in the industry while also making life difficult for building tenants.”).

An increasingly common employer response to comprehensive campaign tactics has been to take unions and individual workers to court. Use of the courts to derail organizing drives and contract campaigns is, of course, nothing new. The labor injunction—to control picketing and alleged secondary activity, and to police workplace tactics, among other things—continues to play a central role in many campaigns. The broadening of labor's campaign tactics, however, significantly expands the number of legal targets available to an employer. These new legal targets possess at least three advantages over the traditional legal approaches such as unfair labor practice actions brought before the Board and injunction actions brought in federal court. First, an employer can control the timing and venue of a private action in the courts in ways that it cannot in a General Counsel-mediated NLRB charge. Second, employer choice of legal theory can play into a larger public relations strategy, as in the use of RICO to raise the specter of union corruption and violence or the use of antitrust actions to paint unions as narrowly self-interested and cartel-like. Finally, and most crucially, private actions in the courts involve expenditures of time and financial resources that the informal proceedings of the NLRB and the relatively expedient injunction action do not. For employers whose primary advantage over the union is financial, such costs are a significant weapon, regardless of the ultimate success of the suit.

The most common forms of employer suits target a union's information-based tactics and publicity campaigns. Employers regularly bring defamation and related suits against unions and union representatives that engage in publicity work. The Supreme Court has held that state defamation claims made during a labor dispute are preempted by federal labor law, unless the complainant can show that the statements were made with "actual malice" and caused actual damages. While this exception to preemption is quite narrow, it is also fact-intensive, often allowing

39. Unfair labor practice charges before the Board are brought by the NLRB's General Counsel, rather than the private complainant. 28 U.S.C. § 160(b) (2004).
41. See supra, notes 5 to 12 and accompanying text, for an example.
43. See Steam Press Holdings, Inc. v. Haw. Teamsters & Allied Workers Union, Local 996, 302 F.3d 998, 1009 (9th Cir. 2002) ("Freedom of speech is an essential component of the labor-management relationship. Collective bargaining will not work, nor will labor disputes be susceptible to resolution,
employer-plaintiffs to engage in extensive discovery and to survive summary judgment motions.\textsuperscript{44} Employers also use trademark suits to attack campaign publicity tactics, although most campaign-related use of employer logos is non-commercial and falls within the parody exception to the Lanham Act.\textsuperscript{45} Another tactic is to seek a broad injunction against the union's publicity campaign and then to litigate alleged violations of the injunction aggressively.\textsuperscript{46}

Employers also regularly target publicity campaigns under the secondary boycott provisions of the Labor Management Relations (Taft-Hartley) Act (LMRA). Section 303 of the LMRA creates a private civil damage remedy for union secondary boycott activities barred under § 8(b)(4) of the NLRA.\textsuperscript{47} In Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, however, the Supreme Court narrowed the scope of secondary liability, holding that peaceful union handbilling urging consumers not to patronize a shopping mall's tenants until the mall's owner agreed to hire contractors paying fair wages did not fall within § 8(b)(4).\textsuperscript{48} Although ultimately decided as a matter of statutory

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unless both labor and management are able to exercise their right to engage in 'uninhibited, robust, and wide-open' debate.” (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)); Intercity Maintenance Co. v. Local 254, Serv. Employees Int'l. Union, 241 F.3d 82, 90 (1st Cir. 2001) (“plaintiffs who endure even malicious libels during a labor dispute must present evidence of harm from defamation in order to recover, notwithstanding the law of states such as Rhode Island in which damages would otherwise be presumed”); Beverly Hills Foodland v. UFCW Local 655, 39 F.3d 191, 194-95 (8th Cir. 1994) (defining “labor dispute” to include statements made during a union boycott, even though the union had expressly abandoned organizing efforts).

\textsuperscript{44} Unions in those states with anti-SLAPP (Strategic Litigation Against Public Policy) statutes have a modicum of protection against meritless defamation suits. Anti-SLAPP statutes generally provide for early dismissal of suits brought to chill political activity. See Monterey Plaza Hotel v. Hotel Employees & Rest. Employees Local 483, 82 Cal.Rptr.2d 10 (Cal. Ct. App. 1999) (striking defamation suit against union and union official under California Anti-SLAPP statute); see also Street Beat Sportswear, Inc. v. Nat'l Mobilization Against Sweatshops, 698 N.Y.S.2d 820 (Sup. Ct. 1999) (dismissing as SLAPP suit action for tortious interference with contractual relationships brought by garment manufacturer against community organizations that engaged in public protest of sweatshop conditions).


\textsuperscript{46} See, e.g., Metropolitan Opera Ass'n v. Hotel Employees & Rest. Employees Local 100, 239 F.3d 172 (2d Cir. 2001) (overturning district court finding that union and union organizer violated an injunction barring the union from "threatening or harassing" the Met, its donors or patrons and vacating the injunction as overbroad).


\textsuperscript{48} 485 U.S. 568, 578–88 (1988). The Court also abandoned the conclusion that labor appeals to
construction, the decision was informed by unions’ First Amendment right to disseminate information. The holding has been read broadly to immunize a wide array of publicity tools that are aimed at secondary targets, and has generally been recognized as providing crucial legal support to labor’s shift in organizing orientation. Secondary picketing, as opposed to handbilling, remains actionable, although a number of commentators believe that § 8(b)(4)’s application to picketing is also constitutionally vulnerable.

Employers have attacked a broad range of union tactics in the courts by claiming that the unions’ actions constitute tortious interference with contract or related torts. Generally, tortious interference claims are found to conflict directly with the NLRA, since most union use of sanctioned economic leverage has as its direct goal interference with the target’s

the public are necessarily a form of commercial speech. The Court concluded instead that peaceful union handbilling is a constitutionally protected form of political speech. See id. at 576.

49. Id. at 575.

50. See, e.g., Storer Communications v. National Ass’n of Broad. Employees & Technicians, 854 F.2d 144 (6th Cir. 1988) (applying DeBartolo to letter writing campaign warning advertisers that they would be handhilled if they did not withdraw advertising from targeted employer); Brown & Root, Inc. v. La. State AFL–CIO, 10 F.3d 316, 326–27 (5th Cir. 1994) (lobbying for termination of plaintiff’s contract with public utility, like handbilling, protected under DeBartolo).


52. For years commentators have pointed out that the First Amendment principle of neutrality has not been applied in the labor context. See Pope, Right to Organize, supra note 25 at 951; Jack Getman, Labor Law and Free Speech: the Curious Policy of Limited Expression, 43 MD. L. REV. 4, 7 (1984). The most vivid example of the anomalous First Amendment position of labor speech is the Supreme Court’s decision in NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). In that case, the Court held secondary picketing by the NAACP, which would have been illegal if undertaken by a labor union, to be constitutionally protected. Id. at 912–13. The Court attempted to distinguish labor picketing on two grounds: first, that boycott activities by unions are economic, rather than political; and second, that labor speech is part of a special, balanced approach to labor–management relations devised by Congress. Id.; see also Jack Getman, The National Labor Relations Act: What Went Wrong; Can We Fix It? 45 B.C. L. REV. 125, 143 (2003). In DeBartolo, however, the Court recognized labor handbilling that “pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace,” as political, rather than economic speech, thus weakening the basis for distinguishing labor boycotts from civil rights boycotts. See DeBartolo, 468 U.S. at 576. Furthermore, the Court’s First Amendment doctrine, as James Pope points out, bars a union from picketing a retail store for selling a product made with child labor, while allowing a human rights activist to do so. See Pope, Right to Organize, supra note 51, at 950–51. Such viewpoint discrimination is subject to strict scrutiny in all other contexts but labor. Id.

Trespass is another commonly-invoked state tort, although trespass claims are often preempted. More recently, employers have begun to sue unions for petitioning of legislative, administrative, and judicial bodies. In several cases, employers have used state law abuse of process actions against campaigns that include petitioning activities. While abuse of process claims may exist where the union has deliberately and egregiously filed frivolous court claims against an employer, several aspects of the tort limit its effectiveness in targeting comprehensive campaigns. Courts generally set a high standard for finding abuse of process liability, requiring both that the allegedly abusive suit has been filed for an improper, collateral purpose and that specific court processes were used to further this aim. Also, in most jurisdictions, the abuse of process tort is limited to the misuse of judicial, as opposed to administrative, proceedings, and thus is not an effective employer tool in countering union administrative petitioning. Finally, unions defending against state abuse of process claims can generally rely on both state anti-SLAPP statutes and the constitutional right to petition.

Employers have also sought to extend the RICO Act’s scope to cover unions’ petitioning activities. The RICO Act makes it unlawful for any “person” to use a pattern of racketeering activity to participate in the affairs of a formal or informal “enterprise.” The Act defines racketeering activity

54. See, e.g., Kaufmann v. Airline Pilots Ass’n, 274 F.3d 197, 204 (5th Cir. 2002); Falls Stamping & Welding Co. v. Int’l Union, UAW, 744 F.2d 521, 525 (6th Cir. 1984); Overnite Transp. Co., 168 F. Supp. 2d at 849.
56. See Food Lion v. United Food & Commercial Workers Int’l Union, 567 S.E.2d 251, 255–257 (S.C. Ct. App. 2002) (dismissing abuse of process claim for lack of evidence that union had a “collateral purpose” of harming the company by bringing class action on behalf of former employees). See also RESTATEMENT (SECOND) OF TORTS § 682 (2002) (“One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.”).
57. Food Lion, 567 S.E.2d at 255 (“An allegation of an ulterior purpose or ‘bad motive,’ standing alone, is insufficient to assert a claim for abuse of process.”).
58. See, e.g., Stolz v. Wong Communications Ltd., 31 Cal.Rptr.2d 229, 236 (Cal. Ct. App. 1994) (declining to extend abuse of process tort to administrative proceedings); Sea–Pac Co. v. United Food & Commercial Workers Local 44, 699 P.2d 217, 221 (1985) (holding that unfair labor practice charges could not form basis of action for abuse of process because no process was issued by Washington courts and that whether union misused process of NLRB was for the NLRB to decide). But see Hillside Assocs. v. Stravato, 642 A.2d 664, 669 (R.I. 1994) (holding that “misuse of an administrative proceeding may give rise to claims for malicious prosecution and/or abuse of process.”).
according to an array of "predicate acts," including those defined directly in the Act, such as murder and arson, and those incorporated from specified federal statutes. Employers have traditionally used civil RICO charges against unions for alleged predicate acts of violence, threats of violence, or fraud. Typically, employer RICO suits in labor disputes are based on alleged picket-line violence. An employer can rely on the picket-line violence itself or a state law claim of extortion as the predicate act under RICO, or rely on allegations of extortion under the Hobbs Act. Although the Supreme Court, in United States v. Enmons, limited the reach of the Hobbs Act to exclude picket-line violence during lawful economic strikes, some lower courts have read the decision narrowly, allowing RICO actions based on picket-line violence to proceed under the Travel Act or the RICO Act itself.

While well-organized, well-run campaigns can generally avoid the threat of violence-based RICO actions, management-side lawyers have also attempted to use RICO claims based on state law extortion and blackmail to target union petitioning activities. For example, Bayou Steel's RICO action against the Steelworkers, described in the introduction to this Article, was based on a state blackmail predicate act. The theory was that

61. "Any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical... which is chargeable under State law and punishable by imprisonment for more than one year..." 18 USC § 1961(1)(A) (2002).


64. 410 U.S. 396 (1973).


66. Bayou Steel Corp. v. United Steelworkers of Am., No. Civ A. 95-496-RPM, 1996 WL 76344 (D. Del. Jan. 11, 1996). Herbert R. Northrup, a former executive at General Electric and management consultant on comprehensive campaigns, and Charles Steen, Bayou Steel's attorney in its RICO action against the Steelworkers, write: "Perhaps the most interesting and significant of the predicate acts likely to be present in a corporate campaign is state law blackmail, which is a species of extortion. Indeed, applying RICO to corporate campaigns comes down, in large measure, to understanding the crime of blackmail under state law, and recognizing that—legally speaking—corporate campaigns are, at bottom, a pattern of blackmail." See Herbert R. Northrup & Charles H. Steen, Union "Corporate Campaigns" as Blackmail: the RICO Battle at Bayou Steel, 22 HARV. J.L. & PUB. POL'Y 771, 774–75 (1999) (internal footnote omitted). The use of RICO to target comprehensive campaigns appears to have been pioneered
“having to purchase the Steelworkers’ forebearance from regulatory harassment by acquiescing in the union’s collective bargaining demands was not bargaining at all, but rather it was extortion.”67 Bayou’s claim was that by involving third-party regulatory agencies in the labor dispute, and by implicitly promising to stop pressing regulatory claims against the company in return for a favorable contract, the union was engaging in blackmail, which in turn could serve as a predicate act to federal RICO charges. The parties ultimately settled, but the viability of the legal strategy remains dubious.68

Finally, employers have developed new uses of antitrust law to attack unions’ petitioning activities, although again with little success. Many union activities are simply immune from antitrust liability. In United States v. Hutcheson, the Supreme Court read the interlacing Sherman, Clayton, and Norris–LaGuardia Acts to give unions a statutory exemption from antitrust laws, “[s]o long as a union acts in its self-interest and does not combine with non–labor groups.”69 The definition of “non–labor groups” remains notoriously confused, but most courts are in agreement that the category includes only those groups that operate in the same market as the plaintiff to such a degree that the group would be able to bring an independent antitrust action against the plaintiff.70 This broad statutory exemption allows unions to form coalitions with community and environmental groups without foregoing their statutory exemption from antitrust liability.71

In several recent cases, non-union contractors have unsuccessfully attempted to use the Sherman Act against union petitioning of environmental and other regulatory agencies as part of comprehensive campaigns. In one such action, Petrochem, Inc., a non-union contractor, filed suit in federal court against the Northern California Pipe Trades Council, claiming that the council’s campaign of filing, and threatening to file, environmental objections to projects on which Petrochem was

68. Bayou’s theory is likely to run up against two major barriers. First, RICO’s non–identity rule requires that the “person” conducting the pattern of racketeering activities be distinct from the “enterprise” being used for such activities. Therefore, unions cannot be sued under RICO for their own activities. See Newman, supra note 51, at 350–52. Second, unions can avail themselves of the First Amendment in seeking immunity from RICO liability for petitioning activity. See infra Part II.
69. 312 U.S. 219, 232 (1941).
70. See, e.g., USS–POSCO v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800, 805–06 (9th Cir. 1994). See also Bodine Produce, Inc. v. United Farm Workers Organizing Comm., 494 F.2d 541, 558 (9th Cir. 1974) (union’s purpose—to obtain union recognition—was enough to insulate broad coalition with non–labor groups to support grape boycott from laws “designed primarily to proscribe combinations between business groups.”).
71. See Pope, Labor–Community Coalitions, supra note 29, at 968–71.
contractor violated federal antitrust law. The district court dismissed the action, holding that Petrochem had not adduced facts sufficient to overcome the statutory exemption, and the Ninth Circuit Court of Appeals affirmed.

In the near-identical employer suit underlying the Supreme Court decision in BE&K Construction, USS–POSCO, a joint venture, formed to modernize and operate an old steel facility in Pittsburg, California. The Contra Costa County Building Trades Council and numerous local unions engaged in a comprehensive campaign to prevent the non-union BE&K Construction from becoming a contractor at the site. In its antitrust action against the unions, BE&K claimed that the unions filed automatic protests to permits in order to cause delay and expense; lobbied for a local toxic waste disposal ordinance that would require BE&K to obtain more permits; sued to enforce the ordinance at the Pittsburg site; encouraged BE&K subcontractors to protest nonexistent safety violations; brought suit against BE&K for allegedly violating environmental laws (Piledrivers suit); and brought numerous grievances, arbitrations and enforcement proceedings against BE&K’s partner, Eichleay Constructors, Inc. The Ninth Circuit held that most of the unions’ actions had been closely related to traditional organizing goals and were thus within the statutory exemption to antitrust liability. The court was more concerned about BE&K’s allegation that the union had engaged in a pattern of automatically filing regulatory claims against the contractor. Ultimately, however, the court dismissed the case against the unions.

In sum, while employers have increasingly sought to use the courts to counter comprehensive campaigns over the last decade, they have been largely unsuccessful in strictly legal terms. Under the First Amendment

75. USS–POSCO, 31 F.3d at 803. BE&K initiated the suit claiming violations of the NLRA’s secondary boycott provisions. When these were dismissed by the trial court, BE&K amended its complaint to add the antitrust claims. Id. at 804.
76. Id. at 809 (“Activities of which BE&K complains are traditional organizational activities, closely related to traditional union ends. . . . That these activities were not undertaken to unionize this particular employer but in order to eliminate non–union shops altogether by making an example of BE&K does not matter.”).
77. Id. at 810.
78. Id. at 811.
79. Management lawyers themselves have admitted that most of their attempts to challenge comprehensive campaign tactics in the courts have been unsuccessful. See Baskin & Northrup, supra note 40, at 217 (“Attempts of companies to curb the corporate campaign activities of unions have had only limited success in the courts.”); Stanley J. Brown & Alyse Bass, Corporate Campaigns: Employer Responses to Labor’s New Weapons, 6 LAB. LAW. 975, 978 (1990) (“In short, employer efforts to utilize
and Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, unions enjoy protection for most information-based pressure tactics, including those that target customers, lenders, and public officials. The broad scope of labor law preemption protects unions from many state law torts, and statutory immunities have stood in the way of employer use of antitrust laws against comprehensive campaigns. Yet employers continue to bring lawsuits against many major comprehensive campaigns, seeking to impose on unions, their staffs, and individual workers the delays and costs that private litigation entails. Since the legal claims in retaliatory employer suits can turn on difficult questions of fact, such as the "actual malice" exception to NLRA preemption of defamation charges, employers can make plausible arguments for extensive discovery and against early dismissal of their case. The costs, delays, and shift in focus to legal issues that are required when a union must defend itself against an employer suit can impede the progress of even well-designed campaigns. The Bill Johnson's charge and the attendant threat of liability for attorney fees have played a crucial role both in limiting the damage of such suits and in deterring employers from bringing them without some legitimate expectation that they will be successful. Without the clear threat of Board-imposed sanctions, retaliatory employer suits against comprehensive campaigns would likely proliferate.

II. NOERR–PENNINGTON AND BILL JOHNSON'S RESTAURANTS

Two main strands of legal doctrine serve as backdrop for the Supreme Court's decision in BE&K Construction: the Noerr–Pennington exception to antitrust liability and Bill Johnson's and its progeny. Both doctrines concern the types of barriers to government petitioning that can be erected to protect some other public goal—in the case of antitrust law, the goal of preventing anti-competitive practices and in the Bill Johnson's context, the goal of protecting workers' rights to organize and bargain collectively.

A. Noerr–Pennington

A trilogy of cases forms the basis for the Noerr–Pennington doctrine of antitrust immunity for petitioning activities. In Eastern Conference of Railway Presidents v. Noerr Motor Freight, the Supreme Court held that "[t]he Sherman Act does not prohibit two or more persons from associating

the Board and the courts for relief will often be frustrated, particularly if a union is well advised by counsel. Management labor lawyers will have to be particularly creative in devising legal strategies for their clients.

together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. The Court provided two reasons for this holding. First, citing its earlier decision in *Parker v. Brown*, the Court held that the state action doctrine prevented a finding of antitrust liability where the government, and not a private business, carried out the anti-competitive act. This has been termed the "essential dissimilarity" rationale. Second, the Court noted that "of at least equal significance" was the concern that "such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." The Court did note, however, that there might be some situations in which the petitioning of governmental processes was a "sham" that was not genuinely aimed at influencing government, but rather at directly harming a competitor. In the second case in the trilogy, *United Mine Workers of America v. Pennington*, the Court stressed that, "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."

The "sham" petitioning exception to the *Noerr–Pennington* doctrine of immunity from antitrust liability was largely undefined until a 1972 case, *California Motor Transport v. Trucking Unlimited*, which also extended the *Noerr–Pennington* doctrine to litigation activities. The case involved a dispute between two trucking companies. The complaint alleged that the defendant trucking company had conspired to monopolize and restrain trade by preventing the plaintiff from obtaining motor carrier operating rights through the filing of numerous lawsuits in state and federal court. After holding that *Noerr–Pennington* extended to court petitions, the *California Motor Transport* Court went on to find the defendant truckers' petitioning activities to be a sham, and thus outside of antitrust immunity. The Court focused on the defendant's litigation strategy, which it characterized as involving the institution of suits "with or without probable cause, and

82. 317 U.S. 341 (1943).
83. "To hold that government retains the power to act in [a] representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." *Noerr*, 365 U.S. at 137.
86. *Id.* at 144.
89. *Id.* at 509.
regardless of the merits of the cases.\footnote{Id. at 512.} The conspirators had not “sought to influence public officials,” but rather to “bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process.”\footnote{Id.} According to Justice Douglas and the Court majority, “[i]f these facts are proved, a violation of the antitrust laws is established. If the end result is unlawful, it matters not that the means used in violation may be lawful.”\footnote{Id. at 515.}

The California Motor Transport doctrine, however, proved to be unstable, as lower courts wrestled with the boundaries of the sham litigation exception.\footnote{Compare McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1560 (11th Cir. 1992) (alleged sham suits must be proved to be legally unreasonable) with Grip-Pak, Inc. v. Ill. Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983) (denying immunity for the pursuit of valid claims if “the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation”).} In 1993, the Supreme Court sought to resolve the confusion that the Noerr–Pennington trilogy had created, addressing the scope of the sham litigation exception in Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. (PRE).\footnote{508 U.S. 49 (1993).} The case involved a resort hotel operator, Professional Real Estate Investors (PRE), that had installed videodisc players in its hotel rooms and assembled a library of videos for its guests. In 1983, Columbia Pictures sued PRE, alleging that the hotel’s rental of videodiscs constituted copyright infringement. PRE counterclaimed under the Sherman Act, alleging that Columbia’s copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade.

The Supreme Court first distinguished California Motor Transport, holding that the case stood for the proposition that sham litigation was established where one party “sought to bar ... competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process’ by ‘institut[ing] ... proceedings and actions ... with or without probable cause and regardless of the merits of the case.’”\footnote{Id. at 57 (quoting California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512 (1972)).} The Court answered this question in the negative, establishing a two-tiered standard for finding sham litigation in the antitrust context. In order to be a sham suit, the Court held:
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 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."  

Thus, after PRE, the mere subjective desire to harm a defendant's competitive position through litigation does not suffice to except an antitrust lawsuit from Noerr-Pennington immunity as sham litigation. A court must also find the litigation to have been "objectively baseless."

Justice Thomas' majority opinion in PRE contained varied definitions of what constitutes "baseless" litigation for purposes of the objective component of the two-part sham litigation test. Thomas began by stating that the lower court had correctly determined that "sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief."

Thomas then analogized the objective criteria for sham litigation to the common law tort of malicious prosecution, which requires the plaintiff to show that the defendant lacked "probable cause" in bringing its lawsuit, noting that the tort also required objective and subjective unreasonableness on the part of the defendant. "Probable cause," in turn, requires a showing of no more than a "reasonable belief that there is a chance that [a] claim may be held valid upon adjudication." Later in the opinion, in applying the two-tier sham test to the facts of the case, Thomas analogized the objective requirement, at least as it pertained to matters of law, to the standards governing the imposition of sanctions under Federal Rule of Civil Procedure 11. Finding that Columbia's suit satisfied the objective prong of the sham test, the majority did not elaborate on what would be required under the subjective prong.

Lower courts interpreting PRE have set a high bar for finding litigation

97. Id. at 60–61 (internal citations omitted).
98. Id. at 62.
99. Id. at 62–63.
100. Id. (citing Hubbard v. Beatty & Hyde, Inc., 178 N.E.2d 485, 488 (1961)).
101. Id. at 65. Since there had been a circuit split over one of the issues at the heart of the case—whether the viewing of rental videos within the privacy of a hotel room constituted a "public" viewing of the copyrighted material—Columbia's cause of action was arguably "warranted by existing law" or at the least based on an objectively good-faith "argument for the extension, modification, or reversal of existing law or the establishment of new law." Id. (citing Fed. R. Civ. Proc. 11).
to be objectively baseless under the first prong of the two-tier test. In fact, to date, no federal court of appeals has reached the subjective prong of the PRE test in an antitrust case or in any of the other settings in which the test has been applied.102 Courts have justified their reluctance to find objective baselessness on the First Amendment groundings of the Noerr–Pennington doctrine.103 A number of commentators have noted the restrictiveness of the PRE approach to sham petitioning and have called for reform.104

Lower courts wrestling with challenges to patterns of repetitive filings have also made clear that PRE did not satisfactorily distinguish California Motor Transport. In PRE, Justice Thomas argued that California Motor Transport had not resolved the issue of whether litigation may be a sham "merely because a subjective expectation of success does not motivate the litigant." Admitting that the earlier case had focused primarily on the purpose of the defendant truckers—to deprive their competitors meaningful access to the permitting process by raising challenges to each application—Thomas stated, "[t]hat a sham depends on the existence of anticompetitive intent, however, does not transform the sham inquiry into a purely subjective investigation." According to Thomas, nothing in California Motor Transport repudiates the principle set forth in Noerr and Pennington that "'Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.'" However, the inquiry in California Motor Transport was indeed based on the defendant trucking company’s subjective intent, since twenty—one of the company’s forty


103. See, e.g., White, 227 F.3d at 1232.

104. A concrete proposal for reform may result from the Federal Trade Commission’s (FTC) Noerr–Pennington Task Force, which was established to "ensure that the scope of the exemption is appropriately tailored to its underlying objectives." See John T. Delancourt, Protecting Competition by Narrowing Noerr: A Reply, 18 ANTITRUST 77, 77 (2003). Delancourt, Chief Antitrust Counsel in the FTC’s Office of Planning and Policy, has argued for a limiting of Noerr–Pennington immunity, writing that "[t]he 'objective baselessness' prong of the PRE test, as interpreted by some courts, has transformed the ‘sham’ exception into an almost insurmountable hurdle." Id. at 77. The current Chairman of the FTC has stated that some courts have expanded Noerr immunity in a manner that potentially harms consumers: "In some instances, parties have been granted immunity even though the anticompetitive conduct at issue had no ‘petitioning’ component whatsoever. In others, courts have immunized abusive tactics, such as repetitive lawsuits and misrepresentations, that clearly were intended to delay a competitor’s entry or raise its costs." Timothy J. Muris, Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy, 2003 COLUM. BUS. L. REV. 359, 369 (2003).

105. PRE, 508 U.S. at 57.
106. Id. at 57 n.4.
107. Id. at 58 (citing United Mineworkers of Am. v. Pennington, 381 U.S. 657, 670 (1965)).
petitions to the administrative licensing agency had, in fact, been successful challenges. The California Motor Transport Court’s finding that the administrative filings as a whole constituted sham petitioning, even though the defendant trucking company had been successful in a majority of the individual claims, indicates that the company’s intent in filing the claims was the deciding factor in the case.

The Ninth Circuit confronted this tension between California Motor Transport and PRE in the litigation underlying the BE&K Construction case. In USS–POSCO Industries v. Contra Costa County Building & Construction Trades Council, the unions raised the Noerr–Pennington defense to allegations that they had violated antitrust laws by protesting BE&K’s administrative permits and by bringing suits challenging the contractor’s environmental practices. The court rejected the unions’ claim that PRE had effectively overruled California Motor Transport, and reconciled the cases by reading them as applying to different situations. While the two-part PRE test would be employed to “assess whether a single action constitutes sham petitioning,” California Motor Transport would be applied where the defendant “is accused of bringing a whole series of legal proceedings.” The court justified the existence of separate single suit/repetitive filing standards by stating that “California Motor Transport thus recognized that the filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action.” The inquiry in repetitive filing cases, therefore, was: “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?” The single suit/repetitive filing distinction has been followed consistently in the Ninth Circuit and has been adopted by at least one other circuit.

USS–POSCO’s attempt to resolve the tension between PRE and California Motor Transport, while plausible, contains a weakness. The court’s approach to the sham determination was based solely on the

108. See California Motor Transp., Inc. v. Trucking Unlimited, 1967 Trade Cas. (CCH) ¶72,298, at 84,744 (N.D. Cal. 1967)). That California Motor Transport was concerned exclusively with the defendant truckers’ subjective intent in bringing their administrative appeals is evident from the Court’s choice of metaphor: common law abuse of process. See 404 U.S. 508, 513 (1972). Unlike the malicious prosecution tort cited in PRE, abuse of process generally does not require that the abusive judicial activity be objectively baseless.
109. 31 F.3d 800, 810 (9th Cir. 1994).
110. Id. at 811.
111. Id.
112. Id.
113. See, e.g., Kottle v. N.W. Kidney Ctrs., 146 F.3d 1056, 1060 (9th Cir. 1998); Amarel v. Connell, 102 F.3d 1494, 1518–19 (9th Cir. 1996).
subjective intent of the filing party, which PRE argued was at odds with the Court's jurisprudence on Noerr-Pennington immunity. The USS-POSCO court took into consideration the number of administrative petitions that the defendant unions had successfully litigated, apparently assessing the subjective intent to harass based on the number of successful claims. The court noted that "the fact that a small number in the series of lawsuits turn out not to be frivolous will not be fatal to a claim under California Motor Transport," but held that in the case at bar, "fifteen of the twenty-nine lawsuits alleged by BE&K as part of the pattern of filings 'without regard to the merits' have proven successful." Given that the unions had "a batting average exceeding .500," BE&K's claim that the petition challenges were a sham had to fail. PRE made clear, however, that subjective intent alone cannot make out a sham litigation claim.

An alternative construction of the two cases exists. The two cases could be reconciled by holding that a pattern of judicial or administrative filings can constitute evidence of litigation's "objective baselessness" different from the malicious prosecution model set forth in PRE. Some of the pre-PRE cases attempting to make sense of the sham litigation standard adopted this position, as did the concurring opinion in PRE. The argument would be that PRE definitively adopted an objective baselessness requirement for a finding of sham litigation in the antitrust context, but that the PRE Court did not adopt a unified standard for the evidentiary requirements necessary to prove objective baselessness. Such an approach would look beyond the success of an individual court or administrative filing to the context in which that filing took place, including whether the filing was one of a series. This approach would also signal that varying definitions of "objective baselessness" would be acceptable in different contexts.

A second area left unresolved by PRE is the relationship between its sham litigation test and the First Amendment’s Petition Clause. PRE, the

116. USS-POSCO, 31 F.3d at 811.
117. Id. The Ninth Circuit has not yet set forth a clear test for determining whether to employ the single suit or the series of suits test. See Amarel, 102 F.3d at 1519 (two lawsuits do not qualify as "repetitive" and should be analyzed under the "single-suit" PRE standard); Kottle, 146 F.3d at 1063 (same).
118. See, e.g., Litton Sys., Inc. v. AT&T Co., 700 F.2d 785, 810 (2d Cir. 1983); PRE, 508 U.S. at 73 (Stevens, J., concurring).
119. A voluminous academic commentary has developed over the relation of the Noerr-Pennington doctrine to the First Amendment. Those arguing that the doctrine is best read as deriving primarily from a statutory interpretation of the Sherman Act informed by the essential dissimilarity doctrine include I PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 150 (2d ed. 2000); Stephen Calkins, Developments in Antitrust and the First Amendment, 57 ANTITRUST L.J. 327, 346 n.96 (1988); Robert A. Zauzmer, Note: The Misapplication of the Noerr-Pennington Doctrine in Non-antitrust Right to Petition Cases, 36
first Supreme Court case to address the application of the *Noerr-Pennington* doctrine to court and administrative petitioning since *California Motor Transport*, retreated from *California Motor Transport*'s broad constitutional reading of *Noerr-Pennington*. Instead, the majority simply reiterated the two rationales for the *Noerr-Pennington* doctrine. The remainder of the majority opinion was silent on the constitutional underpinnings of the decision. The Court did note that the *Noerr-Pennington* doctrine had been "invoked" in contexts other than antitrust, but at no point indicated that such invocation imported the *Noerr-Pennington* framework into other areas of the law by constitutional mandate.

Following *PRE*, few federal or state courts revisited their application of the *Noerr-Pennington* doctrine in non-antitrust settings, continuing to rely on *pre-PRE* precedent to extend the *PRE* two-part test to additional areas of federal and state law.

The issue of the constitutional status of the *Noerr-Pennington* doctrine took on additional significance after *PRE*, since, as numerous commentators...

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121. The *PRE* majority listed the essential dissimilarity rationale as the primary justification: "In light of the government's 'power to act in [it's] representative capacity' and 'to take actions . . . that operate to restrain trade,' we reasoned that the Sherman Act does not punish 'political activity' through which 'the people . . . freely inform the government of their wishes.' Nor did we 'impute to Congress an intent to invade' the First Amendment right to petition." *PRE*, 508 U.S. at 56 (ellipses in original) (internal citation omitted).

122. See id. at 59 ("Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.").

123. The Ninth Circuit, for example, has invoked *Noerr-Pennington* as First Amendment doctrine, and applied the two-part *PRE* test to claims of retaliation under the federal Fair Housing Act. See, e.g., *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) ("*Noerr-Pennington* is a label for a form of First Amendment protection; to say that one does not have *Noerr-Pennington* immunity is to conclude that one's petitioning activity is unprotected by the First Amendment."). An exception is the Tenth Circuit, which in *Cardtoons L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889 (10th Cir. 2000) (en banc), noted that "[t]he logical dilemma in applying *Noerr-Pennington* outside of the antitrust context is that *Noerr*'s first rationale for immunity—an interpretation of the Sherman Act—is not present."
pointed out, a constitutional requirement that courts first determine that litigation is objectively baseless before penalizing it would conflict with numerous state torts, Federal Rule of Civil Procedure 11, and federal statutes with fee shifting provisions. For example, Federal Rule of Civil Procedure 11 ("Rule 11") requires, on penalty of sanction, that a plaintiff certify, before filing a complaint, that she has a proper motive and that her pleadings have legal and factual merit. The requirements of legal and factual merit and of proper motive are conjunctive, indicating that the filer must have a proper motive in addition to a non-frivolous case. Courts have split over the proper interpretation of Rule 11(b), with several circuits, most notably the Ninth, holding that a colorable complaint, regardless of the plaintiff's purpose, is not sanctionable under Rule 11, and others applying Rule 11 sanctions for improper purposes alone.

124. See, e.g., Andrews, Motive Restrictions, supra note 119, at 796-98 (concluding that, after PRE, Federal Rule of Civil Procedure 11(b)(1) violates the First Amendment, and that other procedural rules and torts, such as the inherent power of courts to sanction parties and the state tort of abuse of process, require judicial clarification); Gary Myers, Antitrust and First Amendment Implications of Professional Real Estate Investors, 51 WASH. & LEE L. REV. 1199, 1246-52 (1994) (arguing that PRE calls into question conventional application of abuse of process tort, Rule 11 and Federal Attorney Bad Faith Statute); Julie M. Spanbauer, The First Amendment Right to Petition Government for the Redress of Grievances: Cut From a Different Cloth, 21 HASTINGS CONST. L.Q. 15, 58-64 (1993) (arguing that the Petition Clause invalidates the reasonable inquiry prong of Rule 11); Note, A Petition Clause Analysis of Suits Against the Government: Implications for Rule 11 Sanctions, 106 HARV. L. REV. 1111 (1993) (arguing that suits against the government are deserving of heightened protection under the Petition Clause and a relaxation of Rule 11).

125. Rule 11(b) provides: "Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. CIV. P. 11(b) (emphasis added).

126. Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1991) (en banc). Townsend's reasoning, however, was not based on Petition Clause concerns. See id. See also Sussman v. Bank of Israel, 56 F.3d 450, 458-59 (2d Cir. 1995) (noting split over scope of Rule 11(b) and adopting the Townsend position).

be found to be objectively baseless before the improper purpose clause could be applied at all. Such a reading of the PRE standard would similarly jeopardize the state abuse of process tort, as well as many statutory fee shifting provisions.\textsuperscript{128}

\textbf{B. The Bill Johnson's Unfair Labor Practice Charge}

In \textit{Bill Johnson's Restaurants v. NLRB}, the Court developed a distinct doctrine on the relation between the right to court access and regulatory goals—in this case, federal labor law protections. Prior to \textit{BE&K Construction}, lower court interpretations of \textit{Bill Johnson’s} existed in relative harmony with \textit{Noerr–Pennington} case law. Indeed, some commentators took the different treatment of the misuse of the courts in the labor law and antitrust contexts as an indication that the \textit{Noerr–Pennington} line of cases was at most only partially grounded in the First Amendment.\textsuperscript{129} Like \textit{PRE}, \textit{Bill Johnson’s} was nominally grounded in statutory interpretation, and a body of lower court and Board case law developed alongside the \textit{PRE} antitrust and non–antitrust case law. \textit{Bill Johnson’s} differed from \textit{PRE} in several crucial respects: it grounded its decision in federalism concerns as well as the Petition Clause; it defined “objectively baseless” litigation in broader terms; it addressed the proper deference due to executive agencies in adopting regulatory standards impacting court access; and, most importantly, it allowed the penalizing of unsuccessful, as opposed to objectively baseless, suits.

\textit{Bill Johnson’s Restaurants} grew out of an organizing drive at a restaurant in Phoenix, Arizona.\textsuperscript{130} The restaurant owner fired a senior waitress, in retaliation for her efforts to organize a union at the site. Following her discharge, the waitress, Mryland Helton, led a picket of the restaurant, urging customers to boycott and distributing leaflets accusing the restaurant manager of sexual harassment and maintaining unsanitary working conditions.\textsuperscript{131} In reaction, the owners filed a state court suit against Helton and other picketers, alleging libel and that the picketers had harassed customers, blocked public ingress and egress, and created a threat to public safety. In addition to injunctive relief, the owners asked for $500,000 in

\textsuperscript{128} For example, in \textit{Pound Hill Corp. v. Perl}, 668 A.2d 1260, 1264 (R.I. 1996), the Rhode Island Supreme Court limited the state's abuse of process tort by applying the \textit{PRE} two–pronged test and requiring that the underlying suit have been objectively baseless. \textit{Cf.} Scott v. Hem, 216 F.3d 897, 913–15 (10th Cir. 2000). \textit{See also} Andrews, \textit{Motive Restrictions, supra} note 119, at 796–98.


\textsuperscript{130} \textit{Bill Johnson's Rests., Inc. v. NLRB}, 461 U.S. 731, 733 (1983).

\textsuperscript{131} \textit{Id.}
punitive damages.\textsuperscript{132} Helton, in return, filed a complaint with the NLRB, arguing that the suit was in retaliation for her exercise of protected § 7 rights.\textsuperscript{133} The Board agreed that the suit violated § 8(a)(1) of the NLRA and required that the owners withdraw their state court suit against Helton. The Board reasoned that the employer had acted with retaliatory animus from the fact that the employer had lacked a "reasonable basis for the filing of its lawsuit."\textsuperscript{134}

The Supreme Court began its discussion by recognizing that an employer's lawsuit could be a powerful tool of coercion and retaliation.\textsuperscript{135} Though it recognized the competing interests involved in adjudicating retaliatory suits against organizing activity, a unanimous Court ultimately held that "sensitiv[ity] to First Amendment values" and consideration of the states' interest in the "maintenance of domestic peace"\textsuperscript{136} required a finding that the Board's interpretation of the scope of § 8(a)(1) was untenable.\textsuperscript{137} Instead, the Court established two sets of standards to be used in Board adjudication of retaliatory lawsuit cases. The Court held that, "[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act."\textsuperscript{138} Thus, where the Board sought to \textit{enjoin} an ongoing lawsuit, the Court required a finding of "unreasonableness." Unreasonable suits, the Court held, were beyond the scope of the First Amendment and did not involve the federalism concern with allowing states to adjudicate matters relating to the health and well-being of their citizens.\textsuperscript{139} The Court continued by stating that:

\begin{quote}
[i]f the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further, and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief. In short, then, although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis.\textsuperscript{140}
\end{quote}

Where the employer lost on the merits, the Court reasoned, "the
employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) unfair labor practice.” In sum, Bill Johnson’s established two separate unfair labor practice tests. In order to enjoin an ongoing suit, the Board is required to show that the suit was “unreasonable.” If the Board so finds, it may apply its regular § 8(a)(1) jurisprudence to determine whether the suit was “retaliatory”—that is, whether it interfered with workers’ rights under § 7 of the NLRA. Where the suit was completed, and unsuccessful, Bill Johnson’s did not require a showing of “unreasonableness” and the Board could proceed directly to its regular § 8(a)(1) analysis.

Several aspects of the Court’s holding in Bill Johnson’s are worth noting, since they differed from PRE’s treatment of regulatory sanctioning of court petitioning.

First, the Bill Johnson’s Court’s conception of the First Amendment was narrower than that implied in PRE, encompassing only the right literally to access the Court, rather than to any particular subsequent treatment. Under Bill Johnson’s, completed, unsuccessful suits were considered to be beyond the scope of the Petition Clause. Therefore, when faced with such a suit, the Board was justified in applying its normal § 8(a)(1) jurisprudence in determining whether the employer’s litigation was retaliatory and thus an unfair labor practice. For example, the Board held that when an employer expressly sues workers or a union for engaging in protected conduct, retaliatory motive is established. This definition of “retaliation” stems directly from the Board’s larger body of § 8(a)(1) jurisprudence: as a general matter, where an employer takes action that is expressly targeted at protected activity, the Board will find a § 8(a)(1) violation. In adjudicating Bill Johnson’s charges, the Board has looked to other forms of circumstantial evidence of retaliatory intent common to § 8(a)(1) proceedings, such as whether the employer had made direct statements indicating anti-union animus; whether the employer committed independent, contemporaneous unfair labor practices; and the timing of the lawsuit in relation to the protected activity. The focus of the retaliatory intent inquiry under Bill Johnson’s was no different from that in other § 8(a)(1) charges: whether the employer intended to interfere with workers’ § 7 rights. Beginning with Bill Johnson’s itself, the Board also

141. Id. at 747.
equated a lack of merit in the employer's lawsuit with a finding that the lawsuit was brought for retaliatory purposes. The Supreme Court's decision in Bill Johnson's allowed that the Board could take the lack of merit in the employer's suit "into account in determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights." In other words, the lack of merit in the employer's lawsuit could be a factor in determining whether the lawsuit was retaliatory.

Some reviewing courts struggled with the relation between the Board's § 8(a)(1) jurisprudence and the Bill Johnson's charge. In Petrochem Insulation, Inc. v. NLRB, for example, the Board found that the employer's suit was retaliatory, based in part on the fact that the employer's suit was directed at protected union activity. The D.C. Circuit took issue with this retaliatory factor, claiming that the Board's reasoning had a tautological aspect, since "[e]very lawsuit seeking to recover damages caused by union activity is, by definition, filed 'in direct response' to that activity." According to the court, because a finding that the union's activity is protected under § 7 is a prerequisite to an unfair labor practice charge, equating the fact that the employer's lawsuit was targeted at that activity would eliminate the independent Bill Johnson's requirement that the suit be retaliatory. The court thus overlooked the fact that, under Bill Johnson's, a finding that an unsuccessful suit was brought for a retaliatory purpose was equivalent to a § 8(a)(1) violation. The Petrochem court's confusion over the relation between a Bill Johnson's charge against a completed,

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146. See Bill Johnson's Rests., Inc., 249 N.L.R.B. 155, 165 (1980) (finding retaliatory animus proven by the fact that the employer lacked "a reasonable basis upon which to assert" that its suit had merit).

147. Bill Johnson's, 461 U.S. at 747.

148. 240 F.3d 26, 32 (D.C. Cir. 2001) ("Challenging the second basis for the Board's finding, Petrochem argues that considering the loss of its suit as evidence of retaliatory motive collapses the first prong of the unfair labor practice analysis (lack of merit) into the second (retaliation). This is true, but also precisely what Bill Johnson's permits . . . .").

149. Id.

150. Cf. id. at 32. Because the D.C. Circuit and Board in Petrochem found other retaliatory factors to be present, neither directly addressed a situation in which lack of merit alone was found to show retaliatory intent.

151. In a subsequent NLRB proceeding, the Board took issue with the D.C. Circuit's analysis, referring specifically to its § 8(a)(1) precedent on direct evidence of retaliatory motive and correctly arguing that a similar approach was justified when the employer's action was not discharge of an employee but rather litigation against an employee. Webco Indus., Inc., 2001 N.L.R.B. LEXIS 1066 (2001). The Board reasoned:

An employer that wanted to retaliate against an employee for spearheading a union organizing drive could sue him on a pretext, say, that he embezzled company funds. If the suit proved baseless or meritless, the Board could find the suit unlawful if it found that the employer's real motive was to retaliate against the employee for his organizing activity. In that situation, the General Counsel would have to prove retaliatory motive, because the true motive would not be evident on the face of the complaint. However, when a suit explicitly complains of protected conduct, the employer has essentially admitted retaliatory motive.

Id. at *19-20.
unsuccessful suit and a § 8(a)(1) violation was a prelude to the Supreme Court’s approach to the issue in *BE&K Construction*.

Second, the definition of “unreasonable” litigation adopted by the Court in *Bill Johnson’s* differed from the definition of “baseless litigation” later applied by the Court in *PRE*. In defining the permissible reasonable basis inquiry, the *Bill Johnson’s* Court stated that:

> [a]lthough the Board’s reasonable-basis inquiry need not be limited to the bare pleadings, if there is a genuine issue of material fact that turns on the credibility of a witness or on the proper inferences to be drawn from undisputed facts, it cannot, in our view, be concluded that the suit should be enjoined.\(^{152}\)

This test, the Court continued, was the same as that used for judging motions for summary judgment under Federal Rule of Civil Procedure 56 and the “reasonable jury” rule applied on motions for directed verdict.\(^{153}\) The Court further indicated that the summary judgment standard for “reasonable basis” should apply where the state plaintiff’s case turned mixed questions of fact and law.\(^{154}\) Unsurprisingly, lower courts following *Bill Johnson’s* have been much more likely to find that a suit lacked reasonable basis than in the antitrust context.\(^{155}\)

In sum, prior to *BE&K Construction* the Supreme Court developed two distinct lines of precedent dealing with the interplay of regulatory goals and the right to petition. In the *Noerr–Pennington* cases, culminating in *PRE*, the Court immunized legislative, executive and judicial petitioning from antitrust liability, except where the petitioning could be shown to be a “sham.” In *Bill Johnson’s*, the Court established standards governing the NLRB’s authority to enjoin and sanction retaliatory employer lawsuits. The two lines of cases adopted different standards for determining whether a lawsuit was sufficiently “unreasonable” or “baseless” to be sanctioned under the regulatory regime in question. The two lines of cases also differed on whether unsuccessful, as opposed to “unreasonable” or “baseless,” litigation could be sanctioned. However, commentators\(^{156}\) and those courts that addressed the issue\(^{157}\) saw the divergent approaches taken in the *Noerr–Pennington* line of cases and in *Bill Johnson’s* as indication that the policy differences between the two contexts allowed for different

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152. 461 U.S. at 744–45.
153. Id. at 745 n.11.
154. See id. at 746 (“Just as the Board must refrain from deciding genuinely disputed material factual issues with respect to a state suit, it likewise must not deprive a litigant of his right to have genuine state-law legal questions decided by the state judiciary.”).
157. See Scott v. Hern, 216 F.3d 897, 914 n.9 (10th Cir. 2000); White v. Lee, 227 F.3d 1214, 1235–37 (9th Cir. 2000).
sets of standards. Prior to *BE&K Construction*, reviewing courts had unanimously reconciled the *Bill Johnson*'s cases with *PRE*. It was therefore somewhat surprising that the Court granted certiorari in *BE&K Construction*.

### III. *BE&K Construction*

The Supreme Court's decision in *BE&K Construction* was a masterpiece of caution. The Supreme Court held against the Board on narrow grounds, while leaving open the possibility that a broader revision of post-*Bill Johnson*'s jurisprudence would follow. Thus, it is not surprising that the case was unanimous with regard to result, with the usual 5–4 conservative/liberal split occurring over the broader meaning of the case. Justice O'Connor's majority opinion was crafted to leave open as much room for future revision of the Board's standard as possible and to avoid limitation of courts' own ability to impose sanctions on illegitimate lawsuits and tactics. The majority dismissed the *Bill Johnson*'s framework governing completed lawsuits as dicta and refocused the Board's retaliatory intent inquiry. Justice Scalia's concurring opinion maintained that the Court would, at a future date, import the *PRE* two-pronged standard for sham litigation into the labor law context. Justice Breyer's concurring opinion stressed the limited scope of the majority's holding, claiming that the majority had simply invalidated several of the evidentiary tools upon which the Board had relied in finding retaliatory intent. The elliptical nature of the majority's holding necessitates a detailed analysis of the opinion.

#### A. Background

The suit underlying *BE&K Construction*, as described above, involved BE&K's claim that the Contra Costa County Building and Construction Trades Council and several local unions had violated the secondary boycott provisions of the NLRA and the Sherman Act by filing automatic protests to BE&K's permits, lobbying for a toxic waste ordinance covering BE&K, and suing the company for environmental law violations. BE&K's initial claim pled only the secondary boycott claim. The district court agreed

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158. *See BE&K Constr. Co. v. NLRB*, 246 F.3d 619, 629 (6th Cir. 2001); *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 31–32 (D.C. Cir. 2001); *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1088 (9th Cir. 1995); *Johnson & Hardin Co. v. NLRB*, 49 F.3d 237, 243 (6th Cir. 1995).


with the unions that their petitioning activities were protected under the First Amendment and entered summary judgment on the first complaint. When the unions’ lawyers informed BE&K’s counsel that its claim was frivolous, since the unions’ actions were protected by the First Amendment, BE&K’s counsel responded that he had been instructed to “stop [the union’s] conduct” and thus had filed a “novel” lawsuit. Subsequently, BE&K amended its complaint, including claims similar to those dismissed by the district court and alleging, for the first time, violations of § 1 and § 2 of the Sherman Act. The district court dismissed this second complaint, saying that it improperly restated several claims on which summary judgment had been granted. BE&K then filed a second amended complaint with the district court, restating its antitrust claim. The district court imposed Rule 11 sanctions on BE&K for continuing to allege claims that had been dismissed, but allowed limited discovery on the antitrust claim. Following discovery, the district court granted summary judgment on the antitrust claim and BE&K voluntarily dismissed the remainder of its claims. On appeal, the Ninth Circuit upheld the lower court in dismissing BE&K’s antitrust claim against the unions, but reversed the lower court on the sanctions.

The unions subsequently filed a Bill Johnson’s charge, alleging that BE&K’s suit had been retaliatory. The Board found that the unions’ petitioning activities had been protected under § 7 and that BE&K’s suit, since it had ultimately been unsuccessful, was without merit. In finding that the BE&K suit was also “retaliatory,” and was therefore an unfair labor practice, the Board cited three factors. First, the Board found that BE&K’s suit “was, by its terms, directed at protected conduct,” which under Board precedent, meant that it was retaliatory. Next, the Board noted that in

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161. USS-POSCO, 692 F.Supp. at 1169–70.
166. USS–POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 800, 804 (9th Cir. 1994).
168. USS-POSCO, 31 F.3d at 805.
169. Id. at 811–12. BE&K claimed that it was required to replead the dismissed claims in order to preserve them for appeal. Although BE&K could find no legal authority supporting such a requirement when the amended complaint was filed after summary judgment, as opposed to on a motion to dismiss, the appellate court accepted their claim to a “good faith belief” in this interpretation of the law. Id.
171. Id. at 726. The Board further argued that BE&K had admitted that its suit was filed
challenging the unions' state court lawsuit, in which a number of unions had sought to enforce environmental regulations against the company, BE&K had named as defendants several unions that had not, in fact, taken part in the lawsuit. Finally, the Board held that, "[t]he reception of the Respondent's suit at the hands of the federal courts is still further evidence of retaliatory motive." Having found BE&K's suit to be a violation of § 8(a)(1) of the NLRA, the Board awarded the unions attorneys fees and litigation costs.

On appeal, the Sixth Circuit enforced the order, although it did not rely solely on the Board's cited retaliatory factors. As in Petrochem v. NLRB, the employer argued that the Board had impermissibly conflated lack of success with retaliatory intent. While the court expressed concern that relying solely on lack of merit might be problematic, it noted that there was other circumstantial evidence that could have led the Board to find the employer had acted in retaliation. To the Board's stated reasons for finding retaliatory motive, the court added BE&K's repleading of dismissed claims and the treble damages award sought by the employer. BE&K petitioned for certiorari.

B. Distinguishing Bill Johnson's

Justice O'Connor's majority opinion began by characterizing the Bill Johnson's approach to completed lawsuits as dicta. According to the BE&K Court, the issue of completed lawsuits had not been before the Court in Bill Johnson's, and thus anything that case had to say about the proper standards for sanctioning completed lawsuits was non-binding. In response to the NLRB's argument that the Court in Bill Johnson's had in fact remanded several completed lawsuits for further adjudication based on the standards that it established, the majority opinion replied that the Bill Johnson's Court did not expressly order the Board to apply the new

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172. Id. at 727.
173. Id.
175. See supra, notes 148 to 151 & accompanying text.
177. Id. at 630.
178. BE&K Constr. Co. v. NLRB, 536 U.S. 516, 527–28 (2002) ("In Bill Johnson's, however, the issue before the Court was whether the Board could enjoin an ongoing state lawsuit without finding that the suit lacked a reasonable basis in law or fact. To resolve that issue, we had no actual need to decide whether the Board could declare unlawful reasonably based suits that were ultimately unsuccessful.") (internal citation omitted).
Having cleared away the established Bill Johnson's framework for adjudicating completed lawsuits, the majority could set about creating a new doctrine. The characterization of the Bill Johnson's completed lawsuit framework as dicta, however, allowed the majority to make two further interpretive moves discussed in more detail below: recognizing First Amendment value in completed, unsuccessful lawsuits and reframing Board "retaliation" analysis from its traditional § 8(a)(1) test to a test for "subjectively genuine" intent.

C. Context-Specific First Amendment Analysis

Early in its discussion of the legal merits, the Court framed the issues in pure First Amendment terms, indicating that the PRE two-tier standard—requiring that a sanctioned suit be both objectively baseless and subjectively non-genuine—might be applied in the labor law context. Yet, the Court did not, in the end, extend the PRE test to the labor law context, and instead engaged in a context-specific analysis of the scope of the Petition Clause.

The NLRB argued that the significant procedural differences between the NLRA and antitrust law merited treating the question of court access in the two settings differently, and the Court agreed. The Board argued that while the PRE standard was necessary to balance the risk of anti-competitive lawsuits against the potential chilling effect on petitioning that might be caused by "the treble damages remedy and other distinct features of antitrust litigation," the same level of protection was not necessary in the labor law context, since enforcement of the NLRA requires the Board's General Counsel to authorize the issuance of a complaint, Board procedures themselves involve little pre-hearing discovery, and sanctions are limited to restoring the pre-violation status quo (i.e., the award of attorneys fees). While the Court saw merit in treating the two contexts differently, it stated that "[a]t most, these arguments demonstrate that the threat of an antitrust suit may pose a greater burden on petitioning than the threat of NLRA adjudication. This does not mean the burdens imposed by the NLRA raise

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179. Id. at 528.
180. The majority's presentation of the Bill Johnson's completed lawsuit framework as dicta was clearly wrong. As described above, Bill Johnson's was written with a basic assumption that the Board would retain discretion to determine both whether an employer's suit met the reasonable basis standard and whether it was retaliatory. Because completed, unsuccessful litigation was held to have no First Amendment value, "retaliatory" was understood by the Bill Johnson's Court to simply mean "violating § 8(a)(1)," and thus the Board had particular discretion to make this determination. Thus, the Bill Johnson's Court's statement that "on remand the Board may reinstate its finding that petitioner acted unlawfully... if the Board adheres to its previous finding that the suit was filed for a retaliatory purpose" was not an expression of equivocation over the proper standard to be imposed, but rather an expression of deference to the Board. See Bill Johnson's Rests. v. NLRB, 461 U.S. 731, 749 (1983).
no First Amendment concerns.\textsuperscript{182}

The Court’s acceptance that the proper standard for penalizing the use of courts under antitrust and labor laws must reflect the different burdens in those fields contained an important recognition that any First Amendment analysis of the issue had to be context–specific. A simple adoption of the \textit{PRE} standard would have signaled that there was necessarily a single, unified Petition Clause standard for penalizing court access, as many lower courts had held since \textit{PRE}. The Court’s acknowledgment of the context–specific nature of Petition Clause analysis calls into question lower courts’ application of the \textit{PRE} standard to areas of law other than antitrust without further analysis of the context in which it is being applied.

Although the Court acknowledged that the procedural and remedial differences between the antitrust and labor contexts demanded an isolation of the specific burdens imposed on petitioning under the NLRA, it narrowed its analysis of the burden imposed to the Board’s “finding of illegality,” rather than the actual penalties imposed.\textsuperscript{183} When the Board declares that a lawsuit is an unfair labor practice it does two things. It makes a finding of illegality—i.e., that the employer’s suit violated federal labor law—and it imposes particular penalties, such as attorney’s fees. Although the Board required BE&K to cease and desist from bringing similar lawsuits, post a notice stating that it had violated the law, and pay the unions’ attorney’s fees, the Court argued that because it had not granted certiorari on the validity of any of these penalties, those specific burdens were not before the Court.\textsuperscript{184} Instead, the Court focused solely on the fact that the Board had declared BE&K’s suit to have been illegal under federal labor law. Having recognized that the antitrust and labor contexts impose very different burdens on petitioning, the Court relieved itself of the responsibility of actually analyzing how such burdens affect the standards to be followed in those respective areas of law. Acknowledgment of the relatively light practical burdens imposed on labor law violators (as compared with the potential treble damages of antitrust violations) would have highlighted the differences between the labor law and antitrust contexts. The Court’s narrow focus on the Board’s finding of illegality was quite artificial. The Court’s decision not to grant certiorari on the propriety of the Board’s authority to award attorney’s fees related to an entirely different issue of law than the standards for restricting petitioning mandated by the First Amendment.\textsuperscript{185}

\textsuperscript{182. Id. at 529.}
\textsuperscript{183. See id. at 529–30.}
\textsuperscript{184. Id. at 529.}
\textsuperscript{185. BE&K petitioned for certiorari on the issue of whether the NLRB is authorized to award attorney’s fees for Bill Johnson’s violations. See BE&K Constr. Co. v. NLRB, 536 U.S. 516 (2002), Petition for Writ of Certiorari, No. 01–518, 2001 WL 34092013 (Sept. 25, 2001). However, the Court}
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D. Petition Clause Value in Unsuccessful Lawsuits

Having found that the burden imposed on petitioning by the Board’s determination that an employer’s suit violated § 8(a)(1) was the finding of illegality itself, the Court proceeded to analyze the protection that the Petition Clause provides for unsuccessful litigation. The Court broke with Bill Johnson’s in holding that even unsuccessful lawsuits have value under the Petition Clause.

As noted above, the Bill Johnson’s Court’s interpretation of the Petition Clause was narrow, encompassing a right of access to the courts for the parties involved in the dispute and reserving the core protection of the First Amendment for successful suits. Thus, when its state lawsuit was completed, the employer had “had its day in court” and the Board could proceed to adjudicate its § 8(a)(1) case. Bill Johnson’s also analogized baseless lawsuits to “false statements,” which are not immunized by the First Amendment’s Speech Clause. What this analogy neglected, the BE&K Court argued, was that under the First Amendment, “we protect some falsehood in order to protect speech that matters.” A similar doctrine of “breathing space,” the Court continued, was necessary in the context of the Petition Clause, so that even some baseless lawsuits deserve protection, in order not to chill potential litigants from bringing their cases to court. In the case of unsuccessful, as opposed to baseless, litigation, the First Amendment concerns are even greater. According to the BE&K Court, such cases include much genuine petitioning and serve to advance some First Amendment interests, such as the “public airing of disputed facts” and the promotion of the “evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around.”

The Court concluded that the Petition Clause interests declined to address this issue, limiting the grant of certiorari to the following question: “Did the Court of Appeals err in holding that under Bill Johnson’s Restaurants, Inc. v. NLRB, the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.?” See 534 U.S. 1074 (2002) (internal citations omitted). Employers have claimed that under the Supreme Court’s holding in Summit Valley Industries v. United Bhd. of Carpenters & Joiners Local 112, 456 U.S. 717 (1982), Board has no authority under Bill Johnson’s to order reimbursement to unions because doing so would contravene the “American Rule” that parties to legal disputes pay their own costs. Circuit courts have consistently rejected this argument, reasoning that an award of attorneys fees is appropriate where the employer suit is unsuccessful and retaliatory, not because the employer did not prevail in its district court litigation, but because it was the employer’s lawsuit itself that was unlawful under the NLRA. See, e.g., SEIU Local 32 B–32J v. NLRB, 68 F.3d 490, 496 (D.C. Cir. 1995); Petrochem Insulation Inc. v. NLRB, 240 F.3d 26, 35 (D.C. Cir. 2001).

186. Bill Johnson’s, 461 U.S. at 747.
187. Id. at 743.
189. Id. at 532.
embodied in unsuccessful litigation, as well as the possibility that sanctioning such litigation could "chill" other "genuine" litigation, meant that such litigation deserved some protection under the Petition Clause. Having so concluded, the Court addressed whether the Board's approach to completed, unsuccessful suits offered sufficient protection.

E. BE&K Construction's Holding

Much of the confusion over BE&K Construction has been over its actual holding, which, in effect, told the Board what it could not do without clearly setting forth what it could do. BE&K's holding can be stated in this way: the NLRB may no longer hold an employer's unsuccessful lawsuit to be an unfair labor practice by simply applying its traditional § 8(a)(1) jurisprudence, but instead must determine whether the employer's suit was "subjectively genuine."

The Court first narrowed the scope of the issue presented from the validity of the Bill Johnson's completed suit test in general to the validity of the Board's interpretation of retaliatory motive. The Court did not question the Board's ability to sanction employer lawsuits that are unsuccessful, as opposed to "baseless" or "unreasonable." Since the Court had determined that unsuccessful litigation embodied at least some First Amendment values, the issue became whether the Board's "retaliation" standard sufficiently protected such litigation.

The Court asserted that the problem with the Board (and Bill Johnson's) definition of retaliation in the context of a completed lawsuit was that it "broadly covers a substantial amount of genuine petitioning." Thus, an employer could file a suit to stop union activity that it reasonably believed was illegal under federal or state law, even though the conduct was protected under the NLRA. "If such a belief is both subjectively genuine and objectively reasonable," the Court argued, "then declaring the resulting suit illegal affects genuine petitioning." In so stating, the Court changed not just the types of evidence that the Board could consider in determining a lawsuit to be retaliatory, but the focus of the inquiry itself. In other words, the Court shifted the focus of the subjective motive determination from "retaliation" within the meaning of § 8(a)(1) to something akin to the improper motive test of its Noerr-Pennington jurisprudence. Thus, the Court concluded, "[a]s long as a plaintiff's purpose is to stop conduct he

190. Id. at 533 ("Because the Board confines its penalties to unsuccessful suits brought with a retaliatory motive, however, we must also consider the significance of that particular limitation, which is fairly included within the question presented.").
191. Id.
192. Id. at 533–34.
193. Justice Breyer, writing in concurrence, argued that this was all that the Court had done. See id. at 538–39 (Breyer, J., concurring).
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reasonably believes is illegal, petitioning is genuine both objectively and subjectively. Rather than affirmatively setting forth an evidentiary test for determining whether litigation is "subjectively genuine," however, the Court avoided the "difficult constitutional issue" of whether the Board's sanctioning of unsuccessful litigation under its traditional § 8(a)(1) jurisprudence conflicted with the Petition Clause and framed its holding solely as a statutory invalidation of the Board's definition of "retaliation."

In concluding the opinion, the Court offered a series of disclaimers. The Court repeated its claim that "we need not decide what our dicta in Bill Johnson's may have meant by 'retaliation.'" The Court also stated that "[w]e do not decide whether the Board may declare unlawful any unsuccessful but reasonably based suits that would not have been brought but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity . . ." In other words, the Court did not address the authority of the Board to sanction unsuccessful, as opposed to "objectively unreasonable" lawsuits, but only the finding of subjective intent required to sanction such suits.

IV. ASSESSING PROTECTIONS AGAINST EMPLOYER LAWSUITS AFTER BE&K CONSTRUCTION

Federal labor law continues to provide significant protection against illegitimate employer suits. BE&K Construction did not import the PRE test for "sham litigation" into the labor law context. Doing so would

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194. Id. at 534.
195. The Court held:

Because there is nothing in the statutory text indicating that § 158(a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, we decline to do so. Because the Board's standard for imposing liability under the NLRA allows it to penalize such suits, its standard is thus invalid.

Id. at 536.
196. Id. at 537.
197. Id. at 536–37
198. In its final disclaimer, the Court sought to insulate Rule 11 and statutory fee-shifting provisions from the implications of its First Amendment analysis. The Court stated that nothing in its holding "should be read to question the validity of common litigation sanctions imposed by the courts themselves—such as those authorized under Rule 11 of the Federal Rules of Civil Procedure—or the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff." Id. at 537. Justice Scalia, whose concurring opinion stated that PRE would, in the future, be extended to unfair labor practice cases, was also mindful of the confusion over the validity of Rule 11 and other motive-based access rules following PRE. See id. at 538 (Scalia, J., concurring) ("I am able . . . to join the Court's opinion in full—including its carefully circumscribed statement that 'nothing in our holding today should be read to question the validity of common litigations imposed by courts themselves'.").
199. Even Justice Scalia, who voiced the strongest concern with the Board's role in sanctioning employer lawsuits, did not believe that the PRE standard must now be applied by the Board in § 8(a)(1)
have greatly restricted the type of litigation that could be sanctioned by the Board. However, because BE&K Construction avoided the constitutional issues that it had raised and because it framed its holding in the negative, it did not expressly foreclose adopting such a standard in the future. In other words, BE&K Construction held on statutory grounds that the Board may not find unsuccessful, subjectively genuine litigation to violate § 8(a)(1). The case did not expressly hold, however, that the Board may, within the bounds of the First Amendment, find unsuccessful, subjectively non-genuine litigation to violate § 8(a)(1). Thus, a constitutional case remains to be made for the Board’s continued authority to sanction unsuccessful employer suits that are motivated by a desire to use the court process to punish unions and workers.

This section sets forth this constitutional case, analogizing, as the Court has done, constitutional analysis under the Petition Clause to that of the Speech Clause. After concluding that Justice Scalia’s case for extending the PRE test for “sham litigation” to the labor law context is unpersuasive, the section builds on the analysis set forth by the BE&K Construction majority. Although the majority held that unsuccessful suits promote some Petition Clause values, it did not address whether these values are also advanced where unsuccessful litigation is brought for a “subjectively non-genuine” reason, such as imposing court costs on a union. Unsuccessful suits brought for illegitimate reasons forward few of the Petition Clause values identified by the Court and chill the exercise of the countervailing expressive rights of workers and their unions. Such suits are therefore not deserving of the “core” protection of the Petition Clause and do not require “breathing room” protection to protect suits that are within the core of the Petition Clause. Therefore, the Board should continue to adjudicate unsuccessful, non-genuine employer suits under the framework established by Bill Johnson’s and modified by BE&K Construction. This section also argues that BE&K Construction introduces a new type of suit that may be sanctioned by the Board—completed suits

200. The precedential significance of statutory cases decided by invoking the avoidance canon is a matter of some debate. Thus, Frederick Schauer argues that even where the Court has invoked the avoidance canon, the Court has still made constitutional law by upholding the constitutionality of the statutory construction that it adopts as the result of the canon. See Frederick Schauer, Ashwander Revisited, 1995 Sup. Ct. Rev. 71, 86–87. On the other hand, William Kelley has taken issue with this point, arguing that the avoidance canon does not actually litigated, in a subsequent case, the parties are free to argue “that the statutory construction that the Court earlier adopted . . . itself violates the constitution. The Court has long held that an issue not raised, even if a necessary premise underlying the Court’s decision, is not formally decided until it is actually controverted in the next case.” William K. Kelley, Avoiding Constitutional Questions as a Three-branch Problem, 86 Cornell L. Rev. 831, 864 (2001). In BE&K Construction, as Justice Scalia points out in his concurrence, the Court seemed to use the avoidance canon to tread as lightly as possible in an area of the law with little constitutional precedent. The Court’s point was not to close the First Amendment issues that it raised, but to leave them open.
that are "objectively unreasonable," as opposed to merely unsuccessful. Such suits are even less deserving of First Amendment protection than unsuccessful suits. Finally, this section assesses the effect of BE&K Construction on the types of evidence that the Board may use to determine whether an employer has brought a lawsuit for subjectively non-genuine reasons.

A. Board and Lower Court Interpretation of BE&K Construction

BE&K Construction's elliptical holding is likely to create considerable interpretive problems among lower courts and administrative agencies. The decision left open the future course of Petition Clause jurisprudence in general, and Board–centered protections against retaliatory lawsuits in particular. Some courts have already interpreted BE&K Construction as having adopted the PRE standard, a position that is clearly at odds with the Court's narrow holding in the case. Other courts have taken BE&K Construction as the new Petition Clause standard, ignoring the Court's invocation of the constitutional avoidance canon and its acknowledgement of the particularities of the labor law context.

Cases applying BE&K Construction are only beginning to wind their way through Board adjudication and federal court review. The D.C. Circuit, in dicta, has interpreted BE&K Construction as holding that "the Board may not find that a completed, unsuccessful lawsuit constituted an unfair labor practice where the suit was objectively reasonable and filed with the purpose of receiving the relief requested." The NLRB, as of this writing, has yet to address BE&K Construction on remand or similar issues raised in other cases. The NLRB General Counsel, however, has issued a report summarizing his office's position on BE&K Construction claims and setting forth a two-step process for arguing such claims before the Board.

First, the General Counsel takes the position that BE&K Construction


202. Thus, in Sonja Sahli v. Bull HN Information Sys., Inc., 437 Mass. 696 (2002), the Supreme Court of Massachusetts was called on to determine "whether the filing of a lawsuit by a corporate employer seeking a declaration of its rights... under a contract entered into with one of its employees can constitute an act violative of the retaliation and interference provisions of [Massachusetts state law]." Id. at 700. The court applied BE&K Construction as the Petition Clause standard, holding that such an action could not violate these provisions where "the lawsuit has a legitimate basis in law and fact, absent evidence that the employer's purpose is other than to stop conduct it reasonably believes violates the terms of the contract." Id. at 704–05. Since the "only evidence of retaliatory purpose was the filing of the lawsuit itself," the court dismissed the action. Id. at 707.


requires that the Board make a determination of whether an employer's completed lawsuit was "baseless." This determination is made under the Bill Johnson's standard, although the General Counsel argues that this standard is broader than simply whether the claims survive summary judgment. According to the General Counsel, determination of whether the completed lawsuit was "unreasonable" determines the retaliation test that the Board should apply. Thus, if the underlying lawsuit was reasonable, the Board is required to determine whether the suit would not have been filed "but for" a motive to impose costs on the union. If the suit is determined to have been unreasonable or "baseless," following the Bill Johnson's definition of "baselessness," then the Board may follow its traditional approach to determining retaliation, looking to the factors developed in the Board's Bill Johnson's jurisprudence. To date, the General Counsel has not had success forwarding this approach before administrative law judges. Finally, the General Counsel has not yet taken a position on BE&K Construction's effect on the Board's approach to cases preempted by the NLRA. As this Article develops below, the General Counsel's interpretation, while valuable in some respects, misinterprets Bill Johnson's Restaurants and BE&K Construction in several regards.

Before turning to BE&K Construction's majority opinion, however, it is necessary to address Justice Scalia's case for extending the PRE "sham litigation" test to the labor law context.

B. Agency Deference and the Professional Real Estate Investors Standard

For Scalia, writing in concurrence for himself and Justice Thomas, the implication of the majority holding is that "in a future appropriate case, the Court will construe the NLRA in the same way as the Sherman Act: to prohibit only lawsuits that are both objectively baseless and subjectively intended to abuse the process." For Scalia, however, this result is mandated not solely by a strict reading of the scope of the Petition Clause, but also by a concern for separation of powers. Rather than conceding that the treble damages and extensive litigation costs involved in a privately-

205. Id. at *3 ("The majority in BE&K indicated that a reasonably based lawsuit could not be unlawful unless, at a minimum, the suit would not have been filed but for a motive of imposing the costs of litigation.").


207. General Counsel Report, supra note 204, at *2.

208. Id. at *5.


initiated antitrust suit raise more significant Petition Clause concerns than an unfair labor practice case before the Board, Scalia cited the "most important difference of all" between the Sherman Act and the NLRA: in the latter, an executive agency, rather than an Article III court, is entitled to make the factual determination of improper motive. Thus, for Scalia, the difficult question avoided by the majority is properly, "whether an executive agency can be given the power to punish a reasonably based suit filed in an Article III court whenever it concludes—insulated from de novo review by the substantial evidence standard of 29 U.S.C. §§ 160(e), (f), that the complainant had one motive rather than another." The crucial distinction between the antitrust and labor law contexts, for Scalia, is the nature of the entity making the factual findings that determine whether a litigant will be punished for filing an objectively reasonable lawsuit. In the case of the Sherman Act, such a factual determination will be made by an Article III court, and, according to Scalia, "even with that protection, we thought the right of access to Article III courts too much imperiled." In the case of NLRA adjudication, such a determination will be made by a non–Article III executive agency, subject only to deferential review for substantial evidence by a court of appeals.

From this, Scalia draws two distinct conclusions. First, allowing the NLRB to make the factual determinations underlying a finding of improper motive "makes resort to the courts a risky venture, dependent upon the findings of a body that does not have the independence prescribed for Article III courts." This is essentially an empirical claim on the relative burden imposed on petitioning in the antitrust and labor law settings and, as such, it is subject to empirical challenge, as Justice Breyer's concurrence suggests when it characterizes the NLRB as "a congressionally authorized and politically accountable administrative agency that acts as a screen for meritless complaints." Second, Scalia argues that "[i]t would be extraordinary to interpret a statute which is silent on this subject to intrude upon the courts' ability to decide for themselves which postulants for their assistance should be punished." Although couched in terms of the Petition Clause, this is a separation of powers argument: in addition to the First Amendment issues raised by the majority, Scalia believes that the sanctioning of objectively reasonable litigation by an executive agency intrudes on the constitutional role of Article III courts. Scalia does not make clear which of these two concerns is paramount and, like the majority,

212. Id. at 538. Under the "substantial evidence standard," reviewing courts of appeals generally grant deference to the factual determinations of the Board. See 29 U.S.C. §§ 160(e), (f) (2004).
214. Id.
215. Id. at 542 (Breyer, J., concurring).
216. Id. at 538 (Scalia, J., concurring).
he pulls back from a final constitutional pronouncement on the separation of powers concern.

Scalia’s argument runs into three central problems. First, both as an empirical and as a constitutional matter, it could apply only to employer litigation brought before federal, Article III judges. Empirically, it is hard to see why a federal administrative law judge should be seen as less independent or more biased than an elected state judge. Constitutionally, the separation of powers arguments that Scalia raises do not apply where the underlying litigation is brought in state court, and potential federalism concerns with having a federal agency sanction access to state court are not analogous. The Board stands in a different relation to state courts than it does to Article III courts, since federal labor law preempts much state law.

As the Bill Johnson’s Court recognized, the Supreme Court has upheld Board injunctions against state court suits that are preempted or that seek to by-pass the proscriptions of the NLRA.\textsuperscript{217} Since these suits are wholly within the NLRB’s domain, state courts can hardly be said to have more authority than the NLRB to punish parties that bring these suits. Bill Johnson’s recognized the exception to the generally broad preemption of state law claims by federal labor law for conduct “touching interests ‘deeply rooted in local feeling and responsibility.’”\textsuperscript{218} Bill Johnson’s thus held that “to the extent the Board asserts the right to declare the filing of a meritorious suit to be a violation of the Act, it runs headlong into the basic rationale of . . . cases in which we declined to infer a congressional intent to ignore the substantial state interest ‘in protecting the health and well-being of its citizens.’”\textsuperscript{219}

However, the Bill Johnson’s Court held that where a suit had been litigated to completion and had been unsuccessful, “the interest of the State in providing a forum for its citizens has been vindicated” and the Board was free to litigate the claim under § 8(a)(1).\textsuperscript{220} Following BE&K Construction, this statement must be construed as dictum, since the Court now holds even unsuccessful suits to have some Petition Clause value. However, its reasoning remains undisturbed. While federalism concerns require that the Board not lightly deny state court litigants a forum for bringing claims that are not preempted by federal labor law, once such a suit is completed, the need to enforce federal labor law stands on equal footing with the right of state courts to police access to the state court system. As the Bill Johnson’s Court put it, “[d]ual remedies are appropriate because a State has a substantial interest in deterring the filing of baseless litigation in its courts

\textsuperscript{217} See Bill Johnson’s Rests., Inc. v. NLRB, 461 U.S. 731, 738 n.5 (1983).
\textsuperscript{218} Id. at 741 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959)).
\textsuperscript{219} Id. at 742 (quoting Farmer v. Carpenters, 430 U.S. 290, 302–03 (1977)) (emphasis added).
\textsuperscript{220} Id. at 747.
and the Federal Government has an equally strong interest in enforcing the federal labor laws.\footnote{Id. at 747 n.14. Indeed, if bringing an unsuccessful lawsuit against a union is even arguably an unfair labor practice prohibited by the NLRA, then state courts may lack any power to punish the litigant, since states cannot add their own penalties for unfair labor practices. See Wis. Dept. of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 291 (1988).}

Second, if Scalia’s argument is based in an empirically-grounded claim about the independence of executive agencies, then it ignores the deference accorded to the NLRB and other executive agencies in adjudicating matters touching on First Amendment rights.\footnote{See infra, notes 226 to 232 & accompanying text.} Such deference drove much of the decision in Bill Johnson’s. Although it refused to grant deference to the Board’s interpretation of its statutory power to enjoin state lawsuits, the Bill Johnson’s Court granted the Board deference in determining the precise procedures for adjudicating whether the employer’s lawsuit lacked a reasonable basis.\footnote{Id. at 746.} For the Bill Johnson’s Court, this broad grant of authority to the Board was necessary “in light of the strong federal policy against deterring the exercise of employees’ collective rights.”\footnote{Id. at 746 n.12. Indeed, the Bill Johnson’s Court felt the protection of workers’ § 7 rights to be so important that, in accordance with Fed. R. Civ. P. 56(c), it placed the burden of proof on the employer to show that its state court litigation would survive summary judgment. See id.}

Although the standard for review of the Board’s “reasonable basis” determination has received inconsistent treatment in the lower courts,\footnote{The Seventh Circuit has indicated that substantial deference should be granted only to the Board’s retaliatory motive determination, but not to its conclusion that the employer’s lawsuit was baseless. See Geske & Sons v. NLRB, 103 F.3d 1366, 1379 (7th Cir. 1997); see also Johnson & Hardin Co. v. NLRB, 49 F.3d 237, 243 (3d Cir. 1995). In Vanguard Tours, however, the Second Circuit reviewed under the substantial evidence standard a Board finding that a retaliatory suit that the employer had withdrawn had not had a reasonable basis. See Vanguard Tours, Inc. v. NLRB, 981 F.2d 62, 66 (2d Cir. 1992); see also Int'l Longshoremen's & Warehousemen's Local 32 v. NLRB, 773 F.2d 1012, 1015 (9th Cir. 1985).} this should not obscure the fact that the Bill Johnson’s Court saw the Board as sufficiently independent and unbiased to establish standards for determining a state court lawsuit to be “unreasonable” and to apply such a standard in order to enforce a prior restraint on the employer’s state court lawsuit.

Scalia’s primary concern is with the relationship between the NLRB and Article III courts. Even in this regard, however, the Board and other executive agencies are on occasion granted deference to make factual determinations, subject to substantial evidence review, on matters touching directly on First Amendment rights. The Supreme Court, for example, has granted the Board authority to regulate employer speech in the context of representation elections. In NLRB v. Gissel Packing Co.,\footnote{395 U.S. 575 (1969).} the Court...
addressed a First Amendment challenge\textsuperscript{227} to a Board determination that an employer’s “coercive” campaign speech to its workers violated § 8(a)(1) of the Act and that its violation warranted setting aside the resulting election. In delineating the proper standards for balancing the employer’s rights under the First Amendment and the workers’ rights under § 7, the Court indicated that the Board should be granted deference by reviewing courts in its factual findings on whether the employer’s campaign speech was grounded in “objective fact” and thus protected by the First Amendment.\textsuperscript{228} Courts of appeals continue to review Board factual findings on employer campaign speech under substantial evidence review.\textsuperscript{229}

Supreme Court and lower court treatment of Board regulation of employer campaign speech in the face of First Amendment challenges is instructive in two regards. First, it demonstrates that even in areas touching on First Amendment rights, the Board’s administrative expertise in the field of industrial relations has been the guiding characterization, and the Board’s involvement has not raised any lack of independence or systematic bias concerns. Second, since the Court has rejected the notion that the Petition Clause is entitled to greater protection than other forms of First Amendment expression,\textsuperscript{230} it is hard to see why allowing deferential review of factual matters affecting rights under the Petition Clause should raise greater concerns than deferential review of matters affecting Speech Clause rights.\textsuperscript{231} Courts have taken a similar approach in other administrative law

\textsuperscript{227} The Court held that § 8(c) of the Act, enacted as part of the Taft–Hartley Act, “merely implements the First Amendment by requiring that the expression of ‘any views, argument, or opinion’ shall not be ‘evidence of an unfair labor practice,’ so long as such expression contains ‘no threat of reprisal or force or promise of benefit’ in violation of 8(a)(1).” \textit{Gissel}, 395 U.S. at 617 (citing 29 U.S.C. § 158(c) (2004)).

\textsuperscript{228} Thus, the Court stated that “[a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting,” and that “[i]n carrying out its duty to focus on the question: ‘What did the speaker intend and the listener understand?’, the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities.” \textit{Gissel}, 395 U.S. at 617, 619 (internal citation omitted).

\textsuperscript{229} See \textit{e.g.}, Contech Div., SPX Corp. v. NLRB, 164 F.3d 297, 307 (6th Cir. 1998). Even where enforcing courts have characterized the Board’s treatment of employer’s claims that their speech was protected under § 8(c) as mixed questions of fact and law, thus requiring \textit{de novo} review, many have applied the standard in a particularly deferential manner. See, \textit{e.g.}, Sheridan Manor Nursing Home, Inc. v. NLRB, 225 F.3d 248, 253 (2d Cir. 2000) (“The Board’s conclusion that Sheridan’s encouragement of employee objection and action was conduct ‘beyond’ mere expression of opinion and, thus, beyond the protection of § 8(c) was a reasonable one under the circumstances of this case, even if the Board’s application of fact to law was one over which reasonable people might disagree.”).


\textsuperscript{231} At least one court of appeals cited the latitude given the Board in balancing the First Amendment and § 7 rights to distinguish \textit{PRE} and \textit{Bill Johnson’s}. See \textit{White v. Lee}, 227 F.3d 1214, 1236–37 (9th Cir. 2000) (“The First Amendment rights of employers ‘in the context of [the] labor relations setting’ are limited to an extent that would rarely, if ever, be tolerated in other contexts.”) (quoting NLRB v. \textit{Gissel Packing Co.}, 395 U.S. 575, 617 (1969)).
contexts, such as FTC adjudication of deceptive advertising claims.\footnote{232}

Finally, even if there were valid separation of powers concerns with allowing the Board to make factual determinations as to whether an employer’s federal litigation was brought for improper purposes, the proper remedy would be to allow for independent review of such factual findings by courts of appeals considering enforcement of Board orders, not a reworking of the standards applied by the Board in the first instance. Independent appellate review of “constitutional facts” has been mandated in First Amendment cases reaching federal appellate courts from state courts and from federal district courts.\footnote{233} While federal courts have been less willing to extend the doctrine to federal agencies,\footnote{234} they have refused to do so primarily because of the nature of the First Amendment interests at stake. If concerns about bias at the NLRB or Article III court control over the development of Petition Clause jurisprudence were indeed justified, then it seems clear that requiring independent review in the enforcing court would be preferable to instituting a First Amendment-informed standard that does not adequately balance Petition Clause concerns against workers’ statutory rights under the NLRA.

In sum, Justice Scalia’s argument for extending the \textit{PRE} two-pronged test for sham litigation to the NLRA is unpersuasive and should not guide lower courts wrestling with the implications of \textit{BE&K Construction}. As a constitutional and empirical matter, Scalia’s argument is only applicable to

\footnote{232. For example, in upholding substantial evidence review of FTC determinations of deceptive advertising, the Seventh Circuit noted that “[w]hile it could be posited that it is counter-intuitive to grant more deference to the Commission than to courts, Commission findings are well-suited to deferential review because they may require resolution of ‘exceedingly complex and technical factual issues.’” Kraft, Inc. v. FTC, 970 F.2d 311, 317 (7th Cir. 1992) (quoting Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 645 (1985)).}

\footnote{233. Independent factual review of state cases involving the First Amendment was established in \textit{New York Times v. Sullivan}, in which the Court held that “[w]e must ‘make an independent examination of the whole record,’ so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.” 376 U.S. 254, 285 (1964) (quoting \textit{Edward v. South Carolina}, 372 U.S. 229, 235 (1963)) (internal citation omitted).}

\footnote{234. \textit{Bose Corp. v. Consumers Union of United States} held that, notwithstanding the clearly erroneous standard of Rule 52(a) for appellate review of actual malice determinations in defamation cases, “federal constitutional law” requires appellate courts to “exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.” 466 U.S. 485, 514 (1984). Lower courts interpreting \textit{Bose} have since extended it to require independent review of other First Amendment protections. \textit{See, e.g.}, \textit{Doe v. Small}, 934 F.2d 743, 752 n.9 (7th Cir. 1991) (applying \textit{Bose} to Establishment Clause); \textit{New Life Baptist Church Acad. v. Town of East Longmeadow}, 885 F.2d 940, 941-42 (1st Cir. 1989) (same).}

\footnote{235. Several circuits, for example, have refused to extend \textit{Bose} to Federal Trade Commission regulation of false advertising under §§ 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52 (2004). \textit{See Kraft, Inc.}, 970 F.2d at 316; \textit{FTC v. Brown & Williamson Tobacco Corp.}, 778 F.2d 35, 41 n.3 (D.C. Cir. 1985); \textit{Novartis Corp. v. FTC}, 223 F.3d 783, 787 n.4 (D.C. Cir. 2000). These decisions have been based primarily on language in \textit{Bose} itself indicating that due to its “durable” nature, commercial speech does not require independent review. \textit{See Kraft Inc.}, 970 F.2d at 316.}
claims brought in federal court. It ignores the deference granted the NLRB in other First Amendment areas concerning protection of § 7 rights. Even if Scalia raises valid separation of powers concerns, or a valid empirical claim about executive agency bias, the proper remedy would not be to apply the PRE test, but rather to require independent review of Board determination of improper motive.

C. Petition Clause Values, Breathing Room, and Labor Law

The constitutional case for continued Board adjudication and sanctioning of unsuccessful employer lawsuits builds on the *BE&K Construction* majority’s approach to the Petition Clause. Justice O’Connor’s majority opinion broke with *Bill Johnson*’s in finding that unsuccessful, but reasonable, litigation is of some First Amendment value. O’Connor also noted that even baseless, unsuccessful litigation may deserve “breathing room” protection under the Petition Clause in order to prevent the chilling of litigation that is protected. O’Connor thus indicated that Speech Clause doctrines, such as the “breathing room” doctrine, would be incorporated into Petition Clause analysis. However, because the case was ultimately decided as a matter of statutory interpretation, O’Connor’s analysis of the future application of Speech Clause doctrines to baseless or unsuccessful litigation remained undeveloped. Two issues are important in this regard. First, it remains unclear after *BE&K* what constitutes the “core” of protected litigation under the Court’s apparent new approach. Second, although the *BE&K* Court made clear that Petition Clause analysis in the antitrust and labor contexts would differ, it did not explain how the particularities of the labor law context affected its analysis.

Under the *New York Times v. Sullivan* line of cases invoked by both the *Bill Johnson’s* and *BE&K Construction* Courts, determination of the level of protection afforded to defamatory speech involves two steps. Courts first determine whether the speech is within the “core” First Amendment right and therefore that restrictions on such speech are subject to strict scrutiny. Courts determine whether particular forms of speech merit “core” protection by assessing the relation of the form of speech to

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237. The decision in *BE&K Construction* is not conclusive in this regard. For example, the majority may simply have been responding to the *Bill Johnson’s* Court’s analogy of baseless suits to false statements. However, given the majority’s subsequent discussion of the First Amendment value of unsuccessful litigation, the issue of the proper core and periphery of Petition Clause protection, as well as the scope of this protection, was clearly on the Court’s agenda. See Carol Rice Andrews, *After BE&K: The “Difficult Constitutional Question of Defining the First Amendment Right to Petition*, 39 Hou. L. Rev. 1299, 1333 (2003).
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the constitutional values embodied in the First Amendment. In the defamation context, false statements of fact are not considered to be within the core protection of the First Amendment, while opinions and true statements of fact are. Speech deserving of "core" protection is entitled to heightened scrutiny review. Speech not within the "core" protection of the First Amendment, while not subject to heightened scrutiny, may be entitled to "breathing room" protection in order to safeguard core speech. In Sullivan, the Court held that false and defamatory speech should be protected through the actual malice standard in order to provide "breathing room" to speech that is true. Assessment of whether such breathing room protection is necessary requires a restriction-by-restriction balancing of interests. The first issue that will confront courts deciding Petition Clause cases after BE&K Construction, then, will be whether the type of litigation involved warrants the core protection of the Petition Clause.

I. Petition Clause Values

The Supreme Court's explanation of the relationship between litigation and particular Petition Clause values has been minimal. Noerr, California Motor Transport, and PRE did not identify specific values that the Petition Clause was intended to support. However, Bill Johnson's and BE&K Construction cited several different Petition Clause values that must inform analysis of the scope of Petition Clause protections. These values can be divided into several groups. "Compensation for violated rights" and "the psychological benefits of vindication," cited by the Court in Bill Johnson's, are met only where litigation is successful. Since it is clear that successful litigation cannot be sanctioned as an unfair labor practice, these Petition Clause values are not analyzed further in this Article. Another set of Petition Clause values focuses on the relationship between the parties

239. For example, in Gertz v. Robert Welch, Inc., the Court found that false speech was not entitled to the core protection of the First Amendment, because it did not forward the identified values of the Speech Clause. 418 U.S. 323, 340 (1964) (false statements "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

240. Id. at 341.


242. Thus, in Gertz, the Court did not apply the actual malice standard to defamatory speech aimed at private persons, both because such speech is of lesser First Amendment value and because the state interest in protecting private persons, who have fewer means available to respond than public persons, is greater. See Gertz, 418 U.S. at 342–43.


and the court's legitimacy as arbiter of disputes. Both Bill Johnson's and BE&K Construction cited "the public airing of disputed facts" as a Petition Clause value, and the BE&K Court cited the "legitimacy of the courtroom as a designated alternative to force." Finally, BE&K Construction introduced two Petition Clause values that are focused not on individual parties' petitioning concerns, but instead on the role of court petitioning in communicating information to the government. In this regard, BE&K Construction stated that even unsuccessful litigation can "raise matters of public concern" and support "the development of legal theories that may not gain acceptance the first time around."

The BE&K Construction Court engaged in an analysis of the First Amendment value of both baseless and unsuccessful litigation, but its analysis was truncated. Having identified the First Amendment values embodied in unsuccessful petitioning, the Court limited its analysis to whether the Board's standard for sanctioning such suits was sufficiently protective. The Court held that the Board's use of a § 8(a)(1) standard for finding retaliatory intent was impermissible, since it included a significant amount of litigation that was objectively and subjectively genuine. The Court left open the logical next issue: the relation between the First Amendment values that it had identified and unsuccessful litigation that is subjectively non-genuine.

Unsuccessful suits that have a reasonable legal basis but are filed for a non-genuine purpose advance few of the Petition Clause values identified by the Court. The judiciary's legitimacy as an arbiter of disputes is not promoted when the court is used for an ulterior motive. Indeed, such suits serve to de-legitimate the judiciary, as the Supreme Court recognized in justifying the inherent power of courts to sanction litigants. Furthermore, there is only a tenuous connection between unsuccessful suits that are brought for an ulterior purpose and the Petition Clause goal of allowing parties to communicate matters of public concern. Indeed, it is not entirely clear what the Court meant by this First Amendment value. While a legislature or executive benefits from staying broadly informed of matters

246. BE&K Constr., 536 U.S. at 532.
247. Id. The Court has added other, more general, descriptions of the values embodied in the Petition Clause. See, e.g., McDonald v. Smith, 472 U.S. 479, 483 (1985) (executive petitions are "an important aspect of self-government"); United States v. Cruikshank, 92 U.S. 542, 552 (1875) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably... in respect to public affairs and to petition for a redress of grievances.").
249. Chambers v. NASCO, 501 U.S. 32, 46 (1991) ("[I]f a court finds 'that fraud has been practiced upon it, or that the very temple of justice has been defiled,' it may assess attorney's fees against the responsible party...") (quoting Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946)).
that may require action, a court’s interest in matters of public concern is limited to deciding the dispute before it. The BE&K Court may have meant that courts are a forum for voicing matters of public concern to the general public. However, other, more effective, fora exist for raising matters of public concern: the various public media, legislative petitioning, and demonstrations, among others. Given that such alternative fora exist, the value of lawsuits in bringing to light matters about which the public should be informed is a weak justification for protecting unsuccessful lawsuits generally, and particularly those brought for non–genuine reasons.

Of the Petition Clause values identified by the Court in BE&K, only the evolution of the law through the introduction of novel legal theories is plausibly promoted by unsuccessful suits that are reasonably–based but brought for non–genuine reasons. In the context of Rule 11 sanctions, courts and academic commentators have raised the danger that sanctioning those who bring frivolous lawsuits will “chill” the use of innovative legal theories. However, lawsuits brought for ulterior purposes will likely have little value as sources of novel legal theory. For example, an employer may choose a particular theory of law, such as antitrust, not because the employer is genuinely concerned that the legal theory should be expanded to cover the union activity in question, but rather because the extensive discovery and possibility of treble damages attendant to an antitrust claim will require the union to expend substantial resources in its defense. Goals centered on the process, rather than the outcome, of the case are likely to influence the legal theories chosen and the legal arguments made in ways that are detrimental to an ordered evolution of the law. The only Petition Clause value embodied by unsuccessful suits brought to impose costs on the defending union is therefore a relatively weak one. Whether the value that unsuccessful, non–genuine suits have in advancing the law is sufficient to justify including such lawsuits within the core protection of the Petition Clause, however, requires that the countervailing First Amendment rights of unions and workers also be assessed.

2. Retaliatory Lawsuits and Union Expressive Activity

All three of the BE&K opinions strongly indicated that the context in which litigation is brought will impact the type of protection required by the Petition Clause. Overlooked in all three opinions, however, is an
important procedural difference between antitrust claims against petitioning activity and § 8(a)(1) claims brought against employer lawsuits. In the antitrust context, the "sham litigation" doctrine serves as a defense against a claim or counterclaim charging that a prior court petition violated the antitrust law. Thus, there is only one expressive activity protected by the First Amendment involved: the competitor's original court petition. The interests underlying the sham petitioning doctrine—maintaining market competition and preventing artificial barriers to market entry—are not related to the values that the Court has identified with the Petition Clause. In the labor context, however, there are normally two expressive actions involved: the employer's court petition itself and a unions' or workers' own conduct. While employers can plausibly claim that unbounded authority to sanction lawsuits under federal labor law could chill legitimate suits, unions can argue that meritless suits brought against union organizing campaigns serve to chill workers' statutory rights under the NLRA and the constitutionally-protected conduct necessary for the exercise of these collective rights. Workers and union officials sued for defamation will be less likely to exercise their right to peaceably distribute handbills informing the public of the labor practices of a target employer. Unions sued under antitrust laws will be less likely to exercise their right to lobby legislatures and administrative bodies for laws beneficial to their members. At the heart of disputes over retaliatory suits in the labor context, unlike the antitrust context, are competing claims to the First Amendment.

a. Competing First Amendments

All of the rights guaranteed by the First Amendment are founded on a constitutional commitment to self-government. The autonomy of the individual is defended against government regulation of speech not simply because autonomy itself is a goal, but because autonomy is a necessary precursor to self-government. Yet, as those commentators working in

252. See, e.g., Garrison v. La., 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); Mills v. Ala., 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."). The idea of the First Amendment as a guarantee of self-government was most famously articulated by Alexander Meiklejohn. See generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22–27 (1948). See also Owen Fiss, Free Speech and Social Structure, 71 IOWA L. REV. 1405, 1408–09 (1986) [hereinafter Fiss, Social Structure].
the "public rights" First Amendment tradition have stressed, an exclusive focus on the autonomy of the individual against the state provides, in some contexts, a shallow view of self-government. Imbalances in economic resources and other forms of power, such as a lack of access to media outlets, can silence speakers as effectively as can government regulation. "Public rights" scholars maintain that constitutional guarantees of freedom from government regulation of expression can be inadequate to engender the "uninhibited, robust, and wide-open" debate that is necessary for democracy. Such scholars have advocated a limited role for government in regulating speech in order to promote free debate.

The inadequacy of a single-minded adherence to autonomy from government interference as the guiding principle of the First Amendment is especially profound in cases involving multiple claimants to First Amendment rights. In such situations, protecting the autonomy of one speaker can be detrimental to the autonomy of the other, and resolving the case in a way that promotes free and open debate is not a straightforward enterprise. While in some contexts the Supreme Court has avoided framing its analysis in terms of competing First Amendment rights, a number of First Amendment cases are premised on the fact that more than one party has a legitimate claim to First Amendment relief. The Court


255. See, e.g., Neuborne, supra note 253, at 1061–62 ("The prevailing conception of the First Amendment as a check on democracy leads to creation of a regulatory vacuum in which the ‘speaker’ may engage in privileged behavior free from government interference. Most of the time the privileged behavior reinforces democracy, but as with any powerful autonomy norm, private actors are free to operate in the regulatory dead space in ways that harm democracy.").

256. As Burt Neuborne states:

Generally, when an identifiable speaker wishes to speak and identifiable hearers wish to hear, First Amendment rights are at their apogee, because no matter whose autonomy one chooses to reinforce, speech is protected. Problems can emerge when the speaker wishes to engage in speech but hearers or targets wish the speaker to remain silent, as in situations involving hate speech or fighting words. The conflicts become more complex when more than one potential speaker is involved and multiple speakers wish to use the same conduit, or when a judgment must be made about whether to treat someone as a speaker or a conduit for purposes of First Amendment analysis. Suffice it to say that, in a complex First Amendment universe, cases emerge where it is hard to know who is entitled to wear the mantle of First Amendment autonomy.

Neuborne, supra note 253 at 1064 (footnotes omitted); see also Fiss, supra note 252, at 1418–19.

257. The Court has avoided, for example, addressing the tensions between the Free Exercise Clause and the Establishment Clause in religious accommodation cases. See Gregory P. Magarian, How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution, 99 MICH. L. REV. 1903, 1967–68 (2001) (discussing the tension between the Establishment and Free Exercise Clauses in accommodation cases).

258. See Neuborne, supra note 253, at 1065–66.
has gone farthest in recognizing competing First Amendment claims in cases involving access to broadcast and cable media.\textsuperscript{259} In \textit{Turner Broadcasting Co. v. FCC (Turner I)}, for example, at issue was Congress's requirement that cable systems operators and programmers carry local broadcast systems.\textsuperscript{260} The Court acknowledged that cable programmers are First Amendment speakers entitled to full protection in most contexts, but it also recognized the competing free expression interests of local broadcasters and viewers.\textsuperscript{261} Similarly, in \textit{Denver Area Educational Consortium v. FCC}, cable broadcasters and leased access programmers both claimed that their interests were protected by the First Amendment.\textsuperscript{262} Justice Breyer's plurality decision assiduously avoided choosing definitively between these competing claims: cable operators were permitted to ban certain sexually explicit programming from their leased access channels, but hearers were protected from being required to make formal, written request (subject to a waiting period of up to 30 days) in order to access the sexually explicit material.\textsuperscript{263}

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\textsuperscript{259} One of the earliest cases to recognize multiple First Amendment claims was \textit{Red Lion Broad. Co. v. FCC}. 395 U.S. 367, 387 (1969).

\textsuperscript{260} 512 U.S. 622 (1994).

\textsuperscript{261} \textit{Id.} at 657 ("The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."). See also \textit{Turner Broad. Co. v. FCC}, 520 U.S. 180 (1997) (Turner II). Justice Breyer, concurring in \textit{Turner II}, made explicit that there were multiple First Amendment interests at stake, stating, "I do not deny that the compulsory carriage that creates the 'guarantee' extracts a serious First Amendment price .... But there are important First Amendment interests on the other side as well. The statute's basic noneconomic purpose is to prevent too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public." \textit{Id.} at 226 (Breyer, J., concurring). "With important First Amendment interests on both sides of the equation," Breyer continued, "the key question becomes one of proper fit. That question, in my view, requires a reviewing court to determine both whether there are significantly less restrictive ways to achieve Congress' over-the-air programming objectives, and also to decide whether the statute, in its effort to achieve those objectives, strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences." \textit{Id.} at 227. Breyer has been a consistent advocate of a public rights approach to the First Amendment, and has recently cited NLRB regulation of employer speech during union elections as an example. See \textit{Nixon v. Shrink Mo. Gov't PAC}, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (stating, in campaign finance case, that "constitutionally protected issues lie on both sides of the legal equation"); \textit{United States v. United Foods Inc.}, 533 U.S. 405, 425 (2001) (Breyer, J., dissenting) (applying strict scrutiny to all speech affected by law would create "a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect."); \textit{Nike, Inc. v. Kasky}, 123 S.Ct. 2554, 2567 (2003) (Breyer, J., joined by O'Connor, J., dissenting from dismissal of writ of certiorari as improvidently granted) ("As the historical treatment of speech in the labor context shows, substantial government regulation can coexist with the First Amendment protections designed to provide room for public debate.").

\textsuperscript{262} 518 U.S. 727, 738 (1996).

\textsuperscript{263} \textit{Id.} at 753–60. Breyer even avoided concluding that a First Amendment analysis that balanced multiple First Amendment rights would be impermissible absent any clear state action:

We recognize that the First Amendment, the terms of which apply to governmental action,
A final illustration of the way in which conflicting First Amendment rights can frame First Amendment analysis is *Arkansas Educational Television Commission v. Forbes*. In that case, a marginal political candidate raised a First Amendment challenge to his exclusion from a political debate sponsored by a local public broadcaster. The Court first recognized that "[w]hen a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity." Having recognized the expressive activity of the broadcaster, the Court held that "the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming." However, the Court went on to recognize the competing speech rights of candidates and the public. In the end, the Court limited the normally plenary power of the speaker, in this case the public broadcaster, by calling the candidate debate "the narrow exception to the rule" and designating it a non-public forum. In cases such as *Arkansas Educational Television Commission v. Forbes*, the Court has been forced to recognize a complex First Amendment landscape, in which a simple binary of speaker and government regulator can obscure that multiple First Amendment interests are at stake. Such recognition can justify modifying the power of the ostensible "speaker" to allow for the competing expressive interests of other parties.

As others have argued, the public rights model of the First Amendment has salience in the labor law context. Such a recognition should not be equated with an assertion that unions have an independent First Amendment claim against employers who bring retaliatory lawsuits designed to chill expressive activity and exercise of statutory rights. Even in cases in which it has recognized competing First Amendment interests, the Court has not loosened the state action requirement, and it appears that an employer's institution of a private suit, even if abusive, cannot constitute

ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech—and this is so ordinarily even where those decisions take place within the framework of a regulatory regime such as broadcasting. Were that not so, courts might have to face the difficult, and potentially restrictive, practical task of deciding which, among any number of private parties involved in providing a program (for example, networks, station owners, program editors, and program producers), is the "speaker" whose rights may not be abridged, and who is the speech-restricting "censor."

Id. at 737 (first emphasis added).

265. Id. at 674.
266. Id. at 675.
267. Id. at 675–76.
268. Id. at 682–83.
269. See, for example, the insightful application of the public rights model to union election campaigns in Kate E. Andrias, Note: A Robust Public Debate: Realizing Free Speech in Workplace Representation Election, 112 YALE L.J. 2415 (2003).
state action. In the cases described above, however, the Court has considered the First Amendment interests of multiple parties in determining the scope of permissible governmental regulation of the party deemed the primary "speaker." As the following section sets forth, a similar approach is necessary in the labor law context. Regulation of court access in the labor law context differs from the antitrust context and a greater regulatory role is warranted in the former.

Recognizing that unions' and workers' expressive interests are implicated where employers bring meritless lawsuits to derail organizing campaigns is important, since legal protection for union organizing has historically been undermined by a reduction of the issues involved to one of workers' (weak) statutory rights against employers' (strong) constitutional rights. Unions' shift in organizing strategy away from the confines of the NLRA toward broader information-based tactics that are protected by the First Amendment somewhat equalizes the legal playing field. Were the authority of the Board to sanction employer petitioning to be cast solely in terms of the employer's constitutional right to court access versus unions' and workers' statutory right to mutual aid and protection, the employer's constitutional right would prevail and the Board's authority to sanction employer litigation would be narrower.

b. Countervailing First Amendment Interests in the Labor Law Context

In the labor law context, employers' right to petition must be measured against two countervailing First Amendment activities. First, the § 7 rights adjudicated in § 8(a)(1) proceedings are themselves founded on workers' constitutional rights to freely associate, as recognized by the Court in NLRB v. Gissel Packing. In Gissel, the Court noted that an employer's First Amendment right to communicate with workers, codified in § 8(c) of the NLRA, "cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and

270. Although the Court has not addressed whether the institution of a private suit can constitute state action in the First Amendment context, it has appeared to rule out such a possibility in § 1983 claims. See Lugar v. Edmonson Oil Co., 457 U.S. 922, 941 (1982) ("[P]rivate misuse of a state statute does not describe conduct that can be attributable to the state.").

271. See Andrias, supra note 269, at 2420, 2422-2430 (2003) (tracing evolution of employer free speech rights and noting that countervailing workers' rights have been characterized as statutory); Pope, Right to Organize, supra note 25, at 947-48 (arguing the importance of developing constitutional bases for a right to organize, since "the Constitution trumps statutory law"); David Brody, How the Wagner Act Became a Management Tool, NEW LAB. FORUM, available at http://qcpages.qc.edu/newlaborforum/html/l3_1article1.html (Spring 2004) (last visited Aug. 26, 2004) (noting, in historical perspective, that "Section 7 rights are weak rights, trumped every step of the way by property rights, by employer free speech, by liberty of contract.").

Attempts to curtail organizing activity through abusive lawsuits therefore infringe on workers’ rights that are themselves constitutionally derived.

Furthermore, as discussed above, retaliatory employer suits most commonly target unions’ and workers’ petitioning and expressive activity. For example, in the suit underlying BE&K Construction, BE&K targeted legislative and court petitioning in its suit, alleging, among other things, that the unions’ lobbying for an environmental law and filing of a state lawsuit violated the Sherman Act. State law defamation suits against unions and workers also implicate First Amendment rights. The requirement that such suits meet an “actual malice” test is based on concern for the rights of unions and workers to engage in free debate during organizing drives. Unions’ right to lobby secondary targets with means other than picketing is based on the unions’ First Amendment speech rights.

In short, the typical § 8(a)(1) action against an employer lawsuit brought in the context of an organizing drive will involve not one but two First Amendment–informed rights.

The Court has held previously that the scope of protection afforded under the Petition Clause can depend on the nature of the underlying cause that is advanced. In NAACP v. Claiborne Hardware, the Court overturned a suit brought by white merchants against the organizers of a boycott designed to pressure the merchants to end discrimination in their businesses and in their roles as government leaders. The Court stated that the “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."  

Based on the Petition Clause, the Court held that "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment."  

Eight years later, in *FTC v. Superior Ct. Trial Lawyers' Ass'n*, the Court reviewed a Federal Trade Commission determination that court-appointed lawyers violated antitrust law by organizing and participating in a boycott aimed at increasing their compensation. Among other arguments, the lawyers claimed that, like the boycotters in *Claiborne*, they should be entitled to Petition Clause protection for their boycott. The Court disagreed, noting that the boycotters in *Claiborne* had not sought personal economic advantage through their actions, but rather, "only the equal respect and equal treatment to which they were constitutionally entitled." "Equality and freedom are preconditions of the free market," the Court continued, "and not commodities to be haggled over within it."  

Similar reasoning should inform the Court's assessment of the proper scope of Petition Clause protection afforded in cases involving retaliatory employer lawsuits against unions. Because such suits target activity that is itself protected, directly or indirectly, by the First Amendment, they should not be treated similarly to suits brought in the antitrust setting, which target competing businesses' market activities. Justice Breyer's concurrence in *BE&K Construction* highlighted the fact that workers' rights stand in different relation to an employer's suit than does an analogous suit in the antitrust context. As Breyer argued, "the NLRA finds in the need to regulate an employer's antiunion lawsuits much of its historical reason for being." Given the weak justification for including unsuccessful suits brought for ulterior purposes within the core protection of the Petition Clause generally, this contextual feature of retaliatory employer suits justifies reserving core Petition Clause protection to those employer suits that are actually successful on the merits or are unsuccessful, but are brought out of a genuine belief that a unions' or workers' activities violate the law.

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278. *Id.* at 914.
279. *Id.* at 915. The Court invoked the First Amendment generally, concluding that the boycott was protected under the "inseparable" rights to speech, assembly, association and petitioning. *Id.* at 911–12 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).
281. *Id.* at 426.
282. *Id.* at 427. See also *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988).
3. **Breathing Room**

Even where a lawsuit is not entitled to the "core" protection of the Petition Clause, it may require protection under the "breathing room" doctrine in order to protect legitimate lawsuits of more substantial Petition Clause value. Determining the proper scope of the "breathing room" protection to be afforded unsuccessful, non-genuine suits and objectively unreasonable suits requires that a court determine whether the restriction or sanction on court petitioning will unduly chill potential plaintiffs from bringing genuine suits. Again, context is crucial, since the greater the burden that a particular law places on petitioning, the more likely it is that both legitimate and illegitimate suits will be chilled. In *Gertz v. Welch*, the Supreme Court extended a limited form of breathing room protection to defendants in defamation suits involving private persons by forbidding presumptive and punitive damages in such cases.\(^{284}\) Such damages, the Court reasoned, are particularly capable of chilling speech.\(^{285}\) As a general matter, then, concerns about affording breathing room to suits within the core protection of the Petition Clause should be substantially less in the labor context, in which the penalty is limited to attorney's fees and a finding that the suit in question violated § 8(a)(1), than in the antitrust context, in which treble damages are awarded.

Objectively unreasonable suits and unsuccessful suits brought for non-genuine reasons are both peripheral to the values associated with the Petition Clause. Furthermore, neither requires additional protection to create breathing room for successful suits or unsuccessful suits brought for genuine reasons. Suits that are objectively unreasonable, as *Bill Johnson's* defined that term, are the easier case. In *Bill Johnson's*, the Court allowed the Board to enjoin a suit that the Board determined to be "unreasonable" according to a standard akin to the federal summary judgment standard. The Supreme Court has long held that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."\(^{286}\) While criminal or civil sanctions imposed on publication can be said to "chill" First Amendment rights, "prior restraint 'freezes' it at least for the time."\(^{287}\) Yet, the *Bill Johnson's* Court held that "unreasonable" suits that violated workers' § 7 rights were not entitled to the core protection of the First Amendment, and could be enjoined by the Board.\(^{288}\) Since the Board can enjoin suits that it determines not to have a


\(^{285}\) Id. at 348–50.


\(^{287}\) Id.

\(^{288}\) Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 743, 743–44 (1983). While the prior restraint doctrine has been explicitly invoked only in Speech Clause cases, the differing standards for ongoing
reasonable basis, it would be anomalous for the Board to lack the authority to sanction such suits after they are completed.

Completed suits that are unsuccessful and lack a subjectively genuine purpose also do not require additional safeguards to prevent a chilling effect on legitimate employer suits. Again, an analogy to the Speech Clause is instructive. In *NLRB v. Gissel Packing Co.*, the Court adopted a narrow form of breathing room protection for campaign speech cases. In that case, the employer argued that the "coercive speech" doctrine was too vague to be sustained under traditional First Amendment principles. Under the coercive speech doctrine, employers commit an unfair labor practice by threatening workers with reprisal prior to a union recognition election, but may "predict" the precise effect that unionization will have on the company. The Court dismissed the employer's argument, noting that the employer had sufficient guidance as to what statements would likely "coerce" a worker and stating that an employer could avoid the danger of crossing from prediction to proscribed threat by avoiding "brinksmanship." The Court reasoned that an employer had sufficient control over the likely "coercive" nature of its campaign speech such that breathing room protection for legitimate campaign speech was unnecessary. Where the employer hews close to the prediction/threat line, it can be held responsible for campaign speech that falls on the impermissible, coercive side of that line. The question involved in campaign speech cases—the impact of particular speech on a worker—is highly subjective, requiring the employer to forecast the effect that its speech will have on others. Yet, despite this uncertainty, and the uncertainty attending any administrative or judicial litigation, the *Gissel* Court found that breathing room protection for legitimate campaign speech is not warranted. *Gissel*’s treatment of the breathing room doctrine in weighing the competing claims of employers’ First Amendment rights and workers’ constitutionally-derived § 7 rights should inform the analogous inquiry under the Petition Clause.

Employers have greater control over their subjective reasons for

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290. Id. at 618–19.
291. Id.
292. *Gissel*’s reasoning in this regard has been extended to a variety of contexts. See, e.g., J.P. Stevens & Co. v. NLRB, 638 F.2d 676, 680–81 (4th Cir. 1980) (employer’s record of labor law violations properly considered in determining whether campaign speech was coercive, since employer had control over its labor relations history).
bringing lawsuits against unions and workers than they do over the subjective effect of their campaign speech. Employers can avoid the "brinksmanship" described in Gissel by declining to make state and federal lawsuits part of a larger anti-union campaign that violates federal labor laws, by ensuring that only the correct parties are sued, by avoiding dilatory litigation tactics such as adding and removing causes of action, and by controlling the timing of the suit. Furthermore, while coercive speech is often unplanned and spontaneous, litigation is necessarily pre-meditated and calculated, giving the employer greater opportunity to avoid error.

In sum, the need for breathing room protection of legitimate lawsuits is substantially less in the labor law context than in the antitrust setting. Suits that are objectively unreasonable may be enjoined by the NLRB, and therefore post-litigation sanction by the NLRB cannot be said to impermissibly chill employers' Petition Clause rights. Unsuccessful, non-genuine suits also do not merit the highly limited breathing room afforded to employer First Amendment activity when that activity conflicts with workers' § 7 rights.

D. Defining "Unreasonable" Litigation

Because BE&K Construction held that unsuccessful suits are not beyond the scope of the Petition Clause, the NLRB will now be required to distinguish between completed employer lawsuits that are merely unsuccessful and those that were brought without a reasonable legal basis. The Supreme Court has set forth differing standards for determining when litigation is "baseless," or "objectively unreasonable," in California Motor Transport, PRE, and Bill Johnson's. Because it assumed without analysis that the case before it was a reasonably-based one, the BE&K Court did not shed additional light on the relationship of these varying standards to one another or to the contexts in which they arose. However, after BE&K Construction differing standards for determining the objective unreasonableness of litigation are permissible, since that case implicitly rejected a unified Petition Clause standard that applies across contexts. The standard for finding an employer's lawsuit to be objectively unreasonable should remain the summary judgment standard set forth in Bill Johnson's. Where the lawsuit in question is completed, the Board should find suits that

293. It is true that the legal merits of the lawsuit in question will on occasion have bearing on the Board's determination that a suit was not subjectively genuine. Employers may have less control over the legal merits of the lawsuits that they bring. However, after BE&K the mere fact that a suit was unsuccessful likely does not suffice to show that a suit was subjectively non-genuine. See BE&K Constr. Co. v. NLRB, 536 U.S. 516, 539 (2002) (Breyer, J., concurring).

294. Since there was no reason for the Board to argue that BE&K's suit was "unreasonable," as opposed to simply unsuccessful, the Court's assumption in this regard cannot be interpreted to affect the standard for determining future suits to be unreasonable.
have not survived summary judgment, demurrer, or a motion to dismiss, to be objectively unreasonable. Such suits are not at the core of the Petition Clause and are not entitled to breathing room protection. Therefore, in adjudicating such cases, the Board may apply its traditional § 8(a)(1) approach in determining whether the suit was retaliatory. Furthermore, by analogy to California Motor Transport and its subsequent interpretation, a series of lawsuits brought against a union or worker may be considered objectively unreasonable, even where some of the suits are successful. Similar reasoning should apply where an employer files multiple claims within a single suit, some meritorious and others that are brought in order to impose costs and delays on a union.

1. **Objective Unreasonableness under Bill Johnson’s**

   In *Bill Johnson’s*, the Court granted deference to the NLRB in devising the particular procedures for determining whether a lawsuit had a reasonable basis.295 It indicated, however, that the Board’s approach should be modeled on the federal summary judgment standard,296 and the Board has adhered to this standard in enjoining retaliatory lawsuits over the twenty years since *Bill Johnson’s* was decided.297 The Board may enjoin a suit where there is no genuine issue of material fact, or, in mixed cases of law and fact, where the reasonableness of the employer’s legal theory is “plainly foreclosed as a matter of law” or “otherwise frivolous.”298 The latter requirement is not based on the summary judgment standard that the Court indicated the Board should adopt, but rather on the federalism concerns that ran throughout the *Bill Johnson’s* opinion. Federal Rule of Civil Procedure 56(c) does not require that a suit be “plainly foreclosed” or “otherwise frivolous” for summary judgment to issue. Rather, the litigant’s legal theory must simply be foreclosed, so that judgment as a matter of law is warranted. The heightened requirement for legal reasonableness imposed by *Bill Johnson’s* where the Board seeks to enjoin an employer’s lawsuit is thus based on a concern that state courts be the primary arbiters of state law.

   However, once the relevant court has made the determination to dismiss an employer’s lawsuit as a matter of law, there is no reason for the Board to continue to apply this heightened standard. The state or federal

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295. See *Bill Johnson’s Rests., Inc.* v. NLRB, 461 U.S. 731, 745 n.11 (1983) (“In making reasonable-basis determinations, the Board may draw guidance from the summary judgment and directed verdict jurisprudence, although it is not bound by either.”).

296. *Id.* at 744–47 & nn.11–12.

297. See, e.g., *Phoenix Newspapers*, 294 N.L.R.B. 47, 49 (1989) (“[T]he summary judgment in favor of the union defendants . . . constituted an adjudication establishing that the suit involving the union defendants lacked a reasonable basis in law or fact.”).

court has rendered a decision on the state of the law, and there is no danger of the Board encroaching on the relevant court’s judgment as to the legal merit of the employer’s claims, an undertaking outside of the mandate and competence of the Board. Therefore, where the Board faces a completed lawsuit that has been dismissed by the relevant state or federal court on summary judgment, or following a demurrer or motion to dismiss, the suit should be treated as unreasonable per se. Since such suits need not be afforded breathing room protection, the Board may apply its traditional § 8(a)(1) jurisprudence, as opposed to the “subjectively non–genuine” standard, to determine whether the suit was brought for retaliatory reasons.

A separate type of unreasonable lawsuit was defined in Bill Johnson’s. In a footnote, the Court stated that the type of suit at hand was an employer’s lawsuit “that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law.” Since Bill Johnson’s, the Board has consistently held that lawsuits completely preempted under federal labor law may be enjoined by the Board. The Board’s adjudication of such cases should not be affected by BE&K, since fully preempted cases differ substantially from lawsuits brought in the proper forum but lacking in legal merit or subjective good faith. Preempted labor cases are beyond the jurisdiction of the court itself

299. The position taken by the Board’s General Counsel in In re Dilling Mechanical Contractors, Inc., Nos. 25–CA–25094, 25–CA–25485, 2003 WL 735529 (Feb 28, 2003), which was reheard in light of BE&K Construction, is incorrect. In that case, the relevant state court had dismissed the employer’s claim on summary judgment. In a subsequent § 8(a)(1) action brought by the union, the General Counsel argued that although the case had not survived summary judgment, the legal questions at issue were not “plainly foreclosed.” See General Counsel Report, supra note 204. The Administrative Law Judge ultimately rejected this approach and the NLRB has yet to review the case.

300. Since BE&K Construction, the management attorney who argued BE&K’s case before the Supreme Court has indicated that the “unreasonableness” standard adopted in Bill Johnson’s will be a future legal target. See Baskin & Northrup, supra note 40, at 241. The attorney notes that the standard for determining whether litigation was objectively reasonable in Bill Johnson’s differs from that in PRE, but makes no attempt to analyze the contextual differences between the two cases, as the BE&K Court indicated is necessary. The authors also cite Christianburg Garment Co. v. EEOC to bolster their claim that the Bill Johnson’s definition of “unreasonable” litigation in the labor law context is somehow anomalous. Id. However, at issue in Christianburg Garment was the standard under which a prevailing defendant was entitled to attorney’s fees under Title VII. See Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978). The Court held that a prevailing defendant, as opposed to a prevailing plaintiff, could recover attorneys fees only where the plaintiff’s litigation was “unreasonable or without foundation.” Id. at 422. Christianburg Garment did not require the Court to weigh court access against statutory rights, much less constitutional rights. Furthermore, the Court subsequently stated that Christianburg Garment was based on highly context–specific policy considerations and should not be considered to set standards outside of Title VII. See Fogerty v. Fantasy, Inc., 510 U.S. 517, 522–23 (1994).

301. Bill Johnson’s Rests., 461 U.S. at 738 n.5.

302. The D.C. Circuit has held that BE&K Construction did not alter the application of Bill
and, therefore, hearing a preempted lawsuit imposes a variety of costs that
go beyond costs to the individual litigants, most notably potential damage
to the uniformity of federal labor law.

2. **Objective Unreasonableness under California Motor Transport**

As outlined above, *PRE* did not satisfactorily distinguish *California Motor Transport*, and courts interpreting the cases have had to grapple with which standard to apply where a lawsuit or administrative filing is challenged as an antitrust violation. Several circuits have adopted the single-suit/multiple-suit standard to distinguish the two cases. Under this approach, the *PRE* standard applies only where a single lawsuit is brought, while *California Motor Transport* applies to a series of legal proceedings. In the case of "serial" suits, the Ninth and Second Circuits hold that the relevant inquiry is whether "the legal filings were 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." Since *PRE* made clear that a non-genuine subjective intent in bringing the lawsuit does not suffice to establish "sham" petitioning in the antitrust context, the "serial" suit doctrine derived from *California Motor Transport* is best seen as a means of proving that a suit is objectively baseless that is distinct from the standards described in *PRE*.

The *California Motor Transport* definition of objectively baseless litigation has not been incorporated into the labor law context and cannot be assumed to apply in labor law cases. However, by analogy, findings of unreasonableness in the labor law context should not be limited to suits that are without legal merit under a summary judgment standard, dismissed prior to summary judgment, or withdrawn. Other forms of abusive litigation practices, such as repetitive filings, should also constitute objective unreasonableness. Moreover, repetitive filings should not be defined solely in terms of the number of discrete judicial or administrative proceedings initiated by the employer, but also by the tactics adopted by the employer in filing a single suit.

The necessity of this interpretation of *California Motor Transport* is illustrated by the litigation underlying *BE&K Construction*. In its action against the unions, two of BE&K's initial four claims were dismissed on summary judgment. BE&K then filed an amended complaint re-alleging

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*Johnson’s in charges involving preempted lawsuits. Can-Am Plumbing, Inc. v. NLRB, 321 F.3d 145, 151 (D.C. Cir. 2003).*

*303. See USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council, 31 F.3d 808, 811 (9th Cir. 1994); PrimeTime 24 Joint Venture v. NBC, 219 F.3d 92, 101 (2d Cir. 2000).*

*304. USS-POSCO, 31 F.3d at 811; PrimeTime, 219 F.3d at 101.*

*305. See BE&K Constr. Co. v. NLRB, 246 F.3d 619, 622 (6th Cir. 2001).*
PROTECTIONS AGAINST RETALIATORY LAWSUITS

claims that had been previously denied on summary judgment, adding a Sherman Act claim. The district court dismissed the amended complaint as "unacceptable because the first cause of action includes a restatement of several of the claims upon which summary judgment for defendants has already been granted." BE&K then filed a second amended complaint, reasserting many of the same claims that had previously been advanced and denied on summary judgment. In addition to dismissing the complaints that had been addressed in prior rulings, the district court imposed Rule 11 sanctions on BE&K for repetitiously filing claims that had been adjudicated to be meritless. Through filing multiple amended complaints, each alleging claims that had previously been dismissed, BE&K was able to prolong the litigation process and increase the unions' costs in defending the suit. There is no good reason why filing repetitious claims within a single suit should be treated differently from filing multiple suits, each alleging a different cause of action.

In sum, the Bill Johnson's summary judgment standard continues to define "unreasonable" employer litigation in unfair labor practice proceedings under § 8(a)(1). When adjudicating completed lawsuits, the Board is not required to find that the suit in question was "plainly foreclosed by existing law" in order to find objective unreasonableness; it is sufficient that the suit did not survive summary judgment. Finally, by analogy to California Motor Transport, repetitively amended complaints as well as repetitive filings of complaints can qualify as unreasonable suits and can be sanctioned under the Board’s traditional § 8(a)(1) jurisprudence.

E. Evidence of Subjective Intent

Although BE&K Construction shifted the focus of the Board’s inquiry to an employer’s subjective intent in bringing its lawsuit, most of the forms of evidence previously relied upon by the Board in making this inquiry remain relevant. BE&K Construction shifted the focus of the Board’s inquiry from whether the employer sued in order to “‘interfere with the exercise of [NLRA] § 7 rights’”—the traditional § 8(a)(1) inquiry—to whether the employer brought suit for the “purpose . . . [of stopping] conduct he reasonably believes is illegal.” This shift in focus is significant, since the Board now must now find intent to use court process,

307. Id. at 623. The Ninth Circuit later reversed the Rule 11 sanctions, holding that BE&K had re-filed the claims out of a genuine, but erroneous, belief that it was required to do so to preserve the claims for appeal. USS–POSCO Indus., 31 F.3d at 811–12. While the Ninth Circuit held that BE&K was not “frivolous” in its belief that it had to re-plead claims dismissed on summary judgment, the Rule 11 standard does not guide determinations of objective unreasonableness under Bill Johnson’s.
rather than simply legal outcome, for retaliatory reasons before it sanctions employer litigation. However, most of the types of evidence that the Board has traditionally looked to in determining whether an employer acted with retaliatory intent are germane to this new inquiry.

In his concurrence, Justice Breyer argued that the majority decision held that the NLRA does not allow the Board to declare unlawful "the kind of case in which the Board rests its finding of 'retaliatory motive' almost exclusively upon the simple fact that the employer filed a reasonably based but unsuccessful lawsuit and the employer did not like the union."309 As the foregoing discussion shows, the majority opinion did more than simply bar the Board from relying exclusively on certain types of evidence in finding retaliatory motive. Rather, the majority opinion shifted the focus of the retaliatory motive inquiry from "interference" with § 7 rights to whether the purpose for bringing the suit was "subjectively genuine." The basis for this shift in focus was the majority's determination that unsuccessful suits required protection under the Petition Clause, a determination at odds with Bill Johnson's.

In another sense, however, Breyer is correct. The types of evidence relied on by the Board in finding retaliatory motive are directly relevant to determining whether the employer's decision to litigate was subjectively genuine. A strong showing that the employer brought a lawsuit in order to use the court process, as opposed to the outcome of the case, to burden the union or worker can establish that interfering with § 7 rights, rather than "testing legality," was the primary reason behind bringing the litigation. In those cases in which the Board previously found that an employer's suit was not brought for retaliatory purposes, it has also found that the suit was brought for subjectively genuine purposes.310 For practical purposes, then, much of the approach previously taken by the Board in determining retaliatory motive remains intact after BE&K Construction.

Certain types of evidence, however, must be treated differently under the BE&K Construction "subjectively genuine" analysis. For example, prior to BE&K, the Board relied on direct and circumstantial evidence that an employer harbored anti-union animus to show that the employer's lawsuit was retaliatory.311 Under traditional § 8(a)(1) analysis, a finding that the action in question was motivated by anti-union animus is normally sufficient to make out an unfair labor practice. The majority opinion in BE&K Construction makes clear that anti-union animus cannot be equated with "non-genuine" reasons for bringing a suit, since a reasonably-based

309. Id. at 539 (Breyer, J., concurring).
suit genuinely brought to test the legality of a union’s conduct could be motivated by anti-union animus. However, anti-union animus may be relevant to a determination of whether a suit was brought for subjectively genuine reasons. An employer’s statement that it would “do whatever it takes to stop the union, legal or illegal,” for example, would both establish anti-union animus and be relevant to a determination of whether a suit brought by the employer was subjectively genuine. Similarly, an employer’s recent history of committing unfair labor practices to stop an organizing drive would be relevant both to establishing that the union intended to interfere with § 7 rights and that the employer’s suit was brought to delay and hamper organizing activities by tying up the union’s resources, rather than to test the legality of the union’s actions.

The BE&K Court suggested that the non-genuine reason that an employer would bring a lawsuit against a union or worker would be to impose “the costs of the litigation process” in retaliation for protected activity. Lower courts should interpret the “costs of litigation” expansively. An employer’s motive in bringing a lawsuit is subjectively non-genuine where the employer seeks to use the court process to achieve a collateral benefit that is barred by § 7 of the NLRA, not solely when the employer seeks to impose the costs immediately attributable to the litigation process. Conversely, an employer’s suit is subjectively genuine where the employer’s “purpose is to stop conduct that he reasonably believes is illegal.”

There is no reason for the inquiry in the labor law context to be different from that in the antitrust context in this regard. In PRE, the Court made clear that the requisite subjective motivation is made out where the lawsuit is “an attempt to interfere directly with the business relationships with a competitor,” through the ‘use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.” Thus, in the antitrust context, the non-genuine reason for bringing a lawsuit is to further an anti-competitive intent. In the labor law context, the non-genuine reason for bringing a lawsuit is “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” § 7 through the court process, rather than the outcome of a case. Employers can accomplish this goal in ways other than imposing direct financial costs on a defending union.

313. See id. at 539 (Breyer, J., concurring).
314. Id. at 536–37.
315. Id. at 534.
318. For example, an employer may bring a suit not because of the costs imposed in the immediate
Thus, much of the framework for analyzing an employer’s subjective intent in bringing a retaliatory lawsuit remains after BE&K Construction. Although the Court invalidated several types of evidence previously used by the Board in making this inquiry, most of the Board’s previously-employed forms of evidence are still relevant. Finally, the Board should continue to recognize the variety of costs that an employer can hope to impose on workers’ and unions’ by bringing suit.

CONCLUSION

Employers have responded to a labor movement refocused on organizing and employing a broadened array of campaign tactics by taking unions, their officials, and individual workers to court. Unions’ increasing use of legislative and administrative lobbying, legal action, public demonstrations and creative media work has increased the number of targets for employer lawsuits. Unions and workers engaged in recognition and contract campaigns have been forced to defend against employer suits brought under a variety of state tort theories, under the RICO Act and federal antitrust law. Even where meritless, such suits bleed union resources and can delay and distract even well-designed campaigns. Employers’ increasing use of the courts to derail organizing drives threatens to return labor relations to the pre-Wagner Act days, when the labor injunction was the primary weapon of employers seeking to ward off unionization.319 For more than two decades, the NLRB has recognized this danger and treated retaliatory employer suits as a threat to workers’ rights.

BE&K Construction does not foreshadow a change in the Board’s authority to adjudicate and sanction retaliatory employer lawsuits. As it had done previously in Bill Johnson’s Restaurants v. NLRB, the Court addressed the proper standards to be used by the Board in adjudicating such suits in light of employers’ right of court access under the First Amendment’s Petition Clause. The Court broke with Bill Johnson’s in declaring that even unsuccessful lawsuits have value under the Petition Clause, but held against the NLRB on narrow statutory grounds. After

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319. See BE&K Constr. Co. v. NLRB, 536 U.S. 516, 542 (2003) (Breyer, J., concurring) (stating that “the NLRA finds in the need to regulate an employer’s antilabor lawsuits much of its historical reason for being” and citing employer’s frequent use of the labor injunction prior to passage of the NLRA).
BE&K Construction, the Board may penalize an employer's unsuccessful lawsuit as an unfair labor practice when it finds that the employer used judicial processes to impose the costs of litigation on a union or worker in retaliation for their exercise of rights protected under the NLRA. The Court did not adopt the more stringent "sham litigation" test employed in the antitrust context to determine whether a market competitor's petitioning activity is subject to immunity from antitrust liability, as many employers hoped that it would. Moreover, the Court rejected a unified approach to the Petition Clause that would apply across areas of law, recognizing that antitrust and labor law impose different burdens on court access and that these procedural particularities affect analysis under the Petition Clause.

However, the Court avoided establishing a clear constitutional justification for the Board's authority to sanction unsuccessful employer lawsuits that are brought to inflict costs and delays on unions, opening the door to further constitutional attacks on this authority. Squarely addressing this constitutional issue would have required the Court to determine whether unsuccessful, retaliatory litigation brought to impose litigation costs actually advances the Petition Clause values that it had identified. As this Article has shown, most of these values are not embodied in litigation that has been found to be without legal merit and that was brought for ulterior purposes. Furthermore, unlike in the antitrust context, retaliatory employer lawsuits are directed against conduct that is itself directly or indirectly protected by the First Amendment. Unsuccessful employer lawsuits brought to impose litigation costs on unions and workers, therefore, are not deserving of the core protection of the Petition Clause. With this constitutional justification in the background, the Board should continue to adjudicate retaliatory employer lawsuits in much the same way as it did prior to BE&K Construction, adapting only its inquiry into an employer's subjective intent in bringing its lawsuit to fit the Court's holding.