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Testimony of

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Hearing on Litigation as a Predatory Strategy

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Thank you for inviting me to participate in this hearing. I am a law professor at Seton Hall University School of Law specializing in antitrust law. I am also a member of the Advisory Board of the American Antitrust Institute (AAI), a former chair of the Section of Antitrust and Economic Regulation of the Association of American Law Schools (AALS), and a former attorney at the Department of Justice, Antitrust Division. My written Statement, and my testimony today, is drawn in part from an article that I have published entitled "*Reforming the Noerr-Pennington Antitrust Immunity Doctrine*.[1]

The essence of a representative democracy, protected by the First Amendment right to petition, is the citizen's right to communicate their desires, anticompetitively motivated or otherwise, to government officials. However, when efforts to persuade the government produce anticompetitive effects (harm to competition), they necessarily impinge upon federal antitrust law, creating tension between that law and the First Amendment and related values. The *Noerr-Pennington* antitrust immunity doctrine was developed in an effort to resolve that tension.

[1] Marina Lao, *Reforming the Noerr-Pennington Antitrust Immunity Doctrine*, 55 RUTGERS L. REV. 965 (2003).

As originally conceived, the *Noerr-Pennington* doctrine stood for the principle that genuine efforts to persuade the government to adopt a particular course of action are not subject to antitrust scrutiny, no matter how anticompetitive the petitioner's motive and the action sought. It originated from two U.S. Supreme Court cases that gave the doctrine its name: *Eastern Railroad President Conference v. Noerr Motor Freight*,[2] which immunized petitioning the legislature; and *United Mine Workers of America v. Pennington*,[3] which immunized petitioning the executive branch of the government. About a decade later, in *California Motor Transport Co. v. Trucking Unlimited*,[4] the doctrine was further extended to petitions to courts (and administrative agencies acting in an adjudicatory capacity). There is a "sham" exception to *Noerr*: if the petitioning is considered sham, *Noerr* immunity would have no application.

My Statement will focus on the current expansive scope of *Noerr*, and the correspondingly narrow sham exception, as it is applied to judicial petitions. Litigation can be a particularly effective method of predation.[5] Even if it is unsuccessful, it may inflict substantial costs on a competitor and otherwise cause significant competitive harm. I will also address whether such an expansive interpretation of the Noerr doctrine, as applied to judicial petitioning, is required under either the First Amendment right of petition or a statutory construction of the Sherman Act, and conclude that it is not.

Noerr doctrine as applied to judicial petitions, and the "sham" exception. In California Motor Transport, while the Supreme Court extended the Noerr antitrust immunity doctrine to judicial and quasi-judicial petitions, it applied a "sham" exception for the first time to deny immunity to the antitrust defendants. It held that the defendants, who had sought to forestall competition by routinely opposing their competitors' applications for operating rights in administrative and judicial proceedings, regardless of the merits of the cases, were not entitled to *Noerr* immunity because their petitioning was "sham." The sham exception, then unclearly defined and loosely applied to different kinds of improper conduct, served as a doctrinal limit to the expansive Noerr immunity principle for decades.

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[2] 365 U.S. 127 (1961).
[3] 381 U.S. 657 (1965).
[4] 404 U.S. 508 (1972).
[5] *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 347-78; Grip-Pak v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983).

In 1993, however, the definition of sham was severely restricted by the Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Picture Industries, Inc*. (PRE).[6] Writing for the Court, Justice Thomas said that, for an underlying lawsuit to be considered sham, it must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."[7] If this objective test is met, it must also be shown that 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."[8] In other words, the antitrust plaintiff must prove not only that the earlier lawsuit was objectively baseless but that the antitrust defendant had brought it merely to harm the competitor through the process and not for the litigation outcome.

Both parts of the test are somewhat troubling. As to the objective component, the Court also said that success in the earlier lawsuit precludes a finding of objective baselessness (while a lawsuit that is unsuccessful at every stage of the proceedings is not necessarily baseless).[9] This raises the question of how earlier lawsuits that succeed because of the antitrust defendant's misrepresentations or fraud upon the court should be treated. Would they be deemed to automatically fail the "objectively baseless" test because a successful lawsuit, by definition, is not baseless? Or should the misrepresentation take the judicial petitioning outside the scope of *Noerr*? Unfortunately, the Supreme Court in PRE reserved that question for another day.[10] As a result, lower court treatment of this issue has been confusing and inconsistent. Most seem to treat intentional misrepresentations as a subset of sham but require an additional showing that those misrepresentations "infected the core" of the claim and the decision, or "deprived the litigation of its legitimacy" before the suit might be considered objectively baseless.[11]

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[6] 508 U.S. 49 (1993).
[7] *Id.* at 60-61.
[8] *Id*. (quoting City of Columbia v. Omni Outdoor Adver. Inc., 499 U.S. 365, 380 (1991)).
[9] *Id*. at 60 n.5.
[10] *Id*. at 61 n.6 ("We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust immunity for a litigant's fraud or other misrepresentations.").
[11] *See, e.g.*, Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hospital, 185 F.3d 154 (3d Cir. 1999) (declining to carve out a misrepresentation exception); Cheminor Drugs Ltd. V. Ethyl Corp., 168 F.3d 118 (3d Cir. 1999) (declining to recognize a fraud or misrepresentation exception to Noerr, but treating misrepresentation as a variant of sham and applying a modified PRE test that requiring a showing that the misrepresentation "infected the

Even in the absence of misrepresentations in an earlier suit, the Court's definition of an objectively baseless suit as one that no "reasonable litigant could realistically expect success on the merits" seems unnecessarily narrow. Under this definition, an earlier suit would not be defined as objectively baseless even if it is clearly irrational but for its ability to inflict competitive harm on a rival (the antitrust plaintiff), so long as the suit has a colorable basis in law such that a reasonable litigant *could* expect success on the merits. It should be noted that former Justices Stevens and O'Connor, who concurred only on the Court's judgment but not its reasoning, were very critical of this narrow definition of the objective baselessness test. They questioned whether a case involving ten years of litigation and two appeals to recover a dollar from a defendant, for example, would qualify as an objectively baseless suit under this test.[12]

PRE's second prong—the subjective standard—is also problematic. If the underlying lawsuit is already shown to be objectively baseless (a threshold prerequisite), it is unclear why the antitrust plaintiff must further demonstrate that the litigant brought the suit to harm the competitor through the *process* of litigation, and not for the *outcome*. Proof of objective baselessness, especially as the term is currently construed, should sufficiently show that the litigant had probably brought the suit for an improper purpose. It is difficult to imagine why the litigant would otherwise bring an objectively baseless suit. Therefore, at best, the subjective test seems superfluous. Moreover, under a literal reading of this test, if a litigant with an objectively baseless suit actually seeks to win the suit (most likely aided by misrepresentations) and not to simply use the process as an anticompetitve strategy, the subjective test may not be satisfied and the suit may not be considered sham even if the litigant loses the underlying suit. Thus, at worst, the subjective test eviscerates the sham exception.

In the absence of a meaningful doctrinal limit to the expansive *Noerr* immunity principle, there are greater risks that dominant firms could bring action against smaller competitors that they would not have rationally brought, in order to impose heavy costs on a small rival in the hope of excluding it from the market, diminishing its ability to compete on the merits, or

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core" of the case); Kottle v. N.W. Kidney Ctrs., 146 F.3d 1056 (9th Cir. 1998) (treating misrepresentation as a variant of the sham exception but adding the requirement that the fraud "deprives litigation of its legitimacy").

[12] 508 U.S. at 68.

deterring entry by other firms.[13] From a policy perspective, it would be desirable to limit *Noerr* to a narrower sphere of conduct so as to be more responsive to competition concerns. I believe that it can be done: the First Amendment right of petition does not call for the expansive interpretation currently given *Noerr* (and the corresponding narrow reading of its exceptions), particularly in the adjudicatory context. Nor is such a broad reading of the doctrine necessary under a statutory construction of the Sherman Act.

Limits of First Amendment protection for judicial petitioning. There is some uncertainty and confusion over whether *Noerr* is grounded on the First Amendment right of petition or on statutory construction. I will treat the doctrine as based partly on constitutional principles and partly on statutory interpretation and will analyze its appropriate scope under both, starting first with the constitutional right of petition.

Various commentators have noted the distinction between petitioning in legislative and adjudicatory settings and have argued that *Noerr* should be more liberally construed with respect to the former.[14] I agree with the distinction and would further suggest that, for petitioning in the adjudicatory context, the Constitution guarantees the right of *access* to courts (and other adjudicatory tribunals) but not much more. The traditional constitutional argument for tolerance of some petitioning falsehoods and abuses is that penalizing misrepresentations may unduly "chill" the flow of information to the government as well as chill the people's exercise of their right to petition the government.[15] The concern is that some people may shy away from making efforts to influence government for fear that the statements they make or the information they provide may inch over the line of truth and result in antitrust exposure. But this argument is more persuasive for petitioning in legislative rather than adjudicatory spheres.

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[13] *See* Grip-Pak v. Illinois Tool Works, Inc.,, 694 F.2d 466, 472 (7th Cir. 1982), cert. denied, 461 U.S. 958 (1983) ("Suppose a monopolist brought a tort action against a single, tiny competitor; the action had a colorable basis in law; but in fact the monopolist would never have brought the suit . . . except that it wanted to use pretrial discovery to discover its competitor's trade secrets; or hoped that the competitor would be required to make public disclosure of its potential liability in the suit and this disclosure would increase the interest rate that the competitor had to pay for bank financing; or just wanted to impose heavy legal costs on the competitor in the hope of deterring entry by other firms.")

[14] *See, e.g.*, Bork, supra note ___, at 356; Stephen Calkins, *Developments in Antitrust and the First Amendment: The Disaggregation of Noerr,* 57 Antitrust L.J. 327, 358 (1988).

[15] *See generally* Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177 (1992).

Legislative proceedings are more open and politically oriented than judicial proceedings and are generally expected to provide a forum for uninhibited debate. In the legislative process, there is also greater value placed on the free flow of information to the government. Legislative bodies are expected to solicit information and hear arguments from a variety of sources and sort through them before making decisions. It is also perhaps understood that political lobbying often involves some slanting of the truth and outright misrepresentations. Ideally, the greater input from divergent interests will correct, balance, or compensate for any such inaccuracies. For these reasons, more protection for petitioning in the legislative process may be justified.

Our judicial system, in contrast, operates very differently. It is not a free-for-all forum for unstructured policy debates or the airing of all grievances; disputes must be litigated in accordance with the rules and procedures that govern courts. Thus, the concern that less robust First Amendment protection might "chill" debate is arguably not a real issue in the right to petition in the adjudicatory sphere. More importantly, our court system is already subject to many restrictions. They include the imposition of Rule 11 sanctions for the filing of meritless complaints[16] and other penalties for various litigation abuses. For example, legal judgments obtained through fraud and misrepresentation can be set aside;[17] perjury is uniformly punished;[18] and penalties may be imposed for vexatious judicial filings.[19] There are also numerous court-imposed rules governing judicial proceedings. They range from rules prohibiting or limiting media coverage of certain trials,[20] limiting the right of attorneys to speak in some pending cases,[21] controlling the use of discovery documents,[22] and the like. Unless one is ready to argue that these existing rules and sanctions are all unconstitutional, which no one has suggested, it is difficult to see why stripping *Noerr* immunity off litigation misconduct would somehow be constitutionally impermissible. The right of petitioning the courts must, in fact, constitutionally permit substantial control of the adjudicatory processes.

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[16] Fed. R. Civ. P. 11(b)(3).
[17] Fed. R. Civ. P. 60(b),
[18] *See, e.g.*, 18 U.S.C. § 1621
[19] *See* 28 U.S.C. § 1927
[20] *See, e.g.*, Bridges v. California, 314 U.S. 252, 271 (1941).
[21] *See, e.g.*, Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048-51, 1058 (1991).
[22] *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (194)

In short, in terms of petitioning the courts, the First Amendment certainly protects citizens' right of *access* to courts and other adjudicatory processes. But it is questionable whether constitutional protections extend much beyond that. Those using our courts and other adjudicatory processes are already required to abide by myriad rules that govern those processes, and misrepresentations and various forms of improper litigation conduct are already subject to sanctions. An antitrust rule providing that material misrepresentations to courts, for example, would not be protected under *Noerr*, even if the litigant is genuinely seeking a favorable outcome in litigation, can be no more offensive to the Constitution than the existing rules that govern court processes. In other words, it is constitutionally permissible to recognize a misrepresentation exception to *Noerr* and to otherwise liberalize the sham exception in order to limit the scope of *Noerr*, at least in the litigation context.

Scope of *Noerr* protection under statutory construction. Of course, even if the breadth of the *Noerr* doctrine is not constitutionally mandated, whether the Sherman Act itself should be construed to give the doctrine such an expansive reading (and its exceptions a narrow reading) is a separate issue. Determining the appropriate parameters of Noerr as a matter of statutory interpretation is difficult because the Sherman Act provides no real guidance.

It is often said that federal antitrust law regulates *private*, not state, actions that are in restraint of trade.[23] Therefore, valid actions taken by the state are not subject to antitrust scrutiny, no matter how anticompetitive their effect. It then logically follows that, in a representative democracy, if the government can lawfully take action that is anticompetitive, private citizens should be free to urge the government to take those actions.[24] Accordingly, the Sherman Act should not be interpreted in a way that would undermine the values of a democratic system of government, independent of First Amendment concerns.

Defining the statutory scope of *Noerr* (similar to an analysis under the First Amendment) requires distinguishing between legislative and judicial petitioning. The reasons for drawing the

[23] *See* Parker v. Brown, 317 U.S. 341, 350-51 ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature").
[24] *See* City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 379 (1991)

distinction are largely the same as those discussed for the First Amendment, and need not be reiterated here. The norms of acceptable conduct are decidedly different for lobbying in more open political settings than they are for litigating in the court system. As the Supreme Court suggested in *Noerr*, in a no-holds-barred fight among competitors in attempting to influence legislation, some misrepresentations may be inevitable.[25] That is not the case in judicial proceedings, where adjudicators must rely on the parties for the information on which a decision will be based and, therefore, expect the information presented to be accurate.[26] Presenting false information in judicial settings threatens the proper functioning of the system, and there is no reason to construe the Sherman Act to encourage these acts.

While the *Noerr* doctrine should encourage citizen participation in the political process, there is another value related to a democratic government that is worth protecting as well—the integrity of government. The need to protect the judicial system from corruption or abuse militates against too narrow an interpretation of sham and is a counterbalance against the reasons for a broad immunity concept.

Proposals for limiting the *Noerr* doctrine. The wide swath that has been cut for the petitioning immunity doctrine is unwarranted both constitutionally and as a matter of statutory construction. It also poses risks to competition and, ultimately, to consumers. Ideally, the PRE definition of sham should be liberalized. With respect to the objective baselessness test, the antitrust plaintiff must usually show, under current law, that the theory of the earlier suit was so contrary to existing law that no reasonable person could realistically expect to win on the merits. It may be better, instead, to require the antitrust plaintiff to merely show that the bringing of the earlier suit would not have been brought by a reasonable person were it not for the anticipated collateral damage that would be inflicted on the smaller rival sued. For example, if a dominant firm incurs large sums of money and spends years in litigation, including on appeal, to recover a nominal amount, it seems that the lawsuit should be considered objectively baseless despite the fact that the claim might have a colorable basis in law and the dominant firm ultimately won.

[25] *Noerr Motor Freight*, 365 U.S. at 144.
[26] *See* Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240, 1261 (9th Cir. 1982).

As to the subjective test, I propose eliminating it altogether for alleged sham in the litigation context. The subjective test is particularly unsuited for use in litigation settings for reasons that were addressed earlier.

I would also propose carving out a misrepresentation and fraud exception to *Noerr*.

Narrowing the *Noerr* doctrine (and liberalizing the sham exception) would promote the competition values that underlie the antitrust laws and yet not encroach on the constitutional First Amendment right of petition.